

## ACCEPTED VERSION

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**The grand jury of South Australia**

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# THE GRAND JURY OF SOUTH AUSTRALIA\*

## 1. Introduction

The grand jury system in Australia is a part of legal history that has been almost completely forgotten. Magistrates rather than grand juries have for generations carried out the function of deciding whether to put an accused on trial.<sup>1</sup> The oblivion into which the grand jury system in Australia has sunk is no doubt due in part to its very brief existence in the colony of New South Wales in the 1820s followed by its abolition there, never to be restored.<sup>2</sup> Grand juries have never existed in Queensland.<sup>3</sup> In the State of Victoria, it is true, grand juries may continue to be summoned,<sup>4</sup> and very occasionally do meet.<sup>5</sup> Nevertheless, the very infrequent summoning in Victoria of a grand jury to consider a proposed private prosecution is a mere shadow of the full grand jury system. Only in South Australia and Western Australia<sup>6</sup> have grand juries existed for an appreciable length of time. This was originally because of the status of both colonies as free (non-convict) colonies in which a full jury system could be introduced from the beginnings of settlement (although Western Australia later opted to receive convicts).

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<sup>1</sup> The current South Australian legislation is the *Summary Procedure Act* 1921 ss 101 – 107. See further below, fn 266.

<sup>2</sup> On the grand jury system in New South Wales, see Bennett, "The Establishment of Jury Trial in New South Wales" (1961) 3 Syd LR 462, 482-485; Castles, *An Australian Legal History* (Law Book, Sydney 1982), pp. 177f, 204, 275f; Woods, *A History of Criminal Law in New South Wales: The Colonial Period, 1788-1900* (Federation Press, Sydney 2002), pp. 59-61. On its non-existence, see *Australian Courts Act* 1828 (Imp.) s 5; 5 Vic. No. 4 (N.S.W.) s 10; *R v. Lang* (1859) 2 Legge 1133, 1134; *Attorney-General (New South Wales) v. Bertrand* (1867) LR 1 PC 520, 528f; *Grassby v. R* (1989) 168 CLR 1, 13. In relation to Tasmania, see Low, "Sir Alfred Stephen and the Jury Question in Van Diemen's Land" (2002) 21 U Tas LR 79, 112-117.

<sup>3</sup> See the Queensland statutes 25 Vic. No. 13 s 20; 31 Vic. No. 23 s 27.

<sup>4</sup> *Crimes Act* 1958 s 354, and see s 351 and *R v. Nicola* [1987] VR 1040, 1045f; *Re Shaw* (2001) 4 VR 103. On the history of this provision see Histed, "The Introduction and Use of the Grand Jury in Victoria" (1987) 8 Jo Leg Hist 167; Moore, "A Century of Victorian Law" (1934) 16 Jo Comp Leg & Int Law (3rd) 175, 187f.

<sup>5</sup> *R v. McInnes* [1940] VLR 416. See also *R v. Parker* [1977] VR 22; *Nicola* [1987] VR 1040.

<sup>6</sup> See Castles, *An Australian Legal History*, pp. 297, 300; Russell, *A History of the Law in Western Australia and its Development from 1829 to 1979* (University of Western Australia Press, Nedlands 1980), pp. 138f.

South Australia, at least, was very conscious of its origins and continued status as the sole non-convict Australian colony and the consequent introduction there of the full system of trial by jury – which in the 1830s most certainly included the grand jury – from the very beginning. Despite this, the South Australian legislature agreed to a government Bill<sup>7</sup> and abolished grand juries in 1852,<sup>8</sup> at a time when South Australia was still a British Province with only limited rights of self-government and before any jurisdiction in the United States,<sup>9</sup> let alone England,<sup>10</sup> had done so. Abolition accordingly occurred less than sixteen years after the first grand jury had assembled on South Australian soil on 13 May 1837 (when the Province of South Australia and the city of Adelaide were not yet five months old)<sup>11</sup> pursuant to the common law which the settlers had brought with them and in advance of any statutory recognition of grand juries in the Province.<sup>12</sup>

This article considers, first of all, the contribution to the South Australian legal system and community which grand juries made during their relatively brief existence, and the procedures which they followed. We shall see that grand juries not only considered bills of indictment preferred by the Crown Prosecutor as part of the machinery of the criminal law, but also carried out some additional functions on behalf of the community similar to those which grand juries carried out in England, and sometimes made presentments on diverse topics. These are an enormously valuable source of settler opinion on various matters.

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<sup>7</sup> See the “Adelaide Times”, 9 September 1852, p. 3.

<sup>8</sup> Act No. 10 of 1852, s 1, which had no short title; its long title was “An Act to provide for the Trial of Offenders without the intervention of Grand Juries” (see further below, fn 333). The Act was repealed and re-enacted by ss 3 and 334 and Schedule A Part II of the *Criminal Law Consolidation Act 1876* (S.A.). See now *Criminal Law Consolidation Act 1935* (S.A.) s 275.

<sup>9</sup> The first jurisdiction to abolish grand juries in the United States was Michigan, which did so in 1859 : Frankel/Naftalis, *The Grand Jury : An Institution on Trial* (Hill & Wang, New York 1977), p. 16; Leipold, “Why Grand Juries Do Not (and Cannot) Protect the Accused” (1995) 80 Cornell LR 206, 314; Younger, *The People’s Panel : The Grand Jury in the United States, 1634 – 1941* (Brown University Press, Providence 1963), pp. 68f. See further, for a discussion of whether grand juries should be abolished or not and a summary of the current law relating to grand juries in the federal and nineteen State jurisdictions in which they survive, Simmons, “Re-examining the Grand Jury : Is There Room for Democracy in the Criminal Justice System?” (2002) 81 Boston ULR 1, and the works cited therein.

<sup>10</sup> See below, fn 298.

<sup>11</sup> Thus, South Australians cannot be accused of being slow to adopt the grand jury (*cf.* Kadish, “Behind the Locked Door of an American Grand Jury : Its History, its Secrecy and its Process” (1996) 25 Florida State ULR 1, 9) – or of being slow to abolish it!

<sup>12</sup> The local statute 1 Vic. No. 1 s 32, requiring the use of grand juries for trials on indictment before the Supreme Court of South Australia, was not passed until 15 November 1837.

Among the principal topics with which grand juries dealt were relations between the settlers and the Aborigines. The same topic was prominent in the Judge's charge to the grand jury, which very often went beyond the cases at hand and concerned itself with a more general commentary on matters of concern to the colony and its progress and development. This is a commentary which is of great value given that it was provided by a person who was educated and familiar with the conditions of the Province but who, at the same time, was something of an outsider whose perspective on the doings of the colonists was largely unbiased and impartial.

When the operation of the grand jury system in South Australia has been outlined, the reasons for the abolition of grand juries in 1852 will be investigated. It will be shown that the chief problem perceived (correctly, as it turned out) by legislators in 1852 was the looming over-supply of grand jurors in consequence of the enrichment of the population caused by the gold rush in Victoria. Furthermore, there was little sense in early South Australia that the grand jury's reason for existence was to prevent abuses of the Crown's power to prosecute. This danger appears to have been considered very slight – at least in South Australia, as distinct from Western Australia, where a campaign was mounted (even if unsuccessfully) to preserve grand juries as a check on the Crown. In South Australia, however, the contest was between the grand jury and judicial committal proceedings as the most efficient means of deciding whether to place people on trial, and the latter, as might be expected, won easily.

## **2. The grand jury in the machinery of the criminal law**

### **a. The first grand jury**

As mentioned, the first grand jury on South Australian soil sat on 13 May 1837. It sat pursuant to a Special Commission of Gaol Delivery. As representing the wider community, it received the congratulations of Jeffcott J., who gave a somewhat flowery

and grandiloquent charge to it ‘[i]n the style of the day’,<sup>13</sup> on the fact that South Australia enjoyed the advantages of trial by jury *ab initio*. This appears to have been seen much more as a means of distinguishing South Australia from the convict colonies than as a way of controlling the Crown’s decision to prosecute and thus ensuring freedom from despotism. Jeffcott J. further stated that the grand jury assembled in the infant Province of South Australia might, ‘in respectability or intelligence’, ‘challenge a comparison with those of a similar class in the mother country’.<sup>14</sup> Nevertheless, there is no indication in the official records or elsewhere of the means that had been adopted to select the grand jurors thus flattered.<sup>15</sup> Probably a clue to the procedure adopted is provided by the statute passed shortly afterwards which required merely that grand jurors should be ‘men [...] between the ages of twenty-one and sixty years of good fame and condition’.<sup>16</sup>

The Court’s records<sup>17</sup> do however tell us that the grand jury consisted of fourteen men, that its foreman was Colonel Light, the Surveyor-General who was responsible for the plan and site of Adelaide, and that, of the fourteen, nine were described as esquires, although their qualification (if any) to bear this title is not stated.<sup>18</sup> The five other jurors were Colonel Light, a Captain in the Royal Navy, a Captain (presumably in the Army), a Deputy Surveyor and a merchant. The records also tell us that, of the six indictments presented to the grand jury, all but one were found to be a true bill and

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<sup>13</sup> Castles, *An Australian Legal History*, p. 314. See also Pike, *Paradise of Dissent : South Australia 1829-1857* (Melbourne University Press, Melbourne 1967), p. 227.

<sup>14</sup> “South Australian Register”, 3 June 1837, p. 4.

<sup>15</sup> It should be recalled here that there was at the time no qualification for grand jurors at the assizes : Archbold/Jervis, *Pleading and Evidence in Criminal Cases* (13th ed., H. Sweet, London 1856), p. 65; Stephen, *A History of the Criminal Law of England* (MacMillan, London 1883), p. 254; Stephen/Stephen, *A Digest of the Law of Criminal Procedure in Indictable Offences* (MacMillan, London 1883), p. 119. As late as 1932, the extreme vagueness of the arrangements for selecting grand jurors was pointed out by a correspondent of *The Times*: 16 August 1932, p. 6 (and see the replies : 19 August 1932, p. 6).

<sup>16</sup> 1 Vic. No. 1 (S.A.) s 33. The earlier statute 7 Wm IV No. 2 (S.A.) had fixed the qualification of petty and common jurors only, at least according to the copies in the Supreme Court Library, the Parliamentary Library, the State Library of South Australia and the Law Library of the University of Adelaide. It is possible that the statement in Hague, *A History of the Law in South Australia 1836-1867* (unpublished, Adelaide 1936), p. 982, rests on a variant copy of the Act in question – see p. 985 of the same work for a similar problem.

<sup>17</sup> The criminal record book of the Supreme Court (hereinafter : “Supreme Court, criminal records”), held in the Library of the Supreme Court of South Australia. The indictments are preserved in the State Archives of South Australia, GRG 36/1/1. (All references hereinafter to “GRG” material refer to material in the State Archives of South Australia.) GRG 36/1 contains a set of indictments for the period up to (and beyond) the abolition of grand juries in 1852. See also GRG 1/23; GRG 36/8.

<sup>18</sup> Later, Cooper J., in a report to the Governor (attached to the latter’s despatch to the Colonial Office of 14 October 1846, Public Record Office, CO 13/50/291, 320 (A.J.C.P., reel 607), stated that he thought that this qualification for grand jury service should be dispensed with, as the status of Esquire in South Australia was even more uncertain than it was in England.

the remaining one, as the phrase went, ‘ignored’. Clearly, the smallness of the grand jury – as a majority of twelve was necessary, three dissentients could have prevented the grand jury from reaching a decision – was not an obstacle to its carrying out its functions. It is also worth noting that, of the five persons accordingly tried before the petty jury, all were convicted.<sup>19</sup>

It was not merely the small size of the grand jury which set a precedent for future grand juries. His Honour’s charge referred at great length to the relationship between the settlers and the Aborigines; aggression against the natives, or any ‘infringement on their rights’, would be ‘visited by greater severity of punishment than’<sup>20</sup> would otherwise be inflicted; on the other hand, the civilisation of the natives would lead to the Province’s obtaining ‘a blessing from the great Father of the human family who has placed us among them’.<sup>21</sup> This would also lead to a further contrast between South Australia and the convict colonies to the east, at whose treatment of Aborigines, his Honour said, ‘humanity shudders’.<sup>22</sup> Two prosecutions, he pointed out, already involved natives: one (which was not quite ready to proceed)<sup>23</sup> was against two whites for larceny from an Aborigine, and the other involved a defendant who had attempted to give alcohol to the Aborigines and had abused the Advocate-General, Charles Mann, when he attempted to stop this. His Honour also called for the labouring classes to work hard, respect their betters and thus earn a share in the prosperity of the Province. How prosperous the Province really was, and the conditions under which the early settlers lived, is however brought home vividly to today’s reader, working amidst the solid buildings of the city of Adelaide, when reading his Honour’s directions on whether breaking into ‘the huts and tents, in which the great body of our population now reside’, which were ‘fastened [...] by strings tied together on the inside’,<sup>24</sup> could constitute burglary (it could).

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<sup>19</sup> The indictments (GRG 36/1/1) indicate that one person was convicted of a lesser offence than that in relation to which the grand jury found a true bill.

<sup>20</sup> “Register”, 3 June 1837, p. 5.

<sup>21</sup> “Register”, 3 June 1837, p. 5.

<sup>22</sup> “Register”, 3 June 1837, p. 5.

<sup>23</sup> See also “Register”, 8 July 1837, p. 4. The author has not attempted to trace the subsequent history (if any) of this prosecution.

<sup>24</sup> “Register”, 3 June 1837, p. 5.

Having heard this lengthy charge, containing as it did a mixture of congratulation, bland directions of law, schoolmasterly exhortation and threats of condign punishment for ill-treatment of the natives, the newspaper of the day records that the grand jury retired and found several true bills during the morning.<sup>25</sup> We are not told exactly what procedure was followed in presenting bills to it, but we may assume that the traditional English procedure was followed, there being no indication to the contrary. This would mean that the Crown witnesses would have been sworn in open Court and then examined by the grand jury in private. Support for this may be found in his Honour's statement that the grand jury would 'hear'<sup>26</sup> evidence of the prosecution. There is certainly no indication that what apparently became the practice in Western Australia was followed and that the depositions were sent into the grand jury room.<sup>27</sup>

#### **b. Procedure and composition of the grand jury**

The small size of the first grand jury was not something that South Australia outgrew as it developed. It was merely an expression of the fact that the small population of the colony and the vast distances which some settlers would have to travel made it difficult to convene a grand jury of the usual size.<sup>28</sup> Thus, it was quite common in succeeding years for a grand jury to consist of only fourteen<sup>29</sup> or fifteen<sup>30</sup> members, and two grand juries of only thirteen are also recorded.<sup>31</sup> The session of November 1843 started a day late when only twelve grand jurymen arrived on the appointed

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<sup>25</sup> "Register", 3 June 1837, p. 5.

<sup>26</sup> "Register", 3 June 1837, p. 5.

<sup>27</sup> See Russell, *History of the Law in Western Australia*, p. 128. Note, however, the disagreement on whether the practice existed in the Legislative Council's debates on the abolition of grand juries: "Perth Gazette and Independent Journal of Politics and News", 20 April 1855, p. 2.

<sup>28</sup> See, e.g., Hague, *A History of the Law*, pp. 1226f; below, fn 294.

<sup>29</sup> E.g. Supreme Court, criminal records, session beginning 14 November 1839; "Register", 11 July 1840, p. 6; "Southern Australian", 10 July 1840, p. 3 (the Court's records of this grand jury, and of all such between March 1840 and March 1845, have not survived: statement by Mr Bruce Greenhalgh, Library, Supreme Court of South Australia; some however may be found in GRG 36/10); Supreme Court, criminal records, session beginning 13 May 1850; "South Australian", 14 May 1850, p. 3; "South Australian Gazette and Mining Journal", 16 May 1850, p. 3; "Adelaide Times", 14 May 1850, p. 2.

<sup>30</sup> Supreme Court, criminal records, session beginning 3 March 1840; GRG 36/10 (July 1843); "Register", 19 July 1843, p. 3; "Southern Australian", 21 July 1843, p. 3; "Register", 28 November 1849, p. 4; "South Australian", 30 November 1849, p. 2; "Adelaide Times", 29 November 1849, p. 3; "South Australian Gazette and Mining Journal", 29 November 1849, p. 3.

<sup>31</sup> E.g. the grand jury of July 1839 (as recorded in the Supreme Court, criminal records, session beginning 17 July 1839, and in the "Register", 20 July 1839, p. 2), and that of November 1842 (GRG 36/10 (November 1842); "Register", 12 November 1842, p. 3; "Southern Australian", 11 November 1842, p. 2).

day.<sup>32</sup> On the other hand, there is a record of a grand jury of twenty-two as early as 1838<sup>33</sup> (the second grand jury of the Province) and in 1844,<sup>34</sup> and one of twenty-four in 1846,<sup>35</sup> although how this was allowed is not clear : the applicable statute, like the common law,<sup>36</sup> permitted no more than twenty-three;<sup>37</sup> possibly not all served on each investigation. The names of the grand jurors were, as a rule, published in full in the local newspapers, sometimes with addresses and occupations. The small size of most grand juries led, generally speaking, to the adoption of a fairly strict policy in relation to applications for exemption from grand jury service<sup>38</sup> and the infliction of a number of fines on persons who had not attended at all or been late.<sup>39</sup>

There continues to be no record of any depositions being placed before the grand jury,<sup>40</sup> and it is hard to credit that this would not have been remarked upon somewhere in the historical record<sup>41</sup> if it had been the regular practice of the Court;<sup>42</sup> clearly, at

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<sup>32</sup> “Register”, 8 November 1843, p. 2; “Southern Australian”, 10 November 1843, p. 2. Cf. Bennett, *Sir Charles Cooper : First Chief Justice of South Australia 1856-1861* (Federation Press, Sydney 2002), p. 39.

<sup>33</sup> Supreme Court, criminal records, session beginning 11 April 1838.

<sup>34</sup> “Register”, 3 July 1844, p. 3; “Southern Australian”, 5 July 1844, p. 2.

<sup>35</sup> Supreme Court, criminal records, session beginning 24 November 1846; “Register”, 25 November 1846, p. 3; “South Australian”, 27 November 1846, pp. 5f; “South Australian Gazette and Colonial Register”, 28 November 1846, p. 3

<sup>36</sup> Edwards, *The Grand Jury* (A.M.S. Press, New York 1973) pp. 45f; Frankel/Naftalis, *Grand Jury*, p. 19.

<sup>37</sup> Ordinance No. 12 of 1843, s 34.

<sup>38</sup> “Register”, 12 March 1842, p. 4; “Register”, 12 September 1849, p. 3. One grand juror was however exempted simply owing to his age : “South Australian”, 13 March 1849, p. 2; “Adelaide Times”, 19 March 1849, p. 4. A lenient line was taken in June 1847, when apparently jurors were excused owing to the weather and their health : “Register”, 16 June 1847, p. 2. A harder line was taken in 1851 : “Register”, 12 August 1851, p. 3; “South Australian”, 12 August 1851, p. 3; “South Australian Gazette and Mining Journal”, 14 August 1851, p. 2; “Austral Examiner”, 15 August 1851, p. 6.

<sup>39</sup> GRG 36/10 (November 1843); Supreme Court, criminal records, sessions beginning 13 May 1850; 24 November 1851; “Register”, 11 March 1846, p. 3; “South Australian”, 10 March 1846, p. 2; “South Australian Gazette and Colonial Register”, 14 March 1846, p. 2; “Register”, 1 December 1847, p. 3; “South Australian Gazette and Mining Journal”, 4 December 1847, p. 4; “Register”, 14 May 1850, p. 3; “South Australian”, 14 May 1850, p. 3; “South Australian Gazette and Mining Journal”, 16 May 1850, p. 3; “Adelaide Times”, 14 May 1850, p. 2; 15 May 1850, p. 3; 6 December 1851, p. 5; “Austral Examiner”, 15 August 1851, p. 6.

<sup>40</sup> Even pursuant to the *Indictable Offences Act* 1848 (U.K.) s 17, as adopted in South Australia by Ordinance No. 15 of 1849 s 8, or its predecessors. See, however, below, fn 42, for a reference to occasions in England on which depositions had been admitted despite the non-fulfilment of the conditions laid down in this statute.

<sup>41</sup> As always, however, it cannot be ruled out, in the absence of an index to the newspapers of the time, that a statement about the practice or an exception to it exists somewhere in the several newspapers published over the sixteen years from 1836 to 1852.

<sup>42</sup> Although it is possible that occasional deviations from this rule went unrecorded in the absence of regular law reports. For a list of such deviations in England, see Archbold/Jervis/Craies, *Pleading, Evidence and Practice in Criminal Cases* (24th ed., Sweet & Maxwell, London 1910), pp. 100f; Bowen-Rowlands, *Criminal Proceedings on Indictment and Information* (Stevens & Sons, London 1910), pp. 96, 101.



all events, the grand jury heard and examined witnesses.<sup>43</sup> The evidence on this appears conclusive. There are references, for example, to the inconvenience and delay caused by witnesses' non-attendance when required by the grand jury<sup>44</sup> and to the need for the grand jury to observe their demeanour.<sup>45</sup> At least four times, grand juries complained that they had nothing to do or had been delayed owing to the absence of witnesses,<sup>46</sup> and on at least four occasions they could not find true bills owing to the absence of witnesses.<sup>47</sup> On another occasion, the Judge stated in his charge that as a witness 'is not now in the province, [...] his deposition is put out of the question',<sup>48</sup> on another that a case appeared plain from the depositions, but that the grand jury would have the witnesses before it,<sup>49</sup> and in one further case talked about 'the evidence, if it came before the grand jury in the form which the depositions led him to suppose'.<sup>50</sup> Interpreters were sometimes required for Aboriginal witnesses giving evidence before the grand jury;<sup>51</sup> on another occasion, a grand jury was told that an Aboriginal woman 'could not give her testimony on oath, but they could receive her dec-

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<sup>43</sup> E.g. "Adelaide Independent and Cabinet of Amusement", 4 November 1841, p. 2; "Register", 12 November 1842, p. 3; 16 September 1846, p. 3; "South Australian", 14 September 1847, p. 3; "Register", 13 June 1849, p. 3; Bennett, *Cooper C.J.*, p. 66.

<sup>44</sup> GRG 36/1/1, which contains a letter from the grand jury to Jickling A.J. dated 8 March 1839 about the obstruction of justice caused by the non-attendance of grand jurors, and asks for the names of the defaulters to be published (see "Register", 9 March 1839, p. 4); "Register", 29 August 1840, pp. 1, 2; 16 June 1849, p. 2.

<sup>45</sup> "Register", 6 March 1841, p. 3; "Adelaide Chronicle and South Australian Literary Record", 3 March 1841, p. 3.

<sup>46</sup> "South Australian", 14 September 1847, p. 3; "Register", 13 June 1849, p. 3; 11 February 1851, p. 3; "South Australian Gazette and Mining Journal", 13 February 1851, p. 3; "Adelaide Times", 11 February 1851, p. 3; "Register", 15 August 1851, p. 3; "South Australian", 12 August 1851, p. 3; "South Australian Gazette and Mining Journal", 14 August 1851, pp. 2f.

<sup>47</sup> "South Australian Gazette and Mining Journal", 21 March 1850, p. 3; "Adelaide Times", 17 May 1850, p. 4; "Register", 28 November 1851, p. 3; "South Australian Gazette and Mining Journal", 29 November 1851, p. 4; "Adelaide Times", 28 November 1851, p. 3; "South Australian Gazette and Mining Journal", 12 February 1852, p. 3.

<sup>48</sup> "Register", 6 March 1841, p. 3.

<sup>49</sup> "Register", 3 July 1844, p. 3; "Southern Australian", 5 July 1844, p. 2. A similar statement in the Judge's charge may be found in the "Adelaide Times", 13 March 1850, p. 3 (grand jury to 'ascertain facts from the evidence, much more fully than [Cooper J.] had been able to do from the depositions'). In the "Register", 10 June 1846, p. 4, the Judge is reported as saying that 'if you believe the depositions, you will be left in little doubt', but the quotation is probably not exact and is materially different in the "South Australian", 9 June 1846, p. 3; "South Australian Gazette and Colonial Register", p. 2 ('[t]he circumstances were such as to leave little doubt'). Cf. also "South Australian", 29 November 1844, p. 3.

<sup>50</sup> "Register", 14 June 1848, p. 3; similar in "South Australian", 13 June 1848, p. 2. Similar: "South Australian", 14 September 1849, p. 2.

<sup>51</sup> "Register", 15 September 1849, p. 3; "South Australian", 11 September 1849, p. 3; "South Australian Gazette and Mining Journal", 15 September 1849, p. 3; Pope, *Aborigines and the Criminal Law in South Australia: the First Twenty-Five Years* (Ph.D. thesis, Deakin University, 1998), p. 120; cf. "Register", 11 February 1851, p. 3; "Adelaide Morning Chronicle", 12 August 1852, p. 3.

laration'.<sup>52</sup> In August 1841, an order was made that 'John Collins be brought up to give Evidence before the Grand Jury'.<sup>53</sup> And the practice of "marshalling" the cases, apparently the basis of the West Australian practice,<sup>54</sup> was not followed in South Australia.<sup>55</sup> On the other hand, there may have been the occasional exception : one newspaper report seems to imply that the examination of the accused before the committing Justices was admitted to the grand jury room on at least one occasion when an Acting Judge was in charge.<sup>56</sup> And another newspaper states – whether accurately or not, we cannot know – that the grand jury usually examined only one witness unless minded to ignore the bill;<sup>57</sup> how the grand jury might reach that view is not stated.

Grand juries generally sat for about three days,<sup>58</sup> although some sat for shorter<sup>59</sup> or longer periods;<sup>60</sup> while waiting for indictments to be presented, the Court sometimes dealt with civil or other non-criminal business<sup>61</sup> or even adjourned to the next day.<sup>62</sup> Grand juries occasionally adjourned of their own motion for a day or two while waiting for further business to be placed before them,<sup>63</sup> which must have been inconven-

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<sup>52</sup> "Register", 25 November 1846, p. 3; similar : "South Australian", 27 November 1846, p. 6. The case concerned was the Donnelly case, which will be mentioned again below. As we shall also see below (p. 36), the Protector of Aborigines appeared in the grand jury room in at least one prosecution of an Aborigine, and this was almost certainly a regular practice.

<sup>53</sup> GRG 36/10. That Collins was in gaol at this time may be shown from the records preserved in GRG 54/24/35.

<sup>54</sup> Russell, *A History of the Law in Western Australia*, p. 138.

<sup>55</sup> "Register", 12 September 1849, p. 3; "South Australian", 14 September 1849, p. 2.

<sup>56</sup> "Register", 12 September 1849, p. 3; "South Australian", 11 September 1849, p. 3.

<sup>57</sup> "South Australian Gazette and Mining Journal", 15 August 1850, p. 2.

<sup>58</sup> The reports do not always record the date on which grand juries were discharged, but see, *e.g.*, "Register", 12 March 1842, pp. 2, 4 (records discharge of jury summoned on 8 March on 11 March); "Register", 1 December 1849, p. 3; "South Australian Gazette and Mining Journal", 1 December 1849, p. 3; "Register", 16 May 1850, p. 3 (grand jury of 13 May discharged on 15 May); "South Australian", 15 August 1850, p. 3; "South Australian Gazette and Mining Journal", 15 August 1850, p. 3; "Adelaide Times", 15 August 1850, p. 3 (grand jury of 12 August discharged on 14 August); "Adelaide Times", 17 February 1851, p. 3 (grand jury of 10 February discharged on 12 February).

<sup>59</sup> The grand jury of the July 1843 sessions, for example, sat for only two days : "Register", 22 July 1843, p. 2. So did the grand jury of November 1846 : "Register", 28 November 1846, p. 3. And so did the last grand jury : "Register", 11 October 1852, p. 3.

<sup>60</sup> Thus, the grand juries of June 1848, March 1849 and March 1850 appear to have sat for a week : "Register", 17 June 1848, p. 4; 17 March 1849, p. 3; 19 March 1850, p. 3; "Adelaide Times", 20 March 1850, p. 3. The grand jury summoned on Monday 11 August 1851 was not discharged until Thursday 21 August, although it adjourned over some days in between : "Register", (Saturday) 16 August 1851, p. 3 (grand jury adjourned on Friday to following Thursday); "Register", 25 August 1851, p. 3.

<sup>61</sup> "Southern Australian", 5 March 1841, p. 3; "Adelaide Chronicle and South Australian Literary Record", 3 March 1841, p. 3; "Southern Australian", 8 March 1844, p. 2; "Observer", 9 March 1844, p. 3; "Register", 14 June 1848, p. 3; "Register", 14 March 1849, p. 3.

<sup>62</sup> GRG 36/10 (March 1842); "South Australian", 12 June 1849, p. 2; above, fn 60; "Register", 27 November 1851, p. 3; "Adelaide Times", 26 November 1851, p. 3.

<sup>63</sup> "Adelaide Times", 17 September 1849, p. 4; above, fn 60.

ient for country jurors in particular.<sup>64</sup> Even greater inconvenience could be caused if a formal defect in an indictment were found after a grand jury had dispersed and a new grand jury had to be summoned to find a new true bill<sup>65</sup> or a case was required to be adjourned to the following sessions.<sup>66</sup> Inconvenience must have been caused to Crown witnesses, too, by the need to attend first before the grand jury and (if a true bill were found) then at the trial.<sup>67</sup>

Statistics were not kept of the grand jury's doings,<sup>68</sup> but from the irregular statistical reports that exist it is possible to conclude that their functions were by no means redundant.<sup>69</sup> In the mid-1840s it was usual for the grand jury to ignore only a few bills per session.<sup>70</sup> A change occurred in the second half of 1848<sup>71</sup> and more especially in March 1849, when there was an unusually large number of bills (fifty-three) and the grand jury ignored eleven of them.<sup>72</sup> Thereafter, the grand jury of the March 1850 sessions ignored six of the fifty-three bills presented to it,<sup>73</sup> and that of May 1850 ignored seven on one day.<sup>74</sup> In the August 1850 sessions, a total of three bills, one for manslaughter, against nine defendants (of whom four were Aborigines) were ignored on one day alone.<sup>75</sup> The February 1851 grand jury, perhaps spurred on to special stringency by Crawford J.'s statement that the existence of committal proceedings

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<sup>64</sup> "Southern Australian", 10 March 1843, p. 2; "Adelaide Examiner", 11 March 1843, p. 2 : his Honour ordered other grand jurymen to be summoned in place of those from long distances owing to an adjournment over the weekend.

<sup>65</sup> As occurred in the November 1842 and March 1843 sessions : GRG 36/10; "Register", 19 November 1842, p. 3; "Southern Australian", 18 November 1842, p. 3; "Register", 25 March 1843, p. 2; "Adelaide Examiner", 25 March 1843, p. 3. See also fn 64.

<sup>66</sup> "Register", 27 November 1844, p. 3; "South Australian", 29 November 1844, p. 3.

<sup>67</sup> "Register", 12 September 1849, p. 3.

<sup>68</sup> The inclusion of a statistical summary of the session's proceedings in the Supreme Court's criminal records gradually becomes less and less frequent as time goes on.

<sup>69</sup> This is not to deny that statistics are a crude measure of the grand jury's work; but it has been pointed out that statistics will tend to under-estimate rather than over-estimate the number of prosecutions which do not proceed because of grand juries : Leipold, (1995) 80 Cornell LR 260, 274-278.

<sup>70</sup> Supreme Court, criminal records, sessions beginning June 1845 – March 1848 (no more than three bills ignored in any one session, although for at least one session there are no statistics); "South Australian", 12 May 1847, p. 6.

<sup>71</sup> The grand jury of June 1848 ignored at least five bills ("Register", 17 June 1848, p. 4) and that of September 1848 four ("Register", 16 September 1848, p. 3). However, the "Adelaide Times" of 4 December 1848, p. 4, states that the grand jury found true bills in all cases in that session.

<sup>72</sup> Supreme Court, criminal records, session beginning 12 March 1849.

<sup>73</sup> "Register", 25 March 1850, p. 2.

<sup>74</sup> "Register", 14 May 1850, p. 3; "South Australian", 14 May 1850, p. 3; "South Australian Gazette and Mining Journal", 16 May 1850, p. 3; "Adelaide Times", 14 May 1850, p. 2. (Each newspaper gives slightly different details.)

<sup>75</sup> "South Australian Gazette and Mining Journal", 15 August 1850, p. 3 (proceedings of 14 August 1850).

made the grand jury's duties 'almost a matter of form',<sup>76</sup> ignored a total of six bills against six defendants (one an Aborigine) on seven charges.<sup>77</sup> Statistics such as these led to occasional complaints in the newspapers that the magistrates were committing too freely.<sup>78</sup> And grand juries regularly ignored bills for quite serious offences, that of November 1851, for example, ignoring one bill against four defendants for murder and another against two defendants for manslaughter.<sup>79</sup>

Despite the apparent adherence to English forms, there are some signs that the smallness of the colony and its grand juries required some compromises to be made. In 1845, the leading local newspaper complained indignantly in an editorial that bills were found by a majority of nine.

We thought that every school-boy knew that twelve must concur in a verdict – and we suppose his Honour thought the same, or he would certainly have directed them upon the subject. But while property alone forms the qualification, how can we expect an improvement. In a new colony fortunes spring up like mushrooms, and melt like snow.<sup>80</sup>

The "Register" repeated this complaint against the 'newly-created aristocracy'<sup>81</sup> serving on grand juries in the following year. The same complaint was made by another newspaper in 1850: 'majorities of eight or nine have occasionally found true bills'.<sup>82</sup> The complaint of 1845 – and the breach of the oath of secrecy which the information thus revealed implied – led to judicial directions at the following sessions not only about the need for twelve grand jurors to agree, but also on the need for them to keep

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<sup>76</sup> "Register", 11 February 1851, p. 3; "South Australian", 11 February 1851, p. 3; "South Australian Gazette and Mining Journal", 13 February 1851, p. 3; "Adelaide Times", 11 February 1851, p. 3.

<sup>77</sup> "South Australian Gazette and Mining Journal", 13 February 1851, p. 3 in conjunction with the "Register", 13 February 1851, p. 3, the "South Australian", 14 February 1851, p. 3 and the Judge's charge, which pointed out that Tommy Ross, *alias* Kutromee, was a native.

<sup>78</sup> "Adelaide Chronicle and South Australian Literary Record", 17 March 1841, p. 2; "Register", 11 June 1845, p. 2; "Register", 23 May 1850, pp. 2f; "Adelaide Times", 26 August 1850, p. 3; "Register", 13 September 1845, p. 2.

<sup>79</sup> "Adelaide Times", 26 November 1851, p. 3.

<sup>80</sup> "Register", 11 June 1845, p. 2.

<sup>81</sup> "Register", 17 June 1846, p. 2.

<sup>82</sup> "South Australian Gazette and Mining Journal", 15 August 1850, p. 2.

their deliberations secret.<sup>83</sup> It is easy to imagine that a grand jury's deliberations, in a more or less accurate form, could have become known to all and sundry, including the accused, if the rule of secrecy were not strictly adhered to and some account of them filtered out into the small South Australian community of the time.<sup>84</sup>

It is equally easy to imagine that, as Crawford J. once pointed out, the smaller size of grand juries put pressure on the rule that twelve must agree.<sup>85</sup> In the November 1851 sessions, the grand jury actually went so far as to come into Court and ask whether it could find a true bill with eleven grand jurors in favour of that course and eight opposed. The answer was no, and the bill was later ignored.<sup>86</sup> In another case, which was referred to in Parliament in 1859 as an example of the difficulties created in a small community by the grand jury system, the accused managed to prevent a true bill from being presented by the fact that his friends were on the grand jury.<sup>87</sup>

Another grand jury revealed its ignorance of the rule that a failure by it to find a true bill did not prevent the institution of further proceedings by asking a question about whether that was so.<sup>88</sup> Yet another grand jury revealed its ignorance of the conventions of criminal pleading by asking whether it should find a true bill despite the lack of literal truth of all the averments.<sup>89</sup> In the first criminal sessions over which he presided in South Australia, Crawford J. was even asked by a grand jury whether they could find a true bill despite the insufficiency of the evidence 'if they had reason to believe that at the trial other evidence would be forthcoming'.<sup>90</sup> His Honour responded that they could not, and was probably wise, given the depth of ignorance revealed

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<sup>83</sup> *E.g.* "Register", 10 September 1845, p. 3; "South Australian Gazette and Colonial Register", 13 September 1845, p. 4; "Register", 26 November 1845, p. 3; "South Australian Gazette and Colonial Register", 29 November 1845, p. 2.

<sup>84</sup> As may have happened more than once. An editorial in the "Register", 4 July 1849, p. 2 appears to show awareness of a prosecutor's evidence before the grand jury.

<sup>85</sup> "Register", 11 February 1851, p. 3.

<sup>86</sup> "Register", 28 November 1851, p. 3; "Adelaide Times", 25 November 1851, p. 3; "South Australian Gazette and Mining Journal", 27 November 1851, p. 4; 29 November 1851, p. 4; "Austral Examiner", 15 August 1851, p. 6.

<sup>87</sup> South Australian Parliamentary Debates, House of Assembly, 25 May 1859, coll. 106f.

<sup>88</sup> "Register", 13 June 1849, p. 3.

<sup>89</sup> "Southern Australian", 14 March 1843, p. 3; "Adelaide Examiner", 15 March 1843, p. 3.

<sup>90</sup> "Register", 14 August 1850, p. 3; "South Australian Gazette and Mining Journal", 15 August 1850, p. 3 (quotation to similar effect). Another grand jury asked whether it was possible for it to examine witnesses other than those named on the back of the indictment, to which the reply was that it could if the Crown supplied them: "Register", 13 February 1851, p. 2; "South Australian Gazette and Mining Journal", 13 February 1851, p. 3; "Adelaide Times", 13 February 1851, p. 3. This answer is supported by Archbold/Jervis, 13th ed., p. 65.

by this question, to omit to add that they could find a true bill based on their own knowledge.<sup>91</sup> In this state of affairs, it is probable that some grand jurors were puzzled by one judicial reference to ‘that sound discretion [in determining whether to put persons on their trial], which it is the very object of a grand jury to ensure’,<sup>92</sup> and that grand jurors in other sessions would have been simply ignorant of it. Another topic on which grand juries fairly frequently, and more understandably, required direction was whether they could reduce a bill, finding, for example, a true bill for common assault only when the defendant had been charged with an aggravated assault.<sup>93</sup>

All this makes one wonder what sort of person was qualified to serve on the grand jury. A statute of 1843, repealing the earlier provision referring to ‘good fame and condition’,<sup>94</sup> had assimilated the qualifications of grand jurors to those of special jurors.<sup>95</sup> The rule was henceforth that

every man described in the [Common] Jurors’ Book as an Esquire or person of higher degree or as a Justice of the Peace or as a Merchant (such Merchant not keeping a general retail shop) or as a Bank Director or Manager or as possessing within the Province real estate of the value of five hundred pounds or personal estate of the value of one thousand pounds shall be qualified and liable to serve<sup>96</sup>

as a special, and thus also as a grand, juror. A letter was thereafter sent to various notables asking them to supply names of suitable persons for service on grand and special juries,<sup>97</sup> although their replies, let alone the grand jury lists, do not seem to have

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<sup>91</sup> His Honour atoned for this in speaking to the grand jury of August 1851 : “Register”, 14 August 1851, p. 3; “Adelaide Times”, 14 August 1851, p. 3. As we shall see below, South Australian law required all bills to be signed by the Advocate-General, but this would not have prevented the grand jury from finding a true bill signed by the Advocate-General based on its own knowledge of the evidence.

<sup>92</sup> “South Australian”, 13 March 1849, p. 2; “Adelaide Times”, 19 March 1849, p. 4.

<sup>93</sup> *E.g.* “Register”, 12 August 1851, p. 3; “Adelaide Times”, 14 August 1851, p. 3.

<sup>94</sup> See above, fn 16.

<sup>95</sup> Ordinance No. 12 of 1843, s 34. It is worth noting that this Ordinance was not allowed (*i.e.* not disallowed by London) until the notice published in the South Australian Government Gazette, 30 December 1847, p. 434. The reason for this may be gathered from Bennett, *Cooper C.J.*, p. 87. See further below, fn 303.

<sup>96</sup> Ordinance No. 12 of 1843, s 18.

<sup>97</sup> GRG 24/4/1844/204; GRG 24/6/1844/1069. The latter reference suggests that the lists may have been returned to the Clerk to the Bench of Magistrates.

survived.<sup>98</sup> As the statute implied (‘every man’), no woman ever sat on a grand jury in South Australia,<sup>99</sup> unlike in England.<sup>100</sup> Sections 8, 9 and 34 of the statute of 1843 further required the grand jurors to be summoned in the alphabetical order of their names as they appeared in the jurors’ book, and it is noticeable by the end of the 1840s that the grand jurors often had surnames that were close to one another in the alphabet. The last grand jury, which sat in August 1852, was mostly drawn from the letters R – W; that of August 1851 was also drawn largely from the latter half of the alphabet, which gives one some idea of the size of the pool available. This system, although somewhat unimaginative, at least ensured that a random selection was made from among those eligible, something that was not always guaranteed in colonial America.<sup>101</sup>

It became the practice of the Bench of Magistrates to sit towards the beginning of December to deal with applications for inclusion on the special and grand jury list,<sup>102</sup> and the names of the successful applicants were often published in the newspaper.<sup>103</sup> Occasionally their occupations were given, and these show that successful applicants included small businessmen of quite modest station such as ironmongers, brewers, farmers, grocers, drapers, bootmakers and butchers.<sup>104</sup> In December 1850, one would-be grand juror went so far as to employ counsel, E.C. Gwynne (later Gwynne J.), to press his case for inclusion on the grand jury list before the Magistrates. The applicant was told, regretfully, that, as the keeper of a general retail shop,

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<sup>98</sup> Personal communication between the author and Mr Bruce Greenhalgh, Library, Supreme Court of South Australia; the State Archives of South Australia also do not appear to have the lists.

<sup>99</sup> Women were not eligible for jury service in South Australia until the passing of the *Juries Act Amendment Act* 1965 (except on a jury of matrons : see Taylor, “The *Accused Persons Evidence Act* 1882 of South Australia : A Model for British Criminal Law?” (2002) 31 CLWR 332, 353). This is despite the fact that they had received the right to vote and to stand for Parliament almost three-quarters of a century earlier under the *Constitution Amendment* 1894 (S.A.).

<sup>100</sup> See, e.g., *The Times*, 4 January 1922, p. 7.

<sup>101</sup> Younger, *The People’s Panel*, p. 25.

<sup>102</sup> Cf. ss 7, 19 and 34 of Ordinance No. 12 of 1843, which appear to have suggested, but did not require, this practice for grand jury lists.

<sup>103</sup> “Register”, 10 December 1845, p. 3; 9 December 1846, p. 2; 8 December 1847, p. 3; 6 December 1848, p. 3; 8 December 1849, p. 3; 9 December 1851, p. 3; 12 December 1851, p. 3; “South Australian”, 8 December 1848, p. 3; “South Australian Gazette and Mining Journal”, 14 December 1850, p. 3; 4 December 1851, p. 3.

<sup>104</sup> See the “Register”, 8 December 1847, p. 3; 6 December 1848, p. 3; 8 December 1849, p. 3; 12 December 1851, p. 3.

he was not eligible under the statute just quoted.<sup>105</sup> South Australia clearly did not want to become known as a nation of shopkeepers.

That there was some truth in the lament of the editorial quoted earlier that the property qualification was an insufficient filter is shown by the fact that, for the March 1847 and September 1849 sessions, one Matthew<sup>106</sup> or – as one report has it – Michael<sup>107</sup> Jagger was called up for grand jury service and discharged as he could neither read nor write. Clearly, as his Honour stated in dealing with Jagger, the possession of property alone was not a sufficient test for worthiness to sit on a grand jury, although one report says that the Judge added that could not think of a better qualification.<sup>108</sup> A similar point about the insufficiency of the qualification to ensure that only the elite sat on the grand inquest might have been made when one grand juror applied – successfully – to be excused on the grounds that he was the defendant in one of the cases.<sup>109</sup>

Little is said about where the grand jury met<sup>110</sup> – the Supreme Court of South Australia had several homes between 1837 and 1852<sup>111</sup> – although two protests of the grand jury against the inadequacy of its accommodation are recorded : one in March 1839 in a grand jury presentment which stated that the grand jury had been ‘compelled to intrude on the private apartments of the Judge’<sup>112</sup> and the other in February 1851 immediately after the grand jury had been sent out to begin its deliberations, and just after the Court had moved into a new building which had been designed as a permanent courthouse. In 1851, the room of the Stipendiary Magistrates was allocated to the grand jury.<sup>113</sup> The grand jurors were of course sworn, and there is one record of a

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<sup>105</sup> “Register”, 5 December 1850, p. 3; 10 December 1850, p. 3 (this report perhaps indicating that the applicant had lost the property qualification he previously possessed and now wished to be qualified by virtue of his occupation); “South Australian Gazette and Mining Journal”, 12 December 1850, p. 3; 14 December 1850, p. 3 (same comment as earlier); “Adelaide Times”, 10 December 1850, p. 3.

<sup>106</sup> “Register”, 10 March 1847, p. 2; “South Australian”, 9 March 1847, p. 5.

<sup>107</sup> “South Australian”, 14 September 1849, p. 2.

<sup>108</sup> “South Australian”, 9 March 1847, p. 5.

<sup>109</sup> “South Australian”, 13 June 1848, p. 2. “Southern Australian”, 19 March 1844, p. 2, reports that one petty jurymen was a witness before the grand jury.

<sup>110</sup> There is, however, no record of a South Australian Judge ever charging a grand jury at his bedside, as Huddleston B. once did : *The Times*, 7 August 1890, p. 4.

<sup>111</sup> Castles/Harris, *Lawmakers and Wayward Whigs : Government and Law in South Australia 1836-1986* (Wakefield, Adelaide 1987), pp. 81-85; Hague, *A History of the Law*, pp. 1017-1041.

<sup>112</sup> “Register”, 23 March 1839, p. 2.

<sup>113</sup> “Register”, 11 February 1851, p. 3; “South Australian Gazette and Mining Journal”, 13 February 1851, p. 3.



grand juror being sworn, as statute permitted,<sup>114</sup> in the Jewish form.<sup>115</sup> As far as the flow of business in the Court is concerned, the grand jury is occasionally recorded as coming into the Court in the middle of a case being tried before a petty jury, which must have been quite disruptive on occasion.<sup>116</sup> It is probable that witnesses were always sworn in Court, as the law required.<sup>117</sup> The Crown Prosecutor at one sessions lamented the fact that the witnesses ‘strayed out of Court after being sworn’.<sup>118</sup> But in May 1851,

the Crown Solicitor applied to the Judge for advice in the case of a Malay witness, who had stated that the practice of his country for swearing witnesses was to cut the thumb in the presence of the party accused, and [that] that alone would be binding on his conscience.

His Honour sent for him into Court. It, however, appeared that the Grand Jury had been able to manage the matter without the interference of the Court.<sup>119</sup>

But this witness may well have been sworn in the usual form in Court and declared his reservations only in front of the grand jury. However, in March 1839 a grand jury presented that it could not proceed with a case involving an Indian witness as no oath could be administered,<sup>120</sup> which suggests that this may have been the responsibility of the grand jury while the Court was in the charge of Jickling A.J.

This adds to one’s vague impression that short cuts may have been taken with witnesses (including sending depositions into the grand jury room)<sup>121</sup> when Jickling and Mann A.JJ. presided over the Court. At all events, on his return to the Bench after a

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<sup>114</sup> Section 37 of Ordinance No. 12 of 1843.

<sup>115</sup> Supreme Court, criminal records, session beginning 10 March 1845. The appearance of a Jewish person for service on a special jury and his discharge is recorded in *The Times*, 21 February 1826, p. 4.

<sup>116</sup> *E.g.* “Register”, 19 September 1849, p. 3.

<sup>117</sup> In England until the enactment of the *Grand Jury Act* 1856. The practice until then in England was for the crier or clerk to administer the oath : Archbold/Jervis, 13th ed., p. 64. The Supreme Court criminal records omit from July 1839 to state that witnesses were sworn, but this is doubtless due to greater economy in recording the proceedings which may be observed with the passage of time.

<sup>118</sup> “Adelaide Times”, 12 August 1851, p. 3; the “South Australian Gazette and Mining Journal” repeats a further statement by the foreman of the grand jury that ‘[t]he witnesses get sworn and then leave the Court’ (14 August 1851, p. 3); the “Register”, 12 August 1851, p. 3, is similar.

<sup>119</sup> “Register”, 14 May 1851, p. 3.

<sup>120</sup> “Register”, 23 March 1839, p. 2.

<sup>121</sup> See above, fn 56.

period of illness in 1849 during which Mann A.J. had presided, Cooper J. complained that the grand jury had not, as ‘was usual heretofore in South Australia’ stood up during the charge, whereupon the grand jury ‘took the hint, and one or two of its members muttered an apology’.<sup>122</sup> There is one startling reference in Cooper J.’s first charge (after taking over from Jickling A.J.) to a former practice under which the grand jury ‘engage[d] a gentleman of the legal profession to assist them in their duties’,<sup>123</sup> to which his Honour intended to put a stop owing to the fact that, if direction on the law was required, it should be sought from him; but there is no other confirmation of or elaboration on this report which the author has been able to find. The same report also states that his Honour requested that

[a]fter the grand jury were sworn, [...] counsel would withdraw previous to his delivery of the charge; and he then explained that it was customary in England to withdraw on these occasions, in order that as they were engaged in the cases to come before the court, they might not take advantage of anything that might happen to fall from the judge in relation to those cases.

There is no indication of any protest by counsel against this request, which is not reported in any other known sources; nor has the author been able to find any confirmation that any similar request was made or acted upon at later sessions.<sup>124</sup> Given the extensive reporting of the charge in the press, such a practice would not have concealed very much for very long.

### c. The Judge’s charge

The first charge to the grand jury of South Australia started a tradition which was carried on right through to the end of the system<sup>125</sup>: the charge dealt not only with questions of law which the grand jury might encounter in their narrow task of dealing with the bills to be placed before them, but was also used by the Judge as an opportunity to

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<sup>122</sup> “Register”, 28 November 1849, p. 4.

<sup>123</sup> “Southern Australian”, 29 May 1839, p. 1. Proposals to provide the grand jury with its own counsel have been made in the United States and adopted in Hawaii : Leipold, (1995) 80 Cornell LR 260, 313. See also Younger, *The People’s Panel*, p. 243. On the presence of the prosecutor in the grand jury room, see Edwards, *Grand Jury*, pp. 127-130.

<sup>124</sup> Nor, for that matter, is this request or the reference to engaging a legal practitioner to be found in the “Register”, 25 May 1839, p. 2.

comment on various aspects of South Australian society and law. This purpose was greatly assisted by the publicity given to the Judge's charge to the grand jury : it was a rare month in which it did not appear in full in at least one newspaper,<sup>126</sup> and it was very common for more than one newspaper to carry a complete or nearly complete account of what the Judge had said to the jury.<sup>127</sup>

In commenting on colonial affairs more broadly in the charge, most Judges had the advantage of being persons whose station and origin permitted them the role of a friendly outsider familiar with the circumstances of the colony. The first permanent Supreme Court Judge to be appointed from among the ranks of the colonists – Gwynne J. – was not appointed until after grand juries had been abolished. All the permanent (but not the two Acting) Judges who addressed grand juries in South Australia were Colonial Office appointments who came out from England or Ireland and were not themselves among the ranks of the colonists expecting to remain in South Australia for life.<sup>128</sup>

At the same time, these Judges lived in the community and thus had the advantage of Colonial Office officials in knowing the exact conditions of the colony and the personalities of its leading citizens. When they comment, therefore, on matters such as the colony's treatment of the Aborigines, those comments have an unusual degree of authority. Admittedly, the Judges had to rely to some extent on the good will and respect of the community in which they served, and may perhaps have been minded to express themselves cautiously for that reason; but their station and ability to return to the British Isles in case of emergency enabled them to speak both with candour and authority. And as occasional comments by the Judges show,<sup>129</sup> they knew that they

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<sup>125</sup> Which was, of course, not unique to South Australia; see Bennett, *Cooper C.J.*, p. 41.

<sup>126</sup> See, however, "Register", 6 November 1841, p. 3; "Southern Australian", 5 November 1841, p. 3; "Adelaide Chronicle and South Australian Literary Record", 10 November 1841, p. 3; "Register", 9 July 1842, p. 3; "Southern Australian", 8 July 1842, p. 3.

<sup>127</sup> Which sometimes differed in detail, but hardly ever in substance. The report in the "Register", 14 June 1848, p. 3, states that the charge, before being published, had been 'revised by his Hono[u]r'. The only exception to general willingness to report charges to grand juries were the German-language newspapers, for obvious reasons; there is however a record of the proceedings of the grand jury convened to deal with a case involving R.R. Torrens in the "Deutsche Post für die australischen Colonien", 21 June 1849, p. 10.

<sup>128</sup> In fact Jeffcott and Crawford JJ. died in office, and thus did not have a life extending beyond their South Australian appointment, but this could not have been envisaged at the time of their appointment : Jeffcott J. was drowned in a shipwreck and Crawford J. died very young.

<sup>129</sup> See below, fn 138.

were speaking, through the grand jury and the press, to the South Australian community as a whole.

By far the greatest number of charges were given by Cooper J., who charged all grand juries except for the first three criminal sessions (which were presided over by Jeffcott J. and Jickling A.J.), the period in 1849 when he was unable to preside over three sessions owing to illness (Mann A.J.), and the five sessions over which Crawford J. presided after his arrival in the colony in mid-1850. The series of Judges' charges form accordingly a substantial record of an intelligent and legally trained outsider's view of the Province, its progress and its problems. Those interested in learning about Cooper J.'s character can be referred to a recent biography,<sup>130</sup> but it is right to record here, given the prominence that Aborigines will have in the grand jury charges dealt with here, the conclusion of another recent author that 'there is little doubt that [Cooper J.] acted with the best interests of Aboriginal people at heart',<sup>131</sup> even while he made occasional errors of judgment.

As well as comments on such harmless matters as the crops and the general progress of the Province<sup>132</sup> or general homilies on the need for the cultivation of religion,<sup>133</sup> respect for the authorities, telling the truth and thrift by the lower classes,<sup>134</sup> and the need for the element of society which the grand jurors represented to set a good example,<sup>135</sup> the Judge sometimes commented on aspects of the law generally.<sup>136</sup> He might deal either with proposed or recently enacted reforms to the law and state his

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<sup>130</sup> Bennett, *Cooper C.J.*

<sup>131</sup> Pope, *Aborigines and the Criminal Law*, p. 265.

<sup>132</sup> E.g. "Register", 9 March 1839, p. 7; 7 August 1841, p. 5; "Southern Australian", 6 August 1841, p. 3; "Adelaide Chronicle and South Australian Literary Record", 3 August 1841, p. 3; "Register", 26 November 1845, p. 3; 15 September 1847, p. 3; "South Australian", 14 September 1847, p. 3; "South Australian Gazette and Colonial Register", 18 September 1847, pp. 2f; Bennett, *Cooper C.J.*, pp. 41f.

<sup>133</sup> See Bennett, *Cooper C.J.*, pp. 2, 8, 41.

<sup>134</sup> "Register", 3 July 1844, p. 3; "Southern Australian", 5 July 1844, p. 2. The "Observer", 6 July 1844, p. 5, says that this homily was delivered 'in terms of the most impressive and paternal solicitude'. See also "Register", 11 March 1846, p. 3; "South Australian", 10 March 1846, p. 2; "South Australian Gazette and Colonial Register", 14 March 1846, p. 2, "Register", 24 November 1847, p. 3; "South Australian", 26 November 1847, p. 3.

<sup>135</sup> "Register", 27 November 1844, p. 3; "South Australian", 29 November 1844, p. 3.

<sup>136</sup> "Register", 7 March 1840, p. 5; "Adelaide Chronicle and South Australian Literary Record", 10 March 1840, pp. 2f; "Southern Australian", 10 November 1842, p. 2; 21 July 1843, p. 3; "Register", 18 September 1844, p. 3; "Southern Australian", 19 September 1844, p. 2; "Register", 10 September 1845, p. 3; "South Australian Gazette and Colonial Register", 13 September 1845, p. 4.

opinion of them;<sup>137</sup> on one occasion, he drew ‘the attention of the grand jury, and through them, that of the public’<sup>138</sup> to a proposed reform in the law in order that those affected might comment on the proposal to the responsible authorities. Or he might set out the law for the information of magistrates<sup>139</sup> or, alternatively, of the community generally so that false views of the law (for example, the extent to which self-defence might be practised in the face of threats<sup>140</sup> or the fact that finding something does not convert it into one’s own property)<sup>141</sup> were exploded. On other occasions, the Judge gave general advice to the community in legal matters, such as the precautions it should take when entering into a deed,<sup>142</sup> or the undesirability of indulging in too much libel (which, among other things, could hurt the reputation of the Province in England)<sup>143</sup> or more broadly on the vulnerability of drunk people to being robbed.<sup>144</sup>

On other occasions again, the charge was used as a means of expressing the Judge’s view on a question more or less related to the law which was agitating the community, such as the proposed transportation to South Australia of convict boys from England<sup>145</sup> or the justice of transporting convicts from South Australia to the other colonies.<sup>146</sup> The wide publicity given to the Judge’s charge in the newspaper meant that it was by no means a futile undertaking to reach the community in this way. The Judge’s charge was regularly commented on at length in the press, perhaps most fully after his Honour had expressed himself on the limits of press freedom and the responsibilities of editors under the law and expressed the eminently sensible view that those

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<sup>137</sup> E.g. “Register”, 12 March 1842, p. 2; “Southern Australian”, 11 March 1842, p. 3; “Adelaide Examiner”, 10 March 1842, p. 2 (proposed Court of Requests); “Register”, 11 November 1843, p. 3.

<sup>138</sup> “Register”, 16 September 1846, p. 2.

<sup>139</sup> “Register”, 29 November 1848, p. 3; “South Australian”, 1 December 1848, p. 3; “Register”, 10 December 1850, p. 2; “Adelaide Times”, 26 November 1850, p. 3.

<sup>140</sup> “Register”, 25 November 1851, p. 3; “Adelaide Times”, 25 November 1851, p. 3; “Austral Examiner”, 28 November 1851, p. 7.

<sup>141</sup> “South Australian”, 29 November 1844, p. 3.

<sup>142</sup> “Register”, 11 March 1846, p. 3; “South Australian”, 10 March 1846, p. 2; “South Australian Gazette and Colonial Register”, 14 March 1846, p. 2.

<sup>143</sup> “Register”, 12 November 1842, p. 3; “Southern Star”, 9 November 1842, p. 4. See also “Register”, 19 November 1842, p. 2.

<sup>144</sup> “South Australian”, 14 March 1848, p. 2; “South Australian Gazette and Mining Journal”, 18 March 1848, p. 3.

<sup>145</sup> “Register”, 11 March 1843, p. 3; “Southern Australian”, 10 March 1843, p. 2; “Adelaide Examiner”, 11 March 1843, p. 2 (report of Court proceedings and editorial drawing attention to his Honour’s remarks). See further Pike, *Paradise of Dissent*, pp. 296f.

<sup>146</sup> “Register”, 13 May 1851, p. 2; “South Australian”, 13 May 1851, p. 3; “South Australian Gazette and Mining Journal”, 15 May 1851, p. 3; “Adelaide Times”, 13 May 1851, p. 3.

responsible for newspapers had no duties ‘but those they impose upon themselves’<sup>147</sup> by choosing to run newspapers.

Very often, and especially in the first years of the colony’s existence, the Judge used his charge either to congratulate the colony on the circumstance that none of the prisoners to be tried was an emigrant to South Australia (they being Aborigines, members of the military forces visiting the Province, or imports from the neighbouring Australian colonies)<sup>148</sup> or, alternatively but rather less frequently, expressing alarm at the number of persons to be tried who had settled in South Australia and consequent fears that the quality of the settlers was declining.<sup>149</sup> Cooper J.’s practice was to consult with Mr Ashton, the keeper of the gaol, to find out the origin of the prisoners.<sup>150</sup> This comparative exercise was undertaken ‘not for the purpose of throwing any stigmas on our neighbours’ in the other colonies,<sup>151</sup> but because it was considered to be a good rough-and-ready measure of the moral tone of the immigrants to South Australia.<sup>152</sup> That the moral state of the colony could be deduced from the state of its criminal lists was particularly clear in March 1850, when Cooper J. fulminated against child abusers and pointed out that ‘the lowest and most brutal characters [believe] that connexions with a young and pure person would cleanse them of a certain filthy disease’.<sup>153</sup>

Another frequently used measuring-stick of the moral tone of the colony that was used in the Judge’s charge was its treatment of the Aboriginal natives. In fact, the ju-

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<sup>147</sup> “Register”, 12 November 1842, p. 3; see also “Southern Australian”, 11 November 1842, p. 2; 15 November 1842, p. 2; 18 November 1842, p. 2; “Adelaide Examiner”, 9 November 1842, p. 2; “Southern Star”, 9 November 1842, pp. 3, 4; 16 November 1842, p. 2. See further Bennett, *Cooper C.J.*, pp. 40, 52.

<sup>148</sup> As in the charge to the first grand jury, in which Jeffcott J. noted that only a bare majority of those to be tried were South Australians : “Register”, 3 June 1837, p. 4. See further, e.g., “Register”, 9 November 1839, p. 6; “Register”, 7 March 1840, p. 5; “Adelaide Chronicle and South Australian Literary Record”, 10 March 1840, pp. 2f; “Register”, 11 June 1845, p. 3; Bennett, *Cooper C.J.*, p. 13.

<sup>149</sup> “Register”, 6 March 1841, p. 3; “Southern Australian”, 5 March 1841, p. 3; “Adelaide Chronicle and South Australian Literary Record”, 3 March 1841, p. 4; “Register”, 12 March 1845, p. 3; “Southern Australian”, 11 March 1845, p. 2.

<sup>150</sup> “Southern Australian”, 5 November 1840, p. 3; “Southern Australian”, 11 November 1842, p. 3; “Southern Star”, 9 November 1842, p. 4.

<sup>151</sup> “Southern Australian”, 11 November 1842, p. 3; similar “Adelaide Examiner”, 9 November 1842, p. 3.

<sup>152</sup> “Southern Star”, 9 November 1842, p. 4; “Register”, 13 June 1849, p. 3; “South Australian”, 16 June 1849, p. 2. Even the German-language newspapers got in on the act : “Deutsche Post für die australischen Colonien”, 20 September 1849, p. 63. See also “Register”, 29 November 1848, p. 3; “Register”, 11 May 1852, p. 3; “Adelaide Times”, 12 May 1852, p. 3.

<sup>153</sup> “Register”, 12 March 1850, p. 3. See also “Register”, 13 May 1851, p. 2; “Austral Examiner”, 16 May 1851, p. 6.

dicial views on this had several aspects. One was exhortatory : in the first years of the settlement, especially, the Judge exhorted the colonists to treat the Aborigines well. We have seen that Jeffcott J. did this at the first sessions in May 1837. Later, for example in July 1844 when a native man stood accused of killing a settler, Cooper J. – choosing his words carefully, it would seem – expressed the hope that, as in the past, it could be continue to be said in the future that ‘in no case [...] a white man’s actions were the means of causing a black man to commit mischief’.<sup>154</sup> In 1849, the Judge exhorted all involved in the administration of the law to act ‘with integrity, meting out the same measure of justice to black men and white men’.<sup>155</sup>

The exhortatory aspect of the Judge’s charge merged imperceptibly into its deterrent function, that is pronouncements that condign punishment would follow any infringement of the Aborigines’ rights. As we have seen, in his charge to the first grand jury Jeffcott J. both threatened punishment against those who failed to treat Aborigines well and provided a more general indication that divine blessings would be showered on the Province if it lived in amity with the Aborigines. Shortly after the “Maria” incident (in which a punitive party had been sent to dispense summary justice to Aborigines in an area in which shipwrecked white people had recently been killed by them, and following the expression of a view by Cooper J. that the Aborigines concerned were not amenable to being tried in the local Courts),<sup>156</sup> Cooper J. warned the colonists in the following blunt terms :

[W]hatever question may be raised as to the right to try any of the aborigines for aggressions upon settlers or others, no question can arise as to the right to try British subjects for aggression upon the aborigines, and I hope the law will never be found wanting in strength to avenge their wrongs. [...] There was] no technical difficulty that can arise to screen the white man from punishment.<sup>157</sup>

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<sup>154</sup> “Register”, 3 July 1844, p. 3; “Southern Australian”, 5 July 1844, p. 2.

<sup>155</sup> “Register”, 28 November 1849, p. 4; similar “Adelaide Times”, 29 November 1849, p. 3.

<sup>156</sup> For an account of this incident, see, e.g., Bennett, *Cooper C.J.*, pp. 59-62; Castles/Harris, *Law-makers and Wayward Whigs*, pp. 13-16; Foster, *Fatal Collisions : the South Australian Frontier and the Violence of Memory* (Wakefield Press, Adelaide 2001), pp. 13-28; Pope, *Aborigines and the Criminal Law*, pp. 55ff and the references there cited.

<sup>157</sup> “Register”, 7 November 1840, p. 2; “Southern Australian”, 5 November 1840, p. 3; “Adelaide Chronicle and South Australian Literary Record”, 4 November 1840, p. 3.

All three newspapers carried this charge in full, and all added editorial commentary on it.<sup>158</sup> His Honour returned to this theme in July 1842, drawing ‘general attention’ to the fact that ‘a man might shoot a native when he might shoot a white man, not under other circumstances’.<sup>159</sup>

Thirdly, the Judge’s charge had also a condemnatory aspect in cases in which condemnation was deserved. This became more frequent as time went on and clashes occurred between settlers and Aborigines, something which clearly troubled Cooper J. (and many others) greatly. In July 1843, one defendant was accused of the murder of an Aborigine. Cooper J. observed that ‘cases of this kind were much more frequent, than was creditable to the reputation of the colony’ and that a verdict at the last sessions acquitting a person accused of killing an Aborigine was ‘very merciful, but not so merciful, his Honour trusted, as to countenance the idea that the lives of the natives are held too cheaply’.<sup>160</sup> In another case, involving the killing of an Aborigine by the settler Donnelly – whose fate we shall discover shortly – his Honour ‘observed a reluctance to bring white men to justice for outrages committed on the natives’<sup>161</sup> which was a blot on the Province’s self-image as a place of ‘superior morality and freedom’.<sup>162</sup> The next day, the Judge explained that his remarks had been directed at those who had observed the crime in question but not come forward rather than more generally.<sup>163</sup>

Finally, the Judge might use his charge simply as a means of general commentary on the relations between settlers and Aborigines. It was noted in 1839 that settlers had been killed by Aborigines. But ‘there is this consolation, that they [the killings] have not been committed in one place, or by a body or tribe of natives, but by one or two individuals, which shows that there is no combination by the aborigines against the British settlers’.<sup>164</sup> By 1845, his Honour could report that the conduct of the Aborigi-

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<sup>158</sup> “Register”, 7 November 1840, p. 2; “Southern Australian”, 10 November 1840, p. 2; “Adelaide Chronicle and South Australian Literary Record”, 4 November 1840, p. 3.

<sup>159</sup> GRG 36/10 (July 1842).

<sup>160</sup> “Register”, 19 July 1843, p. 3; “Southern Australian”, 21 July 1843, p. 3.

<sup>161</sup> “Register”, 25 November 1846, p. 3; “South Australian”, 27 November 1846, p. 5; “South Australian Gazette and Colonial Register”, 28 November 1846, p. 3.

<sup>162</sup> “South Australian”, 27 November 1846, p. 6.

<sup>163</sup> “Register”, 28 November 1846, p. 3; “South Australian”, 27 November 1846, p. 5.

<sup>164</sup> “Register”, 25 May 1839, p. 3. See further Bennett, *Cooper C.J.*, p. 56.



nes in the settled areas was improving.<sup>165</sup> Or the comments might refer more specifically to the Aborigines' status in law. This was done, for example, in the March 1839 sessions, in which Jickling A.J. called on the grand jury not to find a true bill against an Aborigine who had set fire to grass on the grounds that the natives probably believed that they had a right to do so.<sup>166</sup> Shortly afterwards, Cooper J. expressed the view that the Aborigines 'knew, as far as they could be expected to understand, those rules of justice'<sup>167</sup> applying to them and hoped, although this statement was 'not connected with the duties of a Grand Jury',<sup>168</sup> that some of the grand jurymen might feel able to support the work of German missionaries among the Aborigines. The Aborigines' status in law became, however, a legal issue of some importance as the years wore on<sup>169</sup> and it was decided that they could be tried for offences committed against each other.<sup>170</sup> This was the subject of a highly interesting grand jury presentment in May 1851. It will be dealt with, therefore, under the next heading.

Of course, there is room to dispute the precise meaning of all these utterances, their suitability to the circumstances of the colony and, most importantly, the extent to which their exhortatory and deterrent functions were reflected in the practice of the prosecution authorities, the police and the colonists generally. A recent study of the treatment of Aborigines before the criminal Courts of early South Australia comes up with a very complex picture.<sup>171</sup> It is not the function of this essay to add to that debate.

However, it is certainly true to say that the colonists who read the newspapers and the Judge's charge or who heard of its contents in this respect were put on notice that any significant ill-treatment of the Aborigines might at least possibly result in a risk of prosecution if – as is the case with any crime – it came to the notice of the authorities.

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<sup>165</sup> "Register", 10 September 1845, p. 3. See also "South Australian", 9 May 1847, p. 5 (comments on inter-racial violence as sheep farming extends into previously unsettled districts).

<sup>166</sup> "Register", 9 March 1839, p. 7; "Southern Australian", 13 March 1839, p. 6.

<sup>167</sup> "Register", 27 July 1839, p. 6.

<sup>168</sup> "Southern Australian", 24 July 1839, p. 3.

<sup>169</sup> See "Register", 7 November 1840, p. 2; "Southern Australian", 5 November 1840, p. 3; 10 November 1840, p. 2; "Adelaide Chronicle and South Australian Literary Record", 4 November 1840, p. 3 (following on the "Maria" incident); "Southern Australian", 5 March 1841, p. 3; Bennett, *Cooper C.J.*, Ch. 5.

<sup>170</sup> A rule that had been explained and defended in earlier charges to the grand jury ("Register", 16 September 1846, p. 3; "South Australian Gazette and Colonial Register", 19 September 1846, p. 3; "Register", 14 June 1848, p. 3; "South Australian", 13 June 1848, p. 2).

<sup>171</sup> See below, fn 222.

This was a form of deterrence in addition to that provided by the tenacious investigations of the Protector of Aborigines.<sup>172</sup> The public execution of the settler Donnelly in 1847 for the murder of an Aborigine<sup>173</sup> – a crime which Cooper J. had not hesitated to describe as ‘unprovoked’ and ‘inhuman’<sup>174</sup> to the grand jury – indicated that such fears would not be entirely without justification, even if it might be said that Donnelly’s case was an extreme one.<sup>175</sup> That being so, the existence of the grand jury and of the Judge’s charge to it not only provides us with an extraordinarily valuable account of the law’s official position with respect to the Aborigines, expressed on a solemn and regularly recurring occasion, but also provided the community of that time with a warning of the possible consequences of misbehaviour.

### 3. Grand jury presentments

In addition to the Judge’s charge to the grand jury, the grand jury system also provided on occasion a valuable insight into the opinion of the grand jurors on those occasions on which the grand jury made a presentment, as grand juries were by common-law tradition entitled to do.

At common law, a grand jury could of course present a person for trial of its own knowledge, that is, without the presentation of a bill of indictment by some other person (whether the Crown or a private prosecutor).<sup>176</sup> As far as the author is aware, this never happened in South Australia, and from 1843 this course was probably no longer available (the point appears never to have been tested), or at least not without the consent of the Crown, as from that year onwards a statute required all prosecutions on

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<sup>172</sup> Pope, *Aborigines and the Criminal Law*, p. 267.

<sup>173</sup> Which was of course also reported in the newspapers, e.g. “Register”, 31 March 1847, p. 2; “South Australian”, 30 March 1847, pp. 5f. The latter journal had, in an editorial of 16 March (pp. 3f), advocated the hanging of Donnelly and drew a distinction between the treatment meted out to Aborigines in New South Wales and that in South Australia.

<sup>174</sup> “Register”, 25 November 1846, p. 3; “South Australian”, 27 November 1846, p. 6; “South Australian Gazette and Colonial Register”, 28 November 1846, p. 3.

<sup>175</sup> Pope, *Aborigines and the Criminal Law*, pp. 236, 238. The reluctance of the witnesses to testify does, however, throw some doubt on Dr Pope’s rationalisation of this case as an exception based on the breaking of the frontier code by the accused and the consequent unavailability of the assistance of other settlers to him.

<sup>176</sup> See, e.g., Baker, *An Introduction to English Legal History* (3rd ed., Butterworths, London 1990), pp. 29, 576f; Younger, *The People’s Panel*, p. 1; and note the qualification in Pollock/Maitland, *The History of English Law before the Time of Edward I* Volume II (2nd ed., Cambridge U.P. 1968), p. 643. South Australia also presumably inherited s 99 of the *Highway Act* 1835 (U.K.) on its foundation.

indictment to be authorised by the Crown.<sup>177</sup> Nor did a grand jury in South Australia give itself the function of a roving commission, as occasionally and famously has happened in the United States, or exercise semi-governmental functions such as approving proposed roads or bridges (other than, as we shall see, occasionally inspecting the gaol).<sup>178</sup> And no dramatic historical event like the American Revolution, in which grand juries might have played their part in representing popular feeling,<sup>179</sup> ever occurred in Australia. However, a grand jury could also make a presentment that commented on any subject that took its fancy (which in the United States is apparently nowadays called a report).<sup>180</sup> The grand juries of South Australia did that on several occasions. In this respect, their contemporary function, like that of the grand juries in colonial America<sup>181</sup> although no doubt in a somewhat less extensive way, was that of a substitute for the fully democratic legislative assembly which South Australia received in 1857. In carrying out this function, grand juries provided a number of documents of some value not only to the legal history, but also to the more general historical record of South Australia.

It should be recalled, at the outset, that the qualifications for grand jurors always excluded the lower strata of society. From 1843, as we have seen, there was a four-part test : grand jurors had to own a specified amount of real or personal property, be entitled to the degree of Esquire or any higher title, be a Justice of the Peace or belong to certain occupational groups. Nevertheless, in the circumstances of the colony this did not mean that only the very top echelons of society were eligible to serve : once, as noted, an illiterate (Matthew or Mick Jagger) was excused on that basis, and the list contained a good number of small businessmen such as drapers, bootmakers and butchers.<sup>182</sup> The reports of the grand jury's composition in the newspapers sometimes noted the occupations of the grand jurors (and, generally speaking, in every sessions

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<sup>177</sup> See below, p. 47. The practice at common law was to indict on a presentment (Edwards, *Grand Jury*, p. 131), which, it seems, would not have been possible after 1843 without the Attorney-General's consent.

<sup>178</sup> See, e.g., Edwards, *Grand Jury*, pp. 121f; Frankel/Naftalis, *Grand Jury*, p. 15; Holdsworth, *A History of English Law* (Methuen, London 1938), pp. 146-151; Kadish, (1996) 25 Florida State ULR 1, 7, 10f; Younger, *The People's Panel*, Chh. 11, 12, pp. 2, 16-20, 136f, 159f, 232-239.

<sup>179</sup> Younger, *The People's Panel*, Ch. 3.

<sup>180</sup> Frankel/Naftalis, *Grand Jury*, p. 31. This word does not occur in any of the contemporary South Australian sources, and will therefore be avoided here, despite the useful distinction it enables to be made.

<sup>181</sup> Leipold, (1995) 80 Cornell LR 260, 283; Simmons, (2002) 82 Boston ULR 1, 10f; Younger, *The People's Panel*, Ch. 2.

<sup>182</sup> See above, fn 104.

several were drapers, bootmakers, butchers *etc.*), and provided something of a clue to the social background of those expressing the opinions found in any particular presentment. But even in cases in which occupations were not noted, we may assume that the grand jury, although not encompassing all sectors of society, was a body that did not draw its membership solely from the upper class of colonial society.

Possibly the first presentment by a grand jury was made at the end of the first sittings, when the foreman of the first grand jury, Colonel Light, came into Court and thanked Jeffcott J. in the name of the grand jury, which thanks were cordially reciprocated.<sup>183</sup> However, the first recorded presentment of any significance occurred at the third sessions of the Court in March 1839. The grand jury expressed its approval of the idea of creating a Court of Quarter Sessions to try the less important cases which had just troubled them, and began a tradition of grand jury presentments by pointing out the need to ensure the tranquillity of the Aboriginal natives, the colony's security from possible endangerment by them and the desirability of good relationships with them.<sup>184</sup> This produced a reply from the Governor of the colony, in which he praised the colonists on their 'degree of judgement and of humanity scarcely ever equalled'<sup>185</sup> in maintaining good relationships with the Aborigines.

The grand jury of March 1840 continued this enlightened tone by making a presentment on the state of the gaol and the religious facilities at it to the Judge, a presentment which received the unusual honour of being reprinted in the British Parliamentary Papers.<sup>186</sup> At the next sessions, his Honour felt it necessary to inform the grand jury of the action that had been taken as a result of that presentment.<sup>187</sup> That grand jury, for its part, also called for the establishment of a Court of Quarter Sessions and for witnesses to be on time.<sup>188</sup> The need for a Court of Quarter Sessions and the state of the gaol<sup>189</sup> were again taken up by the grand jury in March 1841.<sup>190</sup> The grand jury of August 1841, according to the caption of a drawing in a local newspaper, 'present-

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<sup>183</sup> "Register", 8 July 1837, p. 4.

<sup>184</sup> "Register", 23 March 1839, p. 2.

<sup>185</sup> "Register", 23 March 1839, pp. 3f; "Southern Australian", 3 April 1839, p. 3.

<sup>186</sup> No. 394 of 1841, Appendix, p. 315.

<sup>187</sup> "Register", 11 July 1840, p. 6; "Southern Australian", 10 July 1840, p. 3.

<sup>188</sup> "Southern Australian", 14 July 1840, p. 2.

<sup>189</sup> Ordinance No. 7 of 1840 had authorised a new gaol for the Province. As the preamble to Ordinance No. 4 of 1842 recites, the only copies of the former Ordinance were destroyed by fire.

<sup>190</sup> "Register", 13 March 1841, p. 3; "Southern Australian", 16 March 1841, p. 3.

ed to his Honor the house on North Terrace, acre no. 6, formerly occupied by Messrs Mann and Gwynne', two leading legal luminaries. This sounds rather generous until the report is read and we discover that the house was presented by the grand jury owing to the fact that it was 'a public nuisance, extremely destructive to the morals of the community, and tending, in a very great degree[,] to depreciate the value of the neighbouring property'.<sup>191</sup> There is no record of this presentment in any other newspaper, but possibly the other newspapers decided to suppress this report in order not to call attention to the problem and possibly lead their readers astray or transmit this shameful news to the colony's friends in England. However, the presentment certainly did occur, and the original of the grand jury's presentment, which confirms that the house concerned was a 'House of ill Fame and Repute',<sup>192</sup> has been preserved together with the indictments that went to the grand jury. It is signed by the foreman, A.H. Davis – a name which will recur in this story – and many of the grand jurors, and is stated to have been written in the 'Grand Jury Room'. The result of this presentment, at all events, was that the Advocate-General said that he would look into it; there was no immediate prosecution of the persons responsible as would have been the case if they had been formally presented by the grand jury for trial at that sessions.

It appears that no grand jury in 1842 made a presentment, and the situation was somewhat changed from March 1843, given that the Province received in that year a Legislative Council of its own.<sup>193</sup> This body provided at least a rudimentary forum in which matters of concern to the colonists might be raised, and its proceedings began to be reported in some detail in the press. It is probably no coincidence, after the grand jury of March 1843 had expressed the view that 'the general feelings of the Colonists are decidedly unfavourable to'<sup>194</sup> the scheme referred to earlier for importing convict boys,<sup>195</sup> that no grand jury made a presentment for some years. Even so, a petition was addressed to the grand jury of March 1844 by one Jane Noonan, the wife of a prison inmate, who claimed that she was destitute and sought the authorities' at-

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<sup>191</sup> "Adelaide Independent and Cabinet of Amusement", 5 August 1841, p. 2. On this newspaper, see Pitt, *The Press in South Australia 1836-1850* (Wakefield, Adelaide 1946), p. 59. The spelling "Honor" was usual in early South Australia, although now "Honour" is now almost universal.

<sup>192</sup> State Archives of South Australia, GRG 36/1/2. The wording of the original presentment differed slightly but insignificantly from the newspaper report quoted in the text.

<sup>193</sup> Castles/Harris, *Lawmakers and Wayward Whigs*, pp. 38f.

<sup>194</sup> GRG 24/6/1843/341; see further GRG 24/4/7/27f; GRG 2/5/4/No. 74 of 20 April 1843 (Governor's report home failed to mention grand jury's presentment).

<sup>195</sup> See above, fn 145.

tention to her plight. When the foreman of the grand jury had read the petition, the Judge promised to ‘mention the subject’ in the right quarters.<sup>196</sup> Research reveals, however, that the Noonans were engaged in a petitioning campaign at this point, and their petitions to various bodies other than the grand jury had only limited success.<sup>197</sup> So perhaps we should not read too much into this.

After that, there were no petitions or presentments for some years, although there was a jocular attempt by Mr Poulden, a legal practitioner, to present a bill to the grand jury on the state of certain city streets in June 1849.<sup>198</sup> At the next sessions, however, the grand jury returned to the theme of relations with the Aborigines, which it had been prompted to do by a number of cases involving killings and violence between settlers and Aborigines or among the Aborigines themselves. They expressed the view that

previous to these melancholy events of murder of and by the aborigines, the districts in which they occurred were not sufficiently under police control, or the oversight of an officer, whose humane duty it is to protect the savage, and to guard the settlers from the incursions of the natives.<sup>199</sup>

The Judge (Mann A.J.) thought this presentment important enough to transmit it to the Governor.<sup>200</sup> Their presentment also suggests that some confidence, perhaps based on experience, was felt in the ability of the police to prevent outrages against the Aborigines if they were only present in a particular district in sufficient numbers, a statement that is in accord with the results of a recent study.<sup>201</sup> Commenting in a more general fashion on the performance of the police was something in which other grand juries also indulged.<sup>202</sup>

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<sup>196</sup> “Register”, 6 March 1844, p. 3; “Southern Australian”, 3 March 1844, p. 2. Cf. Younger, *The People’s Panel*, p. 64.

<sup>197</sup> GRG 24/4/1844/263 (Sheriff has forwarded petitions to the Governor, who replies saying that no assistance will be granted but that a small sum of money has been provided to the Emigration Agent for providing discretionary relief to Mrs Noonan; at the same time, the Sheriff is instructed not to forward any further petitions); GRG 24/6/1844/1194, 1205 (other petitions by the Noonans).

<sup>198</sup> “Register”, 13 June 1849, p. 3; “South Australian Gazette and Mining Journal”, 14 June 1849, p. 3.

<sup>199</sup> “Register”, 19 September 1849, p. 3; “South Australian”, 18 September 1849, p. 3; “South Australian Gazette and Mining Journal”, 20 September 1849, p. 3.

<sup>200</sup> “Register”, 19 September 1849, p. 3; “South Australian”, 18 September 1849, p. 3; “Adelaide Railway Times, Mining Record and Weekly Political Register”, 19 September 1849, p. 2.

<sup>201</sup> Pope, *Aborigines and the Criminal Law*, pp. 244f, 252, 257-260.

<sup>202</sup> “Register”, 13 February 1851, p. 3; “South Australian Gazette and Mining Journal”, 13 February 1851, p. 3; below, fn 253.

By far the most important presentment made by a grand jury – a significant document not only in South Australian legal history, but in the general history of early South Australia – returned to the theme of relations with the Aborigines. The grand jury of May 1851, the members of which were drawn from the letters B – H, and which had earlier solved the difficulty with swearing the Malay witness without the intervention of the Court, had been directed by Cooper J. to treat two cases of violence among the Aborigines as subject to the colony’s law. This provided the grand jury with an opportunity to express their opinion on the law as it stood in a remarkable document which gives a fascinating insight into the attitudes of a representative group of early South Australian settlers towards, and their perceptions of, the legal status of the Aborigines as they came into contact with the British settlers.<sup>203</sup> Their presentment was reproduced, despite its length, in at least six contemporary Adelaide newspapers.<sup>204</sup>

It is worth noting that the grand jury had initially been discouraged by the Judge when they had asked to visit the gaol.

The foreman said it was their wish to make a presentment on the subject [of the gaol], as was the custom of Grand Juries in England.

His Honor — It is not the province of the Grand Jury to make presentments on any subject not given to them in charge.

The foreman said the Grand Jury had no wish to do anything irregularly; but they felt bound to mention that matter in what they considered the proper manner.<sup>205</sup>

They thereupon left the Court in the company of the head turnkey and returned after a couple of hours<sup>206</sup> with a presentment on the gaol (in which they found certain fairly

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<sup>203</sup> And which also shows that Kirby J. was right to qualify his statement about settler attitudes in *Yougarla v. Western Australia* (2001) 207 CLR 344, 381 ([g]enerally speaking’).

<sup>204</sup> “Register”, 16 May 1851, p. 3; “Observer”, 17 May 1851, p. 8; “South Australian”, 16 May 1851, p. 3; “South Australian Gazette and Mining Journal”, 17 May 1851, p. 3; “Adelaide Times”, 16 May 1851, p. 2; “Austral Examiner”, 23 May 1851, p. 11.

<sup>205</sup> “Register”, 16 May 1851, p. 3. Similar : “Adelaide Times”, 16 May 1851, p. 2.

<sup>206</sup> “Adelaide Times”, 16 May 1851, p. 2.

minor defects),<sup>207</sup> complimentary remarks on the work of the police force and their presentment on the liability of Aborigines to the sanctions of the criminal law, which, given its length, must have been written in advance. They presented these remarks in an open and ‘crowded’<sup>208</sup> Court. It might be thought that it shows some cunning to ask simply to visit the gaol, a task which the grand jury had undertaken relatively frequently in South Australia, and then to spring a presentment on Aborigines, which must have been written before the request was made, on a Court which had reluctantly conceded the right to make a presentment on another subject.

The grand jury’s presentment was very long, thirteen paragraphs in fact. It amply justified the description of it in one newspaper as ‘the very distinct opinion of an intelligent Grand Jury’.<sup>209</sup> The grand jury recorded that they had, in accordance with his Honour’s instructions, found true bills in two separate cases of black-on-black violence, each involving multiple defendants. But in doing so, many of the grand jurors had done ‘violence to their own natural feelings of equity and justice’. They thought that it was ‘morally incumbent’ on the colonists

to confine their interference to the mutual protection of both races in their intercourse with each other, and not to meddle with laws or usages having the force of laws among savages, in their conduct towards their own race.

The Grand Jurors believe, from the evidence adduced, especially of the Protector of the Aborigines, that the slaying of the native at Yorke’s Peninsula was in accordance with a law common in all the native tribes – a law analogous to that which regards spies in civilised countries – that the native who was killed knew the law – that he ran the risk of violating it, and suffered in consequence : and that in the other case, the native seems to have been the victim of a prevalent superstition among the aborigines.

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<sup>207</sup> The chief one of which was the lack of single dormitories; they favoured ‘single sleeping cells’, ‘in the interests of morality’ : *e.g.* “Register”, 16 May 1851, p. 3.

<sup>208</sup> “South Australian Gazette and Mining Journal”, 17 May 1851, p. 3; “Adelaide Times”, 16 May 1851, p. 3.

<sup>209</sup> “South Australian Gazette and Mining Journal”, 17 May 1851, p. 2. And it also amply justifies the similar adjectives applied to it by Bennett, *Cooper C.J.*, pp. 70f.



That the Grand Jurors apprehend that, prior to the occupation of this country by the colonists, all these native tribes, as distinct communities (however small)[,] would have been held by all jurists to be in a situation to make laws and adopt usages for their own protection and government – that it can scarcely be even assumed that the limited intercourse which has yet subsisted between the colonists and the aborigines, especially on the confines of the province, should have sufficed to impart such information to these uncivilised men as would justify us in breaking up their own internal system for the punishment of offences to which all their previous traditions and habits give force and sanction.

That if the character of British subjects is to be enforced upon them, and they are at once to be made amenable to the severe penalties of British law for moral offences between themselves, then it becomes a serious question whether we ourselves are not committing a similar offence (presuming the extreme penalty of the law were inflicted) by punishing that as a crime which, in the minds of the persons punished, was simply the enforcement of their own mode of justice.

That, admitting the aborigines are to the fullest extent entitled to the protection of British law, it is but reasonable that before the awful severities of its infraction are enforced, the blessing and advantages in relation to personal protection and security which it affords, should be made appreciable to those whom by our own voluntary act, and without provocation, we have forced to submit to our sway, and now seek to coerce to our habits.<sup>210</sup>

And they accordingly called for mercy to be shown to the Aborigines concerned if they were sent to trial and for further consideration to be given to the extent to which the colonial Courts should deal with cases of black-on-black violence. This presentment attracted the signatures of eighteen grand jurors; two others were absent. Two further grand jurors dissented from the presentment on the gaol, but, significantly, not from that on Aborigines.

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<sup>210</sup> As above, fn 204.

To this presentment, Cooper J. responded with his standard argument that Aborigines were British subjects now too and were therefore liable to criminal punishment in the same way as other British subjects. This was the principle under which Aborigines were punished for crimes against white people and *vice versa*. (All present would have been reminded at this point that it was Cooper J.'s opinion that the Aborigines involved in the "Maria" incident were not liable to criminal punishment for acts committed against the settlers that prompted the sending out of the punitive expedition referred to earlier.)<sup>211</sup> Cooper J. added that he had always been vigilant to ensure that Aborigines received justice at the hands of the colonial Courts and had counsel assigned to defend them, and was of the view that only Aborigines who were aware of British law were amenable to its sanctions.<sup>212</sup>

While his Honour thus defended the law in public, he wrote a letter to the Governor essentially agreeing with the grand jury's view on the propriety, as distinct from the legality, of subjecting Aborigines such as those he had just tried to the law given their lack of notice of the fact that the law might be applied to them or what it contained.<sup>213</sup> This view is not surprising given his Honour's earlier reservations about placing Aborigines on trial.<sup>214</sup> He had already given a strong hint in summing up to the petty jury in the case involving the Yorke's Peninsula killings that he would recommend clemency if the accused were found guilty, and referred to the distinction between legality and wise policy in putting Aborigines on their trial.<sup>215</sup> (The other set of defendants mentioned by the grand jury had been acquitted after Cooper J. directed the petty jury strongly in their favour.)<sup>216</sup>

The Aborigines in the Yorke's Peninsula case who had been found guilty were initially reprieved; the "Register" noted, despite what we shall see was its opposition to the

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<sup>211</sup> See above, fn 156.

<sup>212</sup> See further Bennett, *Cooper C.J.*, p. 71. The statement about counsel being assigned to defend Aborigines is corroborated in the "Adelaide Times", 15 August 1850, p. 3, where Crawford J. was told that the provision of counsel paid for by the government was 'customary in cases where the aborigines were implicated' and that it was paid for 'liberally'. See further Pope, *Aborigines and the Criminal Law*, pp. 262f.

<sup>213</sup> GRG 24/6/1851/1564, 1721.

<sup>214</sup> See Pope, *Aborigines and the Criminal Law*, Ch. 4.

<sup>215</sup> "Register", 20 May 1851, p. 3. This hint was clear enough to the writer of the letter to the editor of the "Austral Examiner", 6 June 1851, p. 10.

<sup>216</sup> "Register", 21 May 1851, p. 2. See further Pope, *Aborigines and the Criminal Law*, p. 137.

broader principles advocated by the grand jury, that this course would meet with ‘the unanimous approval of the community’ and avoid ‘manifest injustice and inhumanity’.<sup>217</sup> The Executive Council met on 11 June 1851 and resolved to recommend a full pardon for the Aborigines under sentence of death as recommended by his Honour, noting that they had acted in accordance with tribal custom.<sup>218</sup> The pardon was duly issued, the Governor asking the responsible official ‘to see to the safe return’<sup>219</sup> of the Aborigines. It is impossible to deny that the grand jury’s presentment had some effect on this result.<sup>220</sup>

This result,<sup>221</sup> which went beyond mere warm-inner-glow rhetoric,<sup>222</sup> was achieved, and the opinions about Aboriginal law and custom earlier quoted were held, by quite ordinary people. None of the grand jurors who made the presentment had a particularly high rank in colonial society or, with the notable exception of F.H. Faulding (whose name lives on as that of a well-known chemical company), left any other significant trace on South Australia. The occupations of most of the grand jurors are listed in the newspaper : they were drapers, merchants, cabinet makers and so on – a typical South Australian grand jury consisting largely of small businessmen, Justices of the Peace, and, in this case, three grand jurors who gave their occupation simply as “gentleman”.<sup>223</sup>

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<sup>217</sup> 7 June 1851, p. 2.

<sup>218</sup> GRG 40/1/3/334f; Pope, *Aborigines and the Criminal Law*, p. 140. However, the “Austral Examiner” of 13 June 1851, p. 9, still thought that their sentence would be commuted to twelve months’ imprisonment.

<sup>219</sup> GRG 24/6/1851/1721, 1752. No attempt is made here to determine whether two or three Aborigines were involved (see Pope, *Aborigines and the Criminal Law*, p. 137 fn 54), as this is not relevant to the topic here dealt with; but some official sources, as well as newspaper reports, seem to suggest that three pardons were issued, not just two.

<sup>220</sup> In fact, A.H. Davis later claimed credit for it on behalf of the grand jury : see “Observer”, 27 February 1858, p. 2.

<sup>221</sup> Another result of the grand jury’s presentment might well be the letter sent to the Governor by the Protector of Aborigines on 30 August 1851 (GRG 52/7/1/287-289) dealing with the Aborigines currently serving gaol sentences (there were fifteen; the longest sentence was two years) and answering the Governor’s query whether clemency should be exercised in respect of any of them. The Protector recommended against this for those who had killed settlers on the grounds that otherwise the latter might ‘be disposed to administer their own law in self-defence’.

<sup>222</sup> As Pope originally stated was the sole difference between South Australia and the other colonies : Pope, *Resistance and Retaliation : Aboriginal-European Relations in Early Colonial South Australia* (Heritage Action, Bridgewater 1989), p. 147. The same author has since taken the very praiseworthy step of stating that some of his earlier conclusions were ‘intemperate’ (Pope, *Aborigines and the Criminal Law*, p. 261 fn 50).

<sup>223</sup> This assumes that one ignores J.O. Lines, who is listed in the “Register” as a grand juror but not in the Court’s records. There are slight variations in the other newspapers’ reports as well. The Court’s records show that there were other errors in the “Register’s” report; e.g. one C.J. Fox is listed in the “Register” instead of Charles James Fox Campbell. In reporting the presentment, the “Register” has

The *Biographical Index* shows that the grand jury also included a number of people who had lived in places such as Port Lincoln, Mount Gambier, McLaren Vale and Kingscote – that is, in districts well away from the City of Adelaide in which the average settler might well have had considerable contact with Aborigines who were still in their pre-settlement state. On the other hand, few of them even knew South Australia at the commencement of British settlement, most having arrived in the years after the first settlement.<sup>224</sup>

The foreman, A.H. Davis Esq., whom we have met earlier as the foreman of a previous grand jury, is listed in the *Biographical Index of South Australians 1836 – 1855*<sup>225</sup> as a teacher, publisher, gardener and merchant.<sup>226</sup> Much earlier, he had been an unsuccessful applicant for the position of Protector of Aborigines,<sup>227</sup> and in 1839<sup>228</sup> he gave a speech opposing retaliation against the Aborigines at a well-attended public meeting to consider the killings of settlers by Aborigines which had also been the subject of a grand jury charge.<sup>229</sup> He was, however, no follower of every latest fad; after the secret ballot had been introduced in South Australia, for example, he called (unsuccessfully) for the Province to revert to the earlier system of open voting.<sup>230</sup> Shortly after his death, he was described in Parliament as a man of ‘intelligence and [...] thorough conservativeness’.<sup>231</sup> That makes the opinions expressed in the presentment all the more remarkable.

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only twenty jurors, like the Court’s records; J.O. Lines has disappeared (possibly he was excused); and C.J.F. Campbell, who did not sign the presentment owing to absence, is listed under his correct name. This, together with the length of the presentment and the agreement among the newspapers as to its wording, leads one to think that official copies were provided to them by the Court or the grand jury itself – probably the latter.

<sup>224</sup> The *Biographical Index* shows that many whose dates of arrival are listed arrived in the late 1830s or early 1840s and only one, C.S. Hare, in 1836. On him, see his entry in the *Australian Dictionary of Biography*, vol. 4.

<sup>225</sup> Jill Statton (ed.); S.A. Genealogy and Heraldry Society, Adelaide 1986.

<sup>226</sup> The reason for this variety of occupations may be gleaned from Pike, *Paradise of Dissent*, pp. 141, 328. See also Main, “Social Foundation of South Australia : Men of Capital” in Richards (ed.), *The Flinders History of South Australia : Social History* (Wakefield, Netley 1986), p. 102, which records Davis’s opposition to the proposal to create a South Australian hereditary aristocracy, and the sketch of Davis in “First Corporation of the City of Adelaide” (1851) 1 *South Australian Magazine* 159, 161f.

<sup>227</sup> Pike, *Paradise of Dissent*, p. 439.

<sup>228</sup> “Register”, 11 May 1839, pp. 3, 5.

<sup>229</sup> See above, fn 164.

<sup>230</sup> *South Australian Parliamentary Debates*, House of Assembly, 29 April 1859, p. 4; Legislative Council, 2 May 1859, col. 5; House of Assembly, 4 May 1859, col. 9. This request ‘was received with bursts of laughter by the House’: “Register”, 30 April 1859, p. 2.

<sup>231</sup> *South Australian Parliamentary Debates*, House of Assembly, 28 June 1866, col. 125.

Davis later claimed the authorship of the presentment, stating ‘I took some pains at the time to draw up this document’.<sup>232</sup> This statement was made in February 1858 during another campaign for mercy in another black-on-black violence case that had led to convictions and a sentence of death. In support of this campaign, the presentment of May 1851 was wheeled out almost seven years after it was made.<sup>233</sup> Not content with writing to the newspaper and having the presentment re-printed,<sup>234</sup> A.H. Davis personally wrote to the Governor enclosing a copy of it and stating that

It was from the answers elicited from Mr Morehouse in the Grand Jury Room as Protector of the Aborigines that myself and the other Jurors were led to the conclusions at which we arrived, that cases of homicide between Native tribes do not come within the range of British law. I sincerely hope the law may be made definite on this point to avoid further difficulties.<sup>235</sup>

Again, however, the law was not changed; and it has to be said that there were advantages in leaving the treatment of Aborigines convicted of committing violence against each other to the Executive’s discretionary powers of mercy rather than enacting a blanket exemption for all such cases. But it is not within the scope of this study to pursue this question. In February 1858, however, the campaign against the death penalty for the convicted Aborigine based in part on the grand jury’s presentment of May 1851 was again successful, Boothby A.C.J. attending before the Executive Council when it considered the ‘numerously and respectably signed’<sup>236</sup> petitions for clemency.

It is interesting to observe that, in early July 1851, A.H. Davis stood for election to the Legislative Council for the district of West Torrens. He lost by two votes to C.S. Hare, one of the other grand jurymen of May 1851 and fellow-signatory of the pre-

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<sup>232</sup> “Observer”, 27 February 1858, p. 5.

<sup>233</sup> The arguments raised and the facts of the case are handily summarised in the “Observer”, 27 February 1858, pp. 5f.

<sup>234</sup> As above, fn 232.

<sup>235</sup> GRG 24/6/1858/247. Davis has mis-spelt the name of the Protector here; it was Moorhouse.

<sup>236</sup> GRG 40/1/4/412; his Honour’s trial notes may be found at GFG 24/6/1858/248.

sentment.<sup>237</sup> It is unlikely that either would have been keen to associate himself with an unpopular cause so soon before the election; accordingly, we may conclude that the opinions which the grand jury espoused in May had no little support in the community, and were not an eccentric view held only by the grand jurors who signed the presentment. (And it may be that it was fear of election-related grandstanding that explains Cooper J.'s initial half-hearted attempt to prevent the making of the presentment.) How broadly the support reached for the views expressed in the presentment may only be guessed at. It is however extraordinarily interesting that the Chairman of A.H. Davis's election committee was none other than R.D. Hanson,<sup>238</sup> who in July 1851 was appointed Acting Advocate-General<sup>239</sup> and later became South Australia's second Chief Justice. It would be interesting to know whether he had any influence on the opinions expressed by the grand jury.<sup>240</sup>

Whether the grand jury's opinion is very persuasive evidence of the facts which it asserts may be doubted. Although it obviously included a number of intelligent people who had had contact with the Aborigines, there were no lawyers or anthropologists on the grand jury, and there was probably not time for A.H. Davis to consult R.D. Hanson on the precise wording of the presentment, even if he had discussed such issues with him on prior occasions. But as evidence of the settlers' opinions about the legal and cultural status of the Aborigines and their relations with the settlers, the document is remarkable. Although petitions for mercy to be shown to particular Aborigines were 'not uncommon',<sup>241</sup> this presentment was not confined to an individual case but made broad and sweeping claims about the nature of Aboriginal society and law; it attracted support from a broad cross-section of the community in the grand jury and (as we shall see) three newspapers. The opinions expressed are surprisingly modern. It would take only a change of dates, and certainly some polishing of language to re-

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<sup>237</sup> See, e.g., "Register", 2 July 1851, p. 3; 4 July 1851, p. 1; "Observer", 9 June 1866, p. 5; "Adelaide Times", 2 July 1851, p. 3; Pike, *Paradise of Dissent*, pp. 430f, 433.

<sup>238</sup> "Register", 15 July 1851, p. 3; 18 July 1851, p. 2.

<sup>239</sup> See below, fn 324.

<sup>240</sup> Hanson was defending other prisoners at that session (but not the Aborigines concerned); that being so, it is probable that he had no dealings with the members of the grand jury while it was in session. Nevertheless, it may be that he had discussed the matter with Davis on some earlier occasion. On the other hand, too much should not perhaps be read into Hanson's support for Davis, as he supported other candidates as well; on his participation in the elections of 1851, see Brown, *Sir Richard Davies Hanson: A Biography* (unpublished, Adelaide 1940), Ch. 7.

<sup>241</sup> Pope, *Aborigines and the Criminal Law*, p. 80; see also pp. 80-83, 161. Indeed, the issue of Aboriginal liability for black-on-black violence was a live one in several Australian colonies at about this time: Cranston, "Aborigines and the Law: An Overview" (1973) 8 U Qld LJ 60, 62f.

move references to superior peoples, savagery and so on, to convert what was said in May 1851 into a debate about the recognition of Aboriginal customary law in the early twenty-first century.

That means, of course, that, as there are today, there were good arguments both in favour of and against the course proposed by the grand jury. It might be represented either as the law's declaring that Aboriginal life was of lesser value<sup>242</sup> and/or as a breach in the "one law for all" policy on which South Australia claimed to operate.<sup>243</sup> Or it might be seen as a merciful indulgence towards the Aborigines, or, even more significantly, as a recognition of the existence and status of their law alongside or outside the British law (which was essentially the position taken by the grand jury). The newspapers were divided. The "Register"<sup>244</sup> and the "South Australian", the Province's two oldest newspapers, disagreed with the grand jury, the latter on the ground that the criminal liability of Aborigines existed to protect Aboriginal women, 'who are regarded by the brutal males as property over whom they have the power of life and death'.<sup>245</sup> On the other hand, the "South Australian Gazette and Mining Journal",<sup>246</sup> the "Adelaide Times"<sup>247</sup> and the "Austral Examiner"<sup>248</sup> all essentially agreed with the grand jury,<sup>249</sup> and the great detail and thought which it had shown made it difficult for those newspapers to add much more by way of comment or argument. However, the "Adelaide Times", in its editorial, took the opportunity to suggest other topics, such as the bridge over the River Torrens, the law of debtor and creditor and so on, on which future grand juries could make a presentment, and 'hope[d] to see all future grand juries in the Province alive to their position as the conservators, not only of our judicial, but of our constitutional and moral rights'. This was supported by a letter to the editor in which the author suggested that 'the few persons'<sup>250</sup> who wished to see grand juries abolished were wrong, and that the existence of grand juries helped to keep prison managers on their toes and added to public confidence in the prisons.

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<sup>242</sup> Cf. Pope, *Aborigines and the Criminal Law*, p. 148-152.

<sup>243</sup> Pope, *Aborigines and the Criminal Law*, p. 47 *et passim*.

<sup>244</sup> 17 May 1851, p. 2. See also "Observer", 17 May 1851, p. 5. The "Register" appears to have changed its view to some extent shortly afterwards : 28 May 1853, p. 2.

<sup>245</sup> 16 May 1851, p. 2.

<sup>246</sup> 15 May 1851, p. 2.

<sup>247</sup> 21 May 1851, p. 3.

<sup>248</sup> 23 May 1851, p. 6. See also the letter to the editor, "Austral Examiner", 6 June 1851, p. 10.

<sup>249</sup> In addition, opposition to imposing the death penalty on Aborigines had been expressed by the "Deutsche Post für die australischen Colonien", 6 December 1849, p. 107.

<sup>250</sup> "Adelaide Times", 21 May 1851, p. 3. The letter was signed "PRESTIGE".

Despite all this debate and the pardoning of the Aborigines, it is uncertain whether there was any long-term result of the grand jury's presentment. If they had wanted lasting change they might more appropriately have directed their pleas to the prosecutors or, even more appropriately, to the legislature (of which, after all, C.S. Hare was shortly to become a member). The law as laid down by the Judges was tolerably clear; although there were arguments against as well as in favour of the law as it stood, they were unlikely to sway those who had laid it down in the first place. It may be, however, that prosecutors took the feeling of the jury into account in considering future prosecutions; after all, even after the abolition of grand juries in the following years, petty juries continued to exist.<sup>251</sup>

Certainly the Judges did not think that they had the power to re-consider the law as already laid down. At the next sessions, Crawford J., who had been in the colony for little more than a year, reminded the grand jury, with specific reference to Aborigines, that 'it is your duty as well as mine to administer the law as we find it'.<sup>252</sup> Even so, the grand jury at that sessions made a four-point presentment on such matters as the number of minor charges in the Court, unlicensed hawkers, brothels in the city and the excellent work of the police.<sup>253</sup> Having no doubt heard or read of the previous grand jury's efforts, they also asked the Judge whether they were required to inspect the gaol and received the answer that they were not.<sup>254</sup>

#### **4. The abolition of grand juries**

A surprising change comes over grand juries early in 1852. In 1851, as we have seen, the grand juries were full of life, making suggestions and presentments with gusto. In 1852, grand juries suddenly wish to commit suicide, and the suggestions that the three grand juries of 1852 make for the reform of the law centre on the abolition of grand

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<sup>251</sup> See, however, the petition in the "Observer", 29 December 1855, p. 3.

<sup>252</sup> "Register", 12 August 1851, p. 3; "South Australian", 12 August 1851, p. 3; "South Australian Gazette and Mining Journal", 14 August 1851, p. 2; "Adelaide Times", 12 August 1851, p. 3; "Austral Examiner", 15 August 1851, p. 6.

<sup>253</sup> "Register", 25 August 1851, p. 3; "Austral Examiner", 29 August 1851, p. 9.

<sup>254</sup> "South Australian Gazette and Mining Journal", 16 August 1851, p. 3.



juries.<sup>255</sup> This was achieved by the end of the year; the last grand jury sat in August 1852, and by the November criminal session the grand jury was no more. How can this sudden change be explained?

There had been calls for the abolition of grand juries before 1852. But they had been isolated and unheeded; no action had been taken. The calls for the abolition of the grand jury in 1852, however, resulted in their abolition by Act No. 10 of 1852. What can explain this sudden change? It is all the more surprising given the fact that South Australia remained proud of its origins as a non-convict colony and quite content to remain aloof from legal developments in other colonies,<sup>256</sup> as the offence taken at the appointment of a titular Governor-General of all the Australian colonies in the early 1850s showed.<sup>257</sup> The abolition of grand juries, however, removed an institution which like virtually no other was symbolic of South Australia's origins and continued status as a free colony; it was a 'palladium of British' – actually English<sup>258</sup> – 'liberty'<sup>259</sup> well suited to a free community, at least on the symbolic plane.

No doubt, some of the change can be explained by the attitude of Crawford J. to grand juries. In several charges to grand juries, his Honour – who was otherwise prepared to follow British tradition in the colonies, at least to the extent of being the first Judge in South Australia to wear the judicial wig<sup>260</sup> – expressed his opinion that the grand jury had become outmoded. It is clear that he was a Judge whom the colonists re-

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<sup>255</sup> In addition to the statements actually made by the grand juries, that of August 1852, according to a speaker in the Legislative Council in the following month, 'intended to make a presentation, but were unexpectedly dismissed': "Adelaide Times", 9 September 1852, p. 3.

<sup>256</sup> Sometimes contempt even for the Courts of the other colonies was expressed, as in the "South Australian Gazette and Mining Journal", 28 November 1850, p. 2.

<sup>257</sup> E.g. "Register", 18 July 1851, p. 2 (noting the enthusiastic reception for a toast to "Sir Henry Young [the Governor of South Australia], and no Viceroy over him' at a dinner for A.H. Davis); "South Australian", 30 May 1851, p. 3; "South Australian Gazette and Mining Journal", 29 May 1851, p. 22; "Adelaide Times", 28 May 1851, p. 3; 29 May 1851, p. 3; Pike, *Paradise of Dissent*, p. 439 (noting, however, that the gold rushes contributed to breaking down this sentiment); Ward, *Australia's First Governor-General: Sir Charles Fitzroy 1851 – 1855* (University of Sydney, Sydney 1953), pp. 11f.

<sup>258</sup> See the letter to The Times, 16 January 1922, p. 1; South Australian Parliamentary Debates, House of Assembly, 26 June 1866, coll. 74f; "South Australian Gazette and Colonial Register", 5 December 1846, p. 4. In the research for this article, the author came across one record of a grand jury's sitting in Scotland: The Times, 19 August 1794, p. 8.

<sup>259</sup> Rusden, *History of Australia* (Chapman & Hall, London 1883) Vol. III p. 521; see also at p. 518.

<sup>260</sup> Hague, *Mr Justice Crawford: Judge of the Supreme Court of South Australia 1850 – 1852* (unpublished, Adelaide 1995), p. 10.

spected and to whose opinion they would have listened.<sup>261</sup> We have already seen that, in February 1851, Crawford J., anticipating the actions of some later judicial opponents of the grand jury system in England,<sup>262</sup> had spurred on the grand jury to Herculean efforts of ignoring bills by expressing the opinion that their efforts were superfluous.<sup>263</sup> The obvious<sup>264</sup> recent change in the law that supported this opinion and to which Crawford J. referred<sup>265</sup> was the adoption of a statutory system based on *Sir John Jervis's Act*<sup>266</sup> under which Magistrates, after reviewing the evidence, decided whether to commit defendants to trial.

Crawford J. continued the assault in February 1852, suggesting to the grand jury that it should petition the legislature for the abolition of grand juries, a suggestion on which it acted<sup>267</sup> despite his Honour's reference to the fact that there were no grand juries in other colonies.<sup>268</sup> Any suggestion that South Australia should merely follow their lead was likely to be seen by more recalcitrant or chauvinistic South Australians

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<sup>261</sup> Crawford J. died in September 1852 (and thus did not live to see a criminal sessions without a grand jury or even the passing of the Act to abolish grand juries; see the witty comment of Hague, *Crawford J.*, p. 30 : Crawford J.'s hope that he would never again address a grand jury after August 1852 was realised, but because of his death, not their abolition). The statements made on the occasion of his death and funeral illustrate the respect in which he was held in the Province : e.g. "Register", 27 September 1852, p. 3; "Adelaide Times", 25 September 1852, p. 2; 2 October 1852, p. 5; "Adelaide Morning Chronicle", 27 September 1852, p. 3. See also Pike, *Paradise of Dissent*, pp. 291, 405.

<sup>262</sup> The Times, 11 January 1922, p. 12. The response of the grand jury hearing this judicial expression of opinion, however, was different from that of the South Australian one : it asked whether it could return true bills automatically, in all cases!

<sup>263</sup> See above, fn 76.

<sup>264</sup> English grand juries drew attention to this too : e.g. British Parliamentary Papers, 1847-1848 vol. LI, pp. 211ff. A letter to the editor of The Times by "Bulla Vera", 9 January 1849, p. 6, states that '[s]carcely a session passes in London without a presentment against the system' of grand juries by a grand jury. By 1866, it could be said that such a presentment 'has almost become a matter of common form' (The Times, 28 September 1866, p. 7), although it was not so common by 1887 as to be no longer worth publishing in legal journals ((1887) 84 LT 106). See also Younger, *The People's Panel*, pp. 57, 137f.

<sup>265</sup> Mann A.J. referred to committal proceedings too : "Register", 13 June 1849, p. 2; "South Australian", 12 June 1849, p. 2; "South Australian Gazette and Mining Journal", 14 June 1849, p. 3. As a glance at the newspapers shows, committal proceedings were conducted in South Australia before the adoption of *Sir John Jervis's Act*.

<sup>266</sup> *Indictable Offences Act* 1848 (U.K.), as adopted in South Australia by Ordinance No. 15 of 1849. On the historical change in the purpose of proceedings before the Justices in this period, see Frohlich, "Committal Procedures in England and Australia" (1975) 49 ALJ 561, 565. See now the legislation cited above, fn 1.

<sup>267</sup> "Register", 11 February 1852, p. 3; 18 February 1852, p. 3 (quoting the petition in full and indicating that it was now open for signature); "South Australian Gazette and Mining Journal", 12 February 1852, p. 3; "Adelaide Times", 11 February 1852, p. 3. The petition itself has not survived (personal communication with Mr Howard Coxon, Parliament of South Australia), although we shall see below that it had thirty-one signatories. According to F.S. Dutton in the Legislative Council (see the "Adelaide Times", 9 September 1852, p. 3), the grand jury of August 1852 'had intended to make a presentment [against the continuance of grand juries], but were unexpectedly dismissed'.

<sup>268</sup> "Register", 10 February 1852, p. 3; "Adelaide Times", 11 February 1852, p. 3.

as a case of ‘servilely copying the Ordinances of the convict colonies’<sup>269</sup> and a reason against abolition, not for it. Crawford J. had, after all, been in the Province at this stage for rather less than two years, and had clearly not understood the South Australian character in this respect.

It is also unknown whether he was aware of the fact that the foreman of the grand jury to which he spoke, T.S. O’Halloran J.P., had been the leader of the punitive expedition which was sent out against the Aborigines believed to have been responsible for the “Maria” killings over a decade before. Given that, in the previous year, a grand jury had expressed the views on Aborigines that have been recorded above, there was some poignancy in this. Even so, we should not imagine that the abolition of grand juries in late 1852 was a reaction to the grand jury’s presentment of May 1851. There is no evidence for, nor reason to suspect, such a long-delayed reaction to the mere expression of an opinion which Judges and legislators were free to ignore. R.D. Hanson, the Advocate-General who introduced the Bill to abolish grand juries, was, after all, a friend and supporter of the foreman of that jury, as we have seen. And it was not Crawford J., but Cooper J. who had presided over the criminal sessions of May 1851.

In his attack on grand juries in February 1852, Crawford J. said that they were ‘very generally considered useless’.<sup>270</sup> Returning to the fray before the last grand jury in August 1852, his Honour stated that they were ‘cumbrous and useless’<sup>271</sup> given the prohibition on private prosecutions without the Crown’s consent in South Australia, which a grand jury might have to decide upon without the benefit of committal proceedings and the exercise of the Crown prosecutor’s discretion to refuse to prosecute. It has to be said there was little evidence for such statements.<sup>272</sup> As we have seen, there was an explosion of “no bills” in the late 1840s and early 1850s,<sup>273</sup> and com-

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<sup>269</sup> “South Australian Gazette and Mining Journal”, 25 March 1848, pp. 2f.

<sup>270</sup> See above, fn 268.

<sup>271</sup> “Adelaide Times”, 10 August 1852, p. 3, which, like the “Adelaide Morning Chronicle”, 12 August 1852, p. 3, adds his Honour’s statement that ‘a watchful and vigilant press’ would also prevent the abuse of the power to prosecute. See also “Register”, 10 August 1852, p. 3, which modestly omits the reference to a vigilant press.

<sup>272</sup> Another such statement was made in the Legislative Council : see “Adelaide Times”, 8 September 1852, p. 3 (‘the complete effectiveness of preminary [*sic*] investigations’).

<sup>273</sup> See above, p. 10.

plaints that the magistrates were committing defendants for trials far too readily.<sup>274</sup> As late as May 1852, the “Register” went so far as to publish an editorial comment to the effect that the grand jury had been right to ignore one bill;<sup>275</sup> the grand jury of August 1852, which was the last to sit and heard Crawford J.’s opinions just quoted, ignored three bills on its first sitting day.<sup>276</sup> The grand jury system certainly saved some people from the trouble, expense and risk of a trial before the petty jury right up to its very last sitting in August 1852. But this did not sway Crawford J.

His more experienced colleague, Cooper J., also did not see avoiding unnecessary trials as the chief purpose of the grand jury. Speaking at the May 1852 sessions, his Honour indicated that grand juries were ‘not wholly useless’, despite the difficulty experienced in calling together a sufficient number of grand jurors, the careful investigation conducted, ‘at least in this colony’, by the magistrates, and the duties of fairness owed by the Crown prosecutor.

The system [...] might have been imperfect in some respects, yet it had caused gentlemen to take a part and an interest in the due administration of justice, and had led them to watch the proceedings of the Courts in a way that they would otherwise not have done. The duties imposed upon Grand Jurors and unpaid Magistrates had introduced in England a class of men that did not exist in any other country – men who studied and understood the law, and who, even in early life, had felt the necessity of preparing themselves for the positions they were likely to occupy.

Nevertheless, his Honour thought that ‘Grand Juries might safely be abolished’.<sup>277</sup> Those listening to this speech might well have thought that their participation in the

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<sup>274</sup> See above, fn 78.

<sup>275</sup> “Register”, 12 May 1852, p. 3.

<sup>276</sup> “Adelaide Times”, 10 August 1852, p. 3. The bills were for larceny, stealing from the person and forgery. The report in the “Register” (10 August 1852, p. 3) had a lower figure.

<sup>277</sup> “Register”, 11 May 1852, p. 3; similar : “Adelaide Times”, 12 May 1852, p. 3. His Honour had expressed a similar view to that quoted in a charge to a grand jury in 1844 : “South Australian”, 29 November 1844, p. 3. Bennett, *Cooper C.J.*, p. 93 deduces from this that Cooper J. opposed the abolition of grand juries. It is possible to come to this conclusion reading between the lines of what his Honour said.

legal system would have been adequately secured by service on petty juries<sup>278</sup> or, as The Times of London once suggested,<sup>279</sup> if they simply got together and talked amongst themselves.

As far as the state of public opinion in the Province is concerned, one history states that there was ‘considerable discussion in 1852, and great diversity of opinion’<sup>280</sup> on the abolition of grand juries. There is in fact little evidence of any discussion at all, let alone organised opposition to the abolition of grand juries. The “Register” came out in favour of abolition in February 1852, commenting on Crawford J.’s charge to the grand jury of that month and calling the grand jury a ‘supererogatory nuisance’.<sup>281</sup> The “Adelaide Morning Chronicle”, which understood itself as a conservative journal,<sup>282</sup> reprinted without comment a long editorial from The Times<sup>283</sup> favouring the abolition of the grand jury in England. The “South Australian Gazette and Mining Journal” had called for the abolition of grand juries as early as August 1850.<sup>284</sup> The “Register”, too, published items of news from England indicating that the abolition of grand juries was also on the agenda there,<sup>285</sup> and the “South Australian”, in coming out against ‘the useless and absurd system of grand juries’ in 1847, had indicated that ‘the system is about to be abolished in England’.<sup>286</sup> (Strictly speaking, this estimate was out by 101 years,<sup>287</sup> but reassurance that the proposal to abolish grand juries was at the vanguard of English legal reforms rather than a completely novel idea was important to many Australians in the nineteenth century.)

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<sup>278</sup> And indeed after the abolition of grand juries, his Honour made a similar argument in favour of the retention of trial by jury : Supreme Court Judges’ letter book, Library, Supreme Court of South Australia, Cooper J. to Colonial Secretary, June 1853; Taylor, “South Australia’s Judicature Act Reforms of 1853 : The First Attempt to Fuse Law and Equity in the British Empire” (2001) 22 *Jo Leg Hist* 55, 70 fn 71. For a rebuttal to the similar argument against the abolition of grand juries in England, see the letter to the editor of The Times by “Bulla Vera”, 9 January 1849, p. 6.

<sup>279</sup> 28 September 1866, p. 7.

<sup>280</sup> Hodder, *The History of South Australia from its Foundation to the Year of its Jubilee, with a Chronological Summary of all the Principal Events of Interest up to Date* (Samson Low, Marston & Co., London 1893), Vol. I p. 279.

<sup>281</sup> 12 February 1852, p. 3.

<sup>282</sup> Pike, *Paradise of Dissent*, p. 454.

<sup>283</sup> The newspaper does not say when The Times’ editorial appeared; research reveals that it was the leader of 19 April 1852, pp. 4f.

<sup>284</sup> 15 August 1850, p. 2; the call was repeated in the issue of 29 November 1851, p. 2.

<sup>285</sup> 11 March 1852, p. 3; 1 May 1852, p. 3.

<sup>286</sup> 25 June 1847, p. 2.

<sup>287</sup> See below, fn 298.

On the other hand, there is no evidence of any great public clamour in favour of the abolition of the grand jury.<sup>288</sup> The petition started in February 1852 attracted a grand total of thirty-one signatures.<sup>289</sup> Probably most people were indifferent to the question, and opinion among the rest was divided. The fact that people were still applying for inclusion on the list of (special and) grand jurors at the end of 1851<sup>290</sup> – which, as it turned out, was the last opportunity to do so – suggests that at least some people were keen to serve, or at least not deterred by the possible inconvenience from wishing to be seen to have the honour of serving. And it had been said in 1851 that only a ‘few’<sup>291</sup> people were in favour of abolishing grand juries; even if this over-states the case, there must have been at least some people who were against abolition and who had not changed their minds by mid-1852. Accordingly, the view that the proposed abolition caused a great deal of discussion and diversity of opinion may well be right, and reflect a recollection of the actual state of the discussion in the Province which has left little trace in the historical record.<sup>292</sup>

What is remarkable is that there is little evidence of a sustained campaign to keep the grand jury as a means of controlling the Crown’s discretion to prosecute. This function of the grand jury attracted little notice; rather, the question was which was the most efficient system for ensuring pre-trial vetting of prosecutions to exclude those that were unlikely to succeed. As Acting Advocate-General Hanson said in the Legislative Council, ‘[I]n whatever system were introduced, two things must be accomplished. It must be provided that every one against whom a *prima facie* case was made out should be sent to trial, and that no-one should be tried against whom there was not such a case’.<sup>293</sup>

So the question was merely one of machinery and efficiency. In this contest, the grand jury was almost bound to lose. But there were additional reasons why the ques-

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<sup>288</sup> Thus, for example, the letter to the editor of the “Adelaide Times” on law reform on 23 September 1852 (p. 3; repeated 25 September 1852, p. 6) made no mention of the abolition of grand juries.

<sup>289</sup> Votes and Proceedings of the Legislative Council, 7 September 1852, p. 9; “Register”, 8 September 1852, p. 3; “Adelaide Times”, 9 September 1852, p. 3; “Adelaide Morning Chronicle”, 9 September 1852, p. 3.

<sup>290</sup> See above, fnn 103, 105.

<sup>291</sup> See above, fn 250.

<sup>292</sup> See also below, fn 360.

<sup>293</sup> “Adelaide Morning Chronicle”, 9 September 1852, p. 3; similar “Adelaide Times”, 9 September 1852, p. 3.

tion of efficiency became acute in 1852. The grand jury system had always caused inconvenience to a number of people, particularly to the grand jurors themselves (who occasionally complain of it),<sup>294</sup> to witnesses who had to give evidence before two juries and to the prosecutor who had to arrange for this to occur. But there was a particular reason why the inconvenience was greater than usual in 1852: the gold rush in Victoria. This led to the temporary emigration of a great number of persons, particularly men who belonged to the labouring class, to the Victorian goldfields.<sup>295</sup> Although, as we have seen, not everyone was eligible for service on the grand jury, it was probably the case that some grand jurors – such as some small businessmen who were eligible – went across and thus cast a greater burden on the better-off who did not go to seek the fortune they already had.<sup>296</sup> Even so, this did not result in a crisis: on the contrary, the last grand jury was congratulated by Crawford J. on the full attendance of the jurors.<sup>297</sup> One might have thought that, if the temporary absence of grand jurors in Victoria had been the impetus for reform, the local legislature would have passed a statute similar to the *Grand Juries (Suspension) Act 1917* (U.K.), which suspended grand juries for the duration of the War<sup>298</sup> but did not abolish them.

It cannot therefore be the conditions existing in 1852 that were the cause of total abolition. Rather, it is suggested that social conditions which could be anticipated after the conclusion of the gold rush were the real reason for the abrupt abolition of grand juries. As we have seen, the qualification for grand jury service could be satisfied simply by the possession of real estate or personal property in South Australia. It was foreseeable that, after the gold rush was over and South Australians returned to their home Province, the number of people possessing the property qualification would

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<sup>294</sup> The inconvenience increasing, of course, with the distance of a juror's residence from the place of trial, *i.e.* Adelaide: Hague, *A History of the Law*, pp. 987f; "South Australian", 29 November 1844, p. 3; 19 June 1849, p. 3. Note, however, the attempt to debunk the view that jury service caused undue hardship to great numbers of country people reported in the "Southern Australian", 27 October 1843, p. 2. It should also be noted that the members of the Legislative Council who passed the Act abolishing grand juries were themselves exempt from jury service under s 4 of Ordinance No. 12 of 1843.

<sup>295</sup> See, *e.g.*, Jaques, *The Impact of the Gold Rushes on South Australia, 1852-1854* (B.A. (Hons.) thesis, University of Adelaide, 1963); Pike, *Paradise of Dissent*, Ch. 18; *The Times*, 25 June 1852, p. 8; 19 July 1852, p. 8; 18 March 1853, p. 8.

<sup>296</sup> It also increased the likelihood that witnesses would be absent (*cf.*, *e.g.*, "Adelaide Times", 11 February 1852, p. 3), although this problem would have arisen whatever mode of trial was adopted.

<sup>297</sup> "Register", 10 August 1852, p. 3; "Adelaide Times", 10 August 1852, p. 3; "Adelaide Morning Chronicle", 12 August 1852, p. 3.

<sup>298</sup> Grand juries were restored in December 1921: *The Times*, 14 December 1921, p. 4. As is well known, they were then all but abolished by the *Administration of Justice (Miscellaneous Provisions) Act 1933* s 1 and wholly by the *Criminal Justice Act 1948* s 31 (3).

soar. This did in fact happen : the *nouveau riche* multiplied greatly from the end of 1852, and invested heavily in land.<sup>299</sup> They were unlikely to possess educational qualifications; many of them, like Matthew or Mick Jagger, might have been illiterate and ill suited to grand jury service. No doubt this is what F.S. Dutton meant when he said in the Legislative Council in September 1852 that ‘[t]he *materiel* for Grand Juries was here more circumscribed than in England’.<sup>300</sup> He was not referring here to mere numbers. In fact, the explosion of wealth in the community as a result of the gold rush meant that the problem was not that there would soon be too few grand jurors, but too many. It would have been embarrassing, and only partially effective, to raise the hurdle for grand jury membership higher so as to exclude the newly enriched. In those circumstances, the lesser of two evils was simply to abolish the grand jury system, which, in the final analysis, was seen to be dispensable. It is suggested that this is the real reason why the legislators of South Australia heeded the words of Crawford J., despite his blunder in pointing out that the law of the other colonies also did not provide for grand juries, and abolished this institution just as the results of the gold rush of 1852 were starting to become apparent.

One commentator states that, because it was ‘[v]iewed as a bulwark against autocratic rule, the grand jury was widely accepted in the New World’.<sup>301</sup> Neither part of this statement is true in relation to Australia in general, or South Australia in particular. Hardly anyone said anything about the grand jury as a bulwark of freedom or a check on the executive in the South Australian debates of 1852. Hardly anyone had said anything like that beforehand. In fact, a quirk in South Australian law made it possible to present the abolition of grand juries as a means of decreasing official involvement and control over prosecutions rather than increasing it. The quirk arose because, as we have seen, s 33 of Ordinance No. 12 of 1843 provided that bills of indictment were not only to be presented to a grand jury; *ex officio* and the very rare case of Court-initiated informations aside, prosecutions had also to be ‘on the prosecution of’ the Crown prosecution authorities.<sup>302</sup> As Cooper J., who appears to have been the chief drafter of the Ordinance, put it, the aim of this ‘was to protect persons from the malicious presentment of bills to the Grand Jury without the sanction of some responsible

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<sup>299</sup> Pike, *Paradise of Dissent*, pp. 451f.

<sup>300</sup> “Adelaide Times”, 9 September 1852, p. 3.

<sup>301</sup> Brown, “The Witness and Grand Jury Secrecy” (1983) 11 Am Jo Crim Law 169, 171.

<sup>302</sup> See also rule LXV scheduled to Ordinance No. 2 of 1850.



officer’, the ‘small community’ of South Australia needing a ‘double protection’<sup>303</sup> against both official oppression and private malice. The general litigiousness of the early South Australian community was indeed occasionally noted.<sup>304</sup> At all events, this statute made private prosecutions without the sanction of the Advocate-General impossible<sup>305</sup> (and would probably also have prohibited presentments by the grand jury of persons to be tried).<sup>306</sup> It meant that one of the chief reasons urged for the retention of the grand jury, and a principal reason for its introduction into Victoria in 1874<sup>307</sup> – that it permitted private prosecutions to occur independently of the state’s decision about whom to prosecute, while at the same time providing a filtering mechanism – was not applicable in South Australia. Of course, the provision requiring the Advocate-General to approve all prosecutions might simply have been repealed in whole or with reservations for particular offences (such as libel),<sup>308</sup> and grand juries left to adjudicate on all bills preferred by private prosecutors without the Crown’s sanction in the time-honoured manner.

That this option was not chosen suggests that, perhaps, the alleged reform in the law that the Act introduced was more of a sop to those concerned by the removal of the grand jury than a serious attempt to improve the law. However, much was made of this alleged reform in the law by the government in presenting its proposals to the Legislative Council.<sup>309</sup> In the debates – which, as reported, are otherwise notable for their almost complete lack of interest in broader questions of principle and policy involved in abolishing grand juries,<sup>310</sup> as if everyone present agreed on this necessary housekeeping measure for which time had at last been found – R.D. Hanson, the Act-

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<sup>303</sup> Report of Cooper J. to the Governor, attached to the latter’s despatch to the Colonial Office of 14 October 1846, CO 13/50/291 (A.J.C.P., reel 607).

<sup>304</sup> Bennett, *Cooper C.J.*, p. 24; Pike, *Paradise of Dissent*, p. 236.

<sup>305</sup> Clearly, however, some private prosecutions did take place (*e.g.* “Register”, 17 March 1849, p. 2; 13 June 1849, p. 2); but these must have been on bills signed by the Advocate-General.

<sup>306</sup> See above, fn 177.

<sup>307</sup> See above, fn 4.

<sup>308</sup> This would have approached the law of England as it was shortly to be laid down in the *Vexatious Indictments Act 1859* (U.K.), although, so to speak, from the other direction.

<sup>309</sup> “Adelaide Times”, 9 September 1852, p. 3; “Adelaide Morning Chronicle”, 9 September 1852, p. 3. Crawford J. had also mentioned this in his charge of August 1852 (above, fn 271), and the credit for originating this argument may therefore properly belong to his Honour.

<sup>310</sup> With the exception of a proposed amendment to retain grand juries for charges of treason, which was lost: “Register”, 29 October 1852, p. 3. The Votes and Proceedings of the Legislative Council for 28 October 1852 and the report in the “Register” of 1 November 1852, p. 2, are at odds about whether another amendment was made. Yet another view is in the “Adelaide Times”, 4 November 1852, p. 3. Several drafts of the Bill may be found in GRG 1/15/1.

ing Advocate-General, opined that the power thus given to South Australian law to disallow prosecutions was one ‘with which no functionary’, including presumably himself, ‘should be entrusted’.<sup>311</sup> Accordingly, s 3 of the Act abolishing grand juries permitted a criminal information to be filed by the Master of the Supreme Court by leave of the Court in cases in which the Clerk of the Crown or Master of the Crown Office could file such an information in the Queen’s Bench.<sup>312</sup> While there is admittedly at least one case in which use was made of this procedure,<sup>313</sup> it was not widely used, and the provision was repealed as long ago as 1934 by no more elevated a statute than the *Statute Law Revision Act* 1934.<sup>314</sup> Nevertheless, it might have reassured some doubters in 1852 that the proposed reform was not merely the removal of an inconvenient but possibly not wholly useless anachronism such as the grand jury, but actually made some positive contribution towards reforming the law. (It is a great shame that A.H. Davis was not in the Legislative Council in 1852 to put his view of grand juries,<sup>315</sup> although it is noticeable that his co-juryman from May 1851, C.S. Hare, was not inspired to spring to their defence.)

Interestingly, s 2 of the Act abolishing grand juries also required the Attorney-General (as the Advocate-General became after the institution of responsible government in 1857) to prosecute any person committed by the magistrate or to enter a *nolle prosequi* in writing having examined the depositions.<sup>316</sup> No doubt the obligation to prosecute and the *nolle prosequi* procedure, both of which survive into the law of South Australia today,<sup>317</sup> were adopted in the hope that they would exercise some moral

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<sup>311</sup> “Adelaide Morning Chronicle”, 9 September 1852, p. 3; a similar statement is in the “Adelaide Times”, 9 September 1852, p. 3.

<sup>312</sup> For a contemporary account of this procedure, see Archbold/Jervis, 13th ed., pp. 97-102. For a reference to an analogous provision in New South Wales, cf. *R v. McKaye* (1885) 6 NSWLR 123, 127.

<sup>313</sup> *R v. Smith* (1876) 10 SALR 213; 10 SALR 248; (1877) 11 SALR 5.

<sup>314</sup> Section 4 and Schedule 2, repealing s 336 of the *Criminal Law Consolidation Act* 1876, which had repealed and replaced s 3 of Act No. 10 of 1852.

<sup>315</sup> In South Australian Parliamentary Debates, House of Assembly, 28 June 1866, col. 125, it is claimed that Davis was against grand juries and that the speaker had served with Davis, who was the foreman, on the last grand jury to sit in South Australia. However, this is incorrect, as Davis was not the foreman of the last grand jury. Accordingly, the speaker’s memory may be faulty. See further below, fn 360.

<sup>316</sup> It is interesting to observe that the provision allowing for a *nolle prosequi* to be entered did not appear in the earliest drafts of the Bill (see above, fn 310), which accordingly required the prosecution of all persons committed. A similar provision was omitted when Western Australia abolished grand juries in 1855, and accordingly an amending statute had to be passed: 23 Vic. No. 2.

<sup>317</sup> *Criminal Law Consolidation Act* 1935 s 276.

pressure on, and thus contribute to controlling the exercise of the discretion to prosecute by, the Attorney-General.

It is also worth noting that the interests which could be mobilised in favour of grand juries in the colonial setting, in which people are often less willing to accept an ancient institution simply because it is ancient, were very few. Grand juries were clearly an irritation to prosecutors and witnesses alike; the latter, as well as having to turn up twice, might sometimes find themselves in very unsavoury company while waiting to give evidence.<sup>318</sup> At the same time, grand juries could have attracted the support of defence counsel only if they overlooked the fact that they were a means of escaping the clutches of the criminal law without employing the services of defence counsel such as were of use in a trial before a petty jury. No doubt some grand jurors relished their role in the criminal law – A.H. Davis certainly did. But many others would have found the system tiresome and an inconvenience.<sup>319</sup> The public was clearly not interested enough in grand juries to start a campaign for their retention (as a check on executive power, for example) which left any historical traces. Only defendants – and defence counsel who were prepared to look beyond their narrow material interests – could possibly have had a reason to oppose the abolition of grand juries. It is therefore not surprising that, once the decision to abolish grand juries had been made, the system had so few defenders. It had never managed the transition from ‘routine, burdensome institution’ to the ‘bulwark of [...] rights and privileges’<sup>320</sup> which the grand jury managed in many parts of the United States and which might have given rise to a popular movement to retain it despite the inconvenience it caused to grand jurors and its inefficiency compared to committal proceedings before the Magistrates.

The first criminal sessions of the Supreme Court of South Australia without grand juries went ahead without any major difficulties. There was some delay in the commencement of proceedings as witnesses’ subpoenas were still returnable at 10

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<sup>318</sup> Meek, “On Grand Juries” (1888) 85 LT 395, 396 (referring to the position in England). The same might, however, be said of any attendance at Court to give evidence, although the more compressed form of grand jury proceedings may have made this aspect particularly noticeable to witnesses waiting for their turn before grand juries.

<sup>319</sup> Francis Dutton certainly did; he had served on at least one grand jury, that of June 1849 : see the list in the “Register”, 13 June 1849, p. 2; “South Australian”, 12 June 1849, p. 2.

<sup>320</sup> Younger, *The People’s Panel*, p. 21.

o'clock;<sup>321</sup> presumably this had not been changed to allow for the earlier start of trials owing to the omission of what one newspaper called 'the usual speech *ex cathedra*',<sup>322</sup> the charge to the grand jury, not to mention the delay while the first true bills were found. Section 2 of the Act abolishing grand juries stated that informations were to be presented to the Court in future, and thus adopted the name of the document formerly used when grand juries were bypassed by *ex officio* informations.<sup>323</sup> An objection to the informations on the grounds that they were signed by the Acting rather than the permanent Advocate-General<sup>324</sup> was easily overruled.<sup>325</sup>

## 5. Conclusion

The Act to abolish grand juries was not disallowed by the Imperial authorities in London,<sup>326</sup> unlike an earlier Ordinance of 1842 which had dispensed with grand juries at the sessions of the newly created (and, as a result of the disallowance, short-lived) intermediate Court of General Sessions<sup>327</sup> – which was created, as we have seen, after presentments by grand juries urging that step, partly in order to relieve them of the burden of trivial cases.<sup>328</sup> The Imperial authorities thought in 1842 that dispensing with grand juries in relation to misdemeanours was in order, but that if the Court also had, as it did, the jurisdiction to try for felonies, grand juries could not 'according to the practice of the Law of England'<sup>329</sup> be avoided. But by 1852, the Australian colonies (other than Western Australia) were on the threshold of fully democratic self-government, and greater liberties were conceded to them in shaping their own politics.<sup>330</sup> The Colonial Office made no recorded comment, negative or otherwise, on the Governor's despatch relating to the Act abolishing grand juries.<sup>331</sup> Moreover, in 1852<sup>332</sup> Sir Frederick Thesiger, the Attorney-General for England, had introduced a Bill into the House of Commons to abolish grand juries in the Metropolis.<sup>333</sup> Alt-

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<sup>321</sup> "Adelaide Times", 23 November 1852, p. 3; 27 November 1852, p. 7.

<sup>322</sup> "Register", 23 November 1852, p. 2.

<sup>323</sup> The informations presented at the first session without grand juries (GRG 36/1/2) clearly adopt the style of criminal pleading hitherto used for *ex officio* informations. The variant terminology used in other Australian States which have not enacted criminal codes may be found in *Nicola*, [1987] VR 1040; Waller/Williams, *Criminal Law : Text and Cases* (9th ed., Butterworths, Chatswood 2001), p. 28.

<sup>324</sup> The reason for the absence of the Advocate-General may be gathered from Taylor, (2001) 22 Jo Leg Hist 55, 63f.

<sup>325</sup> For a similar objection taken later, see Hague, *The Judicial Career of Benjamin Boothby* (unpublished, Adelaide 1992), p. 173.

though The Viscount Melbourne had lost office (with the rest of the Ministry responsible for seeing such notable reforms as the *Common Law Procedure Act 1852* through to the statute book) before the end of 1852 and thus before the statute abolishing grand juries in South Australia arrived at the Colonial Office for consideration, this certainly indicates the trend of opinion in London.<sup>334</sup> What had lately been advocated by the Attorney-General at Westminster could hardly be denied to the colonies.

Western Australia followed the lead of South Australia from June 1855<sup>335</sup> and abolished grand juries,<sup>336</sup> so that, until their re-introduction in Victoria in 1874,<sup>337</sup> nineteen years passed in which the law of no Australian jurisdiction provided for grand juries to be summoned. The Western Australian Bill for abolition was also a government measure promoted by that jurisdiction's chief prosecutor, the Advocate-

<sup>326</sup> South Australian Government Gazette, 18 August 1853, p. 544; South Australian Archives, GRG 2/1/13 (despatch of 18 May 1853), 2/5/14, 2/6/6 (despatch no. 87); CO 13/78/340 (A.J.C.P., reel 786).

<sup>327</sup> Ordinance No. 7 of 1842, s 12. For notice of its disallowance, see South Australian Government Gazette, 11 April 1844, p. 89.

<sup>328</sup> See further Bennett, *Cooper C.J.*, p. 13; Hague, *A History of the Law*, pp. 1216f, 1224f.

<sup>329</sup> Despatch to the Governor, State Archives of South Australia, GRG 2/1/3/199-202. Emphasis in original.

<sup>330</sup> Cf. Hague, *A History of the Law*, pp. 443f.

<sup>331</sup> See above, fn 326.

<sup>332</sup> Such a Bill had in fact been introduced earlier : see, e.g., *The Times*, 9 July 1849, p. 3.

<sup>333</sup> Hansard, House of Commons, 21 June 1852, vol. 122 col. 1115. The Bill may be found in the British Parliamentary Papers, 1852 vol. II, pp. 193ff, 201ff. It is interesting to note that this Bill refers to criminal trials without 'the Intervention of a Grand Jury', which is very similar to the long title of the South Australian Act No. 10 of 1852 (see above, fn 8) which can be seen from the draft Bills (above, fn 310) to be the second version of the title (the first was "An Act to abolish Grand Juries"). It may be that the title was changed in the hope that a less blunt one would be less likely to attract the attention of the Colonial Office. It may also be that a copy of an early draft English Bill had reached South Australia after the first draft of the South Australian Bill was made and before that Bill was considered by the Legislative Council, although if this occurred it is odd that it is not mentioned anywhere. The change in title permitted the ingenious argument that grand juries had not in fact been abolished at all in South Australia; rather, a mere parallel system had been created alongside them : South Australian Parliamentary Debates, House of Assembly, 21 June 1866, coll. 23f.

<sup>334</sup> That this proposal was supported by at least some sections of the public may be gathered from (1852) 195 *Edinburgh Review* 1, 31f. See also, e.g. the letter to *The Times* from "Bulla Vera", 9 January 1849, p. 1.

<sup>335</sup> Although the law of South Australia was mentioned little in the debates, and differences between the two statutes (see e.g. above, fn 316) make it clear that the legislators in Western Australia did not copy the South Australian statute. Nevertheless, the "Perth Gazette and Independent Journal of Politics and News", 20 April 1855, p. 2, refers to the fact that grand juries have already been abolished in 'the neighbouring colonies'. The "Commercial News and Shipping Gazette" (Fremantle), 8 March 1855, p. 2, seemed to believe that they still existed in the neighbouring colonies.

<sup>336</sup> 18 Vic. No. 5, as supplemented by 23 Vic. No. 2; both were consolidated in the *Grand Jury Abolition Act Amendment Act 1883*. See further Western Australia, *Debates of the Legislative Council*, 25 July 1883, pp. 78f.

<sup>337</sup> See above, fn 4.

General.<sup>338</sup> In Western Australia, unlike South Australia, however, a campaign in favour of retaining grand juries was vigorously conducted by one newspaper,<sup>339</sup> chiefly on the basis that lodging the power to prosecute in the hands of officials rather than the grand jury was undesirable in the absence of fully democratic government. This argument was not available in South Australia in 1852, as it was by that stage clear that fully democratic institutions were only a matter of a few years away, and a substantial instalment of them already existed.<sup>340</sup> It is interesting to note that both major Western Australian newspapers which had supported abolition in 1855<sup>341</sup> recanted as early as 1860, after a ‘trumpery case’<sup>342</sup> had been brought against a Roman Catholic priest during the rule of a Governor who was unpopular, autocratic and had incurred the wrath of the Roman Catholic population on a matter relating to education.<sup>343</sup> As the newspapers lamented, the lack of grand juries meant that there was no-one to stand between the subject and being put on trial by a possibly despotic government;<sup>344</sup> by that time, fully democratic government had been operating in South Australia for three years, but was still thirty years off in Western Australia.

Another difference of importance should be noted.<sup>345</sup> While the preamble of the Western Australian statute abolishing grand juries asserted that ‘a general opinion prevails that the maintenance of the Institution of Grand Juries in this colony is not necessary to the due administration of Justice’,<sup>346</sup> research reveals not only that this overlooks the vigorously argued case for grand juries in one newspaper and the fact that grand juries in Western Australia, too, saved many people the risk of a criminal

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<sup>338</sup> Contrast the position in the United States : there, it has been said that the ‘staunchest defenders’ of the grand jury are prosecutors : Leipold, (1995) 80 Cornell LR 260, 261.

<sup>339</sup> “Commercial News and Shipping Gazette”, 8 March 1855, p. 2; 29 March 1855, p. 2; 12 April 1855, p. 2.

<sup>340</sup> A summary of the position may be found in Castles/Harris, *Lawmakers and Wayward Whigs*, p. 40.

<sup>341</sup> “Inquirer”, 28 February 1855, p. 2; “Perth Gazette and Independent Journal of Politics and News”, 20 April 1855, p. 2.

<sup>342</sup> “Inquirer”, 24 October 1860, p. 2, which however also notes that, as the Judge said, the accused was ‘honourably acquitted’ by the petty jury.

<sup>343</sup> See Stannage (ed.), *A New History of Western Australia* (University of Western Australia Press, Nedlands 1981), pp. 322f, 555f.

<sup>344</sup> See “Inquirer”, 14 November 1860, p. 2; 28 November 1860, p. 2; “Perth Gazette and Independent Journal of Politics and News”, 16 November 1860, p. 2.

<sup>345</sup> Although of course many of the arguments against grand juries were similar, as is shown by the letter to the editor of the “Inquirer”, 28 March 1855, p. 3.

<sup>346</sup> The same assertion was also made in the Governor’s despatch transmitting the Act to the Colonial Office : despatch no. 61 of 1855, 18 June 1855, CO 18/88 (A.J.C.P. reel 466). The allowance of the Act was notified in the “Western Australian Government Gazette”, 17 June 1856, p. 3.

trial before the petty jury,<sup>347</sup> but also the fact that the preamble was originally to record that there was a lack of suitable grand jurors in Western Australia (and also too many trivial trials for them).<sup>348</sup> In the same vein, one newspaper contains a reference to the ‘altered position of the Colony, and the difficulty at all times experienced of obtaining persons properly qualified to serve as Grand or even Petty Jurors’,<sup>349</sup> the first half of which reminds us that Western Australia had agreed to accept convicts in 1850.<sup>350</sup> Furthermore, the legislature of Western Australia took the absence of a petition from grand jurors in favour of their retention as a sign to proceed with abolition, and was probably also concerned about the expense.<sup>351</sup>

There was a half-hearted attempt to revive the grand jury in South Australia after the dust from the gold rush of 1852 had settled in 1857,<sup>352</sup> and a more serious attempt in 1859,<sup>353</sup> but neither was successful. (A Western Australian newspaper of 1860 even reports a ‘popular demonstration’<sup>354</sup> in the recent past in favour of the restoration of grand juries in South Australia. That is presumably a reference to the debate of 1859.)<sup>355</sup> The abolition having once occurred, inertia worked in favour of not having grand juries. And with the introduction into South Australia of a representative assembly and responsible government along Westminster lines in 1857, it was no longer possible to argue (as it still was in Western Australia) that the Crown authorities responsible for prosecutions might misuse their power and not have to answer to the public for it. Nor was there any need for the grand jury as a primitive form of representative assembly. Again in contrast to Western Australia, those favouring rein-

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<sup>347</sup> See the criminal record books in the State Records Office of Western Australia, WAS 204/3577/4, which indicates that seven defendants’ bills were ignored in July 1854, six in October 1854, three in January 1855 and one in April 1855. See above, fn 69.

<sup>348</sup> “Inquirer”, 28 February 1855, p. 3; “Commercial News and Shipping Gazette”, 8 March 1855, pp. 2f.

<sup>349</sup> “Inquirer”, 14 February 1855, p. 2.

<sup>350</sup> The legal authority under which this was done may be found in the statute 13 Vic. No. 1 (Western Australia).

<sup>351</sup> See the report of the debates in the “Perth Gazette and Independent Journal of Politics and News”, 20 April 1855, p. 2, and the summary in the “Inquirer”, 18 April 1855, p. 3.

<sup>352</sup> South Australian Parliamentary Debates, House of Assembly, 7 May 1857, col. 75; Legislative Council, 28 October 1857, col. 625; House of Assembly, 2 December 1857, col. 684.

<sup>353</sup> South Australian Parliamentary Debates, House of Assembly, 25 May 1859, coll. 105-110. This was presumably provoked by the letter from “An Admirer of Old Forms” to the editor of the “Register”, 2 March 1859, p. 2.

<sup>354</sup> “Inquirer” (Perth), 14 November 1860, p. 2.

<sup>355</sup> As always, the absence of an index to the newspapers of the time and the impossibility of conducting an error-free search over a number of years prevents certainty on this score. However, the historical documents that do exist recording the debate of 1859 do not suggest that there was any expression of popular feeling beyond what is recorded in those documents.

statement of the grand jury in 1859 based their argument not on the need to control the Crown's discretion to prosecute in the interests of the liberty of the subject, but on the improvements in the machinery of the criminal law which would allegedly result from reintroducing grand juries.<sup>356</sup> This, rather unsurprisingly, was an argument which failed to convince most people; as the "Register" said, if Magistrates were too ready to commit or otherwise unsuited to the task, the remedy was to find better Magistrates, not to duplicate the arrangements for pre-trial vetting of prosecutions using another piece of inefficient machinery.<sup>357</sup>

Probably the last nail was hammered into the coffin of the grand jury in 1866, when the wildly unpopular Boothby J. (who had taken Crawford J.'s place on the Bench on his early death) announced that it was a 'glorious institution of our forefathers', that 'honest and wise persons in England would not bring their families out to a place' which so disregarded the law of England as to abolish grand juries, that their abolition was illegal and that he would accordingly refuse to entertain criminal prosecutions which did not have the sanction of the grand jury.<sup>358</sup> Few would have wished to be associated with that particular gentleman's hobby horses or to espouse a cause which he had espoused. The abolition of grand juries was one of the many deviations by the Provincial legislature to which Boothby J. took exception under his peculiar view of its legislative competence (a view which was, of course, rejected by the Imperial Parliament by means of the *Colonial Laws Validity Act* 1865). But, in the Parliamentary debate on his refusal to try those who had not been before a grand jury, a notice of motion designed to foster discussion on whether grand juries should be reintroduced<sup>359</sup> sank without trace, and there was no serious movement to reinstate grand juries as a sop to Boothby J.<sup>360</sup>

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<sup>356</sup> Note the tension between efficiency and democracy referred to in Younger, *The People's Panel*, pp. 3, 134.

<sup>357</sup> "Register", 26 May 1859, p. 2.

<sup>358</sup> Hague, *A History of the Law*, pp. 765, 767 (see also pp. 376f, 461-464, 516, 820); Hague, *Boothby J.*, pp. 173f.

<sup>359</sup> Votes & Proceedings, House of Assembly, 19 June 1866, p. 6.

<sup>360</sup> No systematic attempt was made to find any isolated references that may exist to grand juries among the voluminous primary sources dealing with Boothby J.'s disruption of the legal system, which extended over many years. However, it is worth recording that an essay was printed in the "Observer", 9 June 1866, p. 8, noting agitation for the abolition of grand juries in Otago, New Zealand. Other writers lamented the demise of grand juries (see above, fnn 353, 359; "Payment of Jurors" (1861) 1 Thursday Review 200, 201; letter from "Nemo" to the editor of the "Observer", 9 June 1866, p. 7; letter from "Argus" to the editor of the "Observer", Supplement, 23 June 1866, p. 4), but without mounting a serious argument in favour of their reinstatement. It may be that the writer of the piece in the "Thursday



There is no reason to think that grand juries were a particularly undesirable feature of the South Australian legal scene before 1852.<sup>361</sup> True, serving on them caused inconvenience to the grand jurors and others, and sometimes they did not work as well as they might have; but that could be said of any legal institution, and there has been no serious move to abolish petty juries owing to the inconvenience that is caused to those who serve on them. It is beyond doubt that the grand jury saved some people the expense and risk of a trial before a petty jury and was an added safeguard against the abuse of the Crown's powers. One conclusion that can be drawn from the abolition of grand juries, especially in light of the arguments in favour of grand juries in Western Australia, is that the citizens of the very young Province of South Australia were already confident enough in the institutions that they had largely inherited, but also partly created themselves, that they were willing to forgo the extra safeguard of the grand jury in the interests of convenience – or, to put the point more precisely, that the additional risk to, and trouble in, the smooth operation of grand juries due to the imminent explosion in the number of grand jurors at the end of 1852 and the consequent extension of liability to serve to the uneducated *nouveau riche* was considered greater than the risks which were incurred in simply abolishing grand juries.

From the point of view of the legal and indeed the general historian of South Australia, the abolition of grand juries was beyond doubt a matter for regret. At least one of the grand jury's presentments is a unique insight into settler attitudes towards the law and Aborigines, and many other presentments exist which contribute to our knowledge either of that or of another topic in the history of South Australia. Nevertheless, the law does not exist primarily to provide material for historians, but to do a job in the present. In 1852, it was judged that the needs of the present did not include grand juries.

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Review" was A.H. Davis, who was connected with that journal according to his obituary in the "Observer", 9 June 1866, p. 5.

<sup>361</sup> The same might have been said of grand juries in England towards the close of their long history : Meek, (1888) 85 LT 395, 395.

# THE GRAND JURY OF SOUTH AUSTRALIA\*

## 1. Introduction

The grand jury system in Australia is a part of legal history that has been almost completely forgotten. Magistrates rather than grand juries have for generations carried out the function of deciding whether to put an accused on trial.<sup>1</sup> The oblivion into which the grand jury system in Australia has sunk is no doubt due in part to its very brief existence in the colony of New South Wales in the 1820s followed by its abolition there, never to be restored.<sup>2</sup> Grand juries have never existed in Queensland.<sup>3</sup> In the State of Victoria, it is true, grand juries may continue to be summoned,<sup>4</sup> and very occasionally do meet.<sup>5</sup> Nevertheless, the very infrequent summoning in Victoria of a grand jury to consider a proposed private prosecution is a mere shadow of the full grand jury system. Only in South Australia and Western Australia<sup>6</sup> have grand juries existed for an appreciable length of time. This was originally because of the status of both colonies as free (non-convict) colonies in which a full jury system could be introduced from the beginnings of settlement (although Western Australia later opted to receive convicts).

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<sup>1</sup> The current South Australian legislation is the *Summary Procedure Act* 1921 ss 101 – 107. See further below, fn 266.

<sup>2</sup> On the grand jury system in New South Wales, see Bennett, "The Establishment of Jury Trial in New South Wales" (1961) 3 Syd LR 462, 482-485; Castles, *An Australian Legal History* (Law Book, Sydney 1982), pp. 177f, 204, 275f; Woods, *A History of Criminal Law in New South Wales: The Colonial Period, 1788-1900* (Federation Press, Sydney 2002), pp. 59-61. On its non-existence, see *Australian Courts Act* 1828 (Imp.) s 5; 5 Vic. No. 4 (N.S.W.) s 10; *R v. Lang* (1859) 2 Legge 1133, 1134; *Attorney-General (New South Wales) v. Bertrand* (1867) LR 1 PC 520, 528f; *Grassby v. R* (1989) 168 CLR 1, 13. In relation to Tasmania, see Low, "Sir Alfred Stephen and the Jury Question in Van Diemen's Land" (2002) 21 U Tas LR 79, 112-117.

<sup>3</sup> See the Queensland statutes 25 Vic. No. 13 s 20; 31 Vic. No. 23 s 27.

<sup>4</sup> *Crimes Act* 1958 s 354, and see s 351 and *R v. Nicola* [1987] VR 1040, 1045f; *Re Shaw* (2001) 4 VR 103. On the history of this provision see Histed, "The Introduction and Use of the Grand Jury in Victoria" (1987) 8 Jo Leg Hist 167; Moore, "A Century of Victorian Law" (1934) 16 Jo Comp Leg & Int Law (3rd) 175, 187f.

<sup>5</sup> *R v. McInnes* [1940] VLR 416. See also *R v. Parker* [1977] VR 22; *Nicola* [1987] VR 1040.

<sup>6</sup> See Castles, *An Australian Legal History*, pp. 297, 300; Russell, *A History of the Law in Western Australia and its Development from 1829 to 1979* (University of Western Australia Press, Nedlands 1980), pp. 138f.

South Australia, at least, was very conscious of its origins and continued status as the sole non-convict Australian colony and the consequent introduction there of the full system of trial by jury – which in the 1830s most certainly included the grand jury – from the very beginning. Despite this, the South Australian legislature agreed to a government Bill<sup>7</sup> and abolished grand juries in 1852,<sup>8</sup> at a time when South Australia was still a British Province with only limited rights of self-government and before any jurisdiction in the United States,<sup>9</sup> let alone England,<sup>10</sup> had done so. Abolition accordingly occurred less than sixteen years after the first grand jury had assembled on South Australian soil on 13 May 1837 (when the Province of South Australia and the city of Adelaide were not yet five months old)<sup>11</sup> pursuant to the common law which the settlers had brought with them and in advance of any statutory recognition of grand juries in the Province.<sup>12</sup>

This article considers, first of all, the contribution to the South Australian legal system and community which grand juries made during their relatively brief existence, and the procedures which they followed. We shall see that grand juries not only considered bills of indictment preferred by the Crown Prosecutor as part of the machinery of the criminal law, but also carried out some additional functions on behalf of the community similar to those which grand juries carried out in England, and sometimes made presentments on diverse topics. These are an enormously valuable source of settler opinion on various matters.

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<sup>7</sup> See the “Adelaide Times”, 9 September 1852, p. 3.

<sup>8</sup> Act No. 10 of 1852, s 1, which had no short title; its long title was “An Act to provide for the Trial of Offenders without the intervention of Grand Juries” (see further below, fn 333). The Act was repealed and re-enacted by ss 3 and 334 and Schedule A Part II of the *Criminal Law Consolidation Act 1876* (S.A.). See now *Criminal Law Consolidation Act 1935* (S.A.) s 275.

<sup>9</sup> The first jurisdiction to abolish grand juries in the United States was Michigan, which did so in 1859 : Frankel/Naftalis, *The Grand Jury : An Institution on Trial* (Hill & Wang, New York 1977), p. 16; Leipold, “Why Grand Juries Do Not (and Cannot) Protect the Accused” (1995) 80 Cornell LR 206, 314; Younger, *The People’s Panel : The Grand Jury in the United States, 1634 – 1941* (Brown University Press, Providence 1963), pp. 68f. See further, for a discussion of whether grand juries should be abolished or not and a summary of the current law relating to grand juries in the federal and nineteen State jurisdictions in which they survive, Simmons, “Re-examining the Grand Jury : Is There Room for Democracy in the Criminal Justice System?” (2002) 81 Boston ULR 1, and the works cited therein.

<sup>10</sup> See below, fn 298.

<sup>11</sup> Thus, South Australians cannot be accused of being slow to adopt the grand jury (*cf.* Kadish, “Behind the Locked Door of an American Grand Jury : Its History, its Secrecy and its Process” (1996) 25 Florida State ULR 1, 9) – or of being slow to abolish it!

<sup>12</sup> The local statute 1 Vic. No. 1 s 32, requiring the use of grand juries for trials on indictment before the Supreme Court of South Australia, was not passed until 15 November 1837.

Among the principal topics with which grand juries dealt were relations between the settlers and the Aborigines. The same topic was prominent in the Judge's charge to the grand jury, which very often went beyond the cases at hand and concerned itself with a more general commentary on matters of concern to the colony and its progress and development. This is a commentary which is of great value given that it was provided by a person who was educated and familiar with the conditions of the Province but who, at the same time, was something of an outsider whose perspective on the doings of the colonists was largely unbiased and impartial.

When the operation of the grand jury system in South Australia has been outlined, the reasons for the abolition of grand juries in 1852 will be investigated. It will be shown that the chief problem perceived (correctly, as it turned out) by legislators in 1852 was the looming over-supply of grand jurors in consequence of the enrichment of the population caused by the gold rush in Victoria. Furthermore, there was little sense in early South Australia that the grand jury's reason for existence was to prevent abuses of the Crown's power to prosecute. This danger appears to have been considered very slight – at least in South Australia, as distinct from Western Australia, where a campaign was mounted (even if unsuccessfully) to preserve grand juries as a check on the Crown. In South Australia, however, the contest was between the grand jury and judicial committal proceedings as the most efficient means of deciding whether to place people on trial, and the latter, as might be expected, won easily.

## **2. The grand jury in the machinery of the criminal law**

### **a. The first grand jury**

As mentioned, the first grand jury on South Australian soil sat on 13 May 1837. It sat pursuant to a Special Commission of Gaol Delivery. As representing the wider community, it received the congratulations of Jeffcott J., who gave a somewhat flowery

and grandiloquent charge to it ‘[i]n the style of the day’,<sup>13</sup> on the fact that South Australia enjoyed the advantages of trial by jury *ab initio*. This appears to have been seen much more as a means of distinguishing South Australia from the convict colonies than as a way of controlling the Crown’s decision to prosecute and thus ensuring freedom from despotism. Jeffcott J. further stated that the grand jury assembled in the infant Province of South Australia might, ‘in respectability or intelligence’, ‘challenge a comparison with those of a similar class in the mother country’.<sup>14</sup> Nevertheless, there is no indication in the official records or elsewhere of the means that had been adopted to select the grand jurors thus flattered.<sup>15</sup> Probably a clue to the procedure adopted is provided by the statute passed shortly afterwards which required merely that grand jurors should be ‘men [...] between the ages of twenty-one and sixty years of good fame and condition’.<sup>16</sup>

The Court’s records<sup>17</sup> do however tell us that the grand jury consisted of fourteen men, that its foreman was Colonel Light, the Surveyor-General who was responsible for the plan and site of Adelaide, and that, of the fourteen, nine were described as esquires, although their qualification (if any) to bear this title is not stated.<sup>18</sup> The five other jurors were Colonel Light, a Captain in the Royal Navy, a Captain (presumably in the Army), a Deputy Surveyor and a merchant. The records also tell us that, of the six indictments presented to the grand jury, all but one were found to be a true bill and

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<sup>13</sup> Castles, *An Australian Legal History*, p. 314. See also Pike, *Paradise of Dissent : South Australia 1829-1857* (Melbourne University Press, Melbourne 1967), p. 227.

<sup>14</sup> “South Australian Register”, 3 June 1837, p. 4.

<sup>15</sup> It should be recalled here that there was at the time no qualification for grand jurors at the assizes : Archbold/Jervis, *Pleading and Evidence in Criminal Cases* (13th ed., H. Sweet, London 1856), p. 65; Stephen, *A History of the Criminal Law of England* (MacMillan, London 1883), p. 254; Stephen/Stephen, *A Digest of the Law of Criminal Procedure in Indictable Offences* (MacMillan, London 1883), p. 119. As late as 1932, the extreme vagueness of the arrangements for selecting grand jurors was pointed out by a correspondent of *The Times*: 16 August 1932, p. 6 (and see the replies : 19 August 1932, p. 6).

<sup>16</sup> 1 Vic. No. 1 (S.A.) s 33. The earlier statute 7 Wm IV No. 2 (S.A.) had fixed the qualification of petty and common jurors only, at least according to the copies in the Supreme Court Library, the Parliamentary Library, the State Library of South Australia and the Law Library of the University of Adelaide. It is possible that the statement in Hague, *A History of the Law in South Australia 1836-1867* (unpublished, Adelaide 1936), p. 982, rests on a variant copy of the Act in question – see p. 985 of the same work for a similar problem.

<sup>17</sup> The criminal record book of the Supreme Court (hereinafter : “Supreme Court, criminal records”), held in the Library of the Supreme Court of South Australia. The indictments are preserved in the State Archives of South Australia, GRG 36/1/1. (All references hereinafter to “GRG” material refer to material in the State Archives of South Australia.) GRG 36/1 contains a set of indictments for the period up to (and beyond) the abolition of grand juries in 1852. See also GRG 1/23; GRG 36/8.

<sup>18</sup> Later, Cooper J., in a report to the Governor (attached to the latter’s despatch to the Colonial Office of 14 October 1846, Public Record Office, CO 13/50/291, 320 (A.J.C.P., reel 607), stated that he thought that this qualification for grand jury service should be dispensed with, as the status of Esquire in South Australia was even more uncertain than it was in England.

the remaining one, as the phrase went, ‘ignored’. Clearly, the smallness of the grand jury – as a majority of twelve was necessary, three dissentients could have prevented the grand jury from reaching a decision – was not an obstacle to its carrying out its functions. It is also worth noting that, of the five persons accordingly tried before the petty jury, all were convicted.<sup>19</sup>

It was not merely the small size of the grand jury which set a precedent for future grand juries. His Honour’s charge referred at great length to the relationship between the settlers and the Aborigines; aggression against the natives, or any ‘infringement on their rights’, would be ‘visited by greater severity of punishment than’<sup>20</sup> would otherwise be inflicted; on the other hand, the civilisation of the natives would lead to the Province’s obtaining ‘a blessing from the great Father of the human family who has placed us among them’.<sup>21</sup> This would also lead to a further contrast between South Australia and the convict colonies to the east, at whose treatment of Aborigines, his Honour said, ‘humanity shudders’.<sup>22</sup> Two prosecutions, he pointed out, already involved natives: one (which was not quite ready to proceed)<sup>23</sup> was against two whites for larceny from an Aborigine, and the other involved a defendant who had attempted to give alcohol to the Aborigines and had abused the Advocate-General, Charles Mann, when he attempted to stop this. His Honour also called for the labouring classes to work hard, respect their betters and thus earn a share in the prosperity of the Province. How prosperous the Province really was, and the conditions under which the early settlers lived, is however brought home vividly to today’s reader, working amidst the solid buildings of the city of Adelaide, when reading his Honour’s directions on whether breaking into ‘the huts and tents, in which the great body of our population now reside’, which were ‘fastened [...] by strings tied together on the inside’,<sup>24</sup> could constitute burglary (it could).

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<sup>19</sup> The indictments (GRG 36/1/1) indicate that one person was convicted of a lesser offence than that in relation to which the grand jury found a true bill.

<sup>20</sup> “Register”, 3 June 1837, p. 5.

<sup>21</sup> “Register”, 3 June 1837, p. 5.

<sup>22</sup> “Register”, 3 June 1837, p. 5.

<sup>23</sup> See also “Register”, 8 July 1837, p. 4. The author has not attempted to trace the subsequent history (if any) of this prosecution.

<sup>24</sup> “Register”, 3 June 1837, p. 5.

Having heard this lengthy charge, containing as it did a mixture of congratulation, bland directions of law, schoolmasterly exhortation and threats of condign punishment for ill-treatment of the natives, the newspaper of the day records that the grand jury retired and found several true bills during the morning.<sup>25</sup> We are not told exactly what procedure was followed in presenting bills to it, but we may assume that the traditional English procedure was followed, there being no indication to the contrary. This would mean that the Crown witnesses would have been sworn in open Court and then examined by the grand jury in private. Support for this may be found in his Honour's statement that the grand jury would 'hear'<sup>26</sup> evidence of the prosecution. There is certainly no indication that what apparently became the practice in Western Australia was followed and that the depositions were sent into the grand jury room.<sup>27</sup>

#### **b. Procedure and composition of the grand jury**

The small size of the first grand jury was not something that South Australia outgrew as it developed. It was merely an expression of the fact that the small population of the colony and the vast distances which some settlers would have to travel made it difficult to convene a grand jury of the usual size.<sup>28</sup> Thus, it was quite common in succeeding years for a grand jury to consist of only fourteen<sup>29</sup> or fifteen<sup>30</sup> members, and two grand juries of only thirteen are also recorded.<sup>31</sup> The session of November 1843 started a day late when only twelve grand jurymen arrived on the appointed

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<sup>25</sup> "Register", 3 June 1837, p. 5.

<sup>26</sup> "Register", 3 June 1837, p. 5.

<sup>27</sup> See Russell, *History of the Law in Western Australia*, p. 128. Note, however, the disagreement on whether the practice existed in the Legislative Council's debates on the abolition of grand juries: "Perth Gazette and Independent Journal of Politics and News", 20 April 1855, p. 2.

<sup>28</sup> See, e.g., Hague, *A History of the Law*, pp. 1226f; below, fn 294.

<sup>29</sup> E.g. Supreme Court, criminal records, session beginning 14 November 1839; "Register", 11 July 1840, p. 6; "Southern Australian", 10 July 1840, p. 3 (the Court's records of this grand jury, and of all such between March 1840 and March 1845, have not survived: statement by Mr Bruce Greenhalgh, Library, Supreme Court of South Australia; some however may be found in GRG 36/10); Supreme Court, criminal records, session beginning 13 May 1850; "South Australian", 14 May 1850, p. 3; "South Australian Gazette and Mining Journal", 16 May 1850, p. 3; "Adelaide Times", 14 May 1850, p. 2.

<sup>30</sup> Supreme Court, criminal records, session beginning 3 March 1840; GRG 36/10 (July 1843); "Register", 19 July 1843, p. 3; "Southern Australian", 21 July 1843, p. 3; "Register", 28 November 1849, p. 4; "South Australian", 30 November 1849, p. 2; "Adelaide Times", 29 November 1849, p. 3; "South Australian Gazette and Mining Journal", 29 November 1849, p. 3.

<sup>31</sup> E.g. the grand jury of July 1839 (as recorded in the Supreme Court, criminal records, session beginning 17 July 1839, and in the "Register", 20 July 1839, p. 2), and that of November 1842 (GRG 36/10 (November 1842); "Register", 12 November 1842, p. 3; "Southern Australian", 11 November 1842, p. 2).

day.<sup>32</sup> On the other hand, there is a record of a grand jury of twenty-two as early as 1838<sup>33</sup> (the second grand jury of the Province) and in 1844,<sup>34</sup> and one of twenty-four in 1846,<sup>35</sup> although how this was allowed is not clear : the applicable statute, like the common law,<sup>36</sup> permitted no more than twenty-three;<sup>37</sup> possibly not all served on each investigation. The names of the grand jurors were, as a rule, published in full in the local newspapers, sometimes with addresses and occupations. The small size of most grand juries led, generally speaking, to the adoption of a fairly strict policy in relation to applications for exemption from grand jury service<sup>38</sup> and the infliction of a number of fines on persons who had not attended at all or been late.<sup>39</sup>

There continues to be no record of any depositions being placed before the grand jury,<sup>40</sup> and it is hard to credit that this would not have been remarked upon somewhere in the historical record<sup>41</sup> if it had been the regular practice of the Court;<sup>42</sup> clearly, at

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<sup>32</sup> “Register”, 8 November 1843, p. 2; “Southern Australian”, 10 November 1843, p. 2. Cf. Bennett, *Sir Charles Cooper : First Chief Justice of South Australia 1856-1861* (Federation Press, Sydney 2002), p. 39.

<sup>33</sup> Supreme Court, criminal records, session beginning 11 April 1838.

<sup>34</sup> “Register”, 3 July 1844, p. 3; “Southern Australian”, 5 July 1844, p. 2.

<sup>35</sup> Supreme Court, criminal records, session beginning 24 November 1846; “Register”, 25 November 1846, p. 3; “South Australian”, 27 November 1846, pp. 5f; “South Australian Gazette and Colonial Register”, 28 November 1846, p. 3

<sup>36</sup> Edwards, *The Grand Jury* (A.M.S. Press, New York 1973) pp. 45f; Frankel/Naftalis, *Grand Jury*, p. 19.

<sup>37</sup> Ordinance No. 12 of 1843, s 34.

<sup>38</sup> “Register”, 12 March 1842, p. 4; “Register”, 12 September 1849, p. 3. One grand juror was however exempted simply owing to his age : “South Australian”, 13 March 1849, p. 2; “Adelaide Times”, 19 March 1849, p. 4. A lenient line was taken in June 1847, when apparently jurors were excused owing to the weather and their health : “Register”, 16 June 1847, p. 2. A harder line was taken in 1851 : “Register”, 12 August 1851, p. 3; “South Australian”, 12 August 1851, p. 3; “South Australian Gazette and Mining Journal”, 14 August 1851, p. 2; “Austral Examiner”, 15 August 1851, p. 6.

<sup>39</sup> GRG 36/10 (November 1843); Supreme Court, criminal records, sessions beginning 13 May 1850; 24 November 1851; “Register”, 11 March 1846, p. 3; “South Australian”, 10 March 1846, p. 2; “South Australian Gazette and Colonial Register”, 14 March 1846, p. 2; “Register”, 1 December 1847, p. 3; “South Australian Gazette and Mining Journal”, 4 December 1847, p. 4; “Register”, 14 May 1850, p. 3; “South Australian”, 14 May 1850, p. 3; “South Australian Gazette and Mining Journal”, 16 May 1850, p. 3; “Adelaide Times”, 14 May 1850, p. 2; 15 May 1850, p. 3; 6 December 1851, p. 5; “Austral Examiner”, 15 August 1851, p. 6.

<sup>40</sup> Even pursuant to the *Indictable Offences Act* 1848 (U.K.) s 17, as adopted in South Australia by Ordinance No. 15 of 1849 s 8, or its predecessors. See, however, below, fn 42, for a reference to occasions in England on which depositions had been admitted despite the non-fulfilment of the conditions laid down in this statute.

<sup>41</sup> As always, however, it cannot be ruled out, in the absence of an index to the newspapers of the time, that a statement about the practice or an exception to it exists somewhere in the several newspapers published over the sixteen years from 1836 to 1852.

<sup>42</sup> Although it is possible that occasional deviations from this rule went unrecorded in the absence of regular law reports. For a list of such deviations in England, see Archbold/Jervis/Craies, *Pleading, Evidence and Practice in Criminal Cases* (24th ed., Sweet & Maxwell, London 1910), pp. 100f; Bowen-Rowlands, *Criminal Proceedings on Indictment and Information* (Stevens & Sons, London 1910), pp. 96, 101.



all events, the grand jury heard and examined witnesses.<sup>43</sup> The evidence on this appears conclusive. There are references, for example, to the inconvenience and delay caused by witnesses' non-attendance when required by the grand jury<sup>44</sup> and to the need for the grand jury to observe their demeanour.<sup>45</sup> At least four times, grand juries complained that they had nothing to do or had been delayed owing to the absence of witnesses,<sup>46</sup> and on at least four occasions they could not find true bills owing to the absence of witnesses.<sup>47</sup> On another occasion, the Judge stated in his charge that as a witness 'is not now in the province, [...] his deposition is put out of the question',<sup>48</sup> on another that a case appeared plain from the depositions, but that the grand jury would have the witnesses before it,<sup>49</sup> and in one further case talked about 'the evidence, if it came before the grand jury in the form which the depositions led him to suppose'.<sup>50</sup> Interpreters were sometimes required for Aboriginal witnesses giving evidence before the grand jury;<sup>51</sup> on another occasion, a grand jury was told that an Aboriginal woman 'could not give her testimony on oath, but they could receive her dec-

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<sup>43</sup> E.g. "Adelaide Independent and Cabinet of Amusement", 4 November 1841, p. 2; "Register", 12 November 1842, p. 3; 16 September 1846, p. 3; "South Australian", 14 September 1847, p. 3; "Register", 13 June 1849, p. 3; Bennett, *Cooper C.J.*, p. 66.

<sup>44</sup> GRG 36/1/1, which contains a letter from the grand jury to Jickling A.J. dated 8 March 1839 about the obstruction of justice caused by the non-attendance of grand jurors, and asks for the names of the defaulters to be published (see "Register", 9 March 1839, p. 4); "Register", 29 August 1840, pp. 1, 2; 16 June 1849, p. 2.

<sup>45</sup> "Register", 6 March 1841, p. 3; "Adelaide Chronicle and South Australian Literary Record", 3 March 1841, p. 3.

<sup>46</sup> "South Australian", 14 September 1847, p. 3; "Register", 13 June 1849, p. 3; 11 February 1851, p. 3; "South Australian Gazette and Mining Journal", 13 February 1851, p. 3; "Adelaide Times", 11 February 1851, p. 3; "Register", 15 August 1851, p. 3; "South Australian", 12 August 1851, p. 3; "South Australian Gazette and Mining Journal", 14 August 1851, pp. 2f.

<sup>47</sup> "South Australian Gazette and Mining Journal", 21 March 1850, p. 3; "Adelaide Times", 17 May 1850, p. 4; "Register", 28 November 1851, p. 3; "South Australian Gazette and Mining Journal", 29 November 1851, p. 4; "Adelaide Times", 28 November 1851, p. 3; "South Australian Gazette and Mining Journal", 12 February 1852, p. 3.

<sup>48</sup> "Register", 6 March 1841, p. 3.

<sup>49</sup> "Register", 3 July 1844, p. 3; "Southern Australian", 5 July 1844, p. 2. A similar statement in the Judge's charge may be found in the "Adelaide Times", 13 March 1850, p. 3 (grand jury to 'ascertain facts from the evidence, much more fully than [Cooper J.] had been able to do from the depositions'). In the "Register", 10 June 1846, p. 4, the Judge is reported as saying that 'if you believe the depositions, you will be left in little doubt', but the quotation is probably not exact and is materially different in the "South Australian", 9 June 1846, p. 3; "South Australian Gazette and Colonial Register", p. 2 ('[t]he circumstances were such as to leave little doubt'). Cf. also "South Australian", 29 November 1844, p. 3.

<sup>50</sup> "Register", 14 June 1848, p. 3; similar in "South Australian", 13 June 1848, p. 2. Similar: "South Australian", 14 September 1849, p. 2.

<sup>51</sup> "Register", 15 September 1849, p. 3; "South Australian", 11 September 1849, p. 3; "South Australian Gazette and Mining Journal", 15 September 1849, p. 3; Pope, *Aborigines and the Criminal Law in South Australia: the First Twenty-Five Years* (Ph.D. thesis, Deakin University, 1998), p. 120; cf. "Register", 11 February 1851, p. 3; "Adelaide Morning Chronicle", 12 August 1852, p. 3.

laration'.<sup>52</sup> In August 1841, an order was made that 'John Collins be brought up to give Evidence before the Grand Jury'.<sup>53</sup> And the practice of "marshalling" the cases, apparently the basis of the West Australian practice,<sup>54</sup> was not followed in South Australia.<sup>55</sup> On the other hand, there may have been the occasional exception : one newspaper report seems to imply that the examination of the accused before the committing Justices was admitted to the grand jury room on at least one occasion when an Acting Judge was in charge.<sup>56</sup> And another newspaper states – whether accurately or not, we cannot know – that the grand jury usually examined only one witness unless minded to ignore the bill;<sup>57</sup> how the grand jury might reach that view is not stated.

Grand juries generally sat for about three days,<sup>58</sup> although some sat for shorter<sup>59</sup> or longer periods;<sup>60</sup> while waiting for indictments to be presented, the Court sometimes dealt with civil or other non-criminal business<sup>61</sup> or even adjourned to the next day.<sup>62</sup> Grand juries occasionally adjourned of their own motion for a day or two while waiting for further business to be placed before them,<sup>63</sup> which must have been inconven-

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<sup>52</sup> "Register", 25 November 1846, p. 3; similar : "South Australian", 27 November 1846, p. 6. The case concerned was the Donnelly case, which will be mentioned again below. As we shall also see below (p. 36), the Protector of Aborigines appeared in the grand jury room in at least one prosecution of an Aborigine, and this was almost certainly a regular practice.

<sup>53</sup> GRG 36/10. That Collins was in gaol at this time may be shown from the records preserved in GRG 54/24/35.

<sup>54</sup> Russell, *A History of the Law in Western Australia*, p. 138.

<sup>55</sup> "Register", 12 September 1849, p. 3; "South Australian", 14 September 1849, p. 2.

<sup>56</sup> "Register", 12 September 1849, p. 3; "South Australian", 11 September 1849, p. 3.

<sup>57</sup> "South Australian Gazette and Mining Journal", 15 August 1850, p. 2.

<sup>58</sup> The reports do not always record the date on which grand juries were discharged, but see, *e.g.*, "Register", 12 March 1842, pp. 2, 4 (records discharge of jury summoned on 8 March on 11 March); "Register", 1 December 1849, p. 3; "South Australian Gazette and Mining Journal", 1 December 1849, p. 3; "Register", 16 May 1850, p. 3 (grand jury of 13 May discharged on 15 May); "South Australian", 15 August 1850, p. 3; "South Australian Gazette and Mining Journal", 15 August 1850, p. 3; "Adelaide Times", 15 August 1850, p. 3 (grand jury of 12 August discharged on 14 August); "Adelaide Times", 17 February 1851, p. 3 (grand jury of 10 February discharged on 12 February).

<sup>59</sup> The grand jury of the July 1843 sessions, for example, sat for only two days : "Register", 22 July 1843, p. 2. So did the grand jury of November 1846 : "Register", 28 November 1846, p. 3. And so did the last grand jury : "Register", 11 October 1852, p. 3.

<sup>60</sup> Thus, the grand juries of June 1848, March 1849 and March 1850 appear to have sat for a week : "Register", 17 June 1848, p. 4; 17 March 1849, p. 3; 19 March 1850, p. 3; "Adelaide Times", 20 March 1850, p. 3. The grand jury summoned on Monday 11 August 1851 was not discharged until Thursday 21 August, although it adjourned over some days in between : "Register", (Saturday) 16 August 1851, p. 3 (grand jury adjourned on Friday to following Thursday); "Register", 25 August 1851, p. 3.

<sup>61</sup> "Southern Australian", 5 March 1841, p. 3; "Adelaide Chronicle and South Australian Literary Record", 3 March 1841, p. 3; "Southern Australian", 8 March 1844, p. 2; "Observer", 9 March 1844, p. 3; "Register", 14 June 1848, p. 3; "Register", 14 March 1849, p. 3.

<sup>62</sup> GRG 36/10 (March 1842); "South Australian", 12 June 1849, p. 2; above, fn 60; "Register", 27 November 1851, p. 3; "Adelaide Times", 26 November 1851, p. 3.

<sup>63</sup> "Adelaide Times", 17 September 1849, p. 4; above, fn 60.

ient for country jurors in particular.<sup>64</sup> Even greater inconvenience could be caused if a formal defect in an indictment were found after a grand jury had dispersed and a new grand jury had to be summoned to find a new true bill<sup>65</sup> or a case was required to be adjourned to the following sessions.<sup>66</sup> Inconvenience must have been caused to Crown witnesses, too, by the need to attend first before the grand jury and (if a true bill were found) then at the trial.<sup>67</sup>

Statistics were not kept of the grand jury's doings,<sup>68</sup> but from the irregular statistical reports that exist it is possible to conclude that their functions were by no means redundant.<sup>69</sup> In the mid-1840s it was usual for the grand jury to ignore only a few bills per session.<sup>70</sup> A change occurred in the second half of 1848<sup>71</sup> and more especially in March 1849, when there was an unusually large number of bills (fifty-three) and the grand jury ignored eleven of them.<sup>72</sup> Thereafter, the grand jury of the March 1850 sessions ignored six of the fifty-three bills presented to it,<sup>73</sup> and that of May 1850 ignored seven on one day.<sup>74</sup> In the August 1850 sessions, a total of three bills, one for manslaughter, against nine defendants (of whom four were Aborigines) were ignored on one day alone.<sup>75</sup> The February 1851 grand jury, perhaps spurred on to special stringency by Crawford J.'s statement that the existence of committal proceedings

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<sup>64</sup> "Southern Australian", 10 March 1843, p. 2; "Adelaide Examiner", 11 March 1843, p. 2 : his Honour ordered other grand jurymen to be summoned in place of those from long distances owing to an adjournment over the weekend.

<sup>65</sup> As occurred in the November 1842 and March 1843 sessions : GRG 36/10; "Register", 19 November 1842, p. 3; "Southern Australian", 18 November 1842, p. 3; "Register", 25 March 1843, p. 2; "Adelaide Examiner", 25 March 1843, p. 3. See also fn 64.

<sup>66</sup> "Register", 27 November 1844, p. 3; "South Australian", 29 November 1844, p. 3.

<sup>67</sup> "Register", 12 September 1849, p. 3.

<sup>68</sup> The inclusion of a statistical summary of the session's proceedings in the Supreme Court's criminal records gradually becomes less and less frequent as time goes on.

<sup>69</sup> This is not to deny that statistics are a crude measure of the grand jury's work; but it has been pointed out that statistics will tend to under-estimate rather than over-estimate the number of prosecutions which do not proceed because of grand juries : Leipold, (1995) 80 Cornell LR 260, 274-278.

<sup>70</sup> Supreme Court, criminal records, sessions beginning June 1845 – March 1848 (no more than three bills ignored in any one session, although for at least one session there are no statistics); "South Australian", 12 May 1847, p. 6.

<sup>71</sup> The grand jury of June 1848 ignored at least five bills ("Register", 17 June 1848, p. 4) and that of September 1848 four ("Register", 16 September 1848, p. 3). However, the "Adelaide Times" of 4 December 1848, p. 4, states that the grand jury found true bills in all cases in that session.

<sup>72</sup> Supreme Court, criminal records, session beginning 12 March 1849.

<sup>73</sup> "Register", 25 March 1850, p. 2.

<sup>74</sup> "Register", 14 May 1850, p. 3; "South Australian", 14 May 1850, p. 3; "South Australian Gazette and Mining Journal", 16 May 1850, p. 3; "Adelaide Times", 14 May 1850, p. 2. (Each newspaper gives slightly different details.)

<sup>75</sup> "South Australian Gazette and Mining Journal", 15 August 1850, p. 3 (proceedings of 14 August 1850).

made the grand jury's duties 'almost a matter of form',<sup>76</sup> ignored a total of six bills against six defendants (one an Aborigine) on seven charges.<sup>77</sup> Statistics such as these led to occasional complaints in the newspapers that the magistrates were committing too freely.<sup>78</sup> And grand juries regularly ignored bills for quite serious offences, that of November 1851, for example, ignoring one bill against four defendants for murder and another against two defendants for manslaughter.<sup>79</sup>

Despite the apparent adherence to English forms, there are some signs that the smallness of the colony and its grand juries required some compromises to be made. In 1845, the leading local newspaper complained indignantly in an editorial that bills were found by a majority of nine.

We thought that every school-boy knew that twelve must concur in a verdict – and we suppose his Honour thought the same, or he would certainly have directed them upon the subject. But while property alone forms the qualification, how can we expect an improvement. In a new colony fortunes spring up like mushrooms, and melt like snow.<sup>80</sup>

The "Register" repeated this complaint against the 'newly-created aristocracy'<sup>81</sup> serving on grand juries in the following year. The same complaint was made by another newspaper in 1850: 'majorities of eight or nine have occasionally found true bills'.<sup>82</sup> The complaint of 1845 – and the breach of the oath of secrecy which the information thus revealed implied – led to judicial directions at the following sessions not only about the need for twelve grand jurors to agree, but also on the need for them to keep

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<sup>76</sup> "Register", 11 February 1851, p. 3; "South Australian", 11 February 1851, p. 3; "South Australian Gazette and Mining Journal", 13 February 1851, p. 3; "Adelaide Times", 11 February 1851, p. 3.

<sup>77</sup> "South Australian Gazette and Mining Journal", 13 February 1851, p. 3 in conjunction with the "Register", 13 February 1851, p. 3, the "South Australian", 14 February 1851, p. 3 and the Judge's charge, which pointed out that Tommy Ross, *alias* Kutromee, was a native.

<sup>78</sup> "Adelaide Chronicle and South Australian Literary Record", 17 March 1841, p. 2; "Register", 11 June 1845, p. 2; "Register", 23 May 1850, pp. 2f; "Adelaide Times", 26 August 1850, p. 3; "Register", 13 September 1845, p. 2.

<sup>79</sup> "Adelaide Times", 26 November 1851, p. 3.

<sup>80</sup> "Register", 11 June 1845, p. 2.

<sup>81</sup> "Register", 17 June 1846, p. 2.

<sup>82</sup> "South Australian Gazette and Mining Journal", 15 August 1850, p. 2.

their deliberations secret.<sup>83</sup> It is easy to imagine that a grand jury's deliberations, in a more or less accurate form, could have become known to all and sundry, including the accused, if the rule of secrecy were not strictly adhered to and some account of them filtered out into the small South Australian community of the time.<sup>84</sup>

It is equally easy to imagine that, as Crawford J. once pointed out, the smaller size of grand juries put pressure on the rule that twelve must agree.<sup>85</sup> In the November 1851 sessions, the grand jury actually went so far as to come into Court and ask whether it could find a true bill with eleven grand jurors in favour of that course and eight opposed. The answer was no, and the bill was later ignored.<sup>86</sup> In another case, which was referred to in Parliament in 1859 as an example of the difficulties created in a small community by the grand jury system, the accused managed to prevent a true bill from being presented by the fact that his friends were on the grand jury.<sup>87</sup>

Another grand jury revealed its ignorance of the rule that a failure by it to find a true bill did not prevent the institution of further proceedings by asking a question about whether that was so.<sup>88</sup> Yet another grand jury revealed its ignorance of the conventions of criminal pleading by asking whether it should find a true bill despite the lack of literal truth of all the averments.<sup>89</sup> In the first criminal sessions over which he presided in South Australia, Crawford J. was even asked by a grand jury whether they could find a true bill despite the insufficiency of the evidence 'if they had reason to believe that at the trial other evidence would be forthcoming'.<sup>90</sup> His Honour responded that they could not, and was probably wise, given the depth of ignorance revealed

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<sup>83</sup> *E.g.* "Register", 10 September 1845, p. 3; "South Australian Gazette and Colonial Register", 13 September 1845, p. 4; "Register", 26 November 1845, p. 3; "South Australian Gazette and Colonial Register", 29 November 1845, p. 2.

<sup>84</sup> As may have happened more than once. An editorial in the "Register", 4 July 1849, p. 2 appears to show awareness of a prosecutor's evidence before the grand jury.

<sup>85</sup> "Register", 11 February 1851, p. 3.

<sup>86</sup> "Register", 28 November 1851, p. 3; "Adelaide Times", 25 November 1851, p. 3; "South Australian Gazette and Mining Journal", 27 November 1851, p. 4; 29 November 1851, p. 4; "Austral Examiner", 15 August 1851, p. 6.

<sup>87</sup> South Australian Parliamentary Debates, House of Assembly, 25 May 1859, coll. 106f.

<sup>88</sup> "Register", 13 June 1849, p. 3.

<sup>89</sup> "Southern Australian", 14 March 1843, p. 3; "Adelaide Examiner", 15 March 1843, p. 3.

<sup>90</sup> "Register", 14 August 1850, p. 3; "South Australian Gazette and Mining Journal", 15 August 1850, p. 3 (quotation to similar effect). Another grand jury asked whether it was possible for it to examine witnesses other than those named on the back of the indictment, to which the reply was that it could if the Crown supplied them: "Register", 13 February 1851, p. 2; "South Australian Gazette and Mining Journal", 13 February 1851, p. 3; "Adelaide Times", 13 February 1851, p. 3. This answer is supported by Archbold/Jervis, 13th ed., p. 65.

by this question, to omit to add that they could find a true bill based on their own knowledge.<sup>91</sup> In this state of affairs, it is probable that some grand jurors were puzzled by one judicial reference to ‘that sound discretion [in determining whether to put persons on their trial], which it is the very object of a grand jury to ensure’,<sup>92</sup> and that grand jurors in other sessions would have been simply ignorant of it. Another topic on which grand juries fairly frequently, and more understandably, required direction was whether they could reduce a bill, finding, for example, a true bill for common assault only when the defendant had been charged with an aggravated assault.<sup>93</sup>

All this makes one wonder what sort of person was qualified to serve on the grand jury. A statute of 1843, repealing the earlier provision referring to ‘good fame and condition’,<sup>94</sup> had assimilated the qualifications of grand jurors to those of special jurors.<sup>95</sup> The rule was henceforth that

every man described in the [Common] Jurors’ Book as an Esquire or person of higher degree or as a Justice of the Peace or as a Merchant (such Merchant not keeping a general retail shop) or as a Bank Director or Manager or as possessing within the Province real estate of the value of five hundred pounds or personal estate of the value of one thousand pounds shall be qualified and liable to serve<sup>96</sup>

as a special, and thus also as a grand, juror. A letter was thereafter sent to various notables asking them to supply names of suitable persons for service on grand and special juries,<sup>97</sup> although their replies, let alone the grand jury lists, do not seem to have

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<sup>91</sup> His Honour atoned for this in speaking to the grand jury of August 1851 : “Register”, 14 August 1851, p. 3; “Adelaide Times”, 14 August 1851, p. 3. As we shall see below, South Australian law required all bills to be signed by the Advocate-General, but this would not have prevented the grand jury from finding a true bill signed by the Advocate-General based on its own knowledge of the evidence.

<sup>92</sup> “South Australian”, 13 March 1849, p. 2; “Adelaide Times”, 19 March 1849, p. 4.

<sup>93</sup> E.g. “Register”, 12 August 1851, p. 3; “Adelaide Times”, 14 August 1851, p. 3.

<sup>94</sup> See above, fn 16.

<sup>95</sup> Ordinance No. 12 of 1843, s 34. It is worth noting that this Ordinance was not allowed (*i.e.* not disallowed by London) until the notice published in the South Australian Government Gazette, 30 December 1847, p. 434. The reason for this may be gathered from Bennett, *Cooper C.J.*, p. 87. See further below, fn 303.

<sup>96</sup> Ordinance No. 12 of 1843, s 18.

<sup>97</sup> GRG 24/4/1844/204; GRG 24/6/1844/1069. The latter reference suggests that the lists may have been returned to the Clerk to the Bench of Magistrates.

survived.<sup>98</sup> As the statute implied ('every man'), no woman ever sat on a grand jury in South Australia,<sup>99</sup> unlike in England.<sup>100</sup> Sections 8, 9 and 34 of the statute of 1843 further required the grand jurors to be summoned in the alphabetical order of their names as they appeared in the jurors' book, and it is noticeable by the end of the 1840s that the grand jurors often had surnames that were close to one another in the alphabet. The last grand jury, which sat in August 1852, was mostly drawn from the letters R – W; that of August 1851 was also drawn largely from the latter half of the alphabet, which gives one some idea of the size of the pool available. This system, although somewhat unimaginative, at least ensured that a random selection was made from among those eligible, something that was not always guaranteed in colonial America.<sup>101</sup>

It became the practice of the Bench of Magistrates to sit towards the beginning of December to deal with applications for inclusion on the special and grand jury list,<sup>102</sup> and the names of the successful applicants were often published in the newspaper.<sup>103</sup> Occasionally their occupations were given, and these show that successful applicants included small businessmen of quite modest station such as ironmongers, brewers, farmers, grocers, drapers, bootmakers and butchers.<sup>104</sup> In December 1850, one would-be grand juror went so far as to employ counsel, E.C. Gwynne (later Gwynne J.), to press his case for inclusion on the grand jury list before the Magistrates. The applicant was told, regretfully, that, as the keeper of a general retail shop,

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<sup>98</sup> Personal communication between the author and Mr Bruce Greenhalgh, Library, Supreme Court of South Australia; the State Archives of South Australia also do not appear to have the lists.

<sup>99</sup> Women were not eligible for jury service in South Australia until the passing of the *Juries Act Amendment Act* 1965 (except on a jury of matrons : see Taylor, "The *Accused Persons Evidence Act* 1882 of South Australia : A Model for British Criminal Law?" (2002) 31 CLWR 332, 353). This is despite the fact that they had received the right to vote and to stand for Parliament almost three-quarters of a century earlier under the *Constitution Amendment* 1894 (S.A.).

<sup>100</sup> See, e.g., *The Times*, 4 January 1922, p. 7.

<sup>101</sup> Younger, *The People's Panel*, p. 25.

<sup>102</sup> Cf. ss 7, 19 and 34 of Ordinance No. 12 of 1843, which appear to have suggested, but did not require, this practice for grand jury lists.

<sup>103</sup> "Register", 10 December 1845, p. 3; 9 December 1846, p. 2; 8 December 1847, p. 3; 6 December 1848, p. 3; 8 December 1849, p. 3; 9 December 1851, p. 3; 12 December 1851, p. 3; "South Australian", 8 December 1848, p. 3; "South Australian Gazette and Mining Journal", 14 December 1850, p. 3; 4 December 1851, p. 3.

<sup>104</sup> See the "Register", 8 December 1847, p. 3; 6 December 1848, p. 3; 8 December 1849, p. 3; 12 December 1851, p. 3.

he was not eligible under the statute just quoted.<sup>105</sup> South Australia clearly did not want to become known as a nation of shopkeepers.

That there was some truth in the lament of the editorial quoted earlier that the property qualification was an insufficient filter is shown by the fact that, for the March 1847 and September 1849 sessions, one Matthew<sup>106</sup> or – as one report has it – Michael<sup>107</sup> Jagger was called up for grand jury service and discharged as he could neither read nor write. Clearly, as his Honour stated in dealing with Jagger, the possession of property alone was not a sufficient test for worthiness to sit on a grand jury, although one report says that the Judge added that could not think of a better qualification.<sup>108</sup> A similar point about the insufficiency of the qualification to ensure that only the elite sat on the grand inquest might have been made when one grand juror applied – successfully – to be excused on the grounds that he was the defendant in one of the cases.<sup>109</sup>

Little is said about where the grand jury met<sup>110</sup> – the Supreme Court of South Australia had several homes between 1837 and 1852<sup>111</sup> – although two protests of the grand jury against the inadequacy of its accommodation are recorded : one in March 1839 in a grand jury presentment which stated that the grand jury had been ‘compelled to intrude on the private apartments of the Judge’<sup>112</sup> and the other in February 1851 immediately after the grand jury had been sent out to begin its deliberations, and just after the Court had moved into a new building which had been designed as a permanent courthouse. In 1851, the room of the Stipendiary Magistrates was allocated to the grand jury.<sup>113</sup> The grand jurors were of course sworn, and there is one record of a

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<sup>105</sup> “Register”, 5 December 1850, p. 3; 10 December 1850, p. 3 (this report perhaps indicating that the applicant had lost the property qualification he previously possessed and now wished to be qualified by virtue of his occupation); “South Australian Gazette and Mining Journal”, 12 December 1850, p. 3; 14 December 1850, p. 3 (same comment as earlier); “Adelaide Times”, 10 December 1850, p. 3.

<sup>106</sup> “Register”, 10 March 1847, p. 2; “South Australian”, 9 March 1847, p. 5.

<sup>107</sup> “South Australian”, 14 September 1849, p. 2.

<sup>108</sup> “South Australian”, 9 March 1847, p. 5.

<sup>109</sup> “South Australian”, 13 June 1848, p. 2. “Southern Australian”, 19 March 1844, p. 2, reports that one petty jurymen was a witness before the grand jury.

<sup>110</sup> There is, however, no record of a South Australian Judge ever charging a grand jury at his bedside, as Huddleston B. once did : *The Times*, 7 August 1890, p. 4.

<sup>111</sup> Castles/Harris, *Lawmakers and Wayward Whigs : Government and Law in South Australia 1836-1986* (Wakefield, Adelaide 1987), pp. 81-85; Hague, *A History of the Law*, pp. 1017-1041.

<sup>112</sup> “Register”, 23 March 1839, p. 2.

<sup>113</sup> “Register”, 11 February 1851, p. 3; “South Australian Gazette and Mining Journal”, 13 February 1851, p. 3.



grand juror being sworn, as statute permitted,<sup>114</sup> in the Jewish form.<sup>115</sup> As far as the flow of business in the Court is concerned, the grand jury is occasionally recorded as coming into the Court in the middle of a case being tried before a petty jury, which must have been quite disruptive on occasion.<sup>116</sup> It is probable that witnesses were always sworn in Court, as the law required.<sup>117</sup> The Crown Prosecutor at one sessions lamented the fact that the witnesses ‘strayed out of Court after being sworn’.<sup>118</sup> But in May 1851,

the Crown Solicitor applied to the Judge for advice in the case of a Malay witness, who had stated that the practice of his country for swearing witnesses was to cut the thumb in the presence of the party accused, and [that] that alone would be binding on his conscience.

His Honour sent for him into Court. It, however, appeared that the Grand Jury had been able to manage the matter without the interference of the Court.<sup>119</sup>

But this witness may well have been sworn in the usual form in Court and declared his reservations only in front of the grand jury. However, in March 1839 a grand jury presented that it could not proceed with a case involving an Indian witness as no oath could be administered,<sup>120</sup> which suggests that this may have been the responsibility of the grand jury while the Court was in the charge of Jickling A.J.

This adds to one’s vague impression that short cuts may have been taken with witnesses (including sending depositions into the grand jury room)<sup>121</sup> when Jickling and Mann A.JJ. presided over the Court. At all events, on his return to the Bench after a

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<sup>114</sup> Section 37 of Ordinance No. 12 of 1843.

<sup>115</sup> Supreme Court, criminal records, session beginning 10 March 1845. The appearance of a Jewish person for service on a special jury and his discharge is recorded in *The Times*, 21 February 1826, p. 4.

<sup>116</sup> *E.g.* “Register”, 19 September 1849, p. 3.

<sup>117</sup> In England until the enactment of the *Grand Jury Act* 1856. The practice until then in England was for the crier or clerk to administer the oath : Archbold/Jervis, 13th ed., p. 64. The Supreme Court criminal records omit from July 1839 to state that witnesses were sworn, but this is doubtless due to greater economy in recording the proceedings which may be observed with the passage of time.

<sup>118</sup> “Adelaide Times”, 12 August 1851, p. 3; the “South Australian Gazette and Mining Journal” repeats a further statement by the foreman of the grand jury that ‘[t]he witnesses get sworn and then leave the Court’ (14 August 1851, p. 3); the “Register”, 12 August 1851, p. 3, is similar.

<sup>119</sup> “Register”, 14 May 1851, p. 3.

<sup>120</sup> “Register”, 23 March 1839, p. 2.

<sup>121</sup> See above, fn 56.

period of illness in 1849 during which Mann A.J. had presided, Cooper J. complained that the grand jury had not, as ‘was usual heretofore in South Australia’ stood up during the charge, whereupon the grand jury ‘took the hint, and one or two of its members muttered an apology’.<sup>122</sup> There is one startling reference in Cooper J.’s first charge (after taking over from Jickling A.J.) to a former practice under which the grand jury ‘engage[d] a gentleman of the legal profession to assist them in their duties’,<sup>123</sup> to which his Honour intended to put a stop owing to the fact that, if direction on the law was required, it should be sought from him; but there is no other confirmation of or elaboration on this report which the author has been able to find. The same report also states that his Honour requested that

[a]fter the grand jury were sworn, [...] counsel would withdraw previous to his delivery of the charge; and he then explained that it was customary in England to withdraw on these occasions, in order that as they were engaged in the cases to come before the court, they might not take advantage of anything that might happen to fall from the judge in relation to those cases.

There is no indication of any protest by counsel against this request, which is not reported in any other known sources; nor has the author been able to find any confirmation that any similar request was made or acted upon at later sessions.<sup>124</sup> Given the extensive reporting of the charge in the press, such a practice would not have concealed very much for very long.

### c. The Judge’s charge

The first charge to the grand jury of South Australia started a tradition which was carried on right through to the end of the system<sup>125</sup>: the charge dealt not only with questions of law which the grand jury might encounter in their narrow task of dealing with the bills to be placed before them, but was also used by the Judge as an opportunity to

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<sup>122</sup> “Register”, 28 November 1849, p. 4.

<sup>123</sup> “Southern Australian”, 29 May 1839, p. 1. Proposals to provide the grand jury with its own counsel have been made in the United States and adopted in Hawaii : Leipold, (1995) 80 Cornell LR 260, 313. See also Younger, *The People’s Panel*, p. 243. On the presence of the prosecutor in the grand jury room, see Edwards, *Grand Jury*, pp. 127-130.

<sup>124</sup> Nor, for that matter, is this request or the reference to engaging a legal practitioner to be found in the “Register”, 25 May 1839, p. 2.

comment on various aspects of South Australian society and law. This purpose was greatly assisted by the publicity given to the Judge's charge to the grand jury : it was a rare month in which it did not appear in full in at least one newspaper,<sup>126</sup> and it was very common for more than one newspaper to carry a complete or nearly complete account of what the Judge had said to the jury.<sup>127</sup>

In commenting on colonial affairs more broadly in the charge, most Judges had the advantage of being persons whose station and origin permitted them the role of a friendly outsider familiar with the circumstances of the colony. The first permanent Supreme Court Judge to be appointed from among the ranks of the colonists – Gwynne J. – was not appointed until after grand juries had been abolished. All the permanent (but not the two Acting) Judges who addressed grand juries in South Australia were Colonial Office appointments who came out from England or Ireland and were not themselves among the ranks of the colonists expecting to remain in South Australia for life.<sup>128</sup>

At the same time, these Judges lived in the community and thus had the advantage of Colonial Office officials in knowing the exact conditions of the colony and the personalities of its leading citizens. When they comment, therefore, on matters such as the colony's treatment of the Aborigines, those comments have an unusual degree of authority. Admittedly, the Judges had to rely to some extent on the good will and respect of the community in which they served, and may perhaps have been minded to express themselves cautiously for that reason; but their station and ability to return to the British Isles in case of emergency enabled them to speak both with candour and authority. And as occasional comments by the Judges show,<sup>129</sup> they knew that they

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<sup>125</sup> Which was, of course, not unique to South Australia; see Bennett, *Cooper C.J.*, p. 41.

<sup>126</sup> See, however, "Register", 6 November 1841, p. 3; "Southern Australian", 5 November 1841, p. 3; "Adelaide Chronicle and South Australian Literary Record", 10 November 1841, p. 3; "Register", 9 July 1842, p. 3; "Southern Australian", 8 July 1842, p. 3.

<sup>127</sup> Which sometimes differed in detail, but hardly ever in substance. The report in the "Register", 14 June 1848, p. 3, states that the charge, before being published, had been 'revised by his Hono[u]r'. The only exception to general willingness to report charges to grand juries were the German-language newspapers, for obvious reasons; there is however a record of the proceedings of the grand jury convened to deal with a case involving R.R. Torrens in the "Deutsche Post für die australischen Colonien", 21 June 1849, p. 10.

<sup>128</sup> In fact Jeffcott and Crawford JJ. died in office, and thus did not have a life extending beyond their South Australian appointment, but this could not have been envisaged at the time of their appointment : Jeffcott J. was drowned in a shipwreck and Crawford J. died very young.

<sup>129</sup> See below, fn 138.

were speaking, through the grand jury and the press, to the South Australian community as a whole.

By far the greatest number of charges were given by Cooper J., who charged all grand juries except for the first three criminal sessions (which were presided over by Jeffcott J. and Jickling A.J.), the period in 1849 when he was unable to preside over three sessions owing to illness (Mann A.J.), and the five sessions over which Crawford J. presided after his arrival in the colony in mid-1850. The series of Judges' charges form accordingly a substantial record of an intelligent and legally trained outsider's view of the Province, its progress and its problems. Those interested in learning about Cooper J.'s character can be referred to a recent biography,<sup>130</sup> but it is right to record here, given the prominence that Aborigines will have in the grand jury charges dealt with here, the conclusion of another recent author that 'there is little doubt that [Cooper J.] acted with the best interests of Aboriginal people at heart',<sup>131</sup> even while he made occasional errors of judgment.

As well as comments on such harmless matters as the crops and the general progress of the Province<sup>132</sup> or general homilies on the need for the cultivation of religion,<sup>133</sup> respect for the authorities, telling the truth and thrift by the lower classes,<sup>134</sup> and the need for the element of society which the grand jurors represented to set a good example,<sup>135</sup> the Judge sometimes commented on aspects of the law generally.<sup>136</sup> He might deal either with proposed or recently enacted reforms to the law and state his

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<sup>130</sup> Bennett, *Cooper C.J.*

<sup>131</sup> Pope, *Aborigines and the Criminal Law*, p. 265.

<sup>132</sup> E.g. "Register", 9 March 1839, p. 7; 7 August 1841, p. 5; "Southern Australian", 6 August 1841, p. 3; "Adelaide Chronicle and South Australian Literary Record", 3 August 1841, p. 3; "Register", 26 November 1845, p. 3; 15 September 1847, p. 3; "South Australian", 14 September 1847, p. 3; "South Australian Gazette and Colonial Register", 18 September 1847, pp. 2f; Bennett, *Cooper C.J.*, pp. 41f.

<sup>133</sup> See Bennett, *Cooper C.J.*, pp. 2, 8, 41.

<sup>134</sup> "Register", 3 July 1844, p. 3; "Southern Australian", 5 July 1844, p. 2. The "Observer", 6 July 1844, p. 5, says that this homily was delivered 'in terms of the most impressive and paternal solicitude'. See also "Register", 11 March 1846, p. 3; "South Australian", 10 March 1846, p. 2; "South Australian Gazette and Colonial Register", 14 March 1846, p. 2, "Register", 24 November 1847, p. 3; "South Australian", 26 November 1847, p. 3.

<sup>135</sup> "Register", 27 November 1844, p. 3; "South Australian", 29 November 1844, p. 3.

<sup>136</sup> "Register", 7 March 1840, p. 5; "Adelaide Chronicle and South Australian Literary Record", 10 March 1840, pp. 2f; "Southern Australian", 10 November 1842, p. 2; 21 July 1843, p. 3; "Register", 18 September 1844, p. 3; "Southern Australian", 19 September 1844, p. 2; "Register", 10 September 1845, p. 3; "South Australian Gazette and Colonial Register", 13 September 1845, p. 4.

opinion of them;<sup>137</sup> on one occasion, he drew ‘the attention of the grand jury, and through them, that of the public’<sup>138</sup> to a proposed reform in the law in order that those affected might comment on the proposal to the responsible authorities. Or he might set out the law for the information of magistrates<sup>139</sup> or, alternatively, of the community generally so that false views of the law (for example, the extent to which self-defence might be practised in the face of threats<sup>140</sup> or the fact that finding something does not convert it into one’s own property)<sup>141</sup> were exploded. On other occasions, the Judge gave general advice to the community in legal matters, such as the precautions it should take when entering into a deed,<sup>142</sup> or the undesirability of indulging in too much libel (which, among other things, could hurt the reputation of the Province in England)<sup>143</sup> or more broadly on the vulnerability of drunk people to being robbed.<sup>144</sup>

On other occasions again, the charge was used as a means of expressing the Judge’s view on a question more or less related to the law which was agitating the community, such as the proposed transportation to South Australia of convict boys from England<sup>145</sup> or the justice of transporting convicts from South Australia to the other colonies.<sup>146</sup> The wide publicity given to the Judge’s charge in the newspaper meant that it was by no means a futile undertaking to reach the community in this way. The Judge’s charge was regularly commented on at length in the press, perhaps most fully after his Honour had expressed himself on the limits of press freedom and the responsibilities of editors under the law and expressed the eminently sensible view that those

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<sup>137</sup> E.g. “Register”, 12 March 1842, p. 2; “Southern Australian”, 11 March 1842, p. 3; “Adelaide Examiner”, 10 March 1842, p. 2 (proposed Court of Requests); “Register”, 11 November 1843, p. 3.

<sup>138</sup> “Register”, 16 September 1846, p. 2.

<sup>139</sup> “Register”, 29 November 1848, p. 3; “South Australian”, 1 December 1848, p. 3; “Register”, 10 December 1850, p. 2; “Adelaide Times”, 26 November 1850, p. 3.

<sup>140</sup> “Register”, 25 November 1851, p. 3; “Adelaide Times”, 25 November 1851, p. 3; “Austral Examiner”, 28 November 1851, p. 7.

<sup>141</sup> “South Australian”, 29 November 1844, p. 3.

<sup>142</sup> “Register”, 11 March 1846, p. 3; “South Australian”, 10 March 1846, p. 2; “South Australian Gazette and Colonial Register”, 14 March 1846, p. 2.

<sup>143</sup> “Register”, 12 November 1842, p. 3; “Southern Star”, 9 November 1842, p. 4. See also “Register”, 19 November 1842, p. 2.

<sup>144</sup> “South Australian”, 14 March 1848, p. 2; “South Australian Gazette and Mining Journal”, 18 March 1848, p. 3.

<sup>145</sup> “Register”, 11 March 1843, p. 3; “Southern Australian”, 10 March 1843, p. 2; “Adelaide Examiner”, 11 March 1843, p. 2 (report of Court proceedings and editorial drawing attention to his Honour’s remarks). See further Pike, *Paradise of Dissent*, pp. 296f.

<sup>146</sup> “Register”, 13 May 1851, p. 2; “South Australian”, 13 May 1851, p. 3; “South Australian Gazette and Mining Journal”, 15 May 1851, p. 3; “Adelaide Times”, 13 May 1851, p. 3.

responsible for newspapers had no duties ‘but those they impose upon themselves’<sup>147</sup> by choosing to run newspapers.

Very often, and especially in the first years of the colony’s existence, the Judge used his charge either to congratulate the colony on the circumstance that none of the prisoners to be tried was an emigrant to South Australia (they being Aborigines, members of the military forces visiting the Province, or imports from the neighbouring Australian colonies)<sup>148</sup> or, alternatively but rather less frequently, expressing alarm at the number of persons to be tried who had settled in South Australia and consequent fears that the quality of the settlers was declining.<sup>149</sup> Cooper J.’s practice was to consult with Mr Ashton, the keeper of the gaol, to find out the origin of the prisoners.<sup>150</sup> This comparative exercise was undertaken ‘not for the purpose of throwing any stigmas on our neighbours’ in the other colonies,<sup>151</sup> but because it was considered to be a good rough-and-ready measure of the moral tone of the immigrants to South Australia.<sup>152</sup> That the moral state of the colony could be deduced from the state of its criminal lists was particularly clear in March 1850, when Cooper J. fulminated against child abusers and pointed out that ‘the lowest and most brutal characters [believe] that connexions with a young and pure person would cleanse them of a certain filthy disease’.<sup>153</sup>

Another frequently used measuring-stick of the moral tone of the colony that was used in the Judge’s charge was its treatment of the Aboriginal natives. In fact, the ju-

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<sup>147</sup> “Register”, 12 November 1842, p. 3; see also “Southern Australian”, 11 November 1842, p. 2; 15 November 1842, p. 2; 18 November 1842, p. 2; “Adelaide Examiner”, 9 November 1842, p. 2; “Southern Star”, 9 November 1842, pp. 3, 4; 16 November 1842, p. 2. See further Bennett, *Cooper C.J.*, pp. 40, 52.

<sup>148</sup> As in the charge to the first grand jury, in which Jeffcott J. noted that only a bare majority of those to be tried were South Australians : “Register”, 3 June 1837, p. 4. See further, e.g., “Register”, 9 November 1839, p. 6; “Register”, 7 March 1840, p. 5; “Adelaide Chronicle and South Australian Literary Record”, 10 March 1840, pp. 2f; “Register”, 11 June 1845, p. 3; Bennett, *Cooper C.J.*, p. 13.

<sup>149</sup> “Register”, 6 March 1841, p. 3; “Southern Australian”, 5 March 1841, p. 3; “Adelaide Chronicle and South Australian Literary Record”, 3 March 1841, p. 4; “Register”, 12 March 1845, p. 3; “Southern Australian”, 11 March 1845, p. 2.

<sup>150</sup> “Southern Australian”, 5 November 1840, p. 3; “Southern Australian”, 11 November 1842, p. 3; “Southern Star”, 9 November 1842, p. 4.

<sup>151</sup> “Southern Australian”, 11 November 1842, p. 3; similar “Adelaide Examiner”, 9 November 1842, p. 3.

<sup>152</sup> “Southern Star”, 9 November 1842, p. 4; “Register”, 13 June 1849, p. 3; “South Australian”, 16 June 1849, p. 2. Even the German-language newspapers got in on the act : “Deutsche Post für die australischen Colonien”, 20 September 1849, p. 63. See also “Register”, 29 November 1848, p. 3; “Register”, 11 May 1852, p. 3; “Adelaide Times”, 12 May 1852, p. 3.

<sup>153</sup> “Register”, 12 March 1850, p. 3. See also “Register”, 13 May 1851, p. 2; “Austral Examiner”, 16 May 1851, p. 6.

dicial views on this had several aspects. One was exhortatory : in the first years of the settlement, especially, the Judge exhorted the colonists to treat the Aborigines well. We have seen that Jeffcott J. did this at the first sessions in May 1837. Later, for example in July 1844 when a native man stood accused of killing a settler, Cooper J. – choosing his words carefully, it would seem – expressed the hope that, as in the past, it could be continue to be said in the future that ‘in no case [...] a white man’s actions were the means of causing a black man to commit mischief’.<sup>154</sup> In 1849, the Judge exhorted all involved in the administration of the law to act ‘with integrity, meting out the same measure of justice to black men and white men’.<sup>155</sup>

The exhortatory aspect of the Judge’s charge merged imperceptibly into its deterrent function, that is pronouncements that condign punishment would follow any infringement of the Aborigines’ rights. As we have seen, in his charge to the first grand jury Jeffcott J. both threatened punishment against those who failed to treat Aborigines well and provided a more general indication that divine blessings would be showered on the Province if it lived in amity with the Aborigines. Shortly after the “Maria” incident (in which a punitive party had been sent to dispense summary justice to Aborigines in an area in which shipwrecked white people had recently been killed by them, and following the expression of a view by Cooper J. that the Aborigines concerned were not amenable to being tried in the local Courts),<sup>156</sup> Cooper J. warned the colonists in the following blunt terms :

[W]hatever question may be raised as to the right to try any of the aborigines for aggressions upon settlers or others, no question can arise as to the right to try British subjects for aggression upon the aborigines, and I hope the law will never be found wanting in strength to avenge their wrongs. [...] There was] no technical difficulty that can arise to screen the white man from punishment.<sup>157</sup>

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<sup>154</sup> “Register”, 3 July 1844, p. 3; “Southern Australian”, 5 July 1844, p. 2.

<sup>155</sup> “Register”, 28 November 1849, p. 4; similar “Adelaide Times”, 29 November 1849, p. 3.

<sup>156</sup> For an account of this incident, see, *e.g.*, Bennett, *Cooper C.J.*, pp. 59-62; Castles/Harris, *Law-makers and Wayward Whigs*, pp. 13-16; Foster, *Fatal Collisions : the South Australian Frontier and the Violence of Memory* (Wakefield Press, Adelaide 2001), pp. 13-28; Pope, *Aborigines and the Criminal Law*, pp. 55ff and the references there cited.

<sup>157</sup> “Register”, 7 November 1840, p. 2; “Southern Australian”, 5 November 1840, p. 3; “Adelaide Chronicle and South Australian Literary Record”, 4 November 1840, p. 3.

All three newspapers carried this charge in full, and all added editorial commentary on it.<sup>158</sup> His Honour returned to this theme in July 1842, drawing ‘general attention’ to the fact that ‘a man might shoot a native when he might shoot a white man, not under other circumstances’.<sup>159</sup>

Thirdly, the Judge’s charge had also a condemnatory aspect in cases in which condemnation was deserved. This became more frequent as time went on and clashes occurred between settlers and Aborigines, something which clearly troubled Cooper J. (and many others) greatly. In July 1843, one defendant was accused of the murder of an Aborigine. Cooper J. observed that ‘cases of this kind were much more frequent, than was creditable to the reputation of the colony’ and that a verdict at the last sessions acquitting a person accused of killing an Aborigine was ‘very merciful, but not so merciful, his Honour trusted, as to countenance the idea that the lives of the natives are held too cheaply’.<sup>160</sup> In another case, involving the killing of an Aborigine by the settler Donnelly – whose fate we shall discover shortly – his Honour ‘observed a reluctance to bring white men to justice for outrages committed on the natives’<sup>161</sup> which was a blot on the Province’s self-image as a place of ‘superior morality and freedom’.<sup>162</sup> The next day, the Judge explained that his remarks had been directed at those who had observed the crime in question but not come forward rather than more generally.<sup>163</sup>

Finally, the Judge might use his charge simply as a means of general commentary on the relations between settlers and Aborigines. It was noted in 1839 that settlers had been killed by Aborigines. But ‘there is this consolation, that they [the killings] have not been committed in one place, or by a body or tribe of natives, but by one or two individuals, which shows that there is no combination by the aborigines against the British settlers’.<sup>164</sup> By 1845, his Honour could report that the conduct of the Aborigi-

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<sup>158</sup> “Register”, 7 November 1840, p. 2; “Southern Australian”, 10 November 1840, p. 2; “Adelaide Chronicle and South Australian Literary Record”, 4 November 1840, p. 3.

<sup>159</sup> GRG 36/10 (July 1842).

<sup>160</sup> “Register”, 19 July 1843, p. 3; “Southern Australian”, 21 July 1843, p. 3.

<sup>161</sup> “Register”, 25 November 1846, p. 3; “South Australian”, 27 November 1846, p. 5; “South Australian Gazette and Colonial Register”, 28 November 1846, p. 3.

<sup>162</sup> “South Australian”, 27 November 1846, p. 6.

<sup>163</sup> “Register”, 28 November 1846, p. 3; “South Australian”, 27 November 1846, p. 5.

<sup>164</sup> “Register”, 25 May 1839, p. 3. See further Bennett, *Cooper C.J.*, p. 56.



nes in the settled areas was improving.<sup>165</sup> Or the comments might refer more specifically to the Aborigines' status in law. This was done, for example, in the March 1839 sessions, in which Jickling A.J. called on the grand jury not to find a true bill against an Aborigine who had set fire to grass on the grounds that the natives probably believed that they had a right to do so.<sup>166</sup> Shortly afterwards, Cooper J. expressed the view that the Aborigines 'knew, as far as they could be expected to understand, those rules of justice'<sup>167</sup> applying to them and hoped, although this statement was 'not connected with the duties of a Grand Jury',<sup>168</sup> that some of the grand jurymen might feel able to support the work of German missionaries among the Aborigines. The Aborigines' status in law became, however, a legal issue of some importance as the years wore on<sup>169</sup> and it was decided that they could be tried for offences committed against each other.<sup>170</sup> This was the subject of a highly interesting grand jury presentment in May 1851. It will be dealt with, therefore, under the next heading.

Of course, there is room to dispute the precise meaning of all these utterances, their suitability to the circumstances of the colony and, most importantly, the extent to which their exhortatory and deterrent functions were reflected in the practice of the prosecution authorities, the police and the colonists generally. A recent study of the treatment of Aborigines before the criminal Courts of early South Australia comes up with a very complex picture.<sup>171</sup> It is not the function of this essay to add to that debate.

However, it is certainly true to say that the colonists who read the newspapers and the Judge's charge or who heard of its contents in this respect were put on notice that any significant ill-treatment of the Aborigines might at least possibly result in a risk of prosecution if – as is the case with any crime – it came to the notice of the authorities.

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<sup>165</sup> "Register", 10 September 1845, p. 3. See also "South Australian", 9 May 1847, p. 5 (comments on inter-racial violence as sheep farming extends into previously unsettled districts).

<sup>166</sup> "Register", 9 March 1839, p. 7; "Southern Australian", 13 March 1839, p. 6.

<sup>167</sup> "Register", 27 July 1839, p. 6.

<sup>168</sup> "Southern Australian", 24 July 1839, p. 3.

<sup>169</sup> See "Register", 7 November 1840, p. 2; "Southern Australian", 5 November 1840, p. 3; 10 November 1840, p. 2; "Adelaide Chronicle and South Australian Literary Record", 4 November 1840, p. 3 (following on the "Maria" incident); "Southern Australian", 5 March 1841, p. 3; Bennett, *Cooper C.J.*, Ch. 5.

<sup>170</sup> A rule that had been explained and defended in earlier charges to the grand jury ("Register", 16 September 1846, p. 3; "South Australian Gazette and Colonial Register", 19 September 1846, p. 3; "Register", 14 June 1848, p. 3; "South Australian", 13 June 1848, p. 2).

<sup>171</sup> See below, fn 222.

This was a form of deterrence in addition to that provided by the tenacious investigations of the Protector of Aborigines.<sup>172</sup> The public execution of the settler Donelly in 1847 for the murder of an Aborigine<sup>173</sup> – a crime which Cooper J. had not hesitated to describe as ‘unprovoked’ and ‘inhuman’<sup>174</sup> to the grand jury – indicated that such fears would not be entirely without justification, even if it might be said that Donelly’s case was an extreme one.<sup>175</sup> That being so, the existence of the grand jury and of the Judge’s charge to it not only provides us with an extraordinarily valuable account of the law’s official position with respect to the Aborigines, expressed on a solemn and regularly recurring occasion, but also provided the community of that time with a warning of the possible consequences of misbehaviour.

### 3. Grand jury presentments

In addition to the Judge’s charge to the grand jury, the grand jury system also provided on occasion a valuable insight into the opinion of the grand jurors on those occasions on which the grand jury made a presentment, as grand juries were by common-law tradition entitled to do.

At common law, a grand jury could of course present a person for trial of its own knowledge, that is, without the presentation of a bill of indictment by some other person (whether the Crown or a private prosecutor).<sup>176</sup> As far as the author is aware, this never happened in South Australia, and from 1843 this course was probably no longer available (the point appears never to have been tested), or at least not without the consent of the Crown, as from that year onwards a statute required all prosecutions on

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<sup>172</sup> Pope, *Aborigines and the Criminal Law*, p. 267.

<sup>173</sup> Which was of course also reported in the newspapers, e.g. “Register”, 31 March 1847, p. 2; “South Australian”, 30 March 1847, pp. 5f. The latter journal had, in an editorial of 16 March (pp. 3f), advocated the hanging of Donelly and drew a distinction between the treatment meted out to Aborigines in New South Wales and that in South Australia.

<sup>174</sup> “Register”, 25 November 1846, p. 3; “South Australian”, 27 November 1846, p. 6; “South Australian Gazette and Colonial Register”, 28 November 1846, p. 3.

<sup>175</sup> Pope, *Aborigines and the Criminal Law*, pp. 236, 238. The reluctance of the witnesses to testify does, however, throw some doubt on Dr Pope’s rationalisation of this case as an exception based on the breaking of the frontier code by the accused and the consequent unavailability of the assistance of other settlers to him.

<sup>176</sup> See, e.g., Baker, *An Introduction to English Legal History* (3rd ed., Butterworths, London 1990), pp. 29, 576f; Younger, *The People’s Panel*, p. 1; and note the qualification in Pollock/Maitland, *The History of English Law before the Time of Edward I* Volume II (2nd ed., Cambridge U.P. 1968), p. 643. South Australia also presumably inherited s 99 of the *Highway Act* 1835 (U.K.) on its foundation.

indictment to be authorised by the Crown.<sup>177</sup> Nor did a grand jury in South Australia give itself the function of a roving commission, as occasionally and famously has happened in the United States, or exercise semi-governmental functions such as approving proposed roads or bridges (other than, as we shall see, occasionally inspecting the gaol).<sup>178</sup> And no dramatic historical event like the American Revolution, in which grand juries might have played their part in representing popular feeling,<sup>179</sup> ever occurred in Australia. However, a grand jury could also make a presentment that commented on any subject that took its fancy (which in the United States is apparently nowadays called a report).<sup>180</sup> The grand juries of South Australia did that on several occasions. In this respect, their contemporary function, like that of the grand juries in colonial America<sup>181</sup> although no doubt in a somewhat less extensive way, was that of a substitute for the fully democratic legislative assembly which South Australia received in 1857. In carrying out this function, grand juries provided a number of documents of some value not only to the legal history, but also to the more general historical record of South Australia.

It should be recalled, at the outset, that the qualifications for grand jurors always excluded the lower strata of society. From 1843, as we have seen, there was a four-part test: grand jurors had to own a specified amount of real or personal property, be entitled to the degree of Esquire or any higher title, be a Justice of the Peace or belong to certain occupational groups. Nevertheless, in the circumstances of the colony this did not mean that only the very top echelons of society were eligible to serve: once, as noted, an illiterate (Matthew or Mick Jagger) was excused on that basis, and the list contained a good number of small businessmen such as drapers, bootmakers and butchers.<sup>182</sup> The reports of the grand jury's composition in the newspapers sometimes noted the occupations of the grand jurors (and, generally speaking, in every sessions

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<sup>177</sup> See below, p. 47. The practice at common law was to indict on a presentment (Edwards, *Grand Jury*, p. 131), which, it seems, would not have been possible after 1843 without the Attorney-General's consent.

<sup>178</sup> See, e.g., Edwards, *Grand Jury*, pp. 121f; Frankel/Naftalis, *Grand Jury*, p. 15; Holdsworth, *A History of English Law* (Methuen, London 1938), pp. 146-151; Kadish, (1996) 25 Florida State ULR 1, 7, 10f; Younger, *The People's Panel*, Chh. 11, 12, pp. 2, 16-20, 136f, 159f, 232-239.

<sup>179</sup> Younger, *The People's Panel*, Ch. 3.

<sup>180</sup> Frankel/Naftalis, *Grand Jury*, p. 31. This word does not occur in any of the contemporary South Australian sources, and will therefore be avoided here, despite the useful distinction it enables to be made.

<sup>181</sup> Leipold, (1995) 80 Cornell LR 260, 283; Simmons, (2002) 82 Boston ULR 1, 10f; Younger, *The People's Panel*, Ch. 2.

<sup>182</sup> See above, fn 104.

several were drapers, bootmakers, butchers *etc.*), and provided something of a clue to the social background of those expressing the opinions found in any particular presentment. But even in cases in which occupations were not noted, we may assume that the grand jury, although not encompassing all sectors of society, was a body that did not draw its membership solely from the upper class of colonial society.

Possibly the first presentment by a grand jury was made at the end of the first sittings, when the foreman of the first grand jury, Colonel Light, came into Court and thanked Jeffcott J. in the name of the grand jury, which thanks were cordially reciprocated.<sup>183</sup> However, the first recorded presentment of any significance occurred at the third sessions of the Court in March 1839. The grand jury expressed its approval of the idea of creating a Court of Quarter Sessions to try the less important cases which had just troubled them, and began a tradition of grand jury presentments by pointing out the need to ensure the tranquillity of the Aboriginal natives, the colony's security from possible endangerment by them and the desirability of good relationships with them.<sup>184</sup> This produced a reply from the Governor of the colony, in which he praised the colonists on their 'degree of judgement and of humanity scarcely ever equalled'<sup>185</sup> in maintaining good relationships with the Aborigines.

The grand jury of March 1840 continued this enlightened tone by making a presentment on the state of the gaol and the religious facilities at it to the Judge, a presentment which received the unusual honour of being reprinted in the British Parliamentary Papers.<sup>186</sup> At the next sessions, his Honour felt it necessary to inform the grand jury of the action that had been taken as a result of that presentment.<sup>187</sup> That grand jury, for its part, also called for the establishment of a Court of Quarter Sessions and for witnesses to be on time.<sup>188</sup> The need for a Court of Quarter Sessions and the state of the gaol<sup>189</sup> were again taken up by the grand jury in March 1841.<sup>190</sup> The grand jury of August 1841, according to the caption of a drawing in a local newspaper, 'present-

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<sup>183</sup> "Register", 8 July 1837, p. 4.

<sup>184</sup> "Register", 23 March 1839, p. 2.

<sup>185</sup> "Register", 23 March 1839, pp. 3f; "Southern Australian", 3 April 1839, p. 3.

<sup>186</sup> No. 394 of 1841, Appendix, p. 315.

<sup>187</sup> "Register", 11 July 1840, p. 6; "Southern Australian", 10 July 1840, p. 3.

<sup>188</sup> "Southern Australian", 14 July 1840, p. 2.

<sup>189</sup> Ordinance No. 7 of 1840 had authorised a new gaol for the Province. As the preamble to Ordinance No. 4 of 1842 recites, the only copies of the former Ordinance were destroyed by fire.

<sup>190</sup> "Register", 13 March 1841, p. 3; "Southern Australian", 16 March 1841, p. 3.

ed to his Honor the house on North Terrace, acre no. 6, formerly occupied by Messrs Mann and Gwynne', two leading legal luminaries. This sounds rather generous until the report is read and we discover that the house was presented by the grand jury owing to the fact that it was 'a public nuisance, extremely destructive to the morals of the community, and tending, in a very great degree[,] to depreciate the value of the neighbouring property'.<sup>191</sup> There is no record of this presentment in any other newspaper, but possibly the other newspapers decided to suppress this report in order not to call attention to the problem and possibly lead their readers astray or transmit this shameful news to the colony's friends in England. However, the presentment certainly did occur, and the original of the grand jury's presentment, which confirms that the house concerned was a 'House of ill Fame and Repute',<sup>192</sup> has been preserved together with the indictments that went to the grand jury. It is signed by the foreman, A.H. Davis – a name which will recur in this story – and many of the grand jurors, and is stated to have been written in the 'Grand Jury Room'. The result of this presentment, at all events, was that the Advocate-General said that he would look into it; there was no immediate prosecution of the persons responsible as would have been the case if they had been formally presented by the grand jury for trial at that sessions.

It appears that no grand jury in 1842 made a presentment, and the situation was somewhat changed from March 1843, given that the Province received in that year a Legislative Council of its own.<sup>193</sup> This body provided at least a rudimentary forum in which matters of concern to the colonists might be raised, and its proceedings began to be reported in some detail in the press. It is probably no coincidence, after the grand jury of March 1843 had expressed the view that 'the general feelings of the Colonists are decidedly unfavourable to'<sup>194</sup> the scheme referred to earlier for importing convict boys,<sup>195</sup> that no grand jury made a presentment for some years. Even so, a petition was addressed to the grand jury of March 1844 by one Jane Noonan, the wife of a prison inmate, who claimed that she was destitute and sought the authorities' at-

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<sup>191</sup> "Adelaide Independent and Cabinet of Amusement", 5 August 1841, p. 2. On this newspaper, see Pitt, *The Press in South Australia 1836-1850* (Wakefield, Adelaide 1946), p. 59. The spelling "Honor" was usual in early South Australia, although now "Honour" is now almost universal.

<sup>192</sup> State Archives of South Australia, GRG 36/1/2. The wording of the original presentment differed slightly but insignificantly from the newspaper report quoted in the text.

<sup>193</sup> Castles/Harris, *Lawmakers and Wayward Whigs*, pp. 38f.

<sup>194</sup> GRG 24/6/1843/341; see further GRG 24/4/7/27f; GRG 2/5/4/No. 74 of 20 April 1843 (Governor's report home failed to mention grand jury's presentment).

<sup>195</sup> See above, fn 145.

tention to her plight. When the foreman of the grand jury had read the petition, the Judge promised to ‘mention the subject’ in the right quarters.<sup>196</sup> Research reveals, however, that the Noonans were engaged in a petitioning campaign at this point, and their petitions to various bodies other than the grand jury had only limited success.<sup>197</sup> So perhaps we should not read too much into this.

After that, there were no petitions or presentments for some years, although there was a jocular attempt by Mr Poulden, a legal practitioner, to present a bill to the grand jury on the state of certain city streets in June 1849.<sup>198</sup> At the next sessions, however, the grand jury returned to the theme of relations with the Aborigines, which it had been prompted to do by a number of cases involving killings and violence between settlers and Aborigines or among the Aborigines themselves. They expressed the view that

previous to these melancholy events of murder of and by the aborigines, the districts in which they occurred were not sufficiently under police control, or the oversight of an officer, whose humane duty it is to protect the savage, and to guard the settlers from the incursions of the natives.<sup>199</sup>

The Judge (Mann A.J.) thought this presentment important enough to transmit it to the Governor.<sup>200</sup> Their presentment also suggests that some confidence, perhaps based on experience, was felt in the ability of the police to prevent outrages against the Aborigines if they were only present in a particular district in sufficient numbers, a statement that is in accord with the results of a recent study.<sup>201</sup> Commenting in a more general fashion on the performance of the police was something in which other grand juries also indulged.<sup>202</sup>

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<sup>196</sup> “Register”, 6 March 1844, p. 3; “Southern Australian”, 3 March 1844, p. 2. Cf. Younger, *The People’s Panel*, p. 64.

<sup>197</sup> GRG 24/4/1844/263 (Sheriff has forwarded petitions to the Governor, who replies saying that no assistance will be granted but that a small sum of money has been provided to the Emigration Agent for providing discretionary relief to Mrs Noonan; at the same time, the Sheriff is instructed not to forward any further petitions); GRG 24/6/1844/1194, 1205 (other petitions by the Noonans).

<sup>198</sup> “Register”, 13 June 1849, p. 3; “South Australian Gazette and Mining Journal”, 14 June 1849, p. 3.

<sup>199</sup> “Register”, 19 September 1849, p. 3; “South Australian”, 18 September 1849, p. 3; “South Australian Gazette and Mining Journal”, 20 September 1849, p. 3.

<sup>200</sup> “Register”, 19 September 1849, p. 3; “South Australian”, 18 September 1849, p. 3; “Adelaide Railway Times, Mining Record and Weekly Political Register”, 19 September 1849, p. 2.

<sup>201</sup> Pope, *Aborigines and the Criminal Law*, pp. 244f, 252, 257-260.

<sup>202</sup> “Register”, 13 February 1851, p. 3; “South Australian Gazette and Mining Journal”, 13 February 1851, p. 3; below, fn 253.

By far the most important presentment made by a grand jury – a significant document not only in South Australian legal history, but in the general history of early South Australia – returned to the theme of relations with the Aborigines. The grand jury of May 1851, the members of which were drawn from the letters B – H, and which had earlier solved the difficulty with swearing the Malay witness without the intervention of the Court, had been directed by Cooper J. to treat two cases of violence among the Aborigines as subject to the colony’s law. This provided the grand jury with an opportunity to express their opinion on the law as it stood in a remarkable document which gives a fascinating insight into the attitudes of a representative group of early South Australian settlers towards, and their perceptions of, the legal status of the Aborigines as they came into contact with the British settlers.<sup>203</sup> Their presentment was reproduced, despite its length, in at least six contemporary Adelaide newspapers.<sup>204</sup>

It is worth noting that the grand jury had initially been discouraged by the Judge when they had asked to visit the gaol.

The foreman said it was their wish to make a presentment on the subject [of the gaol], as was the custom of Grand Juries in England.

His Honor — It is not the province of the Grand Jury to make presentments on any subject not given to them in charge.

The foreman said the Grand Jury had no wish to do anything irregularly; but they felt bound to mention that matter in what they considered the proper manner.<sup>205</sup>

They thereupon left the Court in the company of the head turnkey and returned after a couple of hours<sup>206</sup> with a presentment on the gaol (in which they found certain fairly

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<sup>203</sup> And which also shows that Kirby J. was right to qualify his statement about settler attitudes in *Yougarla v. Western Australia* (2001) 207 CLR 344, 381 ([g]enerally speaking’).

<sup>204</sup> “Register”, 16 May 1851, p. 3; “Observer”, 17 May 1851, p. 8; “South Australian”, 16 May 1851, p. 3; “South Australian Gazette and Mining Journal”, 17 May 1851, p. 3; “Adelaide Times”, 16 May 1851, p. 2; “Austral Examiner”, 23 May 1851, p. 11.

<sup>205</sup> “Register”, 16 May 1851, p. 3. Similar : “Adelaide Times”, 16 May 1851, p. 2.

<sup>206</sup> “Adelaide Times”, 16 May 1851, p. 2.

minor defects),<sup>207</sup> complimentary remarks on the work of the police force and their presentment on the liability of Aborigines to the sanctions of the criminal law, which, given its length, must have been written in advance. They presented these remarks in an open and ‘crowded’<sup>208</sup> Court. It might be thought that it shows some cunning to ask simply to visit the gaol, a task which the grand jury had undertaken relatively frequently in South Australia, and then to spring a presentment on Aborigines, which must have been written before the request was made, on a Court which had reluctantly conceded the right to make a presentment on another subject.

The grand jury’s presentment was very long, thirteen paragraphs in fact. It amply justified the description of it in one newspaper as ‘the very distinct opinion of an intelligent Grand Jury’.<sup>209</sup> The grand jury recorded that they had, in accordance with his Honour’s instructions, found true bills in two separate cases of black-on-black violence, each involving multiple defendants. But in doing so, many of the grand jurors had done ‘violence to their own natural feelings of equity and justice’. They thought that it was ‘morally incumbent’ on the colonists

to confine their interference to the mutual protection of both races in their intercourse with each other, and not to meddle with laws or usages having the force of laws among savages, in their conduct towards their own race.

The Grand Jurors believe, from the evidence adduced, especially of the Protector of the Aborigines, that the slaying of the native at Yorke’s Peninsula was in accordance with a law common in all the native tribes – a law analogous to that which regards spies in civilised countries – that the native who was killed knew the law – that he ran the risk of violating it, and suffered in consequence : and that in the other case, the native seems to have been the victim of a prevalent superstition among the aborigines.

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<sup>207</sup> The chief one of which was the lack of single dormitories; they favoured ‘single sleeping cells’, ‘in the interests of morality’ : *e.g.* “Register”, 16 May 1851, p. 3.

<sup>208</sup> “South Australian Gazette and Mining Journal”, 17 May 1851, p. 3; “Adelaide Times”, 16 May 1851, p. 3.

<sup>209</sup> “South Australian Gazette and Mining Journal”, 17 May 1851, p. 2. And it also amply justifies the similar adjectives applied to it by Bennett, *Cooper C.J.*, pp. 70f.



That the Grand Jurors apprehend that, prior to the occupation of this country by the colonists, all these native tribes, as distinct communities (however small)[,] would have been held by all jurists to be in a situation to make laws and adopt usages for their own protection and government – that it can scarcely be even assumed that the limited intercourse which has yet subsisted between the colonists and the aborigines, especially on the confines of the province, should have sufficed to impart such information to these uncivilised men as would justify us in breaking up their own internal system for the punishment of offences to which all their previous traditions and habits give force and sanction.

That if the character of British subjects is to be enforced upon them, and they are at once to be made amenable to the severe penalties of British law for moral offences between themselves, then it becomes a serious question whether we ourselves are not committing a similar offence (presuming the extreme penalty of the law were inflicted) by punishing that as a crime which, in the minds of the persons punished, was simply the enforcement of their own mode of justice.

That, admitting the aborigines are to the fullest extent entitled to the protection of British law, it is but reasonable that before the awful severities of its infraction are enforced, the blessing and advantages in relation to personal protection and security which it affords, should be made appreciable to those whom by our own voluntary act, and without provocation, we have forced to submit to our sway, and now seek to coerce to our habits.<sup>210</sup>

And they accordingly called for mercy to be shown to the Aborigines concerned if they were sent to trial and for further consideration to be given to the extent to which the colonial Courts should deal with cases of black-on-black violence. This presentment attracted the signatures of eighteen grand jurors; two others were absent. Two further grand jurors dissented from the presentment on the gaol, but, significantly, not from that on Aborigines.

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<sup>210</sup> As above, fn 204.

To this presentment, Cooper J. responded with his standard argument that Aborigines were British subjects now too and were therefore liable to criminal punishment in the same way as other British subjects. This was the principle under which Aborigines were punished for crimes against white people and *vice versa*. (All present would have been reminded at this point that it was Cooper J.'s opinion that the Aborigines involved in the "Maria" incident were not liable to criminal punishment for acts committed against the settlers that prompted the sending out of the punitive expedition referred to earlier.)<sup>211</sup> Cooper J. added that he had always been vigilant to ensure that Aborigines received justice at the hands of the colonial Courts and had counsel assigned to defend them, and was of the view that only Aborigines who were aware of British law were amenable to its sanctions.<sup>212</sup>

While his Honour thus defended the law in public, he wrote a letter to the Governor essentially agreeing with the grand jury's view on the propriety, as distinct from the legality, of subjecting Aborigines such as those he had just tried to the law given their lack of notice of the fact that the law might be applied to them or what it contained.<sup>213</sup> This view is not surprising given his Honour's earlier reservations about placing Aborigines on trial.<sup>214</sup> He had already given a strong hint in summing up to the petty jury in the case involving the Yorke's Peninsula killings that he would recommend clemency if the accused were found guilty, and referred to the distinction between legality and wise policy in putting Aborigines on their trial.<sup>215</sup> (The other set of defendants mentioned by the grand jury had been acquitted after Cooper J. directed the petty jury strongly in their favour.)<sup>216</sup>

The Aborigines in the Yorke's Peninsula case who had been found guilty were initially reprieved; the "Register" noted, despite what we shall see was its opposition to the

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<sup>211</sup> See above, fn 156.

<sup>212</sup> See further Bennett, *Cooper C.J.*, p. 71. The statement about counsel being assigned to defend Aborigines is corroborated in the "Adelaide Times", 15 August 1850, p. 3, where Crawford J. was told that the provision of counsel paid for by the government was 'customary in cases where the aborigines were implicated' and that it was paid for 'liberally'. See further Pope, *Aborigines and the Criminal Law*, pp. 262f.

<sup>213</sup> GRG 24/6/1851/1564, 1721.

<sup>214</sup> See Pope, *Aborigines and the Criminal Law*, Ch. 4.

<sup>215</sup> "Register", 20 May 1851, p. 3. This hint was clear enough to the writer of the letter to the editor of the "Austral Examiner", 6 June 1851, p. 10.

<sup>216</sup> "Register", 21 May 1851, p. 2. See further Pope, *Aborigines and the Criminal Law*, p. 137.

broader principles advocated by the grand jury, that this course would meet with ‘the unanimous approval of the community’ and avoid ‘manifest injustice and inhumanity’.<sup>217</sup> The Executive Council met on 11 June 1851 and resolved to recommend a full pardon for the Aborigines under sentence of death as recommended by his Honour, noting that they had acted in accordance with tribal custom.<sup>218</sup> The pardon was duly issued, the Governor asking the responsible official ‘to see to the safe return’<sup>219</sup> of the Aborigines. It is impossible to deny that the grand jury’s presentment had some effect on this result.<sup>220</sup>

This result,<sup>221</sup> which went beyond mere warm-inner-glow rhetoric,<sup>222</sup> was achieved, and the opinions about Aboriginal law and custom earlier quoted were held, by quite ordinary people. None of the grand jurors who made the presentment had a particularly high rank in colonial society or, with the notable exception of F.H. Faulding (whose name lives on as that of a well-known chemical company), left any other significant trace on South Australia. The occupations of most of the grand jurors are listed in the newspaper : they were drapers, merchants, cabinet makers and so on – a typical South Australian grand jury consisting largely of small businessmen, Justices of the Peace, and, in this case, three grand jurors who gave their occupation simply as “gentleman”.<sup>223</sup>

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<sup>217</sup> 7 June 1851, p. 2.

<sup>218</sup> GRG 40/1/3/334f; Pope, *Aborigines and the Criminal Law*, p. 140. However, the “Austral Examiner” of 13 June 1851, p. 9, still thought that their sentence would be commuted to twelve months’ imprisonment.

<sup>219</sup> GRG 24/6/1851/1721, 1752. No attempt is made here to determine whether two or three Aborigines were involved (see Pope, *Aborigines and the Criminal Law*, p. 137 fn 54), as this is not relevant to the topic here dealt with; but some official sources, as well as newspaper reports, seem to suggest that three pardons were issued, not just two.

<sup>220</sup> In fact, A.H. Davis later claimed credit for it on behalf of the grand jury : see “Observer”, 27 February 1858, p. 2.

<sup>221</sup> Another result of the grand jury’s presentment might well be the letter sent to the Governor by the Protector of Aborigines on 30 August 1851 (GRG 52/7/1/287-289) dealing with the Aborigines currently serving gaol sentences (there were fifteen; the longest sentence was two years) and answering the Governor’s query whether clemency should be exercised in respect of any of them. The Protector recommended against this for those who had killed settlers on the grounds that otherwise the latter might ‘be disposed to administer their own law in self-defence’.

<sup>222</sup> As Pope originally stated was the sole difference between South Australia and the other colonies : Pope, *Resistance and Retaliation : Aboriginal-European Relations in Early Colonial South Australia* (Heritage Action, Bridgewater 1989), p. 147. The same author has since taken the very praiseworthy step of stating that some of his earlier conclusions were ‘intemperate’ (Pope, *Aborigines and the Criminal Law*, p. 261 fn 50).

<sup>223</sup> This assumes that one ignores J.O. Lines, who is listed in the “Register” as a grand juror but not in the Court’s records. There are slight variations in the other newspapers’ reports as well. The Court’s records show that there were other errors in the “Register’s” report; e.g. one C.J. Fox is listed in the “Register” instead of Charles James Fox Campbell. In reporting the presentment, the “Register” has

The *Biographical Index* shows that the grand jury also included a number of people who had lived in places such as Port Lincoln, Mount Gambier, McLaren Vale and Kingscote – that is, in districts well away from the City of Adelaide in which the average settler might well have had considerable contact with Aborigines who were still in their pre-settlement state. On the other hand, few of them even knew South Australia at the commencement of British settlement, most having arrived in the years after the first settlement.<sup>224</sup>

The foreman, A.H. Davis Esq., whom we have met earlier as the foreman of a previous grand jury, is listed in the *Biographical Index of South Australians 1836 – 1855*<sup>225</sup> as a teacher, publisher, gardener and merchant.<sup>226</sup> Much earlier, he had been an unsuccessful applicant for the position of Protector of Aborigines,<sup>227</sup> and in 1839<sup>228</sup> he gave a speech opposing retaliation against the Aborigines at a well-attended public meeting to consider the killings of settlers by Aborigines which had also been the subject of a grand jury charge.<sup>229</sup> He was, however, no follower of every latest fad; after the secret ballot had been introduced in South Australia, for example, he called (unsuccessfully) for the Province to revert to the earlier system of open voting.<sup>230</sup> Shortly after his death, he was described in Parliament as a man of ‘intelligence and [...] thorough conservativeness’.<sup>231</sup> That makes the opinions expressed in the presentment all the more remarkable.

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only twenty jurors, like the Court’s records; J.O. Lines has disappeared (possibly he was excused); and C.J.F. Campbell, who did not sign the presentment owing to absence, is listed under his correct name. This, together with the length of the presentment and the agreement among the newspapers as to its wording, leads one to think that official copies were provided to them by the Court or the grand jury itself – probably the latter.

<sup>224</sup> The *Biographical Index* shows that many whose dates of arrival are listed arrived in the late 1830s or early 1840s and only one, C.S. Hare, in 1836. On him, see his entry in the *Australian Dictionary of Biography*, vol. 4.

<sup>225</sup> Jill Statton (ed.); S.A. Genealogy and Heraldry Society, Adelaide 1986.

<sup>226</sup> The reason for this variety of occupations may be gleaned from Pike, *Paradise of Dissent*, pp. 141, 328. See also Main, “Social Foundation of South Australia : Men of Capital” in Richards (ed.), *The Flinders History of South Australia : Social History* (Wakefield, Netley 1986), p. 102, which records Davis’s opposition to the proposal to create a South Australian hereditary aristocracy, and the sketch of Davis in “First Corporation of the City of Adelaide” (1851) 1 *South Australian Magazine* 159, 161f.

<sup>227</sup> Pike, *Paradise of Dissent*, p. 439.

<sup>228</sup> “Register”, 11 May 1839, pp. 3, 5.

<sup>229</sup> See above, fn 164.

<sup>230</sup> *South Australian Parliamentary Debates*, House of Assembly, 29 April 1859, p. 4; Legislative Council, 2 May 1859, col. 5; House of Assembly, 4 May 1859, col. 9. This request ‘was received with bursts of laughter by the House’: “Register”, 30 April 1859, p. 2.

<sup>231</sup> *South Australian Parliamentary Debates*, House of Assembly, 28 June 1866, col. 125.

Davis later claimed the authorship of the presentment, stating ‘I took some pains at the time to draw up this document’.<sup>232</sup> This statement was made in February 1858 during another campaign for mercy in another black-on-black violence case that had led to convictions and a sentence of death. In support of this campaign, the presentment of May 1851 was wheeled out almost seven years after it was made.<sup>233</sup> Not content with writing to the newspaper and having the presentment re-printed,<sup>234</sup> A.H. Davis personally wrote to the Governor enclosing a copy of it and stating that

It was from the answers elicited from Mr Morehouse in the Grand Jury Room as Protector of the Aborigines that myself and the other Jurors were led to the conclusions at which we arrived, that cases of homicide between Native tribes do not come within the range of British law. I sincerely hope the law may be made definite on this point to avoid further difficulties.<sup>235</sup>

Again, however, the law was not changed; and it has to be said that there were advantages in leaving the treatment of Aborigines convicted of committing violence against each other to the Executive’s discretionary powers of mercy rather than enacting a blanket exemption for all such cases. But it is not within the scope of this study to pursue this question. In February 1858, however, the campaign against the death penalty for the convicted Aborigine based in part on the grand jury’s presentment of May 1851 was again successful, Boothby A.C.J. attending before the Executive Council when it considered the ‘numerously and respectably signed’<sup>236</sup> petitions for clemency.

It is interesting to observe that, in early July 1851, A.H. Davis stood for election to the Legislative Council for the district of West Torrens. He lost by two votes to C.S. Hare, one of the other grand jurymen of May 1851 and fellow-signatory of the pre-

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<sup>232</sup> “Observer”, 27 February 1858, p. 5.

<sup>233</sup> The arguments raised and the facts of the case are handily summarised in the “Observer”, 27 February 1858, pp. 5f.

<sup>234</sup> As above, fn 232.

<sup>235</sup> GRG 24/6/1858/247. Davis has mis-spelt the name of the Protector here; it was Moorhouse.

<sup>236</sup> GRG 40/1/4/412; his Honour’s trial notes may be found at GFG 24/6/1858/248.

sentment.<sup>237</sup> It is unlikely that either would have been keen to associate himself with an unpopular cause so soon before the election; accordingly, we may conclude that the opinions which the grand jury espoused in May had no little support in the community, and were not an eccentric view held only by the grand jurors who signed the presentment. (And it may be that it was fear of election-related grandstanding that explains Cooper J.'s initial half-hearted attempt to prevent the making of the presentment.) How broadly the support reached for the views expressed in the presentment may only be guessed at. It is however extraordinarily interesting that the Chairman of A.H. Davis's election committee was none other than R.D. Hanson,<sup>238</sup> who in July 1851 was appointed Acting Advocate-General<sup>239</sup> and later became South Australia's second Chief Justice. It would be interesting to know whether he had any influence on the opinions expressed by the grand jury.<sup>240</sup>

Whether the grand jury's opinion is very persuasive evidence of the facts which it asserts may be doubted. Although it obviously included a number of intelligent people who had had contact with the Aborigines, there were no lawyers or anthropologists on the grand jury, and there was probably not time for A.H. Davis to consult R.D. Hanson on the precise wording of the presentment, even if he had discussed such issues with him on prior occasions. But as evidence of the settlers' opinions about the legal and cultural status of the Aborigines and their relations with the settlers, the document is remarkable. Although petitions for mercy to be shown to particular Aborigines were 'not uncommon',<sup>241</sup> this presentment was not confined to an individual case but made broad and sweeping claims about the nature of Aboriginal society and law; it attracted support from a broad cross-section of the community in the grand jury and (as we shall see) three newspapers. The opinions expressed are surprisingly modern. It would take only a change of dates, and certainly some polishing of language to re-

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<sup>237</sup> See, e.g., "Register", 2 July 1851, p. 3; 4 July 1851, p. 1; "Observer", 9 June 1866, p. 5; "Adelaide Times", 2 July 1851, p. 3; Pike, *Paradise of Dissent*, pp. 430f, 433.

<sup>238</sup> "Register", 15 July 1851, p. 3; 18 July 1851, p. 2.

<sup>239</sup> See below, fn 324.

<sup>240</sup> Hanson was defending other prisoners at that session (but not the Aborigines concerned); that being so, it is probable that he had no dealings with the members of the grand jury while it was in session. Nevertheless, it may be that he had discussed the matter with Davis on some earlier occasion. On the other hand, too much should not perhaps be read into Hanson's support for Davis, as he supported other candidates as well; on his participation in the elections of 1851, see Brown, *Sir Richard Davies Hanson: A Biography* (unpublished, Adelaide 1940), Ch. 7.

<sup>241</sup> Pope, *Aborigines and the Criminal Law*, p. 80; see also pp. 80-83, 161. Indeed, the issue of Aboriginal liability for black-on-black violence was a live one in several Australian colonies at about this time: Cranston, "Aborigines and the Law: An Overview" (1973) 8 U Qld LJ 60, 62f.

move references to superior peoples, savagery and so on, to convert what was said in May 1851 into a debate about the recognition of Aboriginal customary law in the early twenty-first century.

That means, of course, that, as there are today, there were good arguments both in favour of and against the course proposed by the grand jury. It might be represented either as the law's declaring that Aboriginal life was of lesser value<sup>242</sup> and/or as a breach in the "one law for all" policy on which South Australia claimed to operate.<sup>243</sup> Or it might be seen as a merciful indulgence towards the Aborigines, or, even more significantly, as a recognition of the existence and status of their law alongside or outside the British law (which was essentially the position taken by the grand jury). The newspapers were divided. The "Register"<sup>244</sup> and the "South Australian", the Province's two oldest newspapers, disagreed with the grand jury, the latter on the ground that the criminal liability of Aborigines existed to protect Aboriginal women, 'who are regarded by the brutal males as property over whom they have the power of life and death'.<sup>245</sup> On the other hand, the "South Australian Gazette and Mining Journal",<sup>246</sup> the "Adelaide Times"<sup>247</sup> and the "Austral Examiner"<sup>248</sup> all essentially agreed with the grand jury,<sup>249</sup> and the great detail and thought which it had shown made it difficult for those newspapers to add much more by way of comment or argument. However, the "Adelaide Times", in its editorial, took the opportunity to suggest other topics, such as the bridge over the River Torrens, the law of debtor and creditor and so on, on which future grand juries could make a presentment, and 'hope[d] to see all future grand juries in the Province alive to their position as the conservators, not only of our judicial, but of our constitutional and moral rights'. This was supported by a letter to the editor in which the author suggested that 'the few persons'<sup>250</sup> who wished to see grand juries abolished were wrong, and that the existence of grand juries helped to keep prison managers on their toes and added to public confidence in the prisons.

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<sup>242</sup> Cf. Pope, *Aborigines and the Criminal Law*, p. 148-152.

<sup>243</sup> Pope, *Aborigines and the Criminal Law*, p. 47 *et passim*.

<sup>244</sup> 17 May 1851, p. 2. See also "Observer", 17 May 1851, p. 5. The "Register" appears to have changed its view to some extent shortly afterwards : 28 May 1853, p. 2.

<sup>245</sup> 16 May 1851, p. 2.

<sup>246</sup> 15 May 1851, p. 2.

<sup>247</sup> 21 May 1851, p. 3.

<sup>248</sup> 23 May 1851, p. 6. See also the letter to the editor, "Austral Examiner", 6 June 1851, p. 10.

<sup>249</sup> In addition, opposition to imposing the death penalty on Aborigines had been expressed by the "Deutsche Post für die australischen Colonien", 6 December 1849, p. 107.

<sup>250</sup> "Adelaide Times", 21 May 1851, p. 3. The letter was signed "PRESTIGE".

Despite all this debate and the pardoning of the Aborigines, it is uncertain whether there was any long-term result of the grand jury's presentment. If they had wanted lasting change they might more appropriately have directed their pleas to the prosecutors or, even more appropriately, to the legislature (of which, after all, C.S. Hare was shortly to become a member). The law as laid down by the Judges was tolerably clear; although there were arguments against as well as in favour of the law as it stood, they were unlikely to sway those who had laid it down in the first place. It may be, however, that prosecutors took the feeling of the jury into account in considering future prosecutions; after all, even after the abolition of grand juries in the following years, petty juries continued to exist.<sup>251</sup>

Certainly the Judges did not think that they had the power to re-consider the law as already laid down. At the next sessions, Crawford J., who had been in the colony for little more than a year, reminded the grand jury, with specific reference to Aborigines, that 'it is your duty as well as mine to administer the law as we find it'.<sup>252</sup> Even so, the grand jury at that sessions made a four-point presentment on such matters as the number of minor charges in the Court, unlicensed hawkers, brothels in the city and the excellent work of the police.<sup>253</sup> Having no doubt heard or read of the previous grand jury's efforts, they also asked the Judge whether they were required to inspect the gaol and received the answer that they were not.<sup>254</sup>

#### **4. The abolition of grand juries**

A surprising change comes over grand juries early in 1852. In 1851, as we have seen, the grand juries were full of life, making suggestions and presentments with gusto. In 1852, grand juries suddenly wish to commit suicide, and the suggestions that the three grand juries of 1852 make for the reform of the law centre on the abolition of grand

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<sup>251</sup> See, however, the petition in the "Observer", 29 December 1855, p. 3.

<sup>252</sup> "Register", 12 August 1851, p. 3; "South Australian", 12 August 1851, p. 3; "South Australian Gazette and Mining Journal", 14 August 1851, p. 2; "Adelaide Times", 12 August 1851, p. 3; "Austral Examiner", 15 August 1851, p. 6.

<sup>253</sup> "Register", 25 August 1851, p. 3; "Austral Examiner", 29 August 1851, p. 9.

<sup>254</sup> "South Australian Gazette and Mining Journal", 16 August 1851, p. 3.



juries.<sup>255</sup> This was achieved by the end of the year; the last grand jury sat in August 1852, and by the November criminal session the grand jury was no more. How can this sudden change be explained?

There had been calls for the abolition of grand juries before 1852. But they had been isolated and unheeded; no action had been taken. The calls for the abolition of the grand jury in 1852, however, resulted in their abolition by Act No. 10 of 1852. What can explain this sudden change? It is all the more surprising given the fact that South Australia remained proud of its origins as a non-convict colony and quite content to remain aloof from legal developments in other colonies,<sup>256</sup> as the offence taken at the appointment of a titular Governor-General of all the Australian colonies in the early 1850s showed.<sup>257</sup> The abolition of grand juries, however, removed an institution which like virtually no other was symbolic of South Australia's origins and continued status as a free colony; it was a 'palladium of British' – actually English<sup>258</sup> – 'liberty'<sup>259</sup> well suited to a free community, at least on the symbolic plane.

No doubt, some of the change can be explained by the attitude of Crawford J. to grand juries. In several charges to grand juries, his Honour – who was otherwise prepared to follow British tradition in the colonies, at least to the extent of being the first Judge in South Australia to wear the judicial wig<sup>260</sup> – expressed his opinion that the grand jury had become outmoded. It is clear that he was a Judge whom the colonists re-

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<sup>255</sup> In addition to the statements actually made by the grand juries, that of August 1852, according to a speaker in the Legislative Council in the following month, 'intended to make a presentation, but were unexpectedly dismissed': "Adelaide Times", 9 September 1852, p. 3.

<sup>256</sup> Sometimes contempt even for the Courts of the other colonies was expressed, as in the "South Australian Gazette and Mining Journal", 28 November 1850, p. 2.

<sup>257</sup> E.g. "Register", 18 July 1851, p. 2 (noting the enthusiastic reception for a toast to "Sir Henry Young [the Governor of South Australia], and no Viceroy over him' at a dinner for A.H. Davis); "South Australian", 30 May 1851, p. 3; "South Australian Gazette and Mining Journal", 29 May 1851, p. 22; "Adelaide Times", 28 May 1851, p. 3; 29 May 1851, p. 3; Pike, *Paradise of Dissent*, p. 439 (noting, however, that the gold rushes contributed to breaking down this sentiment); Ward, *Australia's First Governor-General: Sir Charles Fitzroy 1851 – 1855* (University of Sydney, Sydney 1953), pp. 11f.

<sup>258</sup> See the letter to The Times, 16 January 1922, p. 1; South Australian Parliamentary Debates, House of Assembly, 26 June 1866, coll. 74f; "South Australian Gazette and Colonial Register", 5 December 1846, p. 4. In the research for this article, the author came across one record of a grand jury's sitting in Scotland: The Times, 19 August 1794, p. 8.

<sup>259</sup> Rusden, *History of Australia* (Chapman & Hall, London 1883) Vol. III p. 521; see also at p. 518.

<sup>260</sup> Hague, *Mr Justice Crawford: Judge of the Supreme Court of South Australia 1850 – 1852* (unpublished, Adelaide 1995), p. 10.

spected and to whose opinion they would have listened.<sup>261</sup> We have already seen that, in February 1851, Crawford J., anticipating the actions of some later judicial opponents of the grand jury system in England,<sup>262</sup> had spurred on the grand jury to Herculean efforts of ignoring bills by expressing the opinion that their efforts were superfluous.<sup>263</sup> The obvious<sup>264</sup> recent change in the law that supported this opinion and to which Crawford J. referred<sup>265</sup> was the adoption of a statutory system based on *Sir John Jervis's Act*<sup>266</sup> under which Magistrates, after reviewing the evidence, decided whether to commit defendants to trial.

Crawford J. continued the assault in February 1852, suggesting to the grand jury that it should petition the legislature for the abolition of grand juries, a suggestion on which it acted<sup>267</sup> despite his Honour's reference to the fact that there were no grand juries in other colonies.<sup>268</sup> Any suggestion that South Australia should merely follow their lead was likely to be seen by more recalcitrant or chauvinistic South Australians

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<sup>261</sup> Crawford J. died in September 1852 (and thus did not live to see a criminal sessions without a grand jury or even the passing of the Act to abolish grand juries; see the witty comment of Hague, *Crawford J.*, p. 30 : Crawford J.'s hope that he would never again address a grand jury after August 1852 was realised, but because of his death, not their abolition). The statements made on the occasion of his death and funeral illustrate the respect in which he was held in the Province : e.g. "Register", 27 September 1852, p. 3; "Adelaide Times", 25 September 1852, p. 2; 2 October 1852, p. 5; "Adelaide Morning Chronicle", 27 September 1852, p. 3. See also Pike, *Paradise of Dissent*, pp. 291, 405.

<sup>262</sup> The Times, 11 January 1922, p. 12. The response of the grand jury hearing this judicial expression of opinion, however, was different from that of the South Australian one : it asked whether it could return true bills automatically, in all cases!

<sup>263</sup> See above, fn 76.

<sup>264</sup> English grand juries drew attention to this too : e.g. British Parliamentary Papers, 1847-1848 vol. LI, pp. 211ff. A letter to the editor of The Times by "Bulla Vera", 9 January 1849, p. 6, states that '[s]carcely a session passes in London without a presentment against the system' of grand juries by a grand jury. By 1866, it could be said that such a presentment 'has almost become a matter of common form' (The Times, 28 September 1866, p. 7), although it was not so common by 1887 as to be no longer worth publishing in legal journals ((1887) 84 LT 106). See also Younger, *The People's Panel*, pp. 57, 137f.

<sup>265</sup> Mann A.J. referred to committal proceedings too : "Register", 13 June 1849, p. 2; "South Australian", 12 June 1849, p. 2; "South Australian Gazette and Mining Journal", 14 June 1849, p. 3. As a glance at the newspapers shows, committal proceedings were conducted in South Australia before the adoption of *Sir John Jervis's Act*.

<sup>266</sup> *Indictable Offences Act* 1848 (U.K.), as adopted in South Australia by Ordinance No. 15 of 1849. On the historical change in the purpose of proceedings before the Justices in this period, see Frohlich, "Committal Procedures in England and Australia" (1975) 49 ALJ 561, 565. See now the legislation cited above, fn 1.

<sup>267</sup> "Register", 11 February 1852, p. 3; 18 February 1852, p. 3 (quoting the petition in full and indicating that it was now open for signature); "South Australian Gazette and Mining Journal", 12 February 1852, p. 3; "Adelaide Times", 11 February 1852, p. 3. The petition itself has not survived (personal communication with Mr Howard Coxon, Parliament of South Australia), although we shall see below that it had thirty-one signatories. According to F.S. Dutton in the Legislative Council (see the "Adelaide Times", 9 September 1852, p. 3), the grand jury of August 1852 'had intended to make a presentment [against the continuance of grand juries], but were unexpectedly dismissed'.

<sup>268</sup> "Register", 10 February 1852, p. 3; "Adelaide Times", 11 February 1852, p. 3.

as a case of ‘servilely copying the Ordinances of the convict colonies’<sup>269</sup> and a reason against abolition, not for it. Crawford J. had, after all, been in the Province at this stage for rather less than two years, and had clearly not understood the South Australian character in this respect.

It is also unknown whether he was aware of the fact that the foreman of the grand jury to which he spoke, T.S. O’Halloran J.P., had been the leader of the punitive expedition which was sent out against the Aborigines believed to have been responsible for the “Maria” killings over a decade before. Given that, in the previous year, a grand jury had expressed the views on Aborigines that have been recorded above, there was some poignancy in this. Even so, we should not imagine that the abolition of grand juries in late 1852 was a reaction to the grand jury’s presentment of May 1851. There is no evidence for, nor reason to suspect, such a long-delayed reaction to the mere expression of an opinion which Judges and legislators were free to ignore. R.D. Hanson, the Advocate-General who introduced the Bill to abolish grand juries, was, after all, a friend and supporter of the foreman of that jury, as we have seen. And it was not Crawford J., but Cooper J. who had presided over the criminal sessions of May 1851.

In his attack on grand juries in February 1852, Crawford J. said that they were ‘very generally considered useless’.<sup>270</sup> Returning to the fray before the last grand jury in August 1852, his Honour stated that they were ‘cumbrous and useless’<sup>271</sup> given the prohibition on private prosecutions without the Crown’s consent in South Australia, which a grand jury might have to decide upon without the benefit of committal proceedings and the exercise of the Crown prosecutor’s discretion to refuse to prosecute. It has to be said there was little evidence for such statements.<sup>272</sup> As we have seen, there was an explosion of “no bills” in the late 1840s and early 1850s,<sup>273</sup> and com-

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<sup>269</sup> “South Australian Gazette and Mining Journal”, 25 March 1848, pp. 2f.

<sup>270</sup> See above, fn 268.

<sup>271</sup> “Adelaide Times”, 10 August 1852, p. 3, which, like the “Adelaide Morning Chronicle”, 12 August 1852, p. 3, adds his Honour’s statement that ‘a watchful and vigilant press’ would also prevent the abuse of the power to prosecute. See also “Register”, 10 August 1852, p. 3, which modestly omits the reference to a vigilant press.

<sup>272</sup> Another such statement was made in the Legislative Council : see “Adelaide Times”, 8 September 1852, p. 3 (‘the complete effectiveness of preminary [*sic*] investigations’).

<sup>273</sup> See above, p. 10.

plaints that the magistrates were committing defendants for trials far too readily.<sup>274</sup> As late as May 1852, the “Register” went so far as to publish an editorial comment to the effect that the grand jury had been right to ignore one bill;<sup>275</sup> the grand jury of August 1852, which was the last to sit and heard Crawford J.’s opinions just quoted, ignored three bills on its first sitting day.<sup>276</sup> The grand jury system certainly saved some people from the trouble, expense and risk of a trial before the petty jury right up to its very last sitting in August 1852. But this did not sway Crawford J.

His more experienced colleague, Cooper J., also did not see avoiding unnecessary trials as the chief purpose of the grand jury. Speaking at the May 1852 sessions, his Honour indicated that grand juries were ‘not wholly useless’, despite the difficulty experienced in calling together a sufficient number of grand jurors, the careful investigation conducted, ‘at least in this colony’, by the magistrates, and the duties of fairness owed by the Crown prosecutor.

The system [...] might have been imperfect in some respects, yet it had caused gentlemen to take a part and an interest in the due administration of justice, and had led them to watch the proceedings of the Courts in a way that they would otherwise not have done. The duties imposed upon Grand Jurors and unpaid Magistrates had introduced in England a class of men that did not exist in any other country – men who studied and understood the law, and who, even in early life, had felt the necessity of preparing themselves for the positions they were likely to occupy.

Nevertheless, his Honour thought that ‘Grand Juries might safely be abolished’.<sup>277</sup> Those listening to this speech might well have thought that their participation in the

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<sup>274</sup> See above, fn 78.

<sup>275</sup> “Register”, 12 May 1852, p. 3.

<sup>276</sup> “Adelaide Times”, 10 August 1852, p. 3. The bills were for larceny, stealing from the person and forgery. The report in the “Register” (10 August 1852, p. 3) had a lower figure.

<sup>277</sup> “Register”, 11 May 1852, p. 3; similar : “Adelaide Times”, 12 May 1852, p. 3. His Honour had expressed a similar view to that quoted in a charge to a grand jury in 1844 : “South Australian”, 29 November 1844, p. 3. Bennett, *Cooper C.J.*, p. 93 deduces from this that Cooper J. opposed the abolition of grand juries. It is possible to come to this conclusion reading between the lines of what his Honour said.

legal system would have been adequately secured by service on petty juries<sup>278</sup> or, as The Times of London once suggested,<sup>279</sup> if they simply got together and talked amongst themselves.

As far as the state of public opinion in the Province is concerned, one history states that there was ‘considerable discussion in 1852, and great diversity of opinion’<sup>280</sup> on the abolition of grand juries. There is in fact little evidence of any discussion at all, let alone organised opposition to the abolition of grand juries. The “Register” came out in favour of abolition in February 1852, commenting on Crawford J.’s charge to the grand jury of that month and calling the grand jury a ‘supererogatory nuisance’.<sup>281</sup> The “Adelaide Morning Chronicle”, which understood itself as a conservative journal,<sup>282</sup> reprinted without comment a long editorial from The Times<sup>283</sup> favouring the abolition of the grand jury in England. The “South Australian Gazette and Mining Journal” had called for the abolition of grand juries as early as August 1850.<sup>284</sup> The “Register”, too, published items of news from England indicating that the abolition of grand juries was also on the agenda there,<sup>285</sup> and the “South Australian”, in coming out against ‘the useless and absurd system of grand juries’ in 1847, had indicated that ‘the system is about to be abolished in England’.<sup>286</sup> (Strictly speaking, this estimate was out by 101 years,<sup>287</sup> but reassurance that the proposal to abolish grand juries was at the vanguard of English legal reforms rather than a completely novel idea was important to many Australians in the nineteenth century.)

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<sup>278</sup> And indeed after the abolition of grand juries, his Honour made a similar argument in favour of the retention of trial by jury : Supreme Court Judges’ letter book, Library, Supreme Court of South Australia, Cooper J. to Colonial Secretary, June 1853; Taylor, “South Australia’s Judicature Act Reforms of 1853 : The First Attempt to Fuse Law and Equity in the British Empire” (2001) 22 *Jo Leg Hist* 55, 70 fn 71. For a rebuttal to the similar argument against the abolition of grand juries in England, see the letter to the editor of The Times by “Bulla Vera”, 9 January 1849, p. 6.

<sup>279</sup> 28 September 1866, p. 7.

<sup>280</sup> Hodder, *The History of South Australia from its Foundation to the Year of its Jubilee, with a Chronological Summary of all the Principal Events of Interest up to Date* (Samson Low, Marston & Co., London 1893), Vol. I p. 279.

<sup>281</sup> 12 February 1852, p. 3.

<sup>282</sup> Pike, *Paradise of Dissent*, p. 454.

<sup>283</sup> The newspaper does not say when The Times’ editorial appeared; research reveals that it was the leader of 19 April 1852, pp. 4f.

<sup>284</sup> 15 August 1850, p. 2; the call was repeated in the issue of 29 November 1851, p. 2.

<sup>285</sup> 11 March 1852, p. 3; 1 May 1852, p. 3.

<sup>286</sup> 25 June 1847, p. 2.

<sup>287</sup> See below, fn 298.

On the other hand, there is no evidence of any great public clamour in favour of the abolition of the grand jury.<sup>288</sup> The petition started in February 1852 attracted a grand total of thirty-one signatures.<sup>289</sup> Probably most people were indifferent to the question, and opinion among the rest was divided. The fact that people were still applying for inclusion on the list of (special and) grand jurors at the end of 1851<sup>290</sup> – which, as it turned out, was the last opportunity to do so – suggests that at least some people were keen to serve, or at least not deterred by the possible inconvenience from wishing to be seen to have the honour of serving. And it had been said in 1851 that only a ‘few’<sup>291</sup> people were in favour of abolishing grand juries; even if this over-states the case, there must have been at least some people who were against abolition and who had not changed their minds by mid-1852. Accordingly, the view that the proposed abolition caused a great deal of discussion and diversity of opinion may well be right, and reflect a recollection of the actual state of the discussion in the Province which has left little trace in the historical record.<sup>292</sup>

What is remarkable is that there is little evidence of a sustained campaign to keep the grand jury as a means of controlling the Crown’s discretion to prosecute. This function of the grand jury attracted little notice; rather, the question was which was the most efficient system for ensuring pre-trial vetting of prosecutions to exclude those that were unlikely to succeed. As Acting Advocate-General Hanson said in the Legislative Council, ‘[I]n whatever system were introduced, two things must be accomplished. It must be provided that every one against whom a *prima facie* case was made out should be sent to trial, and that no-one should be tried against whom there was not such a case’.<sup>293</sup>

So the question was merely one of machinery and efficiency. In this contest, the grand jury was almost bound to lose. But there were additional reasons why the ques-

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<sup>288</sup> Thus, for example, the letter to the editor of the “Adelaide Times” on law reform on 23 September 1852 (p. 3; repeated 25 September 1852, p. 6) made no mention of the abolition of grand juries.

<sup>289</sup> Votes and Proceedings of the Legislative Council, 7 September 1852, p. 9; “Register”, 8 September 1852, p. 3; “Adelaide Times”, 9 September 1852, p. 3; “Adelaide Morning Chronicle”, 9 September 1852, p. 3.

<sup>290</sup> See above, fnn 103, 105.

<sup>291</sup> See above, fn 250.

<sup>292</sup> See also below, fn 360.

<sup>293</sup> “Adelaide Morning Chronicle”, 9 September 1852, p. 3; similar “Adelaide Times”, 9 September 1852, p. 3.

tion of efficiency became acute in 1852. The grand jury system had always caused inconvenience to a number of people, particularly to the grand jurors themselves (who occasionally complain of it),<sup>294</sup> to witnesses who had to give evidence before two juries and to the prosecutor who had to arrange for this to occur. But there was a particular reason why the inconvenience was greater than usual in 1852: the gold rush in Victoria. This led to the temporary emigration of a great number of persons, particularly men who belonged to the labouring class, to the Victorian goldfields.<sup>295</sup> Although, as we have seen, not everyone was eligible for service on the grand jury, it was probably the case that some grand jurors – such as some small businessmen who were eligible – went across and thus cast a greater burden on the better-off who did not go to seek the fortune they already had.<sup>296</sup> Even so, this did not result in a crisis: on the contrary, the last grand jury was congratulated by Crawford J. on the full attendance of the jurors.<sup>297</sup> One might have thought that, if the temporary absence of grand jurors in Victoria had been the impetus for reform, the local legislature would have passed a statute similar to the *Grand Juries (Suspension) Act 1917* (U.K.), which suspended grand juries for the duration of the War<sup>298</sup> but did not abolish them.

It cannot therefore be the conditions existing in 1852 that were the cause of total abolition. Rather, it is suggested that social conditions which could be anticipated after the conclusion of the gold rush were the real reason for the abrupt abolition of grand juries. As we have seen, the qualification for grand jury service could be satisfied simply by the possession of real estate or personal property in South Australia. It was foreseeable that, after the gold rush was over and South Australians returned to their home Province, the number of people possessing the property qualification would

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<sup>294</sup> The inconvenience increasing, of course, with the distance of a juror's residence from the place of trial, *i.e.* Adelaide: Hague, *A History of the Law*, pp. 987f; "South Australian", 29 November 1844, p. 3; 19 June 1849, p. 3. Note, however, the attempt to debunk the view that jury service caused undue hardship to great numbers of country people reported in the "Southern Australian", 27 October 1843, p. 2. It should also be noted that the members of the Legislative Council who passed the Act abolishing grand juries were themselves exempt from jury service under s 4 of Ordinance No. 12 of 1843.

<sup>295</sup> See, *e.g.*, Jaques, *The Impact of the Gold Rushes on South Australia, 1852-1854* (B.A. (Hons.) thesis, University of Adelaide, 1963); Pike, *Paradise of Dissent*, Ch. 18; *The Times*, 25 June 1852, p. 8; 19 July 1852, p. 8; 18 March 1853, p. 8.

<sup>296</sup> It also increased the likelihood that witnesses would be absent (*cf.*, *e.g.*, "Adelaide Times", 11 February 1852, p. 3), although this problem would have arisen whatever mode of trial was adopted.

<sup>297</sup> "Register", 10 August 1852, p. 3; "Adelaide Times", 10 August 1852, p. 3; "Adelaide Morning Chronicle", 12 August 1852, p. 3.

<sup>298</sup> Grand juries were restored in December 1921: *The Times*, 14 December 1921, p. 4. As is well known, they were then all but abolished by the *Administration of Justice (Miscellaneous Provisions) Act 1933* s 1 and wholly by the *Criminal Justice Act 1948* s 31 (3).

soar. This did in fact happen : the *nouveau riche* multiplied greatly from the end of 1852, and invested heavily in land.<sup>299</sup> They were unlikely to possess educational qualifications; many of them, like Matthew or Mick Jagger, might have been illiterate and ill suited to grand jury service. No doubt this is what F.S. Dutton meant when he said in the Legislative Council in September 1852 that ‘[t]he *materiel* for Grand Juries was here more circumscribed than in England’.<sup>300</sup> He was not referring here to mere numbers. In fact, the explosion of wealth in the community as a result of the gold rush meant that the problem was not that there would soon be too few grand jurors, but too many. It would have been embarrassing, and only partially effective, to raise the hurdle for grand jury membership higher so as to exclude the newly enriched. In those circumstances, the lesser of two evils was simply to abolish the grand jury system, which, in the final analysis, was seen to be dispensable. It is suggested that this is the real reason why the legislators of South Australia heeded the words of Crawford J., despite his blunder in pointing out that the law of the other colonies also did not provide for grand juries, and abolished this institution just as the results of the gold rush of 1852 were starting to become apparent.

One commentator states that, because it was ‘[v]iewed as a bulwark against autocratic rule, the grand jury was widely accepted in the New World’.<sup>301</sup> Neither part of this statement is true in relation to Australia in general, or South Australia in particular. Hardly anyone said anything about the grand jury as a bulwark of freedom or a check on the executive in the South Australian debates of 1852. Hardly anyone had said anything like that beforehand. In fact, a quirk in South Australian law made it possible to present the abolition of grand juries as a means of decreasing official involvement and control over prosecutions rather than increasing it. The quirk arose because, as we have seen, s 33 of Ordinance No. 12 of 1843 provided that bills of indictment were not only to be presented to a grand jury; *ex officio* and the very rare case of Court-initiated informations aside, prosecutions had also to be ‘on the prosecution of’ the Crown prosecution authorities.<sup>302</sup> As Cooper J., who appears to have been the chief drafter of the Ordinance, put it, the aim of this ‘was to protect persons from the malicious presentment of bills to the Grand Jury without the sanction of some responsible

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<sup>299</sup> Pike, *Paradise of Dissent*, pp. 451f.

<sup>300</sup> “Adelaide Times”, 9 September 1852, p. 3.

<sup>301</sup> Brown, “The Witness and Grand Jury Secrecy” (1983) 11 Am Jo Crim Law 169, 171.

<sup>302</sup> See also rule LXV scheduled to Ordinance No. 2 of 1850.



officer’, the ‘small community’ of South Australia needing a ‘double protection’<sup>303</sup> against both official oppression and private malice. The general litigiousness of the early South Australian community was indeed occasionally noted.<sup>304</sup> At all events, this statute made private prosecutions without the sanction of the Advocate-General impossible<sup>305</sup> (and would probably also have prohibited presentments by the grand jury of persons to be tried).<sup>306</sup> It meant that one of the chief reasons urged for the retention of the grand jury, and a principal reason for its introduction into Victoria in 1874<sup>307</sup> – that it permitted private prosecutions to occur independently of the state’s decision about whom to prosecute, while at the same time providing a filtering mechanism – was not applicable in South Australia. Of course, the provision requiring the Advocate-General to approve all prosecutions might simply have been repealed in whole or with reservations for particular offences (such as libel),<sup>308</sup> and grand juries left to adjudicate on all bills preferred by private prosecutors without the Crown’s sanction in the time-honoured manner.

That this option was not chosen suggests that, perhaps, the alleged reform in the law that the Act introduced was more of a sop to those concerned by the removal of the grand jury than a serious attempt to improve the law. However, much was made of this alleged reform in the law by the government in presenting its proposals to the Legislative Council.<sup>309</sup> In the debates – which, as reported, are otherwise notable for their almost complete lack of interest in broader questions of principle and policy involved in abolishing grand juries,<sup>310</sup> as if everyone present agreed on this necessary housekeeping measure for which time had at last been found – R.D. Hanson, the Act-

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<sup>303</sup> Report of Cooper J. to the Governor, attached to the latter’s despatch to the Colonial Office of 14 October 1846, CO 13/50/291 (A.J.C.P., reel 607).

<sup>304</sup> Bennett, *Cooper C.J.*, p. 24; Pike, *Paradise of Dissent*, p. 236.

<sup>305</sup> Clearly, however, some private prosecutions did take place (*e.g.* “Register”, 17 March 1849, p. 2; 13 June 1849, p. 2); but these must have been on bills signed by the Advocate-General.

<sup>306</sup> See above, fn 177.

<sup>307</sup> See above, fn 4.

<sup>308</sup> This would have approached the law of England as it was shortly to be laid down in the *Vexatious Indictments Act 1859* (U.K.), although, so to speak, from the other direction.

<sup>309</sup> “Adelaide Times”, 9 September 1852, p. 3; “Adelaide Morning Chronicle”, 9 September 1852, p. 3. Crawford J. had also mentioned this in his charge of August 1852 (above, fn 271), and the credit for originating this argument may therefore properly belong to his Honour.

<sup>310</sup> With the exception of a proposed amendment to retain grand juries for charges of treason, which was lost: “Register”, 29 October 1852, p. 3. The Votes and Proceedings of the Legislative Council for 28 October 1852 and the report in the “Register” of 1 November 1852, p. 2, are at odds about whether another amendment was made. Yet another view is in the “Adelaide Times”, 4 November 1852, p. 3. Several drafts of the Bill may be found in GRG 1/15/1.

ing Advocate-General, opined that the power thus given to South Australian law to disallow prosecutions was one ‘with which no functionary’, including presumably himself, ‘should be entrusted’.<sup>311</sup> Accordingly, s 3 of the Act abolishing grand juries permitted a criminal information to be filed by the Master of the Supreme Court by leave of the Court in cases in which the Clerk of the Crown or Master of the Crown Office could file such an information in the Queen’s Bench.<sup>312</sup> While there is admittedly at least one case in which use was made of this procedure,<sup>313</sup> it was not widely used, and the provision was repealed as long ago as 1934 by no more elevated a statute than the *Statute Law Revision Act 1934*.<sup>314</sup> Nevertheless, it might have reassured some doubters in 1852 that the proposed reform was not merely the removal of an inconvenient but possibly not wholly useless anachronism such as the grand jury, but actually made some positive contribution towards reforming the law. (It is a great shame that A.H. Davis was not in the Legislative Council in 1852 to put his view of grand juries,<sup>315</sup> although it is noticeable that his co-juryman from May 1851, C.S. Hare, was not inspired to spring to their defence.)

Interestingly, s 2 of the Act abolishing grand juries also required the Attorney-General (as the Advocate-General became after the institution of responsible government in 1857) to prosecute any person committed by the magistrate or to enter a *nolle prosequi* in writing having examined the depositions.<sup>316</sup> No doubt the obligation to prosecute and the *nolle prosequi* procedure, both of which survive into the law of South Australia today,<sup>317</sup> were adopted in the hope that they would exercise some moral

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<sup>311</sup> “Adelaide Morning Chronicle”, 9 September 1852, p. 3; a similar statement is in the “Adelaide Times”, 9 September 1852, p. 3.

<sup>312</sup> For a contemporary account of this procedure, see Archbold/Jervis, 13th ed., pp. 97-102. For a reference to an analogous provision in New South Wales, cf. *R v. McKaye* (1885) 6 NSWLR 123, 127.

<sup>313</sup> *R v. Smith* (1876) 10 SALR 213; 10 SALR 248; (1877) 11 SALR 5.

<sup>314</sup> Section 4 and Schedule 2, repealing s 336 of the *Criminal Law Consolidation Act 1876*, which had repealed and replaced s 3 of Act No. 10 of 1852.

<sup>315</sup> In South Australian Parliamentary Debates, House of Assembly, 28 June 1866, col. 125, it is claimed that Davis was against grand juries and that the speaker had served with Davis, who was the foreman, on the last grand jury to sit in South Australia. However, this is incorrect, as Davis was not the foreman of the last grand jury. Accordingly, the speaker’s memory may be faulty. See further below, fn 360.

<sup>316</sup> It is interesting to observe that the provision allowing for a *nolle prosequi* to be entered did not appear in the earliest drafts of the Bill (see above, fn 310), which accordingly required the prosecution of all persons committed. A similar provision was omitted when Western Australia abolished grand juries in 1855, and accordingly an amending statute had to be passed: 23 Vic. No. 2.

<sup>317</sup> *Criminal Law Consolidation Act 1935* s 276.

pressure on, and thus contribute to controlling the exercise of the discretion to prosecute by, the Attorney-General.

It is also worth noting that the interests which could be mobilised in favour of grand juries in the colonial setting, in which people are often less willing to accept an ancient institution simply because it is ancient, were very few. Grand juries were clearly an irritation to prosecutors and witnesses alike; the latter, as well as having to turn up twice, might sometimes find themselves in very unsavoury company while waiting to give evidence.<sup>318</sup> At the same time, grand juries could have attracted the support of defence counsel only if they overlooked the fact that they were a means of escaping the clutches of the criminal law without employing the services of defence counsel such as were of use in a trial before a petty jury. No doubt some grand jurors relished their role in the criminal law – A.H. Davis certainly did. But many others would have found the system tiresome and an inconvenience.<sup>319</sup> The public was clearly not interested enough in grand juries to start a campaign for their retention (as a check on executive power, for example) which left any historical traces. Only defendants – and defence counsel who were prepared to look beyond their narrow material interests – could possibly have had a reason to oppose the abolition of grand juries. It is therefore not surprising that, once the decision to abolish grand juries had been made, the system had so few defenders. It had never managed the transition from ‘routine, burdensome institution’ to the ‘bulwark of [...] rights and privileges’<sup>320</sup> which the grand jury managed in many parts of the United States and which might have given rise to a popular movement to retain it despite the inconvenience it caused to grand jurors and its inefficiency compared to committal proceedings before the Magistrates.

The first criminal sessions of the Supreme Court of South Australia without grand juries went ahead without any major difficulties. There was some delay in the commencement of proceedings as witnesses’ subpoenas were still returnable at 10

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<sup>318</sup> Meek, “On Grand Juries” (1888) 85 LT 395, 396 (referring to the position in England). The same might, however, be said of any attendance at Court to give evidence, although the more compressed form of grand jury proceedings may have made this aspect particularly noticeable to witnesses waiting for their turn before grand juries.

<sup>319</sup> Francis Dutton certainly did; he had served on at least one grand jury, that of June 1849 : see the list in the “Register”, 13 June 1849, p. 2; “South Australian”, 12 June 1849, p. 2.

<sup>320</sup> Younger, *The People’s Panel*, p. 21.

o'clock;<sup>321</sup> presumably this had not been changed to allow for the earlier start of trials owing to the omission of what one newspaper called 'the usual speech *ex cathedra*',<sup>322</sup> the charge to the grand jury, not to mention the delay while the first true bills were found. Section 2 of the Act abolishing grand juries stated that informations were to be presented to the Court in future, and thus adopted the name of the document formerly used when grand juries were bypassed by *ex officio* informations.<sup>323</sup> An objection to the informations on the grounds that they were signed by the Acting rather than the permanent Advocate-General<sup>324</sup> was easily overruled.<sup>325</sup>

## 5. Conclusion

The Act to abolish grand juries was not disallowed by the Imperial authorities in London,<sup>326</sup> unlike an earlier Ordinance of 1842 which had dispensed with grand juries at the sessions of the newly created (and, as a result of the disallowance, short-lived) intermediate Court of General Sessions<sup>327</sup> – which was created, as we have seen, after presentments by grand juries urging that step, partly in order to relieve them of the burden of trivial cases.<sup>328</sup> The Imperial authorities thought in 1842 that dispensing with grand juries in relation to misdemeanours was in order, but that if the Court also had, as it did, the jurisdiction to try for felonies, grand juries could not 'according to the practice of the Law of England'<sup>329</sup> be avoided. But by 1852, the Australian colonies (other than Western Australia) were on the threshold of fully democratic self-government, and greater liberties were conceded to them in shaping their own politics.<sup>330</sup> The Colonial Office made no recorded comment, negative or otherwise, on the Governor's despatch relating to the Act abolishing grand juries.<sup>331</sup> Moreover, in 1852<sup>332</sup> Sir Frederick Thesiger, the Attorney-General for England, had introduced a Bill into the House of Commons to abolish grand juries in the Metropolis.<sup>333</sup> Alt-

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<sup>321</sup> "Adelaide Times", 23 November 1852, p. 3; 27 November 1852, p. 7.

<sup>322</sup> "Register", 23 November 1852, p. 2.

<sup>323</sup> The informations presented at the first session without grand juries (GRG 36/1/2) clearly adopt the style of criminal pleading hitherto used for *ex officio* informations. The variant terminology used in other Australian States which have not enacted criminal codes may be found in *Nicola*, [1987] VR 1040; Waller/Williams, *Criminal Law : Text and Cases* (9th ed., Butterworths, Chatswood 2001), p. 28.

<sup>324</sup> The reason for the absence of the Advocate-General may be gathered from Taylor, (2001) 22 Jo Leg Hist 55, 63f.

<sup>325</sup> For a similar objection taken later, see Hague, *The Judicial Career of Benjamin Boothby* (unpublished, Adelaide 1992), p. 173.

though The Viscount Melbourne had lost office (with the rest of the Ministry responsible for seeing such notable reforms as the *Common Law Procedure Act 1852* through to the statute book) before the end of 1852 and thus before the statute abolishing grand juries in South Australia arrived at the Colonial Office for consideration, this certainly indicates the trend of opinion in London.<sup>334</sup> What had lately been advocated by the Attorney-General at Westminster could hardly be denied to the colonies.

Western Australia followed the lead of South Australia from June 1855<sup>335</sup> and abolished grand juries,<sup>336</sup> so that, until their re-introduction in Victoria in 1874,<sup>337</sup> nineteen years passed in which the law of no Australian jurisdiction provided for grand juries to be summoned. The Western Australian Bill for abolition was also a government measure promoted by that jurisdiction's chief prosecutor, the Advocate-

<sup>326</sup> South Australian Government Gazette, 18 August 1853, p. 544; South Australian Archives, GRG 2/1/13 (despatch of 18 May 1853), 2/5/14, 2/6/6 (despatch no. 87); CO 13/78/340 (A.J.C.P., reel 786).

<sup>327</sup> Ordinance No. 7 of 1842, s 12. For notice of its disallowance, see South Australian Government Gazette, 11 April 1844, p. 89.

<sup>328</sup> See further Bennett, *Cooper C.J.*, p. 13; Hague, *A History of the Law*, pp. 1216f, 1224f.

<sup>329</sup> Despatch to the Governor, State Archives of South Australia, GRG 2/1/3/199-202. Emphasis in original.

<sup>330</sup> Cf. Hague, *A History of the Law*, pp. 443f.

<sup>331</sup> See above, fn 326.

<sup>332</sup> Such a Bill had in fact been introduced earlier : see, e.g., *The Times*, 9 July 1849, p. 3.

<sup>333</sup> Hansard, House of Commons, 21 June 1852, vol. 122 col. 1115. The Bill may be found in the British Parliamentary Papers, 1852 vol. II, pp. 193ff, 201ff. It is interesting to note that this Bill refers to criminal trials without 'the Intervention of a Grand Jury', which is very similar to the long title of the South Australian Act No. 10 of 1852 (see above, fn 8) which can be seen from the draft Bills (above, fn 310) to be the second version of the title (the first was "An Act to abolish Grand Juries"). It may be that the title was changed in the hope that a less blunt one would be less likely to attract the attention of the Colonial Office. It may also be that a copy of an early draft English Bill had reached South Australia after the first draft of the South Australian Bill was made and before that Bill was considered by the Legislative Council, although if this occurred it is odd that it is not mentioned anywhere. The change in title permitted the ingenious argument that grand juries had not in fact been abolished at all in South Australia; rather, a mere parallel system had been created alongside them : South Australian Parliamentary Debates, House of Assembly, 21 June 1866, coll. 23f.

<sup>334</sup> That this proposal was supported by at least some sections of the public may be gathered from (1852) 195 *Edinburgh Review* 1, 31f. See also, e.g. the letter to *The Times* from "Bulla Vera", 9 January 1849, p. 1.

<sup>335</sup> Although the law of South Australia was mentioned little in the debates, and differences between the two statutes (see e.g. above, fn 316) make it clear that the legislators in Western Australia did not copy the South Australian statute. Nevertheless, the "Perth Gazette and Independent Journal of Politics and News", 20 April 1855, p. 2, refers to the fact that grand juries have already been abolished in 'the neighbouring colonies'. The "Commercial News and Shipping Gazette" (Fremantle), 8 March 1855, p. 2, seemed to believe that they still existed in the neighbouring colonies.

<sup>336</sup> 18 Vic. No. 5, as supplemented by 23 Vic. No. 2; both were consolidated in the *Grand Jury Abolition Act Amendment Act 1883*. See further Western Australia, *Debates of the Legislative Council*, 25 July 1883, pp. 78f.

<sup>337</sup> See above, fn 4.

General.<sup>338</sup> In Western Australia, unlike South Australia, however, a campaign in favour of retaining grand juries was vigorously conducted by one newspaper,<sup>339</sup> chiefly on the basis that lodging the power to prosecute in the hands of officials rather than the grand jury was undesirable in the absence of fully democratic government. This argument was not available in South Australia in 1852, as it was by that stage clear that fully democratic institutions were only a matter of a few years away, and a substantial instalment of them already existed.<sup>340</sup> It is interesting to note that both major Western Australian newspapers which had supported abolition in 1855<sup>341</sup> recanted as early as 1860, after a ‘trumpery case’<sup>342</sup> had been brought against a Roman Catholic priest during the rule of a Governor who was unpopular, autocratic and had incurred the wrath of the Roman Catholic population on a matter relating to education.<sup>343</sup> As the newspapers lamented, the lack of grand juries meant that there was no-one to stand between the subject and being put on trial by a possibly despotic government;<sup>344</sup> by that time, fully democratic government had been operating in South Australia for three years, but was still thirty years off in Western Australia.

Another difference of importance should be noted.<sup>345</sup> While the preamble of the Western Australian statute abolishing grand juries asserted that ‘a general opinion prevails that the maintenance of the Institution of Grand Juries in this colony is not necessary to the due administration of Justice’,<sup>346</sup> research reveals not only that this overlooks the vigorously argued case for grand juries in one newspaper and the fact that grand juries in Western Australia, too, saved many people the risk of a criminal

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<sup>338</sup> Contrast the position in the United States : there, it has been said that the ‘staunchest defenders’ of the grand jury are prosecutors : Leipold, (1995) 80 Cornell LR 260, 261.

<sup>339</sup> “Commercial News and Shipping Gazette”, 8 March 1855, p. 2; 29 March 1855, p. 2; 12 April 1855, p. 2.

<sup>340</sup> A summary of the position may be found in Castles/Harris, *Lawmakers and Wayward Whigs*, p. 40.

<sup>341</sup> “Inquirer”, 28 February 1855, p. 2; “Perth Gazette and Independent Journal of Politics and News”, 20 April 1855, p. 2.

<sup>342</sup> “Inquirer”, 24 October 1860, p. 2, which however also notes that, as the Judge said, the accused was ‘honourably acquitted’ by the petty jury.

<sup>343</sup> See Stannage (ed.), *A New History of Western Australia* (University of Western Australia Press, Nedlands 1981), pp. 322f, 555f.

<sup>344</sup> See “Inquirer”, 14 November 1860, p. 2; 28 November 1860, p. 2; “Perth Gazette and Independent Journal of Politics and News”, 16 November 1860, p. 2.

<sup>345</sup> Although of course many of the arguments against grand juries were similar, as is shown by the letter to the editor of the “Inquirer”, 28 March 1855, p. 3.

<sup>346</sup> The same assertion was also made in the Governor’s despatch transmitting the Act to the Colonial Office : despatch no. 61 of 1855, 18 June 1855, CO 18/88 (A.J.C.P. reel 466). The allowance of the Act was notified in the “Western Australian Government Gazette”, 17 June 1856, p. 3.

trial before the petty jury,<sup>347</sup> but also the fact that the preamble was originally to record that there was a lack of suitable grand jurors in Western Australia (and also too many trivial trials for them).<sup>348</sup> In the same vein, one newspaper contains a reference to the ‘altered position of the Colony, and the difficulty at all times experienced of obtaining persons properly qualified to serve as Grand or even Petty Jurors’,<sup>349</sup> the first half of which reminds us that Western Australia had agreed to accept convicts in 1850.<sup>350</sup> Furthermore, the legislature of Western Australia took the absence of a petition from grand jurors in favour of their retention as a sign to proceed with abolition, and was probably also concerned about the expense.<sup>351</sup>

There was a half-hearted attempt to revive the grand jury in South Australia after the dust from the gold rush of 1852 had settled in 1857,<sup>352</sup> and a more serious attempt in 1859,<sup>353</sup> but neither was successful. (A Western Australian newspaper of 1860 even reports a ‘popular demonstration’<sup>354</sup> in the recent past in favour of the restoration of grand juries in South Australia. That is presumably a reference to the debate of 1859.)<sup>355</sup> The abolition having once occurred, inertia worked in favour of not having grand juries. And with the introduction into South Australia of a representative assembly and responsible government along Westminster lines in 1857, it was no longer possible to argue (as it still was in Western Australia) that the Crown authorities responsible for prosecutions might misuse their power and not have to answer to the public for it. Nor was there any need for the grand jury as a primitive form of representative assembly. Again in contrast to Western Australia, those favouring rein-

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<sup>347</sup> See the criminal record books in the State Records Office of Western Australia, WAS 204/3577/4, which indicates that seven defendants’ bills were ignored in July 1854, six in October 1854, three in January 1855 and one in April 1855. See above, fn 69.

<sup>348</sup> “Inquirer”, 28 February 1855, p. 3; “Commercial News and Shipping Gazette”, 8 March 1855, pp. 2f.

<sup>349</sup> “Inquirer”, 14 February 1855, p. 2.

<sup>350</sup> The legal authority under which this was done may be found in the statute 13 Vic. No. 1 (Western Australia).

<sup>351</sup> See the report of the debates in the “Perth Gazette and Independent Journal of Politics and News”, 20 April 1855, p. 2, and the summary in the “Inquirer”, 18 April 1855, p. 3.

<sup>352</sup> South Australian Parliamentary Debates, House of Assembly, 7 May 1857, col. 75; Legislative Council, 28 October 1857, col. 625; House of Assembly, 2 December 1857, col. 684.

<sup>353</sup> South Australian Parliamentary Debates, House of Assembly, 25 May 1859, coll. 105-110. This was presumably provoked by the letter from “An Admirer of Old Forms” to the editor of the “Register”, 2 March 1859, p. 2.

<sup>354</sup> “Inquirer” (Perth), 14 November 1860, p. 2.

<sup>355</sup> As always, the absence of an index to the newspapers of the time and the impossibility of conducting an error-free search over a number of years prevents certainty on this score. However, the historical documents that do exist recording the debate of 1859 do not suggest that there was any expression of popular feeling beyond what is recorded in those documents.

statement of the grand jury in 1859 based their argument not on the need to control the Crown's discretion to prosecute in the interests of the liberty of the subject, but on the improvements in the machinery of the criminal law which would allegedly result from reintroducing grand juries.<sup>356</sup> This, rather unsurprisingly, was an argument which failed to convince most people; as the "Register" said, if Magistrates were too ready to commit or otherwise unsuited to the task, the remedy was to find better Magistrates, not to duplicate the arrangements for pre-trial vetting of prosecutions using another piece of inefficient machinery.<sup>357</sup>

Probably the last nail was hammered into the coffin of the grand jury in 1866, when the wildly unpopular Boothby J. (who had taken Crawford J.'s place on the Bench on his early death) announced that it was a 'glorious institution of our forefathers', that 'honest and wise persons in England would not bring their families out to a place' which so disregarded the law of England as to abolish grand juries, that their abolition was illegal and that he would accordingly refuse to entertain criminal prosecutions which did not have the sanction of the grand jury.<sup>358</sup> Few would have wished to be associated with that particular gentleman's hobby horses or to espouse a cause which he had espoused. The abolition of grand juries was one of the many deviations by the Provincial legislature to which Boothby J. took exception under his peculiar view of its legislative competence (a view which was, of course, rejected by the Imperial Parliament by means of the *Colonial Laws Validity Act* 1865). But, in the Parliamentary debate on his refusal to try those who had not been before a grand jury, a notice of motion designed to foster discussion on whether grand juries should be reintroduced<sup>359</sup> sank without trace, and there was no serious movement to reinstate grand juries as a sop to Boothby J.<sup>360</sup>

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<sup>356</sup> Note the tension between efficiency and democracy referred to in Younger, *The People's Panel*, pp. 3, 134.

<sup>357</sup> "Register", 26 May 1859, p. 2.

<sup>358</sup> Hague, *A History of the Law*, pp. 765, 767 (see also pp. 376f, 461-464, 516, 820); Hague, *Boothby J.*, pp. 173f.

<sup>359</sup> Votes & Proceedings, House of Assembly, 19 June 1866, p. 6.

<sup>360</sup> No systematic attempt was made to find any isolated references that may exist to grand juries among the voluminous primary sources dealing with Boothby J.'s disruption of the legal system, which extended over many years. However, it is worth recording that an essay was printed in the "Observer", 9 June 1866, p. 8, noting agitation for the abolition of grand juries in Otago, New Zealand. Other writers lamented the demise of grand juries (see above, fnn 353, 359; "Payment of Jurors" (1861) 1 Thursday Review 200, 201; letter from "Nemo" to the editor of the "Observer", 9 June 1866, p. 7; letter from "Argus" to the editor of the "Observer", Supplement, 23 June 1866, p. 4), but without mounting a serious argument in favour of their reinstatement. It may be that the writer of the piece in the "Thursday



There is no reason to think that grand juries were a particularly undesirable feature of the South Australian legal scene before 1852.<sup>361</sup> True, serving on them caused inconvenience to the grand jurors and others, and sometimes they did not work as well as they might have; but that could be said of any legal institution, and there has been no serious move to abolish petty juries owing to the inconvenience that is caused to those who serve on them. It is beyond doubt that the grand jury saved some people the expense and risk of a trial before a petty jury and was an added safeguard against the abuse of the Crown's powers. One conclusion that can be drawn from the abolition of grand juries, especially in light of the arguments in favour of grand juries in Western Australia, is that the citizens of the very young Province of South Australia were already confident enough in the institutions that they had largely inherited, but also partly created themselves, that they were willing to forgo the extra safeguard of the grand jury in the interests of convenience – or, to put the point more precisely, that the additional risk to, and trouble in, the smooth operation of grand juries due to the imminent explosion in the number of grand jurors at the end of 1852 and the consequent extension of liability to serve to the uneducated *nouveau riche* was considered greater than the risks which were incurred in simply abolishing grand juries.

From the point of view of the legal and indeed the general historian of South Australia, the abolition of grand juries was beyond doubt a matter for regret. At least one of the grand jury's presentments is a unique insight into settler attitudes towards the law and Aborigines, and many other presentments exist which contribute to our knowledge either of that or of another topic in the history of South Australia. Nevertheless, the law does not exist primarily to provide material for historians, but to do a job in the present. In 1852, it was judged that the needs of the present did not include grand juries.

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Review" was A.H. Davis, who was connected with that journal according to his obituary in the "Observer", 9 June 1866, p. 5.

<sup>361</sup> The same might have been said of grand juries in England towards the close of their long history : Meek, (1888) 85 LT 395, 395.