



THE ARRIVAL OF THE HIBERNIA AND THE FIRST YEAR OF THE SUPREME COURT

The Hon Justice Stephen Estcourt AM

The First Chief Justice

John Lewes Pedder arrived in Hobart Town with his wife aboard the barque *Hibernia* on 15 March 1824. On the flag signal, known as signal 42, being made from Mt Nelson, the important personage arriving, as so signified, was thought, particularly by Lieutenant-Governor Sorell, to be his replacement, Lieutenant-Governor Arthur on board the *Adrian*. Such was not the case. Pedder disembarked at noon and proceeded to Government House, where he was introduced to Sorell and other officials of the colony. In his possession Pedder had a document authorising the establishment of a Supreme Court in Van Diemen's Land.

It is a sobering perspective that on 10 May 1824 when Chief Justice Pedder took his seat as the first Chief Justice of the Supreme Court:

- transportation, which was to continue for another twenty-nine years, had swelled the convict population of the colony from 600 to 6,000 over the previous eight years, and would continue to a peak of 28,500 in 1848;
- the first guests of His Majesty King George IV would not be housed at Port Arthur in any form for another six years;
- the so-called Model Prison would not be built there for another twenty-five years;
- Lieutenant Governor Arthur's shameful aberration, the Black Line, as it was coined by contemporary journalist Henry Melville, lay some six years in the future in October 1830;
- trial by jury as we know it today in criminal cases would not come about until 1840;
- more convicted criminals were being executed by public hanging than at any other time before or after in Australian history; and

- representative government for the newly-named Tasmania would not arrive for another thirty-two years, on 1 January 1856.

The Oldest Supreme Court in Australia

The *Act for the Administration of Justice in New South Wales and Van Diemen's Land* 1823 (4 Geo IV, c 96), known as the *New South Wales Act* 1823, empowered His Majesty, as a temporary measure, to institute a court of judicature in Van Diemen's Land. An Imperial Warrant, *Warrant for Charter for Supreme Court in Van Diemen's Land*, issued on 18 August 1823, authorised separate Royal Letters Patent under the *New South Wales Act*, which became the First Charter of Justice for Tasmania issued under the warrant on 13 October 1823.

The date on the First Charter of Justice for Tasmania and on the Third Charter

of Justice for New South Wales, also authorised by the *New South Wales Act*, was 1823. It took approximately seven months, however, for them to be delivered to Hobart Town by Chief Justice Pedder on board the *Hibernia* and to Sydney Town by Chief Justice Forbes on the *Guilford*. Both vessels arrived at their destinations in March 1824, but the reading of the Charter at Government House in Tasmania, and in the market place in Hobart, as well as the first sitting of the Supreme Court in Hobart, all occurred some days before the letters patent authorising the establishment of the Supreme Court of New South Wales was proclaimed in Sydney on 17 May 1824.

Before 1824 New South Wales was the seat of the Court of Criminal Jurisdiction and the Court of Civil Jurisdiction established by the First Charter of Justice of 1787, and the civil court of record called the Supreme Court established by



John Lewes Pedder (Source: Tasmanian Archives and Heritage Office)



The Supreme Court and Police Office buildings in Murray Street (Source: Hobart Tasmanian Archives and Heritage Office)

the Second Charter of Justice of 1814. The jurisdiction of those courts extended to Van Diemen's Land in 1823, but unlike the Supreme Court, enabled in New South Wales by the Third Charter of Justice of 1823, they did not, respectively, have the powers of courts of Oyer and Terminer and General Gaol Delivery, or of the courts of Kings Bench, Common Pleas and Exchequer, or the equitable jurisdiction of the Lord Chancellor of Great Britain. On the basis then that both the Supreme Court of New South Wales and the Supreme Court of Van Diemen's Land were established pursuant to the respective Charters of Justice of 1823, the Tasmanian Supreme Court was the first, and is therefore the oldest in Australia.

Notwithstanding the sympathy of the distinguished legal biographer, Dr J M Bennett, for a contrary view as expressed in his book *Lives of the Australian Chief Justices – Sir John Pedder*, the position of the Supreme Court of Tasmania as Australia's first Supreme Court can now be regarded as settled. Former Chief Justice of the High Court of Australia, the Honourable Murray Gleeson AC, made the following concession on 3 November 2003 at a ceremony to mark the centenary of the High Court. That ceremony was held in the same court room in which that Court first sat on 23 February 1904. Gleeson CJ said:

"Your Excellency, Chief Justice Cox, Attorney-General, Mr President of the Law Society, Mr Estcourt [Chairman of the Tasmanian Bar Association],

This ceremonial sitting is to mark, in Hobart, the Centenary of the High Court. My colleagues and I are delighted and honoured by the presence of all who have joined us for that purpose. We are grateful to

the Attorney-General, and to the representatives of the Law Society and the Bar Association, for their expressions of goodwill, which we value highly."

I should mention in particular the presence of the Governor of Tasmania, and the Chief Justice and other members of Australia's oldest Supreme Court. As a former Chief Justice of the second oldest Supreme Court, I am happy to make that acknowledgment.

The noted commentator Carrel Inglis Clark in an essay published in the Hobart weekly journal the *Critic* on 5 May 1922, and Professor Alex Castles in his book *Lawless Harvests*, both suggest that the Charter was read in the Hobart Town market place on 7 May 1824. A more direct source, William Sorell, the son of the then Lieutenant-Governor, and later the first Registrar of the Supreme Court of Van Diemen's Land, recorded in his meticulously kept journal of the events of 15 March 1824 to 18 April 1824 that it was on Wednesday 31 March 1824 that the Charter was read at Government House before all of the principal officers of the colony and at the market place by the Provost Marshall.

The contemporary nature of Sorell's diary, and the record for 31 March appearing as it does in a sequence of entries both before and after 7 May 1824, make it most probable that the Charter was indeed read on the earlier date. According to Edward Sikk in his contribution to the Law Society of Tasmania's pamphlet *Court in the Colony*, published for the sesquicentenary of the Supreme Court in 1974, 7 May 1824 was also the date on which Pedder CJ was sworn in by Lieutenant-Governor Sorell at Government House.

In any event there is no doubt that the first sitting of the Supreme Court was on Monday 10 May 1824. William Sorell's journal entry for that date quaintly records that he attended "the opening of the Honourable the Supreme Court of Van Diemen's Land". He also noted that he read aloud the Charter, took the oath of office as Registrar and administered oaths to the Solicitor General and others. Pedder had admitted George Cartwright, Hugh Ross and Frederic Dawes as practitioners of the Court on that day.

The Attorney General Addresses the Court

On that day the Attorney General, Joseph Tice Gellibrand, who had arrived on the *Hibernia* with Chief Justice Pedder, addressed the Court. He said, perhaps no more cheerily than might have been expected in the colony at that time:

"It now becomes my painful duty, in the exercise of that high office with which his Majesty has been pleased to invest me, to present to the Court an awful catalogue of crime.

I feel it is my duty previously to offer some observations upon the boon which His Majesty has been graciously pleased to confer upon this Colony; and when I consider that 20 years have scarcely elapsed since this Island was a barren and desolate country, so far as regards civilisation, and view what it now is, its population, its agriculture, and its riches, I consider that this is one of the most favoured spots in the world.

When I call to mind that everything which is valuable to man, either as a rational, social, and moral, being possessed and enjoyed here – when I further consider that we have all these invaluable blessings without the imposts and duties which are necessarily imposed upon the Mother Country, it is natural that we should feel attached to that Government which has bestowed them, and grateful to that Providence which has blessed us with the possession of so many enjoyments. I consider this day, a day which establishes a Court of Civil and Criminal Judicature, and which secures the rights and privileges of the subject, as one of the proudest the Colony has ever known, and I feel no small share of that pride, in being an humble instrument in aiding and assisting upon such an occasion.

Although I shall be under the painful necessity of laying before the Court a heavy catalogue of crimes and misdemeanours, yet it is a subject of congratulations, considering how long a period it is since there

has been a Criminal Court in this place, that the offences are so few, compared with what might have been expected in a Colony so constituted as that of Van Diemen's Land. This circumstance affords a just ground of eulogium, not only on the wise and able administration of the late Lieutenant Governor, but also manifests the vigilance and care of the Magistrates, to whom the preservation of the public peace has been entrusted.

One of the greatest boons conferred by the Legislature upon this Colony is the Trial by Jury: this is the fundamental principle of the Charter, and I trust the Court will pardon me, if, instead of stating my own opinion, I give the opinions of some of those who have written upon this important subject. Mr Justice Blackstone's encomium is so just, striking and beautiful, that I shall read it to the Court at length ...

I will also present to the Court the opinion of De Lolme who though a foreigner is justly considered as one of the best of our constitutional writers ...

Having thus adverted to the criminal, it may not be inapplicable that I should speak of the civil law.

When I reflect on the humble abilities of the individual who addressed the Court – on the errors of judgment to which all are prone – on the deceitfulness of the human heart – against which, we cannot sufficiently guard – I feel a satisfaction and a consolation in knowing, that if through the influence of such causes, any individual should be unfortunately oppressed, he has his remedy in that glorious bulwark of our constitution, the writ of Habeas Corpus. These are the boons – these are the privileges – these are the blessings – for which our fore-fathers fought, and bled, and died – and these boons, privileges, and blessings are the birthright of every Englishman – and though I am removed far from the country that gave me birth, I am bound to say, that, standing in this remote part of the world (through His Majesty's most gracious Charter), I possess and enjoy them here.

To me is entrusted one of the most painful offices which can be sustained by any individual; added to which I have to exercise the functions of a Grand Jury; which it is my duty to discharge – honestly, fearlessly – uprightly, and, however painful and difficult, may be the discharge of these duties, I am encouraged by the sentiments expressed by a man,

not more distinguished as a Lawyer than as a Christian – namely my Lord Chief Justice Hale...

I wish in a few words to state the line of conduct I intend to pursue; that if in the cases, which I of necessity must bring before the Court and with respect to which many persons may be implicated, that whether they be high or low, rich or poor, bond or free – I must and will do my duty."

First Criminal Prosecution and First Pardon

On Thursday 20 May 1824 the Court sat again. According to William Sorell's journal, a Mr Murray addressed the Court at some length in relation to a criminal prosecution, and the Court adjourned until Monday. It is well known that the first case to be heard by the Court was the criminal prosecution of William Tibbs for manslaughter, and that the trial took place on Monday 24 May 1824. But it was not the prosecution of Tibbs that was the subject of Mr Murray's address. Mr Murray was Robert Lathrop Murray.

Murray came to Hobart from Sydney in 1821 and remained for several years during part of which time he was permitted to act as an advocate notwithstanding he had been transported to NSW in 1816 upon his conviction for bigamy. Prior to 1824 he had practiced as a legal agent but by this time he was a gentleman of the press, who later went on to become the editor of the *Hobart Town Gazette* and the *Colonial Times*. His surprise application on 20 May was for a criminal information to issue in respect of an alleged defamation of him by some Hobart merchants and a magistrate. Pedder declined the application on procedural grounds.

In any event Tibbs trial proceeded on 24 May 1824, not concluding, on Sorell's account of it, until 7.00pm in the evening. According to the report in the *Hobart Town Gazette* of 28 May 1824, Tibbs was "put to the bar" on an indictment charging him with shooting at a black man named John Jackson on 17 January 1824, "whereby the unfortunate man lost his life". The report states that the jury took only a few minutes to return a verdict of guilty. It should be noted that John West in his *History of Tasmania* suggests that Jackson was a "negro" and not a Tasmanian Aborigine, a view for which there is growing support.

Carrel Inglis Clark in an essay published in the *Critic* on 5 May 1922 wrote that it was an unhappy omen that Pedder CJ's first judicial function was to pass a sentence of death. Brian Plomley, however, in his seminal work *Friendly Mission* claimed that Tibbs was sentenced to three years "secondary" transportation, which sentence was later "reversed" and he

was "discharged". However, according to Professor Castles in *Lawless Harvests*, Tibbs record of conviction does not show that, but suggests only that he was released at the expiry of his original sentence of transportation. Castles added that there "is evidence" that Tibbs was pardoned by Lieutenant-Governor Arthur.

Summary of the First Year of the Supreme Court in Tasmania

During the remainder of the first year of the Supreme Court's operation the Statistical Relations of Van Diemen's Land 1824 -1835 reveal, as summarised by Inglis Clark in his essay referred to above, that 344 summonses were issued, 360 actions commenced and 25 tried, 62 were judgments made on warrants of attorney and cognovits actionem (written authorisations that allow an attorney named in them to appear in court and admit the liability of the person giving the warrant or cognovit in an action against him or her to collect a debt), and 11 equity suits were commenced.

Criminal statistics disclose 42 convictions for offences against the person including 16 for murder and 10 for libel. Sixteen of the persons convicted were sentenced to death and executed, seven for burglary, two for cattle stealing and one for sheep stealing and six for murder.

Within that first twelve months it appears from a letter Pedder wrote to Lieutenant-Governor Arthur on 9 April 1825, that as Chief Justice he had passed the death sentence in two cases and "suffered" an execution in one of them without properly considering the Act under which they were convicted: "It will always be the most painful reflection to me that, upon neither of these occasions, did I look into the Act itself". The unfortunate man was John Logan who was charged with shooting with intent to murder and found guilty under the terms of a British statute, the *Malicious Shooting and Stabbing Act* 1803. That statute ought not to have been applied in Australia because it was passed after 1787, the year in which the existing law of Great Britain was deemed to be received into New South Wales and Van Diemen's Land by the New South Wales Courts Act of that year.

THE HONOURABLE JUSTICE STEPHEN ESTCOURT AM
Judge
Supreme Court of Tasmania