# Around the Nation: Tasmania

## Editor: Justice Stephen Estcourt AM

## THE BATTLE FOR TRIAL BY JURY

### MILITARY JURIES

The Court of Criminal Jurisdiction visited Van Diemen's Land from New South Wales on two occasions prior to the establishment of the junior colony's own Supreme Court in 1824. It sat with a panel of six military and or naval officers in lieu of a jury as known to English law since the *Magna Carta*.

The *New South Wales Act 1823* 4 Geo IV c 96 (Imp), originally passed as a temporary five year measure, did little to alleviate the emancipist desire in New South Wales and Van Diemen's Land for the introduction of trial by a jury of 12 peers. Section 4 of that Act provided that every criminal charge in the Supreme Courts of the two colonies was to be tried by a judge and a jury of seven commissioned officers of his Majesty's sea or land forces. These "jurors" were to be nominated from time to time by the Governor. There was a right of challenge provided for and when there were insufficient officers, magistrates could sit in their stead.

In civil cases, trial by a jury of 12 was permitted by the Act if the parties agreed and the proceeding involved more than £500. In other cases the Court would sit with two assessors.

The Bill for the Act was unsuccessfully opposed in the House of Commons on the basis that the "so called" right to trial by jury amounted to nothing more than a court martial. The hue and cry was taken up from the outset by disappointed colonists. This was understandable. Commissioner John Thomas Bigge, who had been tasked by the British Government to report on the judicial establishments of New South Wales and Van Diemen's Land had concluded that "the peculiar constitution of the society" meant that a traditional jury system "cannot yet be safely be introduced". To emancipists it was clear that so long as trial by jury was withheld so too would be representative government be denied. Trial by jury was therefore as much a metaphor for an elected government as it was about a preferred mode of trial.

### THE BATTLE BEGINS

The sentiment that endured from the failure of the *New South Wales Act* to deliver full trial by jury is well illustrated by a letter penned to the *Hobart Town Gazette* on 27 May 1825 by a correspondent who described himself as a "plain man" rejoicing in the name of Peter Clod. The letter was written after, as will be seen, a clash of judicial opinions between Chief Justice Forbes of the New South Wales Supreme Court and Chief Justice Pedder, as to the proper construction of s 19 of the Act. Clod wrote:

> I want to know, how it happens that there are juries in Sydney and none here. I believe Mr. Editor, that not one of your correspondents, not even the long tailed devil himself has ever ventured to say a word against the advantages of that institution, which every man who has been reared in England, and has the feelings of an Englishman, must love and venerate; because although seven red coats, fine showy looking blades, cut a great dash in the Jury box, my old English notions make me prefer Twelve good jolly settlers, or even shopkeepers "in a small way" (no offence I hope Mr Editor). But I think those who are used to balance the scales in one shop, are not bad hands at balancing them in another.

The position in Sydney referred to by Mr Clod was the result of a decision of Chief Justice Forbes in *R v Magistrates of Sydney*, published in a second edition of the first number of the *Australian* newspaper on 14 October 1824.

Section 8 of the *New South Wales Act* provided that his Majesty could by an order issued with the advice of the Privy Council "cause the trial by jury to be further introduced and applied" as should be specified in any such Order in Council. Section 19 of the same Act however made provision for the establishment of Courts of Quarter Sessions in New South Wales and Van Diemen's Land. Courts of Quarter Sessions in England had traditionally been conducted with the convening of Grand and

Petit juries. The section specifically stated that convicts could be tried summarily in Courts of Quarter Sessions but was silent as to the position in relation to free settlers.

The possibility of relying on s 19 as permitting trial by jury in Courts of Quarter Sessions, even if not in the Supreme Court, was recognised by D'Arcy Wentworth, a large landowner and magistrate in New South Wales. He contrived to ask Governor Brisbane as to the rules to be adopted and that inquiry resulted in the preparation of an opinion by Attorney-General Bannister. His opinion was that the Courts of Quarter Sessions could not be legally held without appointing a jury.

## The Forbes Decision

The Solicitor General John Stephen, the father of Tasmanian Attorney-General and later Chief Justice of New South Wales, Alfred Stephen, did not agree with Bannister and Governor Brisbane facilitated proceedings for a writ of mandamus to be heard by Chief Justice Forbes as a test case.

Forbes followed Bannister's line of argument, centred around the proposition that *Magna Carta* allowed for trial by jury only unless that right was expressly removed by statute, which s 19 did not do, except in the case of convicts. In his Honour's view the provisions of s 8 of the Act permitting extension of trial by jury beyond civil trials in the Supreme Court by order in council, related only to that Court and not to Courts of Quarter Sessions. Forbes held:

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

In Van Diemen's Land, Lieutenant Governor Arthur, seemingly delayed in publishing the proclamation signed by Governor Brisbane in January 1825, until 29 April 1825. According to Professor Alex Castles in an article published in the *Adelaide Law Review* in 1975 entitled *The Judiciary and Political Questions: The First Australian Experience, 1824-1824* Arthur had been made aware of the possibility of juries being convened for Courts of Quarter Sessions well before the decision of Chief Justice Forbes and had requested an opinion from Attorney-General Gellibrand when he received the proclamation in mid-January.

Gellibrand, whose impassioned speech on the subject of trial by jury had been made at the opening of the Supreme Court on 10 May 1824 had, not long after, drawn Arthur's attention to the difficulties associated with s 19. He was, accordingly, asked by Arthur for his opinion on the proclamation.

Castles writes that in providing his opinion to Arthur, the Attorney-General seems to have gone some way with Chief Justice Forbes' view, agreeing that Courts of Quarter Sessions could not try free persons without juries, but that without further government action those courts could not operate without an Order in Council as contemplated by s 8 of the *New South Wales Act*, or some other similar directive.

On 22 February 1825 Gellibrand wrote to Arthur on the subject of Chief Justice Forbes' decision. He disagreed with it and suggested to Arthur that the judgment of the Supreme Court of Van Diemen's Land should be obtained.

## The Pedder Decision

Proceedings for mandamus came on before Chief Justice Pedder in *R v Magistrates of Hobart Town* on 5 July 1825. This was an arranged hearing as had been the case in Sydney. The opposing parties were represented by Solicitor General Alfred Stephen and Attorney-General Gellibrand.

Castles, in his paper, observes that the *Hobart Town Gazette* of 7 July 1825 discloses that at the conclusion of the arguments Pedder summed up "the impressions that as present advised are on my mind". Castles writes:

> Fundamentally, he affirmed, the case turned on whether section 19 of the Act of 1823 was to be treated as standing alone. If it was to be treated as the "whole Act" as far as Quarter Sessions were concerned then there could be no doubt that Grand and petit juries would be required. On the other hand, if there was doubt about the meaning of s.19 and reference was to be made to other clauses in the statute then Pedder

> indicated that he would be constrained to hold that juries could only be introduced for the trial of free settlers at Quarter Sessions with an Order-in-Council made under the terms of s.8.

A week later Pedder published his decision declining to follow Forbes' view of the Act. The decision was reported in the *Hobart Town Gazette* of 22 July 1825. The difference between the two Chief Justices (apart from, or perhaps, on account of, the fact that Forbes experience at the Bar had been as a Common Lawyer and Pedder's at the Chancery Bar), was that Pedder found no clear entitlement to trial by jury in s 19 and thus had recourse to s 8. Pedder wrote:

> We now come to the powers given to the King to establish juries. I consider it would be an absolute attempt to repeal this clause, if Juries were now to be established … we have an Act of Parliament establishing and order of things quite at variance with the common law. Now, if we were to anticipate the clause by which the King is authorised to establish Juries when he may think fit, there would be nothing left for the King to do … Can it be supported that when the words of this Act were written, that nothing was meant thereby because there is an implication of silence in another place; and that therefore plain, express, intelligible words are to be put away?

Chief Justice Pedder did not conclude without a reference to his more experienced counterpart, Chief Justice Forbes, and perhaps also Alfred Stephen. He wrote:

> [F]or the reasons I have given, I have come to the opinion that there cannot be Trial by Jury in the Courts of General and Quarter Sessions in this Island and its Dependencies, until His Majesty shall think fit to introduce it by an Order in Council; an opinion which I can not express but with considerable diffidence, knowing as I do what has been the opinion of others on the same point. But … it is my imperative duty to form, in the best way I can, an opinion of my own on the question, and having formed it, to deliver it.

Pedder was pilloried by the press in both Van Diemen's Land and New South Wales by those who fought for the cause of freedom from autocratic rule. The *Australian* of 25 August 1825 wrote that the decision was "a syllogistic fallacy which any lawyer of six days standing at the bar, or even a six dinner student could without profound reflection remove".

However, as Castles points out in his article, Forbes privately held the view that his decision was "an experiment" and West in his *History of Tasmania* wrote:[1]

> That the decision of our Supreme Court was a more correct interpretation of the intentions of Parliament, is scarcely to be doubted, but the words of the Act did not expressly extinguish a common law right, and the intentions of legislators is not law. The decision of Forbes was more agreeable to Englishmen, though scarcely compatible with the conditions of the country.

The outcome of the judicial conflict between Forbes and Pedder in Van Diemen's Land was, as reported in a letter from Alfred Stephen to Arthur of 9 October 1826, that free persons were not being tried in Courts of Quarter Sessions, thus continuing the burden on the Supreme Court.

In New South Wales, Castles concludes that the first "experiment" with juries was relatively short lived as the *Australian Courts Act* 1828 9 Geo IV c 83 (Imp) provided that the future regulation of trial by jury was to be left up to the Legislative Councils of the colonies to determine. It was more than a decade after that before military juries were abolished.

## The Battle Continues

On 2 March 1827 a number of the citizens of Hobart requested, as was the custom, that the Sheriff of Van Diemen's Land, Dudley Fereday, convene a public meeting of the free inhabitants of the Colony for the purpose of petitioning the King and both Houses of Parliament for "Trial by Jury" and a "House of Assembly".

The *Colonial Times* of that day trumpeted "Glorious News" and reported:

> Our matter was all prepared, our paper read, and just about to be sent to press, when the welcome intelligence was brought to us, that a meeting was to be convened, for the purpose of resolving on the subject of petitioning the King and Parliament to grant us a House of Assembly and a Trial by Jury. He who will not dare to stand forward for his liberty, deserves to live and die a slave. He who dare not demand

[1] John West, *History of Tasmania* (Henry Dowling, 1852) 102.

> his birthright, is unworthy the name of an Englishman, and he who will not now come forward to support the spirited motion made by a few patriotic individuals, is a disgrace to the Colony he now inhabits, and the country from which his ancestors sprang.

The public meeting was convened by the Sheriff on 13 March 1827 and presided over a gathering of some 200 free inhabitants at the Supreme Court building. The petition was adopted by the meeting.

Arrangements were made for a handful of the petitioners to meet with Lieutenant-Governor Arthur at 12.00 noon on 19 March in order to present the petition and request it be despatched to London. Arthur however, sent the delegation away, instructing them to come at another time. Instead, the delegates took the highly irregular step of sending the petition (and an explanation as to why it had not gone through the Lieutenant-Governor), directly to London on the vessel *Hugh Crawford* which sailed that very day.

According to the *Colonial Times* of 30 March 1827 the delegates informed Arthur of this by letter that day noting that they were "under the necessity from the respect due to the Public, to acquaint your Excellency that we shall not give your Excellency any further trouble upon this occasion".

The petition fell on deaf ears in England with a change of government unfavourable to reform occurring at the time of its arrival there. However, on 28 June 1830, without any fanfare the King issued an Order in Council authorising the Lieutenant-Governor "farther to extend and apply the form and manner of proceedings by Grand or Petit Juries … in the presentation and trial of all crimes".

## Arthur Holds Out

Arthur was apparently not ready to changes his views on the freedoms to which colonists believed they were entitled but which he did not believe they were. He made no move at all to make any change in the law relating to juries for another four years.

In November 1834 the *Extension of Trial by Jury Act 1834* (Imp) (5 Wm IV No 11) was passed however it provided only for juries of four "special" jurors on the trial of issues of fact and the assessment of damages. "Special" jurors were "esquires, merchant or bank directors" who met ownership of property requirements. "Common" jurors also had to meet equivalent requirements but could be farmers or grocers or retailers.

The Act provided that juries of 12 jurors could be assembled at the sole discretion of the Court but that if the Governor or a member of the Executive or Legislative Council, or a naval or military officer, was a prosecutor or had an interest at stake in the result of a criminal case, then, unless the Court directed otherwise, the trial was to be by a judge and a jury of 12 special jurors.

Arthur held out against any further change. In December 1837 he was appointed Lieutenant-Governor of Upper Canada. He administered there, seemingly as repressively as he had done in Van Diemen's Land, in the period between the rebellion and the union of the Canadas early in 1841.

## Victory at Last

After a brief period of administration by Kenneth Snodgrass, the Van Diemen's Land had a new Lieutenant-Governor in January 1837, replacing Arthur. In 1840 during Sir John Franklin's administration, which continued until August 1843, the free inhabitants of the Colony finally won the battle they had commenced on 2 March 1827. On 5 November 1840, after months of opposition, including that of Chief Justice Pedder, the *Jury Act 1840* (Imp) (4 Vic No 33) was passed.

By s 1, the Act provided as follows:

> That from and after the first day of January one thousand eight hundred and forty one, every issue of fact joined upon any information filed in any Court of this Island in the name of Her Majesty's Attorney-General … shall be tried by a jury of twelve inhabitants of the said Island … and after the first day of January one thousand eight hundred and forty one, the trial of offences by seven commissioned officers of her Majesty's sea and land forces shall cease and determine.

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