# Sir Alfred Stephen and the Jury Question in Van Diemen's Land

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## The Quest for Trial by Jury

Just as a child grows and develops into an adult, it cannot but be influenced by background, environment and social conditioning. So it was with the young Van Diemen's Land. Initially, there was the English political, social and economic inheritance, which had a great effect on the form of government adopted. Like an authoritarian parent stood the Imperial Parliament, but at the same time, offering some latitude for Van Diemen's Land to engage in some liberal development. Like a child, Van Diemen's Land offered little resistance. There was a Governor, a judiciary of sorts, and an administrative bureaucracy with control over Van Diemen's Land by way of legislation of the Imperial Parliament, such as that of 1823, 1828 and 1842. This control led to Van Diemen's Land becoming firmly under the grip of Mother England.

The colony now consisted of free settlers, convicts and emancipists, and a few Aboriginals. The colonists must have coined the Nike catch phrase 'Just Do It (for yourself)!' for they sought to enhance their own success and to empower themselves. This was consistent with the attitude of imperialist conquerors throughout the old British Empire: to get what they could for themselves in the way of wealth, control and power.

There is no better example of this than Governor George Arthur, a career civil servant who amassed a fortune as a landowner and trader, not only in Van Diemen's Land but in other colonies where he saw service.

Following the Imperial Parliament, the government of the colony consisted of two houses,[1] but it was the Legislative Council, con-

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trolled by an autocratic Governor, which empowered itself in such a way that reform was stifled, and set the boundaries for the development of Van Diemen's Land. Governor Arthur certainly was a strong, autocratic Governor, and was ideally placed to use such a framework.

Neal[2] argues that the rule of law meant that Governors must act pursuant to pre-existing rules *and* Governors were also bound by such rules. The rule of law to Arthur was simplistic. He was the representative of the Motherland and all its institutions. Those institutions and their rules were to be upheld at all costs, and anyone who stood in the way of this was isolated one way or another.

A highly opinionated man with definite views, even after retirement,[3] he was convinced that transportation was a 'good thing': it provided for the convict a chance to reflect and reform; to Van Diemen's Land, it provided a steady, stable labour force essential to its prosperity and development; and to the Motherland, it provided benefits in the form of removal of criminals and growth of her empire.

Towards the end of Arthur's period in Van Diemen's Land we find that even trenchant critics like Robert Lathrop Murray and Henry Melville became Arthur supporters, and were united in their thinking that Arthur did what was needed for the good of the colony, and that he was a highly efficient and devoted Governor.[4] This devotion was not in vain, for he left an estate of about £50 000, which he saw as just reward for his years of service to the Motherland and preservation of the British Empire.[5]

Another important element in Neal's concept of the rule of law was the necessity to have a legal forum where brisk and robust argument could be used to apply laws in adjudicating disputes before their peers.[6]

As the colony increased its numbers of free settlers and emancipists, there developed opposition by the citizens to autocratic government. This meant there was a need for independence of the judiciary and trial by jury. Of course, one of the problems with trial by jury was that it was often difficult to find enough free citizens who were able

1 Of course, one could argue that Van Diemen's Land followed New South Wales.

2 David Neal, *The Rule of Law in a Penal Colony* (1991) 66.

3 A G L Shaw, *Sir George Arthur, Bart, 1784-1854: Superintendent of British Honduras, Lieutenant-Governor of Van Diemen's Land and of Upper Canada, Governor of the Bombay Presidency* (1980) 92-3.

4 Ibid 176.

5 Ibid 283-4.

6 Neal, above n 2, 67.

to serve as jurymen. Until this could occur, the colony could never be democratic and free. Consequently, there developed a view in the colony that until they had achieved trial by jury their rights could never be equivalent to those of the Englishman. Yet all the while, the number of free colonists was increasing, so the push for democracy increased proportionally to the number of free colonists.

The push for juries found a strong ally in the shape of Sir Alfred Stephen,[7] who was Attorney-General during the time of Governor Arthur. Stephen was a career colonial lawyer, just as Arthur was a career Governor. He spent about 70 of his 92 years in the Australian colonies and is remembered as an 'able and conscientious judge'.[8] Stephen was influenced by the views of Jeremy Bentham, whose theories had begun to transform English law around 1800, in a wave of reform known as the Benthamite movement.[9] Bentham's ideas formed the basis for a movement whose aims were to transform economic, religious and political institutions, as well as the law itself. In the Australian colonies his ideas were not wide-ranging, rather, individuals such as Alfred Stephen took up his theories.

In legal questions, Alfred Stephen was a utilitarian. Like Bentham, he believed that the law had a function in society: 'to promote the welfare of all classes [of society] ... Without on the other hand disregarding the wishes of any class'.[10] The major part of Stephen's life was spent trying to increase the efficiency of legal institutions and the rationality of various laws so that 'welfare' or happiness in society would be increased. Alfred Stephen's work in Van Diemen's Land demonstrates a true allegiance to these principles.

In Van Diemen's Land, the jury question was used as a general uniting platform in empowering forces against the Governor. Inevitably,

7 Alfred Stephen was born in 1802 and came to Van Diemen's Land on 24 January 1825, and was appointed Solicitor-General on 9 May 1825. Ten days later he was elevated to Crown Solicitor on a salary of £300 per annum. He became Attorney-General on 6 May 1832 on a salary of £900 per annum, and an ex-officio member of the Legislative Council. He was always a strong advocate of law reform and trial by jury and on 5 November 1834 he saw the passage of the *Jury Act 1834*. He was made a judge of the New South Wales Supreme Court on 14 May 1839 and Chief Justice on 2 June 1845. He was also a capable administrator and law reformer and chaired the Law Reform Commission from 1870 to 1872. He was knighted in 1846. For a detailed biography, see *Australian Dictionary of Biography* (1976) vol 6, 180-7.

8 *Sydney Morning Herald*, 16 October 1894.

9 See Appendix for an outline of Jeremy Bentham's ideas.

10 Letter from Alfred Stephen to Lieutenant-Governor Arthur, 12 May 1837, in *Stephen's Letter Book IV* (A 673, Mitchell Library).

the Chief Justice, whether by accident or design, also became embroiled in such manoeuvres in his impossible attempts to remain impartial, bearing in mind that he also was viewed as a representative of the Governor.

This article, while considering the development of juries in Van Diemen's Land as a general theme, also looks at the part played by Sir Alfred Stephen, who was initially appointed to the post of Solicitor-General as a young barrister, and who became Attorney-General in 1832 and later Chief Justice of New South Wales in 1844.

## Developments in New South Wales and its Significance for Van Diemen's Land

### New South Wales

The changes in New South Wales provided a model for Van Diemen's Land, so it is therefore important to examine the development of the jury system in New South Wales in the 1820s and 1830s.

Trial by jury was introduced in the process of setting up Courts of General and Quarter Sessions,[11] and endorsed by Chief Justice Forbes in the case of *R v Magistrates of Sydney*,[12] where it was held that both grand and petit juries were an essential part of the indictment process and trial of freemen at Quarter Sessions, unless legislation deemed otherwise.

At the end of 1825, Governor Brisbane had reported to the Secretary of State, Bathurst, 'that by the community at large the mode of trial by jury was considered as a great improvement'.[13]

Secretary of State Bathurst realised that trial by jury could no longer be postponed and wrote to Governor Darling in 1826 that he intended to make a change in the judicial system.[14] He told the Gover-

[11] A C V Melbourne, *Early Constitutional Development in Australia: New South Wales 1788-1856, Queensland 1859-1922* (1963) 122.

[12] [1824] NSWSC 20 (14 October 1824), reported in *Australian*, 21 October 1824; also see below pp 86-7, where the case is discussed briefly in relation to its relevance to Van Diemen's Land; a discussion of the case is in A Castles, *An Australian Legal History* (1982) 186-7. The opposite finding was held in *R v Magistrates of Hobart Town* (1825), reported in *Hobart Town Gazette*, 9 July 1825 (see below pp 87-8). The importance of both cases lies in the fact that the fledgling colony's judicial system had an important part to play in the role of government.

[13] Historical Records of Australia ('HRA'), vol I (xi), 893.

[14] Melbourne, above n 11, 123.

nor to bring the matter before the Executive Council and to send him a copy of its proposals. These were in the Secretary of State's hands when he framed the Bill that was to become the *New South Wales-Van Diemen's Land Act 1830* 9 Geo 4 c 83.

The more important proposals were:

- emancipists should be competent for jury service;
- there should be high property qualifications for jurors;
- there should be grand juries;
- in criminal cases there should be a jury of 12;
- civil cases should remain as at present.[15]

The result was that the *Australian Courts Act 1828* 9 Geo 4 c 83, an Act of the English parliament, did allow changes to be made to jury laws. It preserved the status quo, but allowed the Governor in Council to extend and apply the jury laws,[16] resulting in local legislation being enacted: *An Act on Qualifications of Jurors 1830* 10 Geo 4 No 8, and *An Act For Regulating the Constitution of Juries For the Trial of Civil Issues in the Supreme Court of New South Wales 1830* 11 Geo 4 No 2, with an extending amendment in the same year.

Neither of these Acts, however, made any real changes to the law, for Governor Darling opposed an extension of trial by jury. This attitude was against growing public opinion, the views of some of the Supreme Court judges and the Imperial Government.

Typical of the arguments in favour of civilian juries was that raised by the reformer, Edward Scott Hall. Whilst conducting his own defence in *R v Hall (No 2)*,[17] when charged with libelling the then Archdeacon of Sydney, he began his address to the jury by pointing out to the judges the disadvantages of being a private citizen coming as a defendant before a jury of military officers.[18]

Again, in *R v Hayes*,[19] the use of military officers acting in juries loomed large in the mind of Justice Stephen. In referring to the ap-

15 J M Bennett, 'The Establishment of Jury Trial in New South Wales' (1959/1961) 3 *Sydney Law Review* 463, 472.

16 9 Geo 4 c 83, s 10.

17 (1828), reported in *Australian*, 1 October 1828, available at <http://www.law.mq.edu.au/scnsw/Cases1827-28/html/r_v_hall__no_2___1828.htm>.

18 Ibid 1.

19 (1829), reported in *Australian*, 17 April 1829; also see Division of Law, Macquarie University website: <http://www.law.mq.edu.au/scnsw/Cases1829-30/html>; HRA, vol I (xv), 396; C H Currey, *Sir Francis Forbes* (1968) 362.

pointment of seven officers nominated by the Governor to a jury, he stated:

> It was never contemplated that those appointments were to violate the principles of commonsense and justice ... as it were a mockery of fair and equal justice to suppose a person should be both judge and party to his own cause.[20]

The only exception that Justice Stephen saw was perhaps that of necessity,[21] and in saying that, it would need to be a very strong argument before he would allow it, for to allow a prosecutor to nominate his own jury was a violation of the fundamental principles of English justice.[22]

Finally, the Imperial Parliament was of the general view that trial by jury existed in Van Diemen's Land, the same as in England.[23]

A concerned Secretary of State George Murray expressed his thoughts on cases where government members were parties, suggesting that in such cases civil juries should be appointed. His objection to military juries nominated by a Governor was evidenced when he stated that it would be unthinkable that a military officer would use his position of influence in making a decision, yet it is unfair for such an officer to be placed in such an invidious position every time he was selected for jury service, for there is always a perception that he could be influenced in his decision-making because of his position.[24]

However, Darling unequivocally opposed any reform that would weaken the government's control, and he wrote to George Murray in October 1830: 'I have derived from my situation here that no colony so long as it continues to be a receptacle for criminals ... can be considered eligible to the possibility of the English constitution'.[25]

The opinion of the Legislative Council was divided, though a majority was opposed to Murray's suggestion. Even Francis Forbes, the Chief Justice and very much a liberal,[26] was an opponent, although on

20 *R v Hayes* (1829), reported in *Australian*, 17 April 1829, 15.

21 Ibid.

22 Ibid.

23 Henry Saxelby Melville, *The History of Van Diemen's Land: From the Year 1824 to 1835 During the Administration of Lieutenant Governor George Arthur* (edited with introductory notes and commentary by George Mackaness) (1978) 23.

24 HRA Series 1, vol xv, 396.

25 Ibid 772.

26 He believed that without Circuit Courts the system would not function. See Currey, above n 19, 360.

practical, rather than theoretical, grounds, for he believed that emancipists, like free settlers, should be allowed to serve on juries because they had paid their debt to society.

There was a complete stalemate until Governor Darling was replaced by the Whig, Richard Bourke. In his first meeting with the Legislative Council, Governor Bourke pointed out that the laws with respect to juries had lapsed. The result was that Bourke exercised the power that Murray's Order-in-Council granted, and included Murray's submissions in legislation known as *An Act For Regulating the Constitution of Juries, and For the Trial of Issues in Certain Cases, in the Supreme Court of New South Wales 1832* 2 Will IV No 3.

Governor Bourke, however, was not satisfied with such a limited application of non-military jury trial, and let the Council know that he intended to increase its ambit to all criminal cases. Whilst such reform was supported by some members of the British government, Richard Bourke received no official endorsement for his proposals.

Finally, his impatience overcame him, and in March 1833 he laid a Bill before the Council to provide for civil juries in all military cases. The opposition was much more entrenched than he realised, and although it did pass the Council, it was only on his casting vote.

By 1833 the laws governing trial by jury in New South Wales were the same as those in England, with the following exceptions:

- qualifications for service were higher;
- there was no grand jury;
- an accused could choose either 12 civil or seven military/naval jurors; and
- in civil cases a judge and two assessors were appointed unless application was made for a jury of 12 by either party.

**Van Diemen's Land**[27]

The first real interest in Van Diemen's Land concerning jury trial arose during the course of a New South Wales court case, *R v Magis-*

[27] Van Diemen's Land was proclaimed an independent colony on 3 December 1825 with the formation of an Executive and Legislative Council. The function of the Executive Council was to advise the Governor on important matters, and the latter to make laws for the government of the colony. The first Executive Council members were: Captain John Montague, Colonial Secretary and nephew of Arthur; Chief Justice Pedder; A W H Humphrey, Police Magistrate; and Jocelyn Thomas, Colonial Treasurer; see J Fenton, *History of Tasmania* (1884) 65.

*trates of Sydney*.[28] This case arose out of the failure of the *Constitution Act 1823* 4 Geo 4 c 96 to give any specific authority in relation to empanelling juries. Section 19 of the Act made provision for establishing Courts of Quarter Sessions. However, since it had failed to substitute common for military juries, it seemed clear that only military juries were wanted in criminal cases in that Court.

Chief Justice Forbes, however, decided that a civil jury should be empanelled. The magistrates of the colony challenged his interpretation and refused to swear in civil juries. The result was a writ of mandamus demanding that they show cause why they should not try criminal cases according to the law of England.

The Chief Justice, ruling in favour of the Crown, stated:

> By the Constitution and office of Courts of Sessions, Juries are essential and indispensable to the exercise of their primary and most ordinary duties. This being my opinion, I must rule, that a mandamus do issue, requiring the Justices of Peace in the district of Sydney, to issue their precept, and to Proceed in like manner as Courts of Sessions proceed in England.[29]

Saxe Bannister, the Attorney-General, argued for the Crown that there could be no trial at all if the English system was not adopted.[30] He stated in regard to civil juries: 'The Sessions over the former class (Civilians) were invested with the same jurisdiction as is possessed by the Quarter Sessions in England'.[31] Later, in referring to the statute that constituted Courts of Quarter Sessions in the colony (4 Geo 4 Ch 6), he also stated: 'if any part of a statute be obscure it is proper to consider the parts ... if no such obscurity existed, the other parts of the Act were of course to be put out of consideration'.[32]

On the other hand, John Stephen, on behalf of the magistrates, argued that the specific Act relating to the colonies had excluded the civil jury. He further argued that since the Supreme Court had no civil jury there was no reason why they should be used in Quarter Sessions:

28 [1824] NSWSC 20 (14 October 1824); see *Australian*, 21 October 1824; also referred to in H W H Huntington, *Sir Alfred Stephen* (1886) vol 1, 102-6; see also Bennett, above n 15, 471, and <www.law.mq.edu.au/sctas/html/case_index.htm>.

29 <www.law.mq.edu.au/scnsw/>, *R v Magistrates of Sydney* at 8.

30 Ibid 2-3.

31 Ibid 2.

32 Ibid.

> Courts here [vary] considerably from the Courts in England, from the peculiar circumstances of the Colony, which it was not necessary particularly to state, because they were well known. These circumstances had proved sufficiently cogent to induce the legislature to introduce a different mode of trial here, not only with regard to criminals who were deprived of a jury, but also in civil causes. This shewed that the Legislature thought the Colony unripe for trial by jury.[33]

It was not surprising that Francis Forbes's verdict favoured the Crown, since it was he who had first decided to empanel juries, basing his decision on the fact that magistrates' obligations were settled by the common law of England. One could well argue here that Forbes sat on a case to which he was effectively a party, and so should have disqualified himself.

While this case was proceeding in New South Wales, a young and inexperienced Solicitor-General, Alfred Stephen, decided to put the same case in Van Diemen's Land in *R v Magistrates of Hobart Town*.[34] According to a contemporary journalist, Robert Lathrop Murray,[35] an opponent of the government: 'Stephen wanted the Act to be constructed in Van Diemen's Land as it had been constructed by Forbes in New South Wales'.[36]

The result in Van Diemen's Land was, however, the reverse of both Alfred Stephen's expectations and the Forbes decision. Chief Justice Pedder ruled that Parliament was a higher authority than the common law, and so civil juries were not allowed and were illegal.[37] This meant that from 1824 there was a significant difference in the law relating to juries between New South Wales and Van Diemen's Land.

The Lieutenant-Governor of Van Diemen's Land, George Arthur, was fully in agreement with Pedder's decision, as he revealed in a despatch to Hay:

> A difference as you are aware has arisen between the Judges of the two courts of New South Wales and Van Diemen's Land in the construction of some of the provisions [of the Act] most especially upon the very important Jury question ... I must unhesitatingly declare it to be my opin-

[33] Ibid.

[34] Heard on 1 July 1825 and reported in the *Hobart Town Gazette*, 9 July 1825; also see <www.law.mq.edu.au/sctas/html/r_v_magistrates_1825> – see the commentary appearing at pp 14-15 which is invaluable for future researchers.

[35] See below n 85.

[36] Anon, 'The New Jury Act', *Murray's Austral-Asiatic Review*, February 1828, 582.

[37] This decision was regarded in the Colonial Office as correct in law.

> ion that the colony is in no way prepared for the unlimited admission of trial by Jury.[38]

Stephen was obviously disappointed at the decision but discretion prevented him from offering a personal comment, as can be seen when asked by Arthur to prepare a report on the working of the 1823 Act. In referring to the jury question, he wrote:

> I do not presume to have an opinion: It is merely for me to notice them, trusting that for the peace of the colony the possibility of doubt in this matter will be effectually removed by the highest authority.[39]

## Trial by Jury

### An English Precedent?

Thus, from midway through 1825, the jury question became a matter of public prominence. When in 1826 Peel's Jury Bill was introduced in England, trial by jury became a burning question in the colony. As the *Colonial Times*, an anti-government newspaper, put it: 'To Mr Peel's Jury Bill we have offered the greatest tribute of our warmest gratitude'.[40]

There was now real hope that the same provisions (whereby civil juries were to be used in all cases) would apply in the colony. In fact, the *Times* seemed to think that such a reform was to be introduced almost immediately when they declared happily: 'the Act expressly provided that persons having free pardons were eligible to serve on juries'.[41]

It was at the same time (from the beginning of 1826), that the type of government in the colony came under question and the nexus between trial by jury and the desire for less authoritarian government was established. The *Colonial Times* editorial illustrated this concern: 'We have waited with anxiety in the hope that some explanation would have been given to the public of the nature of Government to which his Majesty's people in this island are at present subjected'.[42]

38 HRA, vol 3 (v), 421.

39 Ibid.

40 *Colonial Times*, 13 January 1826.

41 Ibid.

42 *Colonial Times*, 10 February 1826.

The interrelatedness between this and trial by jury was illustrated when in the same editorial the newspaper demanded the same rights in relation to juries that existed in New South Wales:

> The want of Trial by Jury and Taxation by Representation is one of the most serious to which any British Colony can be subjected ... The necessity of, the restoration of ... trial by jury is daily more and more apparent ... without trial by jury our liberties are but a name.[43]

The issue received increasing public support during 1826. Public meetings were held in Hobart in February 1826 and January 1827,[44] and on both occasions a petition was drawn up and sent to England. The second petition received a reply from Secretary of State Goderich, who promised to lay the petition before the King.[45]

**The Situation Within the Colony**

After the introduction of the *New South Wales-Van Diemen's Land Act 1830* 9 Geo 4 c 83, the situation in criminal cases was the same in the two colonies, viz, only Commissioned officers were eligible to serve on criminal juries.

In civil cases, however, the difference remained. In New South Wales, emancipists were allowed on juries, provided application was made and permission granted by the Governor. In Van Diemen's Land, civil cases were still tried by a judge and two government appointed magistrates.

Despite the apparent similarities of the jury system in the two colonies in 1828, events leading to the passing of a reform law in New South Wales in 1833 were completely different from those events that led to the 1834 *Jury Act* in Van Diemen's Land.

First, the colonists in the smaller colony had to catch up to New South Wales in relation to civil juries. Second, when juries in civil cases had been granted and colonists could concentrate on reforming criminal trials, their involvement and motivation was significantly different to that of New South Wales.[46]

43 Ibid.

44 The purpose of this meeting was to frame a petition to the King and the United Kingdom Parliament for trial by jury and to have free institutions, to allow the people of Van Diemen's Land a say in how they were governed, for all power was in the hands of the Governor. See Melville, *History of Van Diemen's Land*, above n 23, 62-3.

45 This was, of course, merely a 'formality'. *Hobart Town Courier*, 2 February 1828.

46 See below p 101 and following.

## The Situation in Van Diemen's Land

### Civil Juries

Events leading to jury trial in civil cases in Van Diemen's Land were precipitated by *R v Bent (No 1)*,[47] a civil case held before the Chief Justice, John Pedder,[48] in the Supreme Court of Van Diemen's Land on 1 July 1825. Andrew Bent, a well-known publisher, had an action brought against him for libelling Lieutenant-Governor Arthur[49] in the *Hobart Town Gazette* of 8 October 1824.[50]

When this trial was about to start, however, it was pointed out by a local paper, the *Tasmanian*, that there was no Act in Van Diemen's Land that brought its law into line with the jury law of New South Wales.[51] The editor did, however, express the hope that Chief Justice Pedder would act as Forbes had done in New South Wales and empanel a jury.

Attorney-General Gellibrand, who was acting for Bent, sensed that Van Diemen's Land must soon follow New South Wales and asked for a jury to be sworn in. He knew that Stephen had already drafted the Bill, the Legislative Council had it for consideration, and all the signs pointed to the fact that the Bill would not meet any opposition and passage was imminent. However, Stephen refused, stating that

47 (1825), reported in the *Hobart Town Gazette*, 9 July 1825, available at <http://www.law.mq.edu.au/sctas/html/r_v_bent__no_1___1825.htm>.

48 Sir John Lewes Pedder was Chief Justice of Van Diemen's Land from 1824-1854. Pedder's claim to fame was the introduction of trial by jury. The Act empowering the Crown to establish Supreme Courts in New South Wales and Van Diemen's Land (4 Geo IV c 96, s 6) provided that actions at law should be triable by a jury of 12 if both paries agreed. In New South Wales, Chief Justice Forbes construed s 19 of the Act to require that freemen should be tried by juries of their fellows, but limited it to Courts of Quarter Sessions. In contrast, Pedder ruled that the Act introduced trial by jury to the Supreme Court alone. On this matter he was branded as a member of the 'government party'. See *Australian Dictionary of Biography* (1967) vol 2, 319-20; see an authoritative monograph by J M Bennett, *Sir John Pedder: First Chief Justice of Tasmania* (1977); see also below n 59.

49 Prior to Arthur's arrival in Hobart to take over from the previous very popular Governor, William Sorell, in May 1824. Political criticism was nonexistent due to Sorrell's popularity: see Herbert Heaton, 'The Early Tasmanian Press and its Struggle for Freedom' in *The Papers of the Royal Society of Tasmania* (1916) 1, 13-14.

50 In the editorial of 8 October 1824 in the *Hobart Town Gazette*, a reference to the Governor as a 'Gibeonite of Tyranny' was made (see ibid 17). This was thought to mean Arthur was a tyrannical person, and to make such charges against the Governor was improper conduct. Bent was tried and retried a number of times and finally in 1826 he was found guilty of improper conduct and was sentenced by a military jury to six months imprisonment and fines totalling $518. See *Colonial Times*, 4 August 1826.

51 *Tasmanian*, 8 January 1830.

the matter could only be resolved by Pedder. Considering that Pedder had ruled the opposite to Forbes in the *Magistrates* case, it was not surprising that he rejected Gellibrand's request for a jury.

Realising, however, that a law introducing the new method of trial was imminent, Pedder preferred to postpone the case; his reason, according to the *Tasmanian*, being that 'he was well convinced that the Government would feel it imperative to lay before the Council the regulation for juries'.[52]

The conflict between Bent and Gellibrand on the one hand and Stephen on the other was a long-standing one. In 1825, Gellibrand was suspended from his office as Attorney-General,[53] whilst Bent was finally imprisoned for having libelled Arthur.[54] Both actions were made at Stephen's instigation. It was not surprising, then, that Gellibrand and Stephen disagreed on the jury question. Furthermore, considering that Gellibrand was also editor of the *Tasmanian*, it was not strange that the newspaper attacked Stephen for his opposition to juries.

[52] *Tasmanian*, 15 January 1830; see also W D Forsyth, *Governor Arthur's Convict System 1824-36: A Study in Colonization* (2nd ed, 1970); and see C H Manning Clark, *A History of Australia: Volume 2 – New South Wales and Van Diemen's Land 1822-1838* (1968); and also see M C I Levy, *Governor George Arthur, Colonial Benevolent Despot* (1953).

[53] Following a Commission of Inquiry into Gellibrand's rule as Attorney-General and his right to private practice on 15 September 1825, he was suspended from duty indefinitely. The charges were brought by the Solicitor-General, Alfred Stephen, who at that time was an avid Arthur supporter. Stephen also took proceedings to the Supreme Court before Pedder CJ on 10 September 1825, on a charge of unprofessional conduct. This was dismissed by Pedder. Arthur then directed that the matter go before a private inquiry at the home of the Chief Justice. Gellibrand objected on both legal and constitutional grounds: the particular charge was that he had drawn up pleadings for both the plaintiff and defendant (which was a recognised custom in the colony). Pedder opposed the fact that Gellibrand appeared to act for both parties. However, Gellibrand withdrew from the Inquiry when he was not given equal rights with that of the Solicitor-General, ie being allowed to cross-examine Stephen. The matter was then referred to a Mr T N Talfourd of the English Bar (later Mr Justice Sir Thomas Talfourd), who took the opposite view and concluded:

> It is certainly to be regretted that, ill-treated as Mr Gellibrand was before the Commissioners, he did not remain and make his own defence, as by so doing he could have reduced his whole case into a compact and authentic form.

See E Morris Miller, *Pressmen and Governors* (1973) 167-8; also see Enid Campbell, 'Trial by Commission: The Case of Joseph Tice Gellibrand' in *Tasmanian Historical Research Association Papers and Proceedings* (1987) vol 34, 69-83; also for further biographical notes see *Australian Dictionary of Biography* (1966) vol 1, 437-8.

[54] *Colonial Times*, 4 August 1826.

Despite the fact that the non-government newspapers tried to keep the jury question alive following the postponement of Bent's case, the citizens were utterly apathetic. The *Tasmanian* was openly opposed to Arthur, carrying editorials on the jury question three times,[55] and in March 1830, urging the people to follow the example of those in Sydney. They were forced, however, to admit their failure when they reported: 'They [the people of Sydney] have invited the people here to unite with them and there is not PUBLIC SPIRIT enough or PUBLIC COURAGE in this colony to accept the invitation'.[56]

Even though the colonists as a whole appeared uninterested, Stephen single-mindedly drew up an Act to regulate juries, 9 Geo IV No 5,[57] which was passed by the Legislative Council on 21 April 1830. There was widespread praise for the Act, but at the same time, a unanimous declaration by all the newspapers that this was only the beginning. The *Tasmanian*, for example, in referring to the Act, commented that it was prepared with great care, plainness, simplicity and perspicacity and covered not only everything of value in the New South Wales Act, but also had several important improvements.[58] Yet they also agreed with the *Colonial Times* by reporting: 'We merely hope that at all events we may have trial by Jury in civil cases as the stepping stone to other and more valuable concessions of a similar nature'.[59]

An argument may be put that Stephen, as far as the jury question was concerned, was not a reformer, but was in reality only a monitor for New South Wales, for all he did was put in place in Van Diemen's Land what was already in existence in New South Wales.[60]

55 5 March 1830, 12 March 1830, 19 March 1830.

56 *Tasmanian*, 19 March 1830. Levy's explanation is that the majority of the inhabitants were content with Arthur's administration: Levy, above n 52, 47-88.

57 *An Act to Regulate the Constitution of Juries 1830*. There is a copy of the original Act, with Stephen's own handwritten amendments, kept in the Mitchell Library, call no Q346.961/T. There was then a period of inaction on the jury question, partly because Stephen returned to the United Kingdom, coming back three years later, in time to see through the Legislative Council an Act that echoed his earlier effort, together with specific provisions on the administration of juries in Van Diemen's Land: *An Act For Extension of Trial by Jury and to Regulate the Constitution of Juries 1834* 5 Will IV No 11.

58 *Tasmanian*, 9 April 1830.

59 *Colonial Times*, 16 April 1830; *Tasmanian*, 9 April 1830.

60 In New South Wales, the Act that emerged resulting in the regulation of juries in civil cases was called *An Act for Regulating the Constitution of Juries For the Trial of Civil Issues in the Supreme Court of New South Wales 1830* 11 Geo IV No 2, and was modelled on another New South Wales Act, *An Act For Regulating the Constitution of Juries For the Trial of Civil Issues in the Supreme Court of New South Wales 1829* 10

However, this argument is too simplistic for there were notable differences in the legislation of the two colonies at the time, and just one look at the handwritten amendments made by Stephen shows he had given his Act a great deal of thought before submitting it to the Council.

Two great differences concerned the qualifications of jurors and how jury lists were prepared. In New South Wales, only house owners could be jurors,[61] whilst in Van Diemen's Land, house owners and those renting a house at designated rents could be jurors.[62] Again, jury lists in New South Wales were corrected by magistrates at Petty Sessions,[63] whilst in Van Diemen's Land, jury lists were corrected in public at Quarter Sessions.[64] In all other respects the two pieces of legislation were similar.

In May of the same year (1830), *Butler v Bent*,[65] a libel case, was heard before a jury, the first civil case with a jury in Van Diemen's Land. The facts related to a series of satirical cartoons descriptive of life and society in Hobart in 1829 called 'The Hermit in Van Diemen's Land'. The case resulted from a claim by Gamaliel Butler, a solicitor who sought damages from Andrew Bent, claiming he was libelled in several editions of 'The Hermit' dated 21 August 1829 and 2 October and 9 October 1829.

The Court was presided over by Chief Justice Pedder[66] sitting alone. The empanelling of the jury was interesting for it included Robert

Geo IV No 8, which dealt with civil cases and allowed the use of a jury, if such was applied for and a judge agreed.

61 Article II provided jurors had to be aged between 21 and 60 and reside in Sydney or within a radius of 22 miles, and own real estate to the value of £300 or own real estate in which they received at least £30 rent per annum.

62 Article II provided jurors had to be over 21; have their own income of £40 per annum; or real estate plus personal estate to the value of £60; a personal estate valued at £80; or be a tenant of any Hobart house worth £75, or in other areas, £50.

63 Article VIII provided that Petty Sessions would allow magistrates to correct lists in the first week of December and to do so within six days of sitting.

64 Article VIII provided for the correction of lists to be done at Quarter Sessions.

65 Heard in the Supreme Court on 10 May 1830 and reported in the *Tasmanian*, 14 May 1830 and in the *Colonial Times*, 14 May 1830. In Van Diemen's Land, the *Jury Act 1830* 11 Geo 4 No 5 was passed, allowing a judge to permit a jury in civil cases when either party wanted it. Twenty-four names were given to both parties and they were to delete six. The remaining 12 would become the jury. *Butler v Bent* was the colony's first jury trial.

66 First Chief Justice of the new Supreme Court, which also had J T Gellibrand as Attorney-General; for biographical details see above n 48.

Lathrop Murray, but he was not selected. The foreman was James Ross,[67] a prominent citizen.

The jury found for Butler on all counts.

The public did not see this reform as particularly important, and some even considered the subject 'old and hackneyed'.[68] Yet the holding of the first jury case did result in some praise, for the *Colonial Times* opined that jury trial had for a long time been a catchphrase of the disaffected:

> So important a proceeding as has this week for the first time since Van Diemen's Land has been a colony, marked the sittings of the Supreme Court cannot with propriety be ignored ... the previous mode of trial is very unfavourable to the flowing of the stream of justice, the new Act is thoroughly adapted to the circumstances of the colony.[69]

Thus, by 1830 the form of jury trial in civil cases had been settled. It was ironic that a case of such little importance in itself had advanced so important a reform. The *Colonial Times* commented that had Stephen and Gellibrand not been such bitter personal enemies at the particular time, the case would, undoubtedly, have passed over without incident.

## Criminal Juries

### *The Actors*

The way was now open for the reform of criminal juries: a matter of much greater importance, causing much greater conflict than the reform of civil juries.

For this contest there were, between 1830 and 1839, four actors: the Governor; the Active Radical Party[70] (radical in the sense that they

67 James Ross was a Scotsman who came to Tasmania in 1822. He, with a Mr G T Howe, became co-editor of the *Hobart Town Gazette* (the official Government Gazette) in June 1825, and was an ardent supporter of Arthur's Governorship. He was an opponent of Murray to the point that in editorials both would attack each other on matters ranging from political leanings to the correct quotation of a piece of poetry: see Miller, above n 53, 439-40.

68 *Colonial Times*, 14 May 1830; and also reported in the *Tasmanian*, 14 May 1830.

69 Ibid.

70 The *Colonial Times* had Henry Melville as editor. He was an ardent radical, and an advocate of a single tax on improved land and heavier taxation burdens on unimproved land. In his *History of Van Diemen's Land*, above n 23, Melville deals with the whole question of land tenure. He urges that the whole revenue of the colony should be raised by a land tax or quit-rent; customs, stamp duties and other existing forms of taxation could then be abolished. Further, he suggests that in a land tax, unimproved land 'should be more severely taxed than the soil on which labour and capital have been expended; the former has been almost useless to

were most opposed to government policy), consisting mainly of a handful of newspaper proprietors and journalists; the free 'middle class'; and finally, Alfred Stephen, who, at one time or other, came into conflict with each of the other three groups.

The Governor's position as to civil juries remained throughout the period consistent and unambiguous. He was opposed to any reform that might increase the difficulty of administering an immense gaol like Van Diemen's Land.[71]

The position of the 'Active Party' was equally clear. Although these men never coordinated their efforts (and were not, therefore, a real 'party'), they were all of the belief that the colony was too largely populated with free men to be considered a gaol.

The activists, as a group, wanted free institutions and were of the same voice in their hatred of Arthur.[72] Some, like William Gellibrand,[73] were undoubtedly idealists. Others, like Anthony Fenn Kemp,[74] Joseph Tice Gellibrand[75] and George Meredith,[76] whilst having liberal pretensions, wanted to discredit Arthur because he had harmed them financially or reduced their social prestige. However,

society, whilst the latter has assisted in the maintenance of the inhabitants'. See Miller, above n 53, 152 and following.

The radical group so hated Arthur that when Arthur was recalled to England in 1836 it was reported:

> Yes, colonists ... present Colonel Arthur with a piece of plate, but let it be symbolical of [the colony's] present state – let it be a shivered fragment of crockery, and tell Col Arthur that as the fragments can never be united, so has he dissevered society.

See *Hobart Town Courier*, 10 June 1836.

71 Levy, above n 52; and Forsyth, above n 52.

72 Whilst Arthur was a good administrator, he suffered from the animosities of the colony. Many colonists drifted with the tide and would say in reference to Arthur: 'I do not like thee, the reasons why I cannot tell': see Fenton, above n 27, 136-40.

73 Father of Joseph Tice Gellibrand, a merchant who was opposed to Arthur and who became one of the colony's very first magistrates. He was liberal thinking, of intellectual tastes, lofty spirit, and an advocate of freedom: see J West, *The History of Tasmania* (1971) 127.

74 See below n 113.

75 See below n 125.

76 George Meredith was born in 1778 and emigrated to Tasmania in 1821 and was prominent in public affairs until his death in 1856 at the age of 79. Murray and Meredith hated each other, but they would join in public meetings where there was a common cause against the common enemy, ie the government and Arthur, for example, they were of one voice in demanding free political institutions. Their hatred of each other reached a high when Meredith became editor and owner of the *Colonist* in 1832 and Murray edited the *Tasmanian* under Melville's ownership: see Miller, above n 53, 159-60.

they were all united by their opposition to Arthur, some opposing his policies, others opposing the man himself. People like Andrew Bent,[77] Gilbert Robertson[78] and Henry Melville,[79] who had fought the administration and personally suffered for it, were amongst this group. Despite having little respect for some of Arthur's other opponents, the influence of this pressure group cannot, however, be underestimated. Having control of the newspapers, their voices were loud and heard often. In addition, these newspapers were the only public forums in the colony. Yet despite all this, it is doubtful whether they initiated any widespread public support or directly influenced Arthur.[80]

It would be hard to imagine that the community could have escaped entirely from the constant anti-Arthur, pro-jury reform propaganda. The issue was raised too often in editorials. The number of letters to the editor on jury trial show the depth of interest. The final response for most of the thirties, however, was apathy. The vast majority of the 18 000 free inhabitants of the colony were too concerned with the difficult task of making a living in the economically depressed 1830s to worry about ideological issues.

The third group in the conflict, consisting of emancipists, settlers and merchants (the free middle class),[81] were not all motivated by the same ideals. Some were undoubtedly allied with the activist group in demanding free institutions like jury trial, because they were opposed in principle to dictatorship. Others, however, wanted free institutions because they would help to protect their own interests and ensure the

77 See J Woodberry, *Andrew Bent and the Freedom of the Press in Van Diemen's Land* (1972).

78 Gilbert Robertson arrived in Hobart in 1822 and was on the committee of the Hobart Town Mechanics Institute. The Institute had the Governor as patron, and the inaugural membership consisted of the Chief Justice as president, and J T Gellibrand as chairman. Dr Ross delivered the inaugural address, followed by Messrs Gellibrand, Hackett, Giblin and Turnbull. He was vehemently opposed to Arthur and was a highly controversial and emotive editor of the *True Colonist* from 1834 to 1894: see Fenton, above n 27, 82-3.

79 Henry Saxelby Melville Wintle (alias Henry Melville), like Ross Robertson and other Tasmanian publisher/editors, suffered from financial difficulties (*Tasmanian and Austral-Asiatic Review*, 24 February 1834). He arrived in Tasmania in 1827 aged 28 and purchased the *Colonial Times* from Andrew Bent and used it to lobby forces against Arthur. He was proprietor from 1830-1839. He was an avid student of freemasonry and philosophy, and was prominent in local politics: see Miller, above n 53, 43-53.

80 Levy, above n 52, 314-21.

81 This developing middle class group was arguably the nearest thing to the gentry in the United Kingdom by the 1840s.

maintenance of their privileged social and economic position in the colony.[82] It was this group that took action in 1834 and to some extent succeeded in obtaining reform of jury trial, although, like the radicals, their influence on Arthur was limited.[83]

Finally, there was Alfred Stephen, who through his official position was a central figure in the struggle, acting as a buffer between the other groups, and also to some extent fusing their separate ideas. Stephen's role in the jury issue, like the whole of his career in Van Diemen's Land, seems paradoxical. He was, for example, an ideological supporter of civil juries, as was shown by an essay he wrote on representative institutions and juries in New South Wales, published in 1831.[84] Yet he was the focus of the radical and middle class parties' attacks on him in 1834 as the most reactionary opponent of civil juries. Then, it was Stephen who was instrumental in convincing Arthur of the need to reform the law in 1834, and who actually drafted the Act and introduced it into the Council in November of that year. After the temporary passion of 1834 had dissipated, it was Stephen who fought almost alone to change the law in order to reduce the oppression of arbitrary government.

***The Struggle***

This struggle and the conflicts it produced can be divided conveniently into two periods, namely up to 1834 and 1834 and following:

Up to 1834:

This period saw the introduction of 5 Will 4 No 11. This followed Stephen's solitary struggle, for between 1830 and 1834 the jury question, both in respect of civil and criminal cases, was almost completely ignored. In the second half of 1830, the middle class group was preoccupied with economic affairs and other issues, such as the war against the Aboriginals.[85]

There is no evidence to suggest that the 'radical' group were interested in jury reform during this period. The conservatism of their

82 Clark, above n 52, 288-93.

83 See also below p 98.

84 *Remarks with Reference to the Introduction of Trial by Jury and a Representative Assembly in the Colony of New South Wales* (1831).

85 As Henry Melville put it: 'the whole Island appeared in commotion ... and the black war, and nothing but the black war, was the subject of general attention'; see Melville, *History of Van Diemen's Land*, above n 23, part 2 at 23. This part of the monograph makes graphic reading as to the atrocities carried out by the settlers against the Aboriginal people.

ideas can best be inferred from a number of editorials condemning the radicalism of the 1830 Revolutions in France,[86] and urging that 'the fashionable rage for copying everything that is French' should be rejected, since 'our freedom needs no such concomitant, our constitution wants no such change'.[87]

There was also some dissatisfaction among the middle class in 1831, which resulted in a public meeting known as 'Glorious May 23', in which a series of resolutions were passed calling for representative government and improved administration.[88] However, neither in 1831 nor on 18 August 1832, when a similar public meeting was held,[89] was there any specific mention of the need for trial by jury. The second meeting, held in the winter of 1832[90] and convened by J T Gellibrand, was interesting in that it clearly revealed the motivations of the middle class group. In his address, he gave the following reasons for demanding representative government:

- the colonists were being taxed;
- not all of the money was being used in the colony to benefit the colony;
- all free people should, as a matter of principle, live under the British *Constitution*.

It was the same sort of threat to their economic positions that motivated the public meetings of 1834 when the middle class group demanded trial by jury. In other words, neither in 1832 nor 1834 was this group motivated by purely ideological considerations. They did not fight for jury trial in 1834 because it was a 'good thing' per se, nor did they demand representative government in 1831 and 1832 because it was a 'good thing'. Rather, they felt these reforms would guarantee their economic and social position in the colony.

The only mention of trial by jury in the period from 1830 to 1833 came from the pen of Murray,[91] immediately after Bourke's reforms

86 *Hobart Town Courier*, 2 April 1831; 16 April 1831; 16 July 1831.

87 *Hobart Town Courier*, 12 March 1831.

88 *Hobart Town Courier*, 28 May 1831. The object of the meeting was to bring to royal notice the government of the colony, and to demand trial by jury and a Legislative Assembly. The colony could well complain, for the Supreme Court had been closed for months and Legislative Council business had taken away the Chief Justice and the Attorney-General from their duties: see West, above n 73, 125.

89 *Hobart Town Courier*, 20 August 1832; *Colonial Times*, 14 August 1832.

90 13 August 1832.

91 Robert Lathrop Murray wrote under the non-de-plume of 'A Colonist' in various letters to the *Hobart Town Gazette* and was initially a critic of Arthur, who took

in February 1832 in New South Wales. Murray, once the administration's more persistent and biting critic, had changed his allegiance in 1831, and under his editorship[92] the *Tasmanian* became an apologist for the administration.

In the same breath as urging Arthur to follow New South Wales in improving trial by jury, he praised Arthur for the concessions he had already made:

> Lieutenant Governor Arthur, whose anxious desire to advance the colony is now we rejoice to say with one accord admitted – could do no better than pursue the same path with his contemporary in the sister colony.[93]

In summary, between 1830 and 1834, jury trial was not a major public issue in the colony. The middle class group and the radical group did exhibit dissatisfaction with the administration, but before 1834 they concentrated their efforts on demanding a representative assembly.[94] During much of this period Stephen was in England. He did not return to the colony until late in 1833, when he took up his position as Attorney-General.

1834 and Following:

Ironically, the issue of jury trial was raised in 1834 not by the free population, but by the staunchest opponent of it, the Lieutenant-Governor. Having observed the functioning of Bourke's liberal jury law in New South Wales, Arthur sent two letters to his Attorney-General, Alfred Stephen, asking him to report on the question of extending trial by jury.[95]

over from the well-liked and popular Governor Sorrell. He wrote generally on freedom of the press and looked with disdain upon Arthur's policy of controlling newspapers by licence. He even organised an annual dinner on 7 April 1825 commemorating and extolling the virtues of Sorrell. He was born in England on 22 December 1777 and educated at Westminster School, where George Sorrell was his contemporary. Whilst a young man in the Irish Army, he 'married' a much older woman, but the marriage was not solemnised according to law. He later married a friend of the family who knew all about his earlier 'marriage', and when he was charged with bigamy, nearly 20 years later in 1815, and found guilty, he was sentenced to seven years transportation. See Miller, above n 53, 36-7.

92 He was editor from 1834 to 1837.

93 *Tasmanian*, 3 March 1832.

94 See articles in *Colonial Times*, 24 July 1832, 14 August 1832; *Tasmanian*, 17 August 1832; *Hobart Town Courier*, 24 August 1832.

95 Letters from Alfred Stephen to Lieutenant-Governor Arthur, 17 February 1834, in *Letter Book I* (A699, Mitchell Library). Stephen refers to these letters in his reply to Arthur's requests.

In his reply, Stephen demonstrated clearly his desire to reform the jury system so that juries could be introduced in both civil and criminal cases. Referring initially to civil cases, Stephen wrote:

> I have no hesitation in expressing my opinion founded on a very extended professional practice that the mode of trial by Judge and two assessors is neither so beneficial nor so satisfactory as that of trial by jury.[96]

His reasoning was simple. He felt that the law as it stood was inefficient and was failing to serve the interests of the community. The difficulties placed in the path of people who wanted trial by jury seemed unjustified to Stephen, particularly the fact that the applicant for a jury had to demonstrate to the judge why his case should not be tried without a jury. Furthermore, even if this was demonstrated, the adversary was still allowed to oppose it.

Stephen saw how out of touch this law was with the community's demands, and he wrote to Arthur:

> Yet under all the obstacles existing the repeated applications by persons in important cases proves how much mistaken persons are that the mode of trial by jury and assessors really is approved of.[97]

To remedy the deficiencies, Stephen proposed that all indictable offences should be tried by a jury, and that such a jury should be a 'special' jury if desired.[98] To ensure acceptability and impartiality, Stephen advocated a list of 24 jurymen be submitted, with each party able to strike out those in the list they did not approve of. He noted that the *New South Wales-Van Diemen's Land Act 1830* 9 Geo 4 c 83 had given the local legislature the discretion in relation to qualifications and numbers of jurors, and through this power he felt he could further increase the law's efficiency:

> Our local law, the result of probably in this respect of prejudice and long habit rather than any better reason has fixed the number [of jurors] at twelve and has also required them to be unanimous (such is the law in England). Experience has however convinced me that no good end whatsoever is answered by requiring in each case so large a number. By it, so many persons are taken from their several occupations. Seven people would be just as likely as twelve to return a proper verdict ... absolute unanimity should not be required after a certain specified time passed in

96 Ibid.

97 Ibid.

98 See generally below pp 109-15.

> deliberations, without a unanimous conclusion the verdict of any five should be taken and entered as the verdict of all.[99]

These two proposals were not entirely original. They were obviously influenced by the recommendations of the English law commissioners, who had proposed that nine out of 12 jurors should be able to return a verdict in civil cases.

In recommending a similar reform in Van Diemen's Land, with the additional proposal to use less jurors, Stephen demonstrated his pragmatism. Not only would the law be likely to promote better justice, but the community as a whole would benefit by using less men as jurors, allowing the others to continue in the work of the economy.

In the reformation of the law relating to trials in criminal cases, Stephen admitted this was a more complex question. He felt in these cases that practical arguments, in some respects, justified the retention of military juries. The military, he argued, was comprised of honourable men and was more likely to be impartial. Further, Stephen pointed out that ordinary citizens would not want this onerous duty. Yet, despite these practical considerations, Stephen still concluded that he would like to see criminal juries made the same as civil juries: he stated that if there were a choice between the two juries, he would be in favour of a civil jury, rather than there be the perpetual fear and suspicion of injustice.[100] He pointed out that if seven jurors was acceptable in civil cases, there was no reason to change it in criminal cases. As to unanimity, Stephen was ambivalent, suggesting that it could remain as it was, or that perhaps a verdict of six of the seven jurors would be acceptable.

## Rational Utilitarianism versus Subjective Pressures

### The Community Response

Stephen's rational, utilitarian approach to the jury law was, however, completely misunderstood by the whole community. Three days after expressing these views to Arthur, the *Tasmanian* took up the question:

> Mr Attorney-General Stephen obtained great credit with the whole colony, [referring to some of his suggestions] ... It is said we hope incorrectly, that Mr Stephen has it in contemplation to undermine his

[99] Letters from Alfred Stephen to Lieutenant-Governor Arthur, 17 February 1834, in *Letter Book I* (A699, Mitchell Library).

[100] Ibid.

> excellent work by a new plan to fritter the great Palladium of English liberty to a Jury of five or seven?[101]

When Stephen refused to deny these recommendations, the *Tasmanian* intensified its opposition and declared 'this law will exclude ... from the people that confidence in juries in which at present they place their own security.'[102]

In April, when Stephen actually affirmed his recommendations, the jury question became, at least according to the *Tasmanian*, a major public issue:

> We never recollect [wrote the editor] so great an excitement prevailing in this town as has existed during the last few days in confirming an avowal, of Attorney-General Stephen that he has prepared an Act ... limiting the number of jurors.[103]

The jury question suddenly became the major plank in the anti-government newspaper's attacks on the government.

A civil case, *Pearce v Loane*,[104] in May of that year (1834), added fuel to this attack. In this case, Pearce was employed by Loane and following a series of failed prosecutions against Pearce by Loane (in all, Pearce was acquitted three times), Pearce had had enough and brought an action for malicious prosecution against Loane.

The hearing was before the Chief Justice and a civil jury of 12. The case created great interest, for during the hearing it became clear that the Attorney-General, representing Pearce, was anti-jury.

At the completion of submissions, and before handing down its verdict, the jury foreman, a Mr R Lewis, read a prepared statement:

> The jury cannot allow the present opportunity to pass without expressing their regret, that the Attorney-General should have imputed motive to them, which they consider are conveyed by the following expression: 'Mr Gellibrand thinks he has got a Jury that will give him damages.' I will not commit my client's cause by saying one word to such a jury. [Gellibrand refused to address the jury].

The jury then found for the plaintiff and awarded him £130. In support of the jury, it was reported:

[101] *Tasmanian*, 21 February 1834.

[102] *Tasmanian*, 7 March 1834.

[103] *Tasmanian*, 18 April 1834.

[104] Reported in the *Tasmanian and Austral-Asiatic Review*, 16 May 1834, 576; also reported in the *Colonial Times*, 20 May 1834, 942, where it was reported as *Pearse v Loane*.

> It was a straight-out declaration of war against the Jury system, and the people must prepare for the worst accordingly. We say war against the 'the Jury System', because we assert, without fear of contradiction, that the above twelve men were of 'good sense, sound judgement, and extent of property'.[105]

The *Colonial Times* specifically attacked Stephen:

> We blame no man for differing in opinion with the generality of the public but such be openly and candidly expressed ... let us know what are the objections to trial by jury of twelve.[106]

This case was the first public indication that there were two clear lines of thought upon the question of trial by jury.

### *Bryan v Hortle*: A Further Response

All these attacks crystallised in the case of *Bryan v Hortle*,[107] which really turned the jury issue into a matter of concern to all sectors of the community, especially the middle class. The case first went on the Supreme Court's list in April 1834, yet the circumstances giving rise to it had occurred in the previous November.

At that time, Arthur had struck William Bryan off the Commission of the Peace for improper transactions with his assigned servants, resulting in Arthur recalling the servants.[108] Bryan was outraged and brought an action against a Mr C D Hortle, a government agent, for the act of removing these servants and taking away their clothes, which Bryan claimed were his property.

The preliminaries to the case were seized upon by the newspapers, and every detail was reported to an enraptured public who saw their fate linked with that of Bryan. Their economic and social privileges were, they feared, at the mercy of executive decisions. The government, too, saw the importance of the implications of the case.

If Bryan were to succeed against Hortle, the way would be open for a myriad of cases where private citizens would sue government officials. Consequently, Stephen recommended to Arthur in the strongest terms that Hortle should be given the services of the Crown Solicitor.[109]

[105] *Tasmanian and Austral-Asiatic Review*, 16 May 1834, no 376.

[106] *Colonial Times*, 20 May 1834.

[107] An account of this case and its aftermath can be found in West, above n 73, 128-32; also see Shaw, above n 3, 162-5.

[108] Clark, above n 52, 281-7; Huntington, above n 28, 97.

[109] Letter from Alfred Stephen to Lieutenant-Governor Arthur, 28 April 1834, in *Letter Book I* (A669, Mitchell Library).

Stephen also informed Arthur that he would vigorously resist Bryan's motion for a jury, saying, 'I trust that considering the peculiar nature of the action their Honours will not grant it.'[110] This latter action of Stephen is not hard to reconcile with his previous advocation of jury trial in civil cases. He genuinely felt, and with good reason, that any jury would be prejudiced due to the massive newspaper coverage of the conflict between Arthur and Bryan.[111]

If Stephen's recommendations regarding civil juries had been law, then this case would obviously have been one where (as he had put it earlier)[112] the government would suffer injustice. However, since his proposals were not law, Stephen saw no reason why he should not try to prevent this particular injustice.

It may be said that it was a lawyer's rationalisation, nevertheless, it enabled Stephen to deny a jury in this particular case without abandoning his basic commitment to upholding juries in both civil and criminal cases.

Despite this commitment, it was Stephen's action in openly denying Bryan a jury that turned the attention of the middle class group to the question. Between June and November 1834, when the new law was passed, two public meetings were held, both as a result of the dissatisfaction of the middle class concerning the state of jury trial.

On 9 June, before *Bryan v Hortle* was actually heard, Anthony Fenn Kemp,[113] a prominent ex-officer and long time opponent of Arthur, decided to call a public meeting. He made this decision after a personal conversation with Stephen, the result of which convinced him that Stephen's ideas on juries were not in the best interests of himself or his class. The particular point to which Kemp objected was the reduction of the size of juries:

> I must say that I would look upon such abridgement of our civil rights as, a prelude to more arbitrary acts and although practical men may think

[110] Ibid.

[111] Letter from Alfred Stephen to Colonial Secretary, 20 July 1834, in *Letter Book I* (A669, Mitchell Library).

[112] Ibid.

[113] Kemp was born in London in 1773 and joined the New South Wales Corps in 1793. He staunchly opposed Bligh, who was subsequently deposed in 1808. He settled in Tasmania in 1815, receiving a grant of land at Melton Mowbray, formerly Cross Marsh. He was a leading citizen of his time, taking part in the political and commercial life of Hobart. He died in 1868; see Miller, above n 53, 289-90.

> seven would be more eligible than twelve, I am at a loss to know on what practices these opinions are grounded.[114]

The *Tasmanian* also felt the issue was an important one, and had urged people from all classes who were concerned about their liberty to forget their differences by declaring: 'all should come then, who have the power'.[115]

Despite this call the meeting was not well attended. Whilst a resolution proposed by Kemp and seconded by Meredith,[116] another prominent citizen and opponent of Arthur, was passed unanimously, there was little fire in the resolution, for a mere 37 people signed the petition, all prominent citizens.

In late June, *Bryan v Hortle* was heard in the Supreme Court and the once theoretical threat became a reality.

The radical group was most strongly represented by the *Tasmanian*. It launched an attack on Stephen when it was clear that it was he who had recommended against a jury in the case.[117] The Attorney-General countered by issuing a writ against the editors, Murray and Melville, for contempt of court. This was, however, dismissed[118] by Montagu J,[119] a personal enemy of Stephen.[120]

**A Community's Cry for Review**

By July, the jury question had become the only important issue in the colony. After Bryan withdrew his action on 1 July, the newspapers took up the issue in earnest, calling for a complete review of the laws relating to juries. The *Tasmanian*, for example, devoted almost two whole editions to letters to the editor featuring the jury question.[121]

[114] *Tasmanian*, 13 June 1834.

[115] *Tasmanian*, 6 June 1834.

[116] See above n 51.

[117] *Tasmanian*, 20 June 1834.

[118] *Tasmanian*, 27 June 1834. See also *Arthur Papers* (A2208, Mitchell Library).

[119] Algernon Sidney Montagu (1802-1880) was appointed Attorney-General in October 1828 and made a judge on 1 February 1833. He was a highly controversial figure who was removed from office on 31 December 1847 by order of Lieutenant-Governor Dennis and his Executive Council, when it was found that it was highly likely that Montagu was involved in questionable financial dealings. After his dismissal he was appointed to positions in the Falkland Islands and Sierra Leone, where not only did he have a colourful life, but also published a collection of Sierra Leone laws; see *Australian Dictionary of Biography* (1967) vol 2, 246-8.

[120] *Tasmanian*, 4 July 1834; see also *Arthur Papers* (A2208, Mitchell Library).

[121] *Tasmanian*, 4 July 1834; 11 July 1834.

The *Colonial Times*[122] wrote that Bryan's fate could draw the community out of their apathy. Even the usually pro-government *Hobart Town Courier* joined forces with the other newspapers in calling for juries in all cases, and suggesting further that such a jury should consist of 12 people, deciding unanimously.[123]

The excitement generated by the newspapers culminated in a public meeting held in the courthouse on 14 July 1834.[124] The meeting was addressed first by J T Gellibrand,[125] who explained the constitutional position and history of jury trial in the colony. Not surprisingly, he spent a good deal of time attacking Stephen, accusing him of being the most intransigent of those opposed to juries. Gellibrand's speech climaxed in a resolution calling for trial by jury 'as the indisputable right of all free subjects of the Crown.'[126]

The second resolution was moved by Captain William Bunster and reflected the importance of Bryan's case. He called for trial by jury in any case, but more importantly, 'in cases where it is openly avowed that the Crown is substantially a party to the suit'.[127]

The third resolution was moved by James Hackett, a prominent member of the Hobart Mechanics Institute, who pointed out that the startling news the *Tasmanian* had made public on 13 June should be acted upon. On that date, the *Tasmanian* had claimed that according to Alfred Stephen, Arthur had received the same instructions in relation to juries as had Bourke in Sydney. Consequently, the third resolution was moved: 'That being impressed with the conviction that the King has transmitted instructions to the local government to introduce trial by jury an address should be sent to his Excellency.'[128]

The resolutions undoubtedly reflected the genuine hatred of arbitrary government amongst many of the colonists. The real feeling of the

[122] *Colonial Times*, 8 July 1834.

[123] *Hobart Town Courier*, 9 July 1834.

[124] For a full report on the jury question, see *Tasmanian and Austral-Asiatic Review*, 18 July 1834, and *Colonist*, 24 July 1834. A booklet was also printed: H Melville, *Letters and Proceedings of the Public Meeting Relating to the Jury Question* (1834).

[125] Miller, above n 53, 54. Joseph Tice Gellibrand was born in London in 1786 and was Attorney-General for Tasmania from 1823 until 1826, when he was removed from office by Arthur at the instigation of Alfred Stephen. Once freed from his official position, he went into private practice and was active in politics, more so in Melbourne where he was legal adviser to the Port Phillip Association in 1836. He was an articulate and eloquent speaker.

[126] Melville, *Letters and Proceedings*, above n 124, 65.

[127] Ibid 61.

[128] Ibid 65.

meeting was probably best expressed by the seconder to the third resolution, Mr Andrew Brodribb.[129] Brodribb agreed with Hackett that the free people of the colony should have jury trial because all free British citizens had it. He went on to say to the meeting that there were many other more specific and tangible reasons why they, the people at the meeting, should have trial by jury. He called on 'all the richest and most talented people in Van Diemen's Land'[130] to resist the authorities, since not to do so would obviously risk their wealth and social position.

Despite the fact that the middle class meeting was motivated more by self-interest than by any ideological commitment to liberty, they were probably happy to listen to the main address given by Robert Lathrop Murray. Murray's undoubted passion for free institutions gave the meeting an idealistic tone with which the meeting was happy to identify. Probably every person at the meeting believed that what Murray said was correct, but perhaps unlike him, their reasons for acting were not merely a belief in the abstract virtues of liberty through the institution of juries.

Murray's speech emphasised two main points: firstly, that the government's failure to introduce juries in cases involving itself was an 'unspeakable' injustice; and secondly, that the method of trial where a judge and two assessors were used had been entirely unsatisfactory to the community.

Murray was concerned that these two provisions were a contradiction of the basic principles of British law. The problem, he claimed, was further compounded by the presence of the supposedly independent Chief Justice on the Legislative Council. This, Murray stated, 'MUST lead to a mode of proceeding repugnant to every principle of British Justice'.[131] The petition was signed by 69 people and presented to Arthur on 21 July 1834.

[129] William Adam Brodribb came to Hobart Town in May 1817, where he was appointed clerk to the bench of magistrates. He was pardoned on 7 August 1821 after being transported to Australia for seven years for administering unlawful oaths. He was allowed to resume practice as an attorney in January 1819, and was a shareholder in the Bank of Van Diemen's Land. In 1835, he left Van Diemen's Land for New South Wales, which offered 'fairer prospects to young men of small means'; see *Australian Dictionary of Biography* (1969) vol 3, 237-9.

[130] Ibid.

[131] Melville, *Letters and Proceedings*, above n 124, 72.

**A Government's Response**

The Lieutenant-Governor was typically displeased at having to answer a critical deputation, but he did give the petitioners a short, courteous reply, saying that their concern was unnecessary since he had been, for some time, considering a reform of the jury laws.[132] He was reported to have said: 'I cannot refrain from expressing my concern that the jury question should have been again brought forward before there was time to develop the further determinants of the government'.[133]

John Burnett, the Colonial Secretary, sent a formal reply to Gellibrand, advising him that the government would soon reform the Act, but that the New South Wales precedent could not be used.[134] The reaction of the original petitioners was one of extreme disappointment. The result was a meeting by the hard core, and another petition was presented to the Governor on 26 July. This petition expressed pleasure that the new laws were imminent, but, seizing the opportunity to oppose Arthur, the petitioners claimed that their main

[132] See earlier at p 95, where generally the community considered him anti-jury.

[133] Melville, *Letters and Proceedings*, above n 124, 80.

[134] This reply was sent on 23 July: ibid 84. In New South Wales, the *NSW-Van Diemen's Land Act 1828* 9 Geo IV c 83 allowed trial by jury in civil cases in New South Wales. It gave the Supreme Court discretion on the application of either party. Qualifications of jurors was to be determined by the Legislative Council – which it did in New South Wales by the Act 10 Geo IV No 8, passed in October 1830. For criminal cases, the *Imperial Act* authorised the Crown, by Order-in-Council, to empower the colonial authorities to establish trial by jury; for the moment the British government declined to grant this authority. Forbes CJ strongly favoured the eligibility of emancipists, who were three times more numerous than the immigrant population. The non-official members of the Council were generally opposed to their admission, but the measure was carried by 10 against five. Thus, although the trial of criminal causes still remained with the military, the courts would not withdraw civil wrongs from the verdict of civilians. By this act the officers of government were liable to some responsibility, and in several instances were cast in damages, notwithstanding the efforts of the Crown to defend them. An Order-in-Council providing for civil juries in criminal cases was issued on 28 June 1830. In 1832, on instructions from London (Murray to Darling, 7 April 1830, HRA, vol I (xv), 396), Council passed an Act (2 Will IV No 3) providing for a civil jury in cases in which the government or naval or military officers 'had any personal interest in the result'. The Act (4 Will IV No 12) extending the jury system in criminal cases was passed at the instance of Governor Bourke against the votes of the unofficial members of the Legislative Council. The property qualification for jurors was £300, and though Forbes considered that emancipists were eligible for jury service, magistrates, in practice, refused to summon them unless they had been granted a full pardon. Even this did not accord with the views of the emigrants who asserted that the accused was being tried by his peers; see West, above n 73, 132-3.

object was to remove the Chief Justice from the ranks of the Executive Council, not the jury question.

The Lieutenant-Governor was obviously angered by these proceedings, and via the Colonial Secretary sent Stephen a letter asking him to explain to him the circumstances of Bryan's case.[135]

Arthur was apparently genuinely ignorant of the reasons for the uproar in July. He left administrative details to his officers and took little notice of the opposition press that was extremely biased against him.[136] Probably Arthur's last thoughts on the jury question before the petition reached him had been his correspondence with Stephen in February.[137] Thus, the petition, whilst not forcing Arthur to grant reforms that he disagreed with, did force him to think about a problem which since February, he had been content to ignore.

Speculation about the form of the new jury Act dominated the newspapers at the beginning of August. There were rumours that Stephen's recommendations about grand juries, communicated to Arthur in February, were to be accepted.[138]

The *Tasmanian* ecstatically reported:

> Grand Juries on the full English plan will be in operation with the least possible delay. Herein is found '... convincing proof of the opinions of Lieutenant Governor Arthur as to restoring to the whole people the full possession of their rights and privileges'. [139]

As to the rest of the putative Act, opinions varied from extreme scepticism to undiluted optimism. In an editorial headed 'MOST IMPORTANT', the *Colonial Times* demonstrated extreme concern: 'It is said we are to have a Jury Bill, but it is to be a crippled or lopsided Bill ... not one for our liberties'.[140]

[135] See 23 July 1834, *Letter Book I*, (A669, Mitchell Library).

[136] See Forsyth, above n 52, ch IX.

[137] See earlier at pp 94-7.

[138] Letter from Alfred Stephen to Lieutenant-Governor Arthur, 17 February 1834, in *Letter Book I* (A669, Mitchell Library). Stephen had recommended that the practice whereby the Attorney-General acted as the grand jury should be replaced by a system where a grand jury based on the English model operated. Stephen said: 'I am decidedly of the opinion that it is extremely desirable ... especially if the number does not exceed thirteen'. At the same time, Stephen also suggested, however, that such a grand jury should have 'concurrent' power with the Attorney-General.

[139] *Tasmanian*, 1 August 1834.

[140] *Colonial Times*, 5 August 1834.

On the other hand, the *Tasmanian*, whilst admitting 'an imperfect knowledge of the nature of the provisions', expressed some optimism: 'We have good reason to believe that they [the sections of the new jury Act] are of a MORE POPULAR AND EXTENDED NATURE THAN ARE CONTAINED IN THE NEW SOUTH WALES ACT'.[141]

Whilst Stephen was working on the new Act, the middle class were showing their true colours in a public meeting held on 2 August. The jury question, which had been all important in July, was forgotten, despite the fact that it was still being debated in the Council. Instead, they demanded a representative system of government with a limited franchise, obviously hoping to ensure that men of means could safeguard their wealth and status.[142] So the jury question became a matter of no great interest.

**The New Act: A Compromise?**

Stephen, meanwhile, completed his draft of the Bill and introduced it to the Council in early August. It was passed by the Council and assented to by the Lieutenant-Governor on 15 November 1834 and entitled *An Act for the Extension of Trial by Jury and to Regulate the Constitution of Juries 1834* 9 Geo 4 No 11.[143]

This Act[144] dealt comprehensively with trial by jury in both civil and criminal cases, and was put in place by an Order-in-Council on 28 June 1830. The Act set out the general principles that were to apply to civil and criminal trials. Civil cases would proceed by way of assessment and were subject to the same rules and processes as in England. Similarly, criminal matters were to proceed by way of indictment before Justices of Gaol Delivery. The Act's unique thrust was that criminal prosecutions where the Governor, or any inferior officer, civil or military, could be interested in the result of a trial, a jury taken from the special jury list[145] should try the issue.

The new Act was a compromise between the ideas of the various groups or persons who had been involved with the jury question: Arthur, the radicals, the middle class, and Alfred Stephen.

[141] *Tasmanian*, 1 August 1834.

[142] Clark, above n 52, 288-91.

[143] For Stephen's annotated copy of the Act, see 042Pa257, Mitchell Library.

[144] See s 6 for the general rule.

[145] The names of those on the special list can be found in the Fisher Collection: 'List of Men Qualified to Serve on Juries in Van Diemen's Land' (11 Geo IV No 2).

The first section introduced a jury of four in civil cases[146] to determine all matters of fact and all damages. Either party to an action could apply to the court[147] for a jury of 12, consisting either of special or common jurors. This section ensured that a member of the middle class could be judged by members of his own class, since 'special' juries were to consist of either[148] esquires, merchants, or bank directors. The general rule was that the same rules should apply in the colony as applied in England, viz, in civil cases, the rules of the Kings Bench, in criminal cases, the rules of Indictment before Justices of Gaol Delivery.[149]

Stephen's argument against unanimous verdicts in relation to civil cases appeared in the fourth section:

> If after having remained six hours or upwards in deliberation all of them shall not agree as to the verdict ... the decision of three fourths its number shall be taken and entered as the verdict or assessment of all.

In the event that there was not a three-quarters verdict after 12 hours, the jury was to be dismissed.

The sixth section settled the controversy surrounding government employees. In any indictable offence where the Lieutenant-Governor, a government officer or military officer was involved, a jury of 12 was to be empanelled from a special list of prominent citizens eligible to be jurors.

At first sight, this seemed to be a complete victory for the middle class, for with a special jury, they could control their own fate. However, there was a rider to the sixth section, which if invoked, favoured the government: 'Unless a judge of the court making the order [for a special jury of 12] shall see fit to direct otherwise'.[150]

The other sections of the Act were mainly administrative measures relating to return of jury process, the summoning of jurors, change of venue, compensation, and so on.

[146] Criminal cases remained unchanged and tried by a jury of 12. The only change was in relation to government employees; see s 6.

[147] 9 Geo 4 No 11 s 2.

[148] 9 Geo 4 No 11 s 9.

[149] 9 Geo 4 No 11 s 3.

[150] This part of the section seems to be quite unclear. It could have meant that a common jury could be empanelled or perhaps even a military jury of 12. The author cannot find any cases in support of either view. Whatever the case, it does seem to give control of the number and type of jury to the judge, and ultimately the Governor.

Overall, Arthur's views on juries received favourable consideration in the Act. He probably would have preferred that the government have greater control over civil cases, but was obviously willing to forego this for de facto control of criminal cases.

The radicals were obviously the most disappointed – they got neither trial by jury in all criminal cases, nor unanimous verdicts in civil cases, nor a grand jury.

The members of the middle class improved their position, but still were not in any position to challenge the government's power or to ensure their predominance socially and/or economically. This would only ultimately occur when there was responsible government that would elevate their position.

Stephen's views in relation to civil cases had been applied, but his recommendations as to grand juries, criminal cases, and 'special' juries had not been accepted.[151]

It is not surprising that the new *Jury Act* reflected Arthur's views rather than the ideas of the free middle class. He argued that as long as transportation existed, the main purpose of the colony was to provide punishment for criminals. It was incompatible with this purpose to allow trial by jury in all cases as the free citizens wanted.

The position of the free middle class, on the other hand, was inconsistent. They wanted free institutions, yet they were not entirely opposed to transportation since it gave them economic advantages.[152] Blinded by their selfish economic and social desires, they failed to see that as long as they did not oppose transportation, their expectations regarding free institutions, such as a free press, complete trial by jury and a representative government, would fall on deaf ears. It was only after the movement against transportation began in about 1836 that the free settlers' arguments had any logical consistency.

Arthur's victory over Stephen was inevitable. As Attorney-General, it was Stephen's job to give advice and make recommendations, and it was up to the Governor to consider his advice. His only other option

[151] Stephen felt the definition of 'special' in s 9 was too limited: 'the term esquire', he wrote, 'ought to be given to every person of intelligence whose situation in life or respectability accustoms him to receive that designation by courtesy'. Letter from Alfred Stephen to Colonial Secretary, 6 August 1834, in *Letter Book II* (A670, Mitchell Library).

[152] The system of assignment gave them these advantages; see Forsyth, above n 52, 200. In Forsyth's bibliography he quotes McKay (MA thesis, University of Tasmania, 1958), who claims that until 1840, assignment was supported by the settlers as a whole.

would be the tendering of his resignation. Obviously, at this stage of his career, Stephen had no intention of resigning a job that he had coveted for so long. He did not, however, accept Arthur's views passively, and was to spend the next five years fighting against the inadequacies of the jury law and other laws that prevented the establishment of free institutions.[153]

Despite an undisputed government victory, the public reaction to the new Bill was reasonably favourable. The *Tasmanian*, for example, declared:

> Although certainly not altogether such as we would wish and as we hoped before it passed into law to convince our legislators that it ought to be, yet it is certainly a very great improvement and extension on the present system.[154]

The purpose of the rider in s 6 was, they explained, to ensure the local legislature did not repeal express provisions of the *Imperial Act*. The newspapers realised that such a rider could be interpreted to the community's disadvantage:

> We indulge the hope that after the passing of the present law the Judges will not act upon a power which although they still possess it is obvious that their continuing to do so is at variance with the expressed wish of the whole people.[155]

The main focus of criticism was on criminal juries.[156] Nevertheless, the overall reaction to the Bill was one of fairly passive acceptance.

### A New Demand for Criminal Juries

Despite Arthur's victory in the short term, the passage of the *Jury Act* was not the close of the debate. Shortly after the passing of the Act, a demand for juries in criminal cases was again made, this time by the Attorney-General.

Stephen's philosophy and rationale for the jury law was entirely different to that of Governor Arthur's. Stephen wrote personally to Arthur in an attempt to convince him that reform in criminal cases was both necessary and easy to implement.

[153] For Stephen's fight to establish a representative Assembly after his resignation from public office, see K Fitzpatrick, *Sir John Franklin in Tasmania, 1837-43* (1949) 138-43.

[154] *Tasmanian*, 8 August 1834.

[155] Ibid.

[156] *Colonial Times*, 5 August 1834, 19 August 1834.

Commenting on suggestions made during public meetings in June and July, Stephen wrote that such an idea 'should not inconvenience the government'.[157] He went on to point out that a jury of 12 was probably too large a number, and that the only real question was whether a jury should consist of 12 or some other number. Stephen wrote:

> For my own part I presume only to offer these suggestions from an anxiety to perfect a work so nearly completed by yourself. I would have trial by jury in all cases or in none ... I think twelve is a number inconveniently large and would therefore have seven or eight.[158]

Between August 1834, when the *Jury Act* was passed, and December 1836, when Arthur left the colony for England, the jury question was ignored, largely for two reasons.

Firstly, the middle class and the radicals, who had supported trial by jury in 1834, began increasingly to turn their attention to the wider ideal of obtaining representative government. Trial by jury was only a means to an end, and although for a short time (due to Bryan's case) it was the best means, the jury question had out-served its usefulness in their eyes by the end of 1834. To further the wider aim, the group changed their focus to developing an organisation that would make their struggle for free government more effective. Thus, the Political Association was born in October 1834.[159] Throughout 1835 and 1836, the Association organised meetings against transportation and against the conservativeness of the administration's political and legal philosophy.[160] The Association attacked Arthur constantly in these meetings, as well as in the newspapers that supported them, calculating that the best way to realise their objectives was to discredit Arthur, rather than plead with him as they had done during the jury issue in 1834.

Secondly, during this period the jury question was not raised, due to the ambivalence of Stephen's position. Stephen, being ideologically opposed to Arthur's convict philosophy, would dearly have liked to

[157] Letter from Alfred Stephen to Lieutenant-Governor Arthur, 16 August 1834, in *Arthur Papers* (A2214, Mitchell Library). A jury of 12 was cumbersome and difficult to empanel, due to the population mix and the small numbers eligible to serve. In any case, a smaller number meant that the jury would be more efficient and the empanelling process expedited.

[158] Ibid.

[159] *Tasmanian*, 9 October 1834. For an account of the Association, see Fenton, above n 27, 136-7.

[160] *Tasmanian*, 25 February 1835, 6 March 1835.

introduce juries in all cases. Yet he despised Arthur's opponents, and felt that if he pushed the jury question he might be playing into their hands.

The Political Association comprised men Stephen had known for many years and who had used every method to discredit and humiliate him. As he wrote to Arthur:

> I can conceive few associations which might be ... more unjust than this irresponsible junta having the command of money for such purposes being at the head of a large body of followers of the ignorant and unreflecting.[161]

Always the reformer,[162] Stephen concentrated on other pieces of legislation that excited him. He was extremely proud of his *Insolvency Act*[163] and his architecture of the *Deserted Wives and Children Act 1837*, which permitted a deserted wife to sue her husband for maintenance. He was also instrumental in reforming the administration of law in the Supreme Court of Van Diemen's Land, and was said to be pleased that some of the rules he had introduced in the administration of the Court had been followed in England.[164]

In 1836, the question of trial by jury was revived after Arthur's recall. The *Colonial Times*, although it had been silent on the subject for two years, felt it was one of the gravest defects of the old government, particularly the question of the grand jury:

> If there is one grievance under which the colonists are suffering more deserving immediate redress than another it is the monstrous absurdity of allowing one man to perform the duties of a Grand Jury, that this should be withheld from the people is a disgrace to the late government.[165]

Upon the arrival of the new Lieutenant-Governor, Sir John Franklin, the same newspaper again raised the issue, obviously hoping to induce him to grant the reform: 'Among the first boons that may be expected from the present enlightened administration we may reckon trial by jury.[166]

[161] Letter from Alfred Stephen to Lieutenant-Governor Arthur, 19 November 1831, in *Letter Book* (A669, Mitchell Library).

[162] See *Australian Dictionary of Biography* (1976) vol 6, 181.

[163] Entitled *Relief of Insolvent Debtors in Custody For Debt 1836* 4 Will 4 No 17.

[164] *Australian Dictionary of Biography* (1976) vol 6, 181.

[165] *Colonial Times*, 13 December 1836.

[166] *Colonial Times*, 10 January 1837.

It was obvious from this editorial that Stephen no longer felt obligated to the previous government and was now willing to let his personal position on the jury question be known. He had always favoured a grand jury, for example (as he had indicated to Arthur in February 1834), but due to his support for Arthur, this had never become general public knowledge. In 1837, however, the *Times* wrote:

> It is said that the Attorney-General is now an advocate of trial by jury and we believe that he is now of opinion that the Grand Jury should not be vested in the power of any one man ... that the colonists are now in a fit state for trial by jury and a house of representatives only some half dozen individuals in the colony will be bold enough to deny. We recommend that trial by jury should be forthwith allowed.[167]

Like the middle class group, Stephen felt that Franklin's administration would be far more liberal than that of Arthur's. As a consequence, he stayed on as Attorney-General, and when in May, Franklin asked him to make a report on some legal questions, Stephen once again tried to raise the jury law. He wrote to Franklin: 'We need a law to extend by some well considered plan the list of special jurors so as to give a Grand Jury and to allow people in criminal cases the benefit of a civil jury at their option'.[168]

Like the middle class and the radicals, Stephen was to be severely disappointed by Franklin's attitude. Although he did implement some of Stephen's recommendations, it became increasingly obvious that Franklin wished to continue with Arthur's illiberal policies. As the year progressed, Stephen conflicted increasingly with the administration, and in September 1837, he resigned his position. His resignation, like much of his career in Van Diemen's Land, was shrouded in controversy. The *Colonial Times* advanced the theory that he had resigned over a disagreement about his right to private practice.[169] The *True Colonist*, on the other hand, was probably closer to the truth when it claimed that Stephen was genuinely insulted by Franklin's refusal to take advice on legal subjects – especially the reform of juries.[170] There was also a possibility that Stephen used his disagreements with Franklin as an excuse to resign before Franklin could convince the Secretary of State to dismiss him.[171]

[167] Ibid.

[168] Letter from Alfred Stephen to Lieutenant-Governor Franklin, 12 May 1837, in *Letter Book V* (A673, Mitchell Library).

[169] *Colonial Times*, 26 September 1837.

[170] *True Colonist*, 12 September 1837.

[171] *Colonial Times*, 19 September 1837.

Whatever the reason, after his resignation, Stephen's work on the jury question ceased. During his remaining two years he spent in the colony, he divided his time between private practice and organising public meetings and petitions demanding representative government for the colony.[172]

## Evaluation

When he left the island to take up a judgeship in New South Wales, Stephen could not claim the success in his demands for representative government, or in the area of jury reform, that he had enjoyed in other legal areas.[173]

He had certainly been instrumental in modifying Arthur's views on juries (as manifested in the 1834 Act), but he had failed to convince Arthur or Franklin of the feasibility of his own views.

He did, however, leave the colony as an example and an inspiration. Despite the unpopularity he faced on many occasions whilst Attorney-General, Stephen left the colony unanimously respected for his honesty and admired for his energy and intelligence.

The *Colonial Times*, at times Stephen's most trenchant critic, expressed the feelings of most of the colony when it wrote on his departure:

> It is not however in any formal capacity that the memory will most pleasantly revert to Mr Alfred Stephen: but as the determined champion of Public Rights so long withheld. We do think that had Mr Stephen remained among us he would have done much more in working out the salvation of this functionary ridden colony and in obtaining for us those rights and ordinances which pertain to a people who enjoy free institutions.[174]

Stephens, the law-maker, would have been well aware that law is dynamic and changes with society. Therefore it would have been a matter of great disappointment to him if reforms in all his laws, including his jury laws in Van Diemen's Land, were still in operation near the end of the century, when social circumstance had changed dramatically.

[172] The most prominent meeting was held on 20 June 1838 at the Theatre Royal.

[173] It is beyond the bounds of this article to examine other areas of Stephen's accomplishments.

[174] *Colonial Times*, 5 May 1839.

It can be said that Stephen was not an original legal innovator, for many of his ideas were based on the experience of other countries: his jury laws were based on English ideas that he adapted to Australian conditions. His skill was an ability to take the best reforms of a country and to modify and adapt them to produce a superior law for his adopted country, and above all, to ensure that the new law served the colony and its people.

## Appendix

### The Views of Jeremy Bentham

By the second half of the eighteenth century, there was a fairly large group of lawyers who were conscious of the need to reform the law.[175] Until the work of Jeremy Bentham, however, there was no lawyer who was prepared to apply his ideas to all branches of the law. According to Holdsworth, Bentham was 'the first English lawyer to devise a comprehensive set of philosophic principles upon which reforms to the law ought to be made.'[176] Bentham was different from his predecessors in that he felt that it was Parliament's task to introduce reforms, thus avoiding the uncertainty, verbosity and unscientific nature of judge-made law.[177]

Bentham's most valuable contribution to legal thinking was to convince others of the primacy of the concept of 'utility' and to devise a method to apply it. He believed that mankind was governed by two principles, pain and pleasure. The sole object of law, as he saw it, was to increase pleasure and diminish pain. The only criterion for the success of a law was whether it made for 'the greatest happiness of the greatest number'. The concept of utility had been accepted before Bentham, but only he claimed that it was the sole principle on which law should be based, and that all other principles were fallacies.

Bentham believed that the amount of pain and pleasure could, and should, be calculated scientifically, so that ultimately a perfect system of legislation could be enacted.

These ideas were manifested in many legislative reforms from the beginning of the nineteenth century. From the 1790s, Bentham's disci-

[175] For example, Burke and Mansfield. See W S Holdsworth, *A History of English Law* (1952) vol 13, 41.

[176] Ibid.

[177] Bentham's ideas are dealt with in a large number of works. For a list see ibid 63-76.

ples, including Henry Brougham, Samuel Romilly, Lord John Campbell, Lord John Russell, James Macintosh and Michael Taylor, all worked to reform the law on utilitarian principles. Romilly and Macintosh worked in criminal law, Campbell in bankruptcy and libel, Taylor in machinery of the courts, and Brougham in his efforts to reform the whole legal system, court procedure, pleading and evidence.[178]

Immediately after the French Revolution, it was an extremely difficult task to persuade the legislature to consider reform. Despite this, the vocal minority of reformers never abandoned their task. The result was that a considerable number of reforms were passed even before the Reform Bill in 1832. The principal areas were related to the judicial system: laws relating to debtor and creditor, criminal law, ecclesiastical law and equity law. These changes were occurring while Stephen was a student and, with his family background, he could not have failed to be impressed by them.

It was the period between the First Reform Bill in 1832 and the passing of the Judicature Acts in 1875 that Bentham's disciples won their principal victories. During these years the statute book was utterly transformed. It would be impossible to give more than a few examples even of those reforms that Bentham suggested, let alone those suggested by his disciples. They included the mitigation of the Criminal Code; the reform of the representative system; the removal of defects in the jury system; the abolition of arrest for debt; abolition of the usury laws; reform of the judicial system; and simplification of the laws of procedure. After 1875, more of Bentham's ideas were realised, for example, the reform of real property law and the granting of women's rights.

In England, Bentham's ideas formed the basis for a whole movement whose aims were to transform economic, religious and political institutions, as well as the law itself. In the Australian colonies, his ideas were never to have such a wide-ranging effect. Rather, they were taken up by individuals on various occasions and applied to specific aspects of society. One such individual was Alfred Stephen.

[178] For a more detailed account see ibid 259-307. See also C H Currey, *The Influence of English Law Reformers of the Early Nineteenth Century on the Law of New South Wales* (1939).