

CURIAL TWINS: THE BIRTH STORIES OF THE SUPREME COURTS OF VAN DIEMEN'S LAND AND NEW SOUTH WALES

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A recension of an after-dinner speech delivered to the assembled Fellows of the Australian Academy of Law in Hobart on the 10th of June 2021.

If you will permit, let me set the scene: it is almost exactly two hundred years ago, and we are on board the chartered ship *Guildford* – a vessel *en route* from Portsmouth to Sydney conveying one hundred and sixty male convicts to New South Wales. The voyage began on the 23rd of August 1823. But in addition to the crowded and unhappy exiles, there were a few more honourable passengers, including Francis Forbes who was travelling to assume his freshly created position as the Chief Justice of the new Supreme Court of New South Wales. But the voyage was not an easy one: in the Bay of Biscay the *Guildford* ran afoul of a storm of such severity that her timbers were strained, and between Tenerife and Rio de Janeiro she began to leak badly. Limping into Rio, more than two months after leaving England, the *Guildford* went into dock for extensive repairs for two months, and did not resume her voyage until the 26th of December. It was not until the 5th of March 1824, more than six months after leaving Portsmouth, that the *Guildford* finally arrived in Sydney.

Meanwhile, and under fairer conditions, another voyage had been underway. On the 9th of November 1823, while Francis Forbes languished at Rio, John Pedder set sail from Plymouth on the *Hibernia*, bound for Hobart – on his twin mission to be the Chief Justice of the new Supreme Court of Van Diemen's Land. He arrived in Hobart on either the 15th or 16th of March 1824, after a more standard passage of about four months, only about 10 days behind Forbes' late arrival in Sydney.

Both Pedder and Forbes were literal embodiments of the constitution of new legal institutions, and when Forbes and Pedder stepped ashore, from their long (and in Forbes's case difficult) voyages, in Sydney and Hobart respectively, they did so to create a new legal order.

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The story, it seems to me, is hard to separate from the assumptions of the positivism of Bentham, and later Austin, as the dominant legal discourse of the time (and, some would argue, still). It is also hard to separate from the towering figure of Francis Forbes himself, who influenced the drafting of the basic constitutional instruments both before and after his arrival in the colony. Forbes was a disciple of Bentham's, and he had been the chief judge of Newfoundland from 1816 to 1822. Then, back in England later in 1822, he had been commissioned to work on the draft bill for the Imperial Act known as 4 Geo. IV c.96, sometimes called the *New South Wales Act* (The Act). The legislation, in effect, created a civil (as opposed to military) government for the colony. Pursuant to the Act, *Letters Patent* (an executive order) were issued by the Crown on the 13 October 1823, which themselves were known as the Charter of Justice - and it was this order that established the Supreme Court - in Hobart as well as Sydney.

It is worth noting that it was intended from the start that there be a separate Court established in Hobart, and even the long title of *The New South Wales Act 1823* (4 Geo. IV c. 96) was "An Act to provide, ... for the better Administration of Justice in New South Wales and Van Diemen's Land, and for the more effectual Government thereof and for other Purposes relating thereto". Of course, the background to the Act was that there had, for some years, been criticism in the colony of New South Wales about the absence of a proper superior court, coupled with an expressed need for the establishment of some form of responsible government. It was still the case, as it had been since the founding of the colonies, that the Governor of New South Wales, and the Lieutenant Governor in Van Diemen's Land, had essentially limitless powers, subject only to overriding by the distant and often disinterested Colonial Office in London. As an initial response to these criticisms, Commissioner John Bigge had been dispatched from London in 1819, to investigate and report on the state of the colony; and thereafter Francis Forbes was involved, as we have noticed, in the drafting of this curative legislation. The Act provided for six fundamental and constituting institutions and processes: Firstly, it authorised the creation of a Legislative Council for the colony of New South Wales; Secondly, it created the Supreme Court of New South Wales, being a court of equivalent authority to that of the King's Bench in the United Kingdom; Thirdly, it created the office of Chief Justice of that Court; Fourthly, it authorised the ultimate separation of Van Diemen's Land from the colony of New South Wales and its establishment as a colony in its own right; Fifthly, the Act created the Supreme Court of Van Diemen's Land; and Sixthly, it created the office of Chief Justice of that Supreme Court.

But we might note, from a positivist point of view, even upon disembarking at their respective journeys' ends, there was nothing, yet, which could separate the twin Supreme Courts of NSW and Van Diemen's Land – they being (so to speak) still *en ventre sa mere* – conceived and carried but not yet delivered. Before we reach that critical moment, however, I might beg your indulgence just a little longer to say a thing or two about John Pedder – the lesser known of our two judicial argonauts.

John Lewes Pedder was born in London on 10 February 1784. He was the eldest son of one John Pedder, who was a barrister. John Pedder (the son) was schooled at Charterhouse, and then he read at the Middle Temple from 1818 from where in 1820 he was called to the bar. Afterwards he was admitted to Trinity Hall in Cambridge, and he graduated with a Bachelor of Laws in 1822. When it became known, in early 1823, that the Bill for the "New South Wales Act" was being drawn up, and that a separate Court in Hobart (requiring its own Chief Justice) would be established, Pedder began to register his interest in the post. It appears that the selection was not hotly contested, nor even of much evident interest in the Colonial Office.

So, with only about 3 years legal experience, Pedder was appointed Chief Justice of Van Diemen's Land, on 18 August 1823. A little under three months later, he set sail on board the *Hibernia*, on the 9th of November, carrying with him the Charter of Justice, under the Great Seal. He arrived in Hobart with his wife Maria, on 15 March 1824. Interestingly, fellow passengers on the ship were Joseph Gellibrand, commissioned to be the first Attorney-General of Van Diemen's land and Saxe Bannister, likewise commissioned to be the first Attorney-General of New South Wales. For four months they, and their spouses, must have made a cosy company in the very confined spaces available to the free passengers on the transport. How exciting the conversation must have been for those other passengers on the voyage! We can only imagine.

As Chief Justice, under the Act, Pedder was *ex officio* a member of the Executive Council of Van Diemen's Land, which dictated a close association with Governor Arthur – a relationship which even led to Pedder being referred to as being part of the "government party". This was a flaw in the legislation, and the colony's Chief Justice should not have been put in that kind of position, but it was not until 1851, when the new legislation provided for a partly elected legislative council, that the Chief Justice was no longer one of the government nominee members and Pedder was excused.

Pedder continued for all of that time, and beyond, on the bench. Remaining in post for nearly 30 years, on the 19th of July 1854 Pedder had a paralytic

seizure while on the bench, and shortly afterwards he retired (still in Hobart), on a pension of £1500 a year. Not long after, Pedder's wife Maria died, on 23 October 1855. He then returned to England, and died in Brighton on the 24th of March 1859 at the age of 76. He had been knighted, while serving as Chief Justice, in 1838.

Sometimes much is made of a comparison between Forbes and Pedder, with Pedder coming off the worse – but I think that is something of an injustice. Forbes' "seniority" is often compared to Pedder's inexperience, and Forbes' previous appointment as the chief judge of Newfoundland is set against Pedder's mere three years at the bar before his appointment. But it needs to be noted that Forbes was only at the bar for about four years before his appointment to the post in Newfoundland – not really so great a difference. It is also said that Forbes was Pedder's senior in years, but that is in fact doubtful – both were born in 1784, and although we do not know the exact day of Forbes's birth we do know Pedder's (the 10th of February), so if Forbes was indeed the elder it can have been only by 41 days at the most and it is more likely that Pedder was in fact the elder. The final claim to Forbes' superiority is, to be frank, the tendentious appraisal of judicial ability – of Forbesian "flair" as the counterpoint to Pedderian pedestrianism – a subjective evaluation which perhaps I should leave for another day – because I digress from our purpose.

We left off with the arrivals of Forbes and Pedder, the former in Sydney on the 5th of March 1824; and the latter in Hobart on the 15th or 16th of March 1824. Now disembarked and to all intents and purposes ready to carry the intent of the Act into effect by promulgating the Charter of Justice. And so it came to pass: the Charter of Justice, was promulgated in Hobart on the 7th of May 1824, with Pedder being sworn in to his office by Lieutenant Governor Sorrell; and with Forbes's swearing in, in Sydney, ten days later on the 17th of May by Governor Brisbane. In the meantime, however, the Supreme Court of Van Diemen's Land had already convened and commenced its activities, on the 10th of May. In Sydney, the Court in fact sat, briefly, in the same afternoon of the 17th of May itself. And so, the end of our story – and how the Supreme Court of Van Diemen's Land became the first established Supreme Court in Australia – the two courts born of the same legislative and executive acts like identical twins, but the one (as is always the case with twins) delivered just before the other.

But not quite the end: Why this sequence? Why the time lag? Particularly given Forbes still made it to Sydney, despite all the delays, before Pedder got to Hobart – as was originally intended? Well, the fact is that Forbes's intentions, perhaps even his vaulting ambitions, overran the pragmatic side of

legal positivism. When Forbes left England on the *Guildford* on the 23rd of August 1823 the Charter of Justice had not yet been executed. That did not happen until the 13th of October 1823; and so Forbes carried with him only a draft copy – and Governor Brisbane would not act upon a mere draft. Pedder, on the other hand, leaving England on the *Hibernia* on the 9th of November 1823, carried with him the real deal - the Charter of Justice, executed under the Great Seal.

But even then, there was still delay – although Pedder was “good to go” (as we say, nowadays) immediately upon his arrival in Hobart, Pedder prevaricated because of the lack of curial officers, a Master and a Registrar, to support him in his office. The former, Edward Butler, was still *en route*, and the latter Joseph Hone had died on his outward voyage. Pedder maintained that the Court could not be properly constituted without his ministerials, but Lieutenant Governor Sorrell would have none of it – His Excellency was obviously eager to get the job done before his own office was terminated upon the arrival of the new viceroy George Arthur – who was expected to arrive at any day. So, the dates in Hobart were fixed and matters proceeded accordingly to the 7th and the 10th of May 1824 as we have noted. Just in time, as it turned out, because the new Lieutenant Governor, Arthur, arrived on the 12th of May and formally assumed his position two days later.

Meanwhile, back in Sydney, the properly executed Charter had arrived – on the 5th of April. And the (sealed) Charter to hand, Sir Thomas Brisbane then proclaimed the 17th of May as the day Forbes would enter upon the exercise of his jurisdiction, as we have seen.

Which brings me to the end of this evening’s tale – but not without something of a humble call to arms: as we approach the bicentenary of these events it is appropriate to think about how best to mark the dual anniversaries of these curial twins, the Supreme Courts of New South Wales and Tasmania. Perhaps, let me suggest, a pair of seminars or conferences, the first in Hobart and the second in Sydney (as the correct sequence must be). In any event, there is sufficient time for the planning, if we begin soon enough – and it is with that, hopefully tantalising, thought that I finish, and thank the assembled Fellows for their patient forbearance.