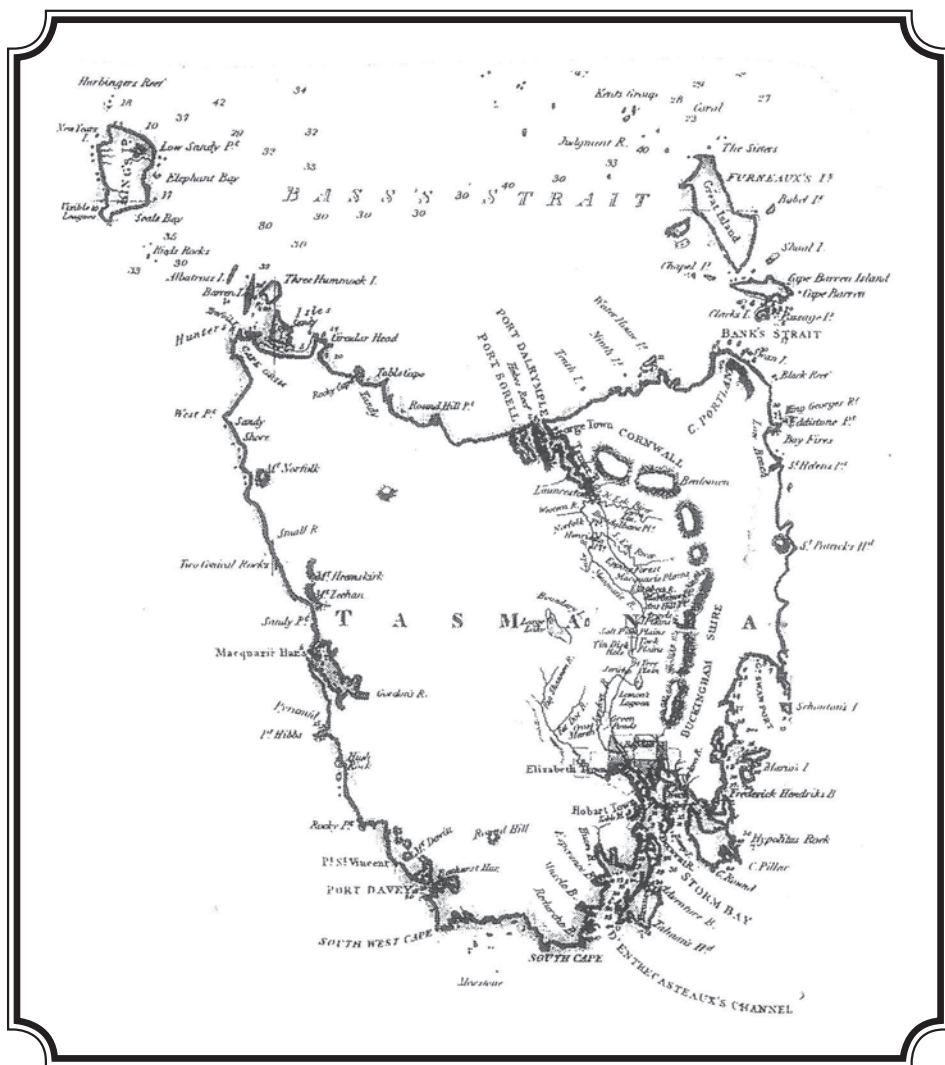


# Tasmanian Historical Research Association

(Incorporated)

PAPERS AND PROCEEDINGS



# THRA Papers and Proceedings

---

Vol. 59, no. 3

December 2012

---

## CONTENTS

### PAPERS

John Lewes Pedder (1793–1859): Some new perspectives on a colonial judge .....	Jacqueline Fox	165
Yet more about Mary Leman Grimstone .....	Michael Roe	189
‘Secure the shadow ere the substance fadeth’: Stephen Spurling, colonial artist-photographer .....	Gillian Winter	194
‘They call me “wild cat”’: William Aylett (1863–1952), career bushman .....	Nic Haygarth	203

### BOOK REVIEWS

John Biggs <i>Tasmania over five generations.</i> <i>Return to Van Diemen's Land?</i> .....	Elizabeth Parkes	229
Roger McNeice <i>Fight the fiery fiend:</i> <i>colonial fire fighting 1803–1883</i> .....	Alison Alexander	230
Lucy Frost (ed.) <i>Convict lives at the Ross Female Factory</i> .....	Margaret Glover	231
Guidelines to submitting papers .....	inside back cover	

# TASMANIAN HISTORICAL RESEARCH ASSOCIATION INC.

## PATRON

Robert Sharman

## COMMITTEE

*President:* Caroline Homer

*Vice President:* Ian Terry

*Hon. Secretary:* Andrew McKinlay

*Hon. Treasurer:* Ross Kelly

*Hon. Editor:* Heather Felton

*Members:* Michael Roe, Margaret Glover, Alison Alexander,  
Stefan Petrow, Caitlin Sutton

## Annual Subscription

Individual: \$45    Household: \$50    Student: \$35

Life Members: \$40 for *Papers and Proceedings*

These prices include 10 per cent GST.

Overseas: Asia-Pacific: \$50    Rest of world: \$60

Address all communications to:

PO Box 441

Sandy Bay, Tasmania 7006

THRA Website – [www.thra.org.au](http://www.thra.org.au)

The Association meets at 8.00 pm on the second Tuesday of each month, from February to December (inclusive), in the Royal Society Room, Tasmanian Museum and Art Gallery.

The Annual General Meeting is held in February.

The Association has published indexes to its first 50 volumes.

*Index to the Papers and Proceedings:*

*Volumes 1–30, 1951–1983*

*Volumes 31–40, 1984–1993*

*Volumes 41–50, 1994–2003*

The indexes are available from the Association.

Price \$25.00 per index or \$65.00 for all indexes, post free.

The *Papers and Proceedings* are indexed in the Australian Public Affairs Information Service, which is readily available in large public libraries.

Contributors' opinions are not necessarily those of the Association.

Publication is assisted by the Minister for the Arts through Arts Tasmania.

Cover illustration: detail from the map in  
*Godwin's Emigrants' Guide to Van Diemen's Land ...* (1823)

ISSN 0039-9809

# JOHN LEWES PEDDER (1793–1859): SOME NEW PERSPECTIVES ON A COLONIAL JUDGE

Jacqueline Fox

This paper was presented at a meeting of THRA held on 10 July 2012.

Foundation chief justice of the Supreme Court of Van Diemen's Land, Sir John Lewes Pedder (1793–1859) was a central figure in the colonial administration and settler society from 1824 until his retirement in 1854. Appointed by the Colonial Office to administer English law in an experimental superior court which extended full civil and criminal jurisdiction to the penal colony for the first time, Pedder also served as a member of the executive and legislative councils. In these ex-officio roles, he provided legal, policy and legislative advice to a series of lieutenant-governors.

With his wife Maria Everitt, Pedder arrived in Hobart Town in March 1824, bearing the Charter of Justice which established the Supreme Court.<sup>1</sup> A thirty-year-old London equity barrister at the time of his appointment, Pedder belongs to the first of what Tony Earls has identified as three 'waves' of professional judges posted to the Australian colonies during the nineteenth century.<sup>2</sup> Like other 'first wavers', Pedder was one of many expatriate professionals who filled official posts throughout the British world.<sup>3</sup> American colonial historian Ann Laura Stoler characterises these men as colonisers who 'followed career itineraries and personal trajectories that led them ... across imperial maps'.<sup>4</sup> Pedder's unusually long tenure in a single colony suggests that his imperial itinerary stalled in Van Diemen's Land in 1837, when promotion to the Supreme Court of New South Wales was thwarted by an applicant with more influential connections in London.<sup>5</sup> In the local context, this (unintended) thirty years at the head of the Van Diemen's Land judiciary has endowed Pedder's colonial career with a false fixity. During thirty years on the bench, Pedder 'became a judicial institution' whose career appears to be neatly book-ended by the judicial and administrative reforms introduced by the New South Wales Act of 1823 and Van Diemen's Land's formal transition to self-government in 1856 as the rebranded 'Tasmania'.<sup>6</sup>

Despite his central role in colonial law and politics over three decades, Pedder has attracted comparatively little sustained scholarly attention.<sup>7</sup> This historiographical

1 William Sorell to Earl Bathurst, 31 March 1824, *Historical records of Australia*, series III, vol. IV, p. 126; Tasmanian Archive and Heritage Office, SC479/1/1, Letters Patent issued under the Great Seal, 13 October 1823.

2 T Earls, 'Three waves of Australian judges', Australian and New Zealand Law and History Society Conference, University of Adelaide, 2008; personal communication, 20 January 2009.

3 Z Laidlaw, *Colonial connections, 1815–45: patronage, the information revolution and colonial government*, Manchester University Press, Manchester, 2005, p. 102.

4 AL Stoler, 'Tense and tender ties: the politics of comparison in North American history and (post) colonial studies', *Journal of American History*, vol. 88, no. 3, 2001, p. 848. See also D Lambert and A Lester (eds), *Colonial lives across the British Empire: imperial careerings in the long nineteenth century*, Cambridge University Press, Cambridge, 2006.

5 JM Bennett, *Lives of the Australian chief justices. Sir James Dowling: second chief justice of New South Wales, 1837–1844*, The Federation Press, Sydney, 2001, pp. 105–7.

6 JM Bennett, *Lives of the Australian chief justices. Sir John Pedder: first chief justice of Tasmania, 1824–1854*, The Federation Press, Sydney, 2003, p. 10.

7 There is a significant, and growing, biographical literature on the Lieutenant-Governors of Van Diemen's Land. By contrast, sporadic references to Chief Justice Pedder appear in more general works, including biographies of his most influential contemporary, George Arthur. See, for example, RM Baker, 'The early judges in Tasmania', *Tasmanian Historical Research Association Papers and Proceedings*, vol. 8, no. 4, 1960, pp. 71–84; R Ely (ed.), *Carrel Inglis Clark: the Supreme Court of Tasmania. Its first century*, University of Tasmania Law Press, Hobart, 1995; K Fitzpatrick, *Sir John Franklin in Tasmania, 1837–1843*, Melbourne University Press, Melbourne, 1949; JND Harrison (ed.), *Court in the colony: Hobart Town, May, 1824*, Law Society of Tasmania, Hobart, 1974; PA Howell, 'Pedder, Sir John Lewes (1793–1859)', *Australian dictionary of biography*, adb.anu.edu.au/biography/pedder-sir-john-lewes-2542/text3457; MCI Levy, *Governor George Arthur: a colonial benevolent despot, Georgian House, Melbourne, 1953*; LL Robson, *A history of Tasmania, volume I: Van Diemen's Land from the earliest times to 1855*, Oxford University Press, Melbourne, 1983; and AGL 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*, Melbourne University Press, Melbourne, 1980.

lacuna was filled during the later nineteenth and twentieth centuries with popular and scholarly representations which articulate three recurring constructions: a ‘hanging judge’, a puppet of government, and a champion of the island’s indigenous people. Lacking contextual sensitivity, each has resulted in a series of ahistorical interpretations of Pedder’s judicial career and official persona which speak more to the concerns of their own age than of Pedder’s. The first part of this article traces how the three constructions have evolved and been deployed in the secondary sources, and argues for alternative readings of the archival evidence. Then, utilising the interpretative frames of social and family history, it outlines and contests a more recent construction, which casts Pedder as solitary ascetic who lived only through his work.

## A ‘hanging judge’?

John Pedder began his judicial career at a time when more than 200 criminal offences were punishable by death under a system of common and statute law known to historians as the ‘bloody code’.<sup>8</sup> As the *Hobart Town Gazette* explained to readers in 1825, the Supreme Court of Van Diemen’s Land had ‘cognizance of all crimes from the highest treason to the lowest misdemeanour’.<sup>9</sup> The majority of cases heard by Pedder in the Supreme Court involved capital offences (felonies), and many of these attracted mandatory sentence of death. Capital convictions were subject to review and a significant number of prisoners were pardoned, or had their sentences commuted, when the prerogative of mercy was exercised by the king (or his colonial delegate). As the table below illustrates, a range of sentencing options was available to Pedder in the Supreme Court in cases where the law allowed for judicial discretion.

Class of sanction	Penalty
Economic sanctions	Pecuniary fine - 1 shilling to £200, depending on the offence and the prisoner’s ability to pay
	Recognizance of up to £200, with sureties of up to £100 each ‘for good behaviour’ for a specified period
Non-lethal corporal punishments	Public whipping - ‘at the cart’s-tail’ along a specified route through the town; e.g. along Elizabeth Street from the Ship Hotel to Roxburgh House
	Branding (burning in the hand), with a successful plea of benefit of clergy, or as a traditional punishment for manslaughter
Incapacitative sanctions	Imprisonment, with or without hard labour (months or years) - often combined with fines, recognizances and sureties for good behaviour
	Transportation, to a penal station in Van Diemen’s Land or New South Wales - for 7 or 14 years, or life
Capital punishment	‘Death recorded’ - formal sentence of death was recorded, but commuted to imprisonment or transportation by the judge
	Death by public execution (hanging)
Post-mortem punishments	Death by public hanging plus anatomisation (dissection) or hanging in chains (gibbeting). The <i>Murder Act</i> (1752) required that bodies be delivered to the surgeons for dissection or gibbeted in a public space near the scene of the crime.

Sentencing options in the Supreme Court of Van Diemen’s Land during the mid-1820s. (TAHO, SC45/1/1, Register of prisoners discharged by proclamation, 1825–1827, ff. 1-133, reel Z225.)

8 DJ Bentley, *English criminal justice in the nineteenth century*, The Hambledon Press, London, 1998, p. 11; L Radzinowicz, *A history of English criminal law and its administration from 1750: vol. I*, Stevens, London, 1948, pp. 4–5.

9 *Hobart Town Gazette*, 22 July 1825. The common-law world (outside the United States) no longer distinguishes between felonies and misdemeanours. However, this distinction remained important during the early colonial period. Defined by statute or common law, felonies were (or had been) punishable by death, forfeiture of property, or corruption of the blood. Misdemeanours were considered to be less grave than felonies, and were punished with a range of non-capital sanctions.

As the only Supreme Court judge on the island until 1833, Pedder is inexorably linked to what Hamish Maxwell-Stewart has characterised as the ‘appalling rate of judicial carnage’ practised during the administration of Governor Arthur (1824–36), when approximately 260 prisoners were executed.<sup>10</sup> A comparable number of executions took place in New South Wales during the same timeframe, leading Tim Castle to identify this as the ‘heyday of capital punishment’ in the sister colony.<sup>11</sup> Significantly, where Maxwell-Stewart and Castle frame their analyses in terms of gubernatorial policy and community fear of crime, Chief Justice Pedder has acquired personal notoriety as a ‘hanging judge’ – which is not the case with judges in Sydney. My qualitative research suggests that this posthumous reputation illustrates two key themes: the enduring resonance of the popular literary trope of the ‘hanging judge’, and what leading historian of capital punishment Randall McGowen identifies as ‘ameliorist’ narratives which ‘unreflectively credit the present with more humanity than the past’.<sup>12</sup>

Pedder’s construction as a ‘hanging judge’ draws on a long tradition of English radical satire in which judges were cast in the ‘time-honoured role’ of ‘bloodthirsty enemies of the poor’.<sup>13</sup> Like its Stuart archetype, Judge Jeffreys at the ‘Bloody Assizes’, Pedder has been absorbed into an ideologically inspired popular tradition of ‘hanging judges’ in revolutionary times or frontier locales, and his prominence in the hated Arthur ‘regime’ infects his portrayal as a Tasmanian Judge Jeffreys.

Writing a series of ‘reminiscences’ on the ‘dark age of Tasmania’ for the Hobart *Mercury* in the 1870s, retired surveyor, James Erskine Calder, invoked the trope of the ‘hanging judge’ with his assertion that Pedder had ‘probably passed more death sentences than any other colonial judge living’.<sup>14</sup> Forty years later, a Melbourne tabloid revived the construction in *The History of Tasmania written specially for ‘Truth’* (1915), which was serialised and then published in book form. Again emphasising the ‘dark deeds of the old convict days’, its anonymous author depicts Pedder as the ‘embodiment of judicial murder and devilish heartlessness’, and specifically likens him to ‘that notorious judicial murderer, Judge Jeffries [sic]’.<sup>15</sup> Evidencing its enduring popular appeal, two Sydney newspapers (including *Truth* stable-mate, the *Daily Mirror*) revived the construction in the 1970s and 1980s, with sensationalist headlines like ‘Australia’s fastest hanging judge’ and ‘Judge maintained fodder supply to Hobart’s gallows’.<sup>16</sup>

The ‘ameliorist’ assumptions of Calder and the *Truth* also have implicit parallels in more scholarly treatments of the death penalty on the island. In *The Tasmanian Gallows* (1974), historian Richard Davis routinely contrasts the ‘savage punishments’ of the early colonial period with ‘modern enlightened opinion’.<sup>17</sup> Accusing the chief justice of a ‘naïve and callous utilitarianism’, Davis asserts that there is ‘no indication ... Pedder was concerned about the frequent application of the death penalty’.<sup>18</sup> The colonial archive provides numerous examples to refute this claim.

At the time of Pedder’s death in 1859, an obituarist recalled that the chief justice

10 H Maxwell-Stewart, ‘“I could not blame the rangers ...”: Tasmanian bushranging, convicts and convict management’, *THRA P&P*, vol. 42, no. 3, 1995, p. 117. T Castle, ‘Watching them hang: capital punishment and public support in colonial New South Wales, 1826–1836’, *History Australia*, vol. 5, no. 2, 2008, p. 43.2; RP Davis, *The Tasmania gallows: a study of capital punishment*, Cat & Fiddle Press, Hobart, 1974, p. 13.

11 Castle, p. 43.2.

12 R McGowen, ‘Revisiting *The hanging tree*: Gattrell on emotion and history’, *British Journal of Criminology*, vol. 40, no. 1, 2000, p. 8.

13 VAC Gattrell, *The hanging tree: execution and the English people, 1770–1868*, Oxford University Press, Oxford, 1996, p. 504.

14 *Mercury*, 19 August 1873, 19 February 1881; M Roe, *An imperial disaster: the wreck of the George the Third*, Blubber Head Press, Hobart, 2006, pp. 239, 251.

15 [no author], *The history of Tasmania written specially for ‘Truth’*. Compiled from authentic sources, Truth Popular Press Print, Melbourne, 1915, pp. 105–7, ‘Preface’ [n.p.] and p. 103.

16 *Sun*, 4 February 1975; *Daily Mirror*, 22 August 1986. The *Daily Mirror* was owned by *Truth*.

17 The ‘ameliorist’ perspective is clearly reflected in Davis’ language: he writes about ‘civilised countries’, the ‘slow growth of humanitarian feeling’, ‘faults far short of murder’, and a ‘more rational society’, and fears ‘regression to pre-Enlightenment attitudes’. Davis, pp. xiii, xiv, 23, 24, 26, 28, 29, 31.

18 Davis, pp. 26, 24.



was ‘often known to shed tears, when ... it devolved upon him to pass the last sentence of the law’.<sup>19</sup> Writing to the *Mercury* in 1873 to ‘vindicate’ the ‘memory of one of the most upright and humane Judges that ever presided on the Bench in Her Majesty’s dominions’, Pedder’s old friend and former clerk of the Executive Council, JW Kirwan, provides a more detailed insight into the emotional strain of mandatory capital sentencing on a judge charged with its enforcement. Specifically refuting Calder’s characterisation of the chief justice as ‘ill-tempered’ and ‘harsh’, Kirwan vividly recalled that the ‘struggle between duty and the softer and gentler feelings of his heart was visible to all’. Whenever it was his ‘painful duty to pass sentence of death on a fellow creature’, Kirwan averred, Pedder’s ‘whole frame trembled’ and he was ‘overcome with the humane emotions of his nature’. At such times, Kirwan suggested, the sensitive judge ‘endured more agony than the prisoner in the Dock’.<sup>20</sup>

Colonial law reports and newspaper editorials support Kirwan’s assessment of Pedder’s humanity on the bench. Reporting the conviction of nine men for murdering a constable at the Macquarie Harbour penal station in 1827, for example, the *Hobart Town Courier* observed that the chief justice was ‘almost overcome by the lamentable and unexampled spectacle of nine human beings convicted of so cold blooded a murder’.<sup>21</sup> When the jurymen returned a guilty verdict, the *Tasmanian* reported, Pedder explained that ‘he felt conscious that the Jury ... had done their duty ... however painful to him was the task which he consequently had to perform’.<sup>22</sup> The chief justice went on to sentence the nine killers ‘in a most feeling and impressive manner, and evidently much agitated’.<sup>23</sup>

Years of judicial experience did not diminish Pedder’s emotional displays. On sentencing George Pettit to death in 1840, the *Hobart Town Advertiser* declared that the judge’s ‘address was heart-rending – less from the actual words spoken, than the manner and emotion of the speaker, which suffused his eyes with tears, and nearly choked his utterance’.<sup>24</sup> Nineteen-year-old Pettit had murdered his master, Mr Paul, apparently without motive, and Pedder’s address to the prisoner highlights how the individual circumstances of a case shaped his response:

To have to pass sentence upon one so young, and for such an offence, had (his Honor observed) moved him exceedingly, and it might appear strange that, after passing the same sentence on the two [other] men who had [just] left the dock, his feelings should now be so much excited. But the cases were so different in their complexion, this crime being committed as it were without a motive, and, in the language of the indictment, ‘at the instigation of the devil’.<sup>25</sup>

Underscoring complex contemporary attitudes around capital punishment, the *Colonial Times* distinguished Pedder’s judicial duty from his personal inclination, with its commentary that ‘Never ... did His Honor ... exhibit so admirably, the abilities, patience, and firmness, of the *Judge*; or the humanity and kindness of the *Man*’.<sup>26</sup> These qualities were ‘most particularly exemplified’, it continued,

19 *Hobart Town Advertiser*, 10 June 1859.

20 *Mercury*, 27 August 1873.

21 *Hobart Town Courier*, 15 December 1827.

22 *Tasmanian*, 14 December 1827, cited at B Kercher and S Petrow (eds), *Decisions of the Nineteenth Century Tasmanian Superior Courts*, Division of Law, Macquarie University and the School of History and Classics, University of Tasmania, R v Lacey and others [1827], [www.law.mq.edu.au/research/colonial\\_case\\_law/tas/cases/case\\_index/1827/r\\_v\\_lacey\\_and\\_others/](http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1827/r_v_lacey_and_others/)

23 R v Lacey and others [1827].

24 *Hobart Town Advertiser*, 7 February 1840, cited at *Decisions of the Nineteenth Century Tasmanian Superior Courts*, R v Pettit [1840], [www.law.mq.edu.au/research/colonial\\_case\\_law/tas/cases/case\\_index/1840/r\\_v\\_pettit/](http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1840/r_v_pettit/)

25 R v Pettit [1840]. The two other prisoners, Davis and Riley, had murdered, then robbed, their victim. See *Colonial Times*, 4 February 1840.

26 *Colonial Times*, 11 February 1840. Original emphasis.

in sentencing ... the lad Pettit. In our report of that sentence, we have stated that His Honor wept: what man of feeling could refrain from grief to see a human being, in the very outset of life, condemned to die, for a crime the most atrocious? Sympathy is withheld from the hoary and hardened criminal, but, upon the young and inexperienced it is freely bestowed.

Just as Pedder is seen to be acting in the twin personæ of judge and man, each with its appropriate duties and sentiments, so Pettit is characterised as both pitiable youth and atrocious criminal. In both cases, the personal dimension is subsumed by the public one. Despite its sympathy for the 'boy', the *Colonial Times* was quick to add its support for the punishment imposed by Pedder on the murderer, declaring that it did not 'in the slightest degree, impugn the sentence, or its probable result'.<sup>27</sup>

Still more confronting, sexual offences against children elicited affecting emotional responses from the chief justice. '[D]eclaring to his God that he would not have believed such a case to be possible had he not heard the evidence', Pedder sentenced eighteen-year-old Elijah Ainsworth to death in 1842 for assaulting a young child.<sup>28</sup> Horrified by Ainsworth's guilt and mindful of community consensus about the gravity of his offence, Pedder 'entreated the prisoner to banish all hope of mercy, as no government in the world dare spare the life of such a monster'. 'In passing sentence of death', the *Launceston Courier* narrated, Pedder was 'greatly agitated and affected'; his 'voice was frequently broken, and tears were rolling profusely down his cheeks'.<sup>29</sup>

Among the official papers, the minutes of sentencing reviews in the Executive Council indicate that Pedder provided detailed 'reports on prisoners capitally convicted' and actively participated in deliberations on their ultimate fate.<sup>30</sup> In cases where the law had allowed him no discretion in sentencing from the bench, the chief justice could advocate for mercy during the pardoning process. Pedder was also prepared to reconsider his sentencing decisions and refer individual cases to London for further review when legal technicalities raised doubts about the validity of a conviction.<sup>31</sup>

The chief justice's doubts around the legality of two capital convictions in the mid-1820s illustrate his concern for procedural fairness and the emotional impact of his work as a trial judge. On 3 February 1825, John Logan faced Pedder in the Supreme Court, charged with 'Shooting with intent to kill and murder'.<sup>32</sup> Logan was found guilty under Lord Ellenborough's Act (*Malicious Shooting or Stabbing Act 1803*) and sentenced to be hanged.<sup>33</sup> In April, Pedder was thrown into perplexity by a report from New South Wales, which raised uncertainties about the applicability of Lord Ellenborough's Act to the colonies. In a letter to Arthur, dated 9 April 1825, Pedder 'very heartily' thanked the governor for his 'kindness, in sending me the *Sydney Gazette*, alluding to the decision reported to have been made [by the Twelve Judges in England] in Davidson's case'.<sup>34</sup>

27 *Colonial Times*, 11 February 1840.

28 *Launceston Courier*, 11 April 1842, cited at *Decisions of the Nineteenth Century Tasmanian Superior Courts*, R v Ainsworth [1842], [www.law.mq.edu.au/research/colonial\\_case\\_law/tas/cases/case\\_index/1842/r\\_v\\_ainsworth/](http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1842/r_v_ainsworth/)

29 R v Ainsworth [1842]. The attorney-general was 'also obliged to have recourse to his pocket handkerchief' as he 'attempted in vain to subdue his feelings'.

30 See 'Chief Justice's reports on prisoners capitally convicted', TAHO MM71/1/7-10, Tasmanian archival estrays in the State Library of New South Wales: Dixon Collection. Governor's Office – Chief Justice Reports, 1823–1839, reels Z3234–3237.

31 State Library of New South Wales, Mitchell Library, ML ZA 2169, Papers of Sir George Arthur, vol. 9, Pedder to Arthur, 9 April 1825; *Decisions of the Nineteenth Century Tasmanian Superior Courts*, viewed 1 January 2012, R v Murray [1826], [http://www.law.mq.edu.au/research/colonial\\_case\\_law/tas/cases/case\\_index/1826/r\\_v\\_murray/](http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1826/r_v_murray/), and R v Murray and others [1827], [www.law.mq.edu.au/research/colonial\\_case\\_law/tas/cases/case\\_index/1827/r\\_v\\_murray\\_and\\_others/](http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1827/r_v_murray_and_others/); State Library of NSW, ML ZA 2169, Pedder to Arthur, 11 April 1829.

32 TAHO, SC45/1/1, Register of prisoners discharged by proclamation, 1825–1827, case no. 85, ff. 41–42, reel Z225.

33 43 Geo. III, c. 58; TAHO, SC45/1/1, case no. 85, ff. 41–2, reel Z225. Logan was executed on 25 February. *Colonial Times*, 5 January 1827.

34 State Library of NSW, ML ZA 2169, Pedder to Arthur, 9 April 1825. Pedder refers here to the *Sydney Gazette*, 24 March 1825. For the original report of Davidson's conviction and the motion in arrest of judgment, see *Sydney Gazette*, 25 October 1822. On the 'twelve-judge procedure', see J Oldham, 'Informal law-making in England by the Twelve Judges in the late eighteenth and early nineteenth centuries', *Law and History Review*, vol. 29, no. 1, 2011, pp. 184–191.



Explaining the ‘unhappy situation in which I find myself placed’, Pedder candidly acknowledged gnawing doubts about the legality of Logan’s execution seven weeks earlier.<sup>35</sup> At issue was the date of reception of English statute law: passed in 1803, Lord Ellenborough’s Act would not ordinarily have applied in New South Wales and Van Diemen’s Land because it had been promulgated after the New South Wales Courts Act of 1787.<sup>36</sup> Until doubts had been raised by Davidson’s case, Pedder explained to Arthur, he had shared the ‘unorthodox opinion’ of Chief Justice Forbes of New South Wales that the Act did apply in the southern colonies, and had ‘come out’ to Van Diemen’s Land in 1824 with the ‘general impression on my mind that the act extended hither’.<sup>37</sup> In the wake of Logan’s execution in 1825, however, Pedder told Arthur that ‘I must confess to my everlasting sorrow, that I have passed sentence in two cases & suffered an execution to take place in one of them under it’. Reiterating his discomfort, Pedder continued, ‘It will never cease to be a matter of the most painful reflection to me that, upon neither of these occasions, did I look into the Act itself’.<sup>38</sup>

A second doubtful case had a happier outcome for the defendant and for Pedder. In 1826, Robert Lathrop Murray, a gentleman transported to Van Diemen’s Land for bigamy, was charged with ‘forging and uttering a bill of exchange for £50’.<sup>39</sup> Murray was found guilty by the jury, but the chief justice doubted whether his actions constituted forgery under the relevant Act. With the painful memory of his error in Logan’s case still firmly in mind, Pedder had indicated to the court that ‘in the event of a conviction’ he would ‘send the case to England’ for review as it raised points that were ‘of too great importance to be decided by any one Judge’.<sup>40</sup>

An educated ex-convict turned colonial pressman, Murray was a thorn in the side of Arthur’s administration and, in Pedder’s view, a ‘known systematic opposer and calumniator of the government’.<sup>41</sup> Where the ‘hanging judge’ conjured by Calder and the *Truth* would have relished the opportunity to rid the government of an enemy like Murray, Chief Justice Pedder pressed his doubts about the conviction, and the case was ultimately referred to ‘the twelve Judges’.<sup>42</sup> Pedder’s relief at their vindication of his concerns is evident in a letter to Arthur, dated 11 April 1829: ‘Whether my own particular views of the case were right or wrong’, he told the governor, ‘it is a happy circumstance that I did entertain them, since it has been the means whereby the life of a man has been spared’. Suggesting that Pedder’s concern for procedural fairness was not just a relic of his equity training, but also reflected a keen awareness that he had to live with his sentencing decisions, the judge barely dared to speculate about the consequences of erring a second time: ‘Had Murray been hanged and the opinion of the Crown been ... known’, he asked rhetorically, ‘what would have been my feelings’.<sup>43</sup>

The popular and scholarly readings of capital punishment which contribute to Pedder’s reputation as a ‘hanging judge’ typically fail to acknowledge the complex and intersecting range of ‘penal purposes’, which Simon Devereaux usefully characterises as a ‘triad’ of ‘retributive severity, deterrent terror, and reform’.<sup>44</sup> Instead, conventional

35 State Library of NSW, ML ZA 2169, Pedder to Arthur, 9 April 1825. Editorial emphasis.

36 For the opposing views of the chief justice and attorney-general of New South Wales, see B Kercher (ed.), *Decisions of the Superior Courts of New South Wales, 1788–1899*, Division of Law Macquarie University, Notes to R v Smith [1825] NSWSupC 3, [www.law.mq.edu.au/research/colonial\\_case\\_law/nsw/cases/case\\_index/1825/r\\_v\\_smith/](http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1825/r_v_smith/); AC Castles, *An Australian legal history*, Law Book Co., Sydney, 1982, p. 378.

37 *Decisions of the Superior Courts of New South Wales*, Notes to R v Smith [1825] NSWSupC 3. The matter was not finally settled until the passage of the *Huskisson (or Australian Courts) Act* of 1828 confirmed the statutory reception date as 25 July 1828.

38 State Library of NSW, ML ZA 2169, Pedder to Arthur, 9 April 1825.

39 *Decisions of the Nineteenth Century Tasmanian Superior Courts*, R v Murray [1826], and R v Murray and others [1827].

40 R v Murray [1826].

41 CR Murray, ‘Murray, Robert William (1777–1850)’, [adb.anu.edu.au/biography/murray-robert-william-2497/text33367](http://adb.anu.edu.au/biography/murray-robert-william-2497/text33367); State Library of NSW, ML ZA 2169, Pedder to Arthur, 11 September 1825.

42 R v Murray and others [1827].

43 State Library of NSW, ML ZA 2169, Pedder to Arthur, 11 April 1829.

44 S Devereux, ‘In place of death: transportation, penal practices, and the English state, 1770–1830’ in C Strange (ed.), *Qualities of mercy: justice, punishment, and discretion*, University of British Columbia Press, Vancouver, 1996, pp. 56, 72.

accounts of the convict period in Van Diemen's Land overwhelmingly privilege the 'trivial offenders theory', which routinely downplays the social and financial impacts of property crimes.<sup>45</sup> Similarly, they favour subjective and emotive readings in which the penalties for historically significant offences, such as livestock theft, are decoupled from their social, political, economic and statutory contexts. As chief justice, Pedder indisputably sentenced many individuals to be hanged. By comparing specific examples from Calder and the *Truth* with contemporary editorial comment, statute law, and the minutes of Executive Council review my research, however, suggests that traditional 'hanging judge' narratives simultaneously overestimate Pedder's power of life and death, and underplay the social meaning of capital punishment during a period of declining, but still significant, mainstream community support for the ultimate sanction. The trope of the 'hanging judge' might appeal to modern abolitionist sensibilities, but its uncritical repetition diminishes our capacity to make sense of a profoundly different penal philosophy.

### A puppet of government?

Pedder's construction as a puppet of government is heavily inflected by the aspirational rule-of-law rhetoric of the free settler activists who agitated for the full enjoyment of their 'English liberties' in Van Diemen's Land. On the touchstone issues of trial by jury and freedom of the press, Pedder was strongly criticised for his conservative-legalistic readings of public law, his Tory sensibilities, and his close relationship with Governor Arthur. The chief justice's concurrent roles as head of the judiciary and ex officio Executive and Legislative Councillor were also condemned by the reformist colonial press as an 'extraordinary system of government'.<sup>46</sup>

Pedder's multiple offices continue to pose challenges for liberal-constitutionalist readings of the history of Van Diemen's Land which portray Pedder as a 'pliant' judge, who supported the colonial government at the expense of constitutional development.<sup>47</sup> The jury trial test case of *R v Magistrates of Hobart Town* [1825] neatly illustrates this point. As Ian Holloway observes, Pedder's 'reputation [has] never really recovered' from liberal critiques of his judgment in the case.<sup>48</sup> Marking him as a member of the 'government party', Pedder's disallowance of jury trial in the Court of Quarter Sessions has become controversial, not only because it frustrated local settler aspirations for the further extension of their 'English liberties', but because it contradicted the decision of Chief Justice Forbes in a similar test case brought before the Supreme Court of New South Wales in October 1824.<sup>49</sup> As Holloway contends, popular and scholarly opinion has widely regarded Forbes' decision in *R v the Magistrates of Sydney* [1824] as 'the "right" judgment'.<sup>50</sup> Pedder's judicial biographer is particularly critical, contrasting Forbes's 'high and eloquent expressions of principle' with the 'uncritical compliance, inexact legal knowledge, and willing subservience' of his Van Diemen's Land counterpart.<sup>51</sup>

Writing in the 1850s, colonial historian John West captured the essence of a more nuanced contemporary reaction when he observed that while Forbes's judgment was preferred as being 'more agreeable to Englishmen', Pedder's decision was a 'more

45 D Oxley, 'Counting the convicts: the unlikely love affair between convicts and historians' in D Gare and D Ritter (eds), *Making Australian history: perspectives on the past since 1788*, Thomson, Melbourne, 2007, p. 116; A Alexander, *Tasmania's convicts: how felons built a free society*, Allen & Unwin, Sydney, 2010, pp. 215–18.

46 *Colonial Times*, 26 May 1826.

47 RW Giblin, *The early history of Tasmania. Volume II*, Melbourne University Press/Oxford University Press, Melbourne, 1939, p. 469; Bennett, *Sir John Pedder*, 2003, p. 48.

48 I Holloway, 'Sir Francis Forbes and the earliest Australian public law cases', *Law and History Review*, vol. 22, no. 2, 2004, p. 235.

49 PA Howell, 'Pedder, Sir John Lewes (1793–1859); *Decisions of the Superior Courts of New South Wales*, *R v the Magistrates of Sydney* [1824] NSWKR 3; [1824] NSWSupC 20, [www.law.mq.edu.au/research/colonial\\_case\\_law/nsw/cases/case\\_index/1824/supreme\\_court/r\\_v\\_the\\_magistrates\\_of\\_sydney/](http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1824/supreme_court/r_v_the_magistrates_of_sydney/)

50 Holloway, p. 235.

51 Bennett, *Sir John Pedder*, 2003, p. 61.

correct interpretation of the *intentions* of [the imperial] parliament'.<sup>52</sup> Indeed, a minute from Colonial Office counsel, James Stephen, confirms the imperial government's perspective on the 'correct' reading of the relevant section of the *New South Wales Act 1823*: 'Whatever may be the construction of the words of this Clause', Stephen advised the Secretary of State for the Colonies, 'it is a matter admitting of no doubt that the *real intention* was to prevent Trial by Jury alike in all the legal Tribunals of the Colony'.<sup>53</sup> Whether guided by this 'real intention' or not, Pedder eschewed Forbes' 'interventionist' approach, and accepted the 'authority of the lawmaker' – here, the imperial parliament which had passed the *New South Wales Act 1823*.<sup>54</sup> When succeeding legislation confirmed the continuing operation of the Supreme Courts of both colonies in 1828, Pedder's reading of the original legislative intent was further vindicated by the abolition of jury trial in the Quarter Sessions allowed by Forbes in New South Wales, until it was first established in the Supreme Court.<sup>55</sup>

Anachronistic readings of the key concepts of rule of law and judicial independence underpin Pedder's construction as a puppet of government. Presupposing an inevitable trajectory towards the post-colonial order, whiggish histories of Van Diemen's Land/Tasmania regularly rehearse the arguments of free settler activists, but rarely problematise their underlying assumptions. A growing body of comparative colonial legal historiography provides an alternative frame for interpreting contemporary rule-of-law rhetoric and for assessing Pedder's judicial independence.

Throughout the British imperial world settler-colonists carried with them a 'compelling myth' of constitutionalism and the rule of law which emphasised the celebrated 'English liberties' guaranteed by Magna Carta, habeas corpus and the Bill of Rights.<sup>56</sup> Into the 1820s and 1830s key 'constitutional' liberties, such as freedom of the press, remained 'contingent and contested', however, even at the imperial centre.<sup>57</sup> The 'rule of law' itself constituted a 'highly tensile notion'.<sup>58</sup> Early nineteenth-century conceptions of the rule of law embodied both constitutional and legalistic strands, and its rhetoric could be deployed by reformists and conservatives for quite different ends: liberty, order, and even economic stability, through the enforcement of property and contract rights.<sup>59</sup> In the 'absence of a written constitution' – and in contrast to the now-dominant Diceyan rubric of separation of powers – John McLaren explains that the rule of law represented a more broadly conceived 'set of standards ... by which to judge the performance of those possessing governmental and judicial authority'.<sup>60</sup>

52 AGL Shaw (ed.), John West, *History of Tasmania*, Angus and Robertson, Sydney, 1981; originally published Henry Dowling, Launceston, 1852, p. 83. Editorial emphasis.

53 4 Geo. IV, c. 96, s. 19; 1 March 1828, CO 201/195, f. 343a, AJCP reel PRO 163. Editorial emphasis. Bennett cites Stephen's minute, but disputes the validity of the Colonial Office's interpretation of its own legislation. He similarly ignores Stephen's opinion that an 'extraordinary contradiction on the subject of Juries exists in the present New South Wales Act [1823], or at least has been attributed to it by Mr Forbes ... in opposition to the opinion of Mr Pedder'. Editorial emphasis. 1 March 1828, CO 201/195, ff. 343-343a, AJCP reel PRO 163; Bennett, *Sir John Pedder*, 2003, pp. 23-4.

54 Bennett, *Sir John Pedder*, 2003, p. 23, suggests that Pedder was not made aware of Stephen's opinion. P Hamburger, *Law and judicial duty*, Harvard University Press, Cambridge, Mass./London, 2008, p. 31; AC Castles, 'The judiciary and political questions: the first Australian experience, 1824-1825', *Adelaide Law Review*, vol. 5, 1975, pp. 312-3.

55 See 9 Geo. IV, c. 83, the *Huskisson Act* (1828).

56 RL Fraser, 'All the privileges which Englishmen possess': order, rights, and constitutionalism in Upper Canada' in RL Fraser (ed.), *Provincial justice: Upper Canadian legal portraits from the Dictionary of Canadian Biography*, University of Toronto Press, Toronto, 1992, p. xxxiii.

57 J McLaren, 'The rule of law in British colonial societies in the 19th century: gaseous rhetoric or guiding principle?', *The transposition of empire: historiographic approaches to the translation of juridical and political thought in colonial contexts*, Monash Centre, Prato, 2009, p. 3, [www.ched.uq.edu.au/Transitions/McLaren.PratoPaper.pdf](http://www.ched.uq.edu.au/Transitions/McLaren.PratoPaper.pdf)

58 McLaren, 'The rule of law in British colonial societies', pp. 2.

59 DM Klerman and PG Mahoney, 'The value of judicial independence: evidence from eighteenth-century England' in P Brand, K Costello, and WN Osborough (eds), *Adventures of the law: proceedings of the sixteenth British Legal History conference*, Four Courts Press, Dublin, 2005, pp. 139-60.

60 Referencing AV Dicey's seminal *Introduction to the study of the law of the Constitution* (1885), this court-focussed definition of judicial independence is virtually synonymous with the doctrine of separation of powers. Dicey popularised the phrase 'rule of law', but his definition is considerably narrower than would have been understood by either liberals or conservatives in the early nineteenth century. J McLaren, 'The judicial office ... bowing to no power but the supremacy of the law: judges and the rule of law in colonial Australia and Canada, 1788-1840', *Australian Journal of Legal History*, vol. 7, no. 2, 2003, pp. 3, 187.

As Robert Fraser has identified in the Canadian colonial context, the ‘intimate’ link between the judiciary and the executive, in the person of a colonial chief justice, ‘brought the judiciary within the framework of opposition criticism of executive misrule’.<sup>61</sup> Colonial critics of Pedder’s role as a ‘component part’ of the government were also fervent opponents of Arthur’s autocratic style of governance, and their critiques illuminate the ‘interplay of interest, grievance and constitutional rhetoric’.<sup>62</sup> Yet, far from being the ‘extraordinary system of government’ condemned in the Van Diemen’s Land press, the comparative judicial biographies of McLaren and Fraser demonstrate that colonial judges were routinely appointed ‘at pleasure’ by the imperial executive to perform a range of extra-judicial roles.<sup>63</sup> As McLaren argues, judges like Pedder were ‘expected to straddle the legal and political spheres in the cause of stable governance’.<sup>64</sup> In contrast to settler and historiographical critiques, which conventionally privilege constitutionalist readings, McLaren’s ‘Baconian colonial judiciary’ model – in which a judge’s primary loyalty was to the Crown – recasts Pedder as the ‘epitome of the loyal, journeyman judge doing what was expected of him’.<sup>65</sup> Pedder’s successful negotiation of his competing obligations was rewarded with continuing Colonial Office support in an age when judges who failed to internalise this Baconian conception of service were regularly removed from office. Unlike many of his colleagues, Pedder remained on the bench for thirty years – despite settler complaints and official investigations – and was rewarded with a knighthood in 1838.<sup>66</sup>

### A champion of the Aboriginal people?

Pedder’s more benevolent construction as a champion of the Aboriginal people of Van Diemen’s Land hangs on two assumptions which are not supported by the archive: a racialised ‘binary’ of black indigenes and white colonisers, and the myth of the ‘doomed race’.<sup>67</sup> Pedder’s first criminal trial in the Supreme Court has been invoked as proof of his ‘enlightened attitude’ towards indigenous people.<sup>68</sup> *R v Tibbs* [1824] resulted in the conviction of an English convict for the manslaughter of a ‘black man, named John Jackson’.<sup>69</sup> No colonial sources link William Tibbs’s prosecution to conflict between settlers and Aboriginal people.<sup>70</sup> In the first decade of the twenty-first century, however, the Tibbs case has been cited as a ‘seminal example’ of settler-indigenous legal relations.<sup>71</sup>

This reading hangs on what Cassandra Pybus has identified as the ‘almost universal’ tendency of Australian historiography to ‘read late nineteenth- and twentieth-

61 Fraser, p. lxxv.

62 *Colonial Times*, 2 June 1826; Fraser, p. lv.

63 Fraser, pp. xxi–xcii; J McLaren, *Dewigged, bothered and bewildered: British colonial judges on trial, 1800–1900*, University of Toronto Press, Toronto, 2011.

64 McLaren, *Dewigged, bothered and bewildered*, p. 149.

65 Referencing Francis Bacon’s seventeenth-century injunction that judges should be ‘lions under the throne, being circumspect that they do not check or oppose any points of sovereignty’, this model favours ‘service to government above all else’. The opposing ‘Cokeian’ model – associated with Bacon’s Stuart rival, Sir Edward Coke – represents an ‘expansive understanding of the rule of law’ and a commitment to the ‘ascendancy of the legislative branch of the constitution’. FM Greenwood, *Legacies of fear: law and politics in Quebec in the era of the French Revolution*, University of Toronto Press/Osgoode Society, Toronto, 1993, p. 27; McLaren, *Dewigged*, pp. 11–12, 160.

66 *London Gazette*, 27 November 1838.

67 C Pybus, *Black founders: the unknown story of Australia’s first black settlers*, University of New South Wales Press, Sydney, 2006, p. 181.

68 G Green, ‘Foreword’ in Bennett, *Sir John Pedder*, 2003, p. vii.

69 *Decisions of the Nineteenth Century Tasmanian Superior Courts*, *R v Tibbs* [1824], [www.law.mq.edu.au/research/colonial\\_case\\_law/tas/cases/case\\_index/1824/r\\_v\\_tibbs/](http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1824/r_v_tibbs/)

70 No official law reports were published in Tasmania until the end of the nineteenth century. Instead, recovering colonial case law depends on the law reports, and some trial transcripts, published by local newspapers during the colonial period.

71 G Green, ‘The marginalisation of law in Australia’, Order of Australia Oration, 2006, p. 9, [www.theorderofaustralia.asn.au/downloads/OAA2006ORATIONSirGuyGreen.pdf](http://www.theorderofaustralia.asn.au/downloads/OAA2006ORATIONSirGuyGreen.pdf); Bennett, 2003, p. 67; Green, ‘Foreword’, p. vii; R Cox, *Steps to the scaffold: the untold story of Tasmania’s black bushrangers*, Cornhill Publishing, Pawleena, 2004, pp. 8–9; NJB Plomley (ed.), *Friendly mission: the Tasmanian journals and papers of George Augustus Robinson, 1829–1834*, Tasmanian Historical Research Association, Hobart, 1966, p. 43 n. 42; and K Windschuttle, *The fabrication of Aboriginal history, volume one: Van Diemen’s Land, 1803–1847*, Macleay Press, Paddington, 2002, p. 191 n. 74.

century racial assumptions' into the early colonial period.<sup>72</sup> My reassessment of Pedder's role in this case began with testing the key assumption that 'black' was synonymous with Aboriginal. It soon became clear that Tibbs's victim, John Jackson, was not indigenous, but one of several hundred people of colour who arrived in Van Diemen's Land before 1850.<sup>73</sup> Colonial sources, including John West's *History of Tasmania* (1852), describe him as a 'man of color [sic]' and a 'negro',<sup>74</sup> while records from the Convict Department, Old Bailey and the War Office identify Jackson as an American man of colour who had served in the British Army before being transported to Van Diemen's Land in 1821.<sup>75</sup> By confirming Jackson's identity as a non-indigenous black, my research demonstrates that existing glosses on the case hang on anachronous assumptions about the language of racial identification and ignore a growing body of evidence for the multi-racial colonisation of Australia. This new reading of the Tibbs case therefore adds to our understanding of colonial race relations, but does not reveal anything of Pedder's judicial attitude towards the indigenous population.

The 'doomed race' paradigm underpins readings of Pedder's dissenting voice in the Executive Council meeting of 23 February 1831, which endorsed a policy of island exile for all indigenous survivors of the Black War. In words that are regularly attributed to the chief justice himself, Pedder's humanitarian concern that exiles would 'soon begin to pine away when they found their situation one of hopeless imprisonment' was reframed in 1870 by colonial historian, James Bonwick, as a protest against 'an unchristian attempt to destroy the whole race'.<sup>76</sup>

Lyndall Ryan argues that the myth of inevitable 'extinction' took hold in Van Diemen's Land after the Black War, as colonial writers sought to 'expiate' settler guilt for the violent dispossession of the island's indigenous people.<sup>77</sup> It became the dominant paradigm of the late-nineteenth-century colonial historians whose texts are still consulted as standard sources.<sup>78</sup> Bonwick continues to be cited uncritically by scholars working in a range of disciplines – from judicial biography to international genocide scholarship – despite his social Darwinist assumptions around race, and his failure to acknowledge the particular context of the Black War in February 1831.<sup>79</sup> By contrast, the archival evidence reveals that Pedder's concerns were more nuanced and culturally sensitive than Bonwick's fictive 'extinction' prophecy.

72 Pybus, p. 180.

73 Pybus counts sixty men and women from India, Mauritius and Ceylon among the 500 people of colour who arrived in Van Diemen's Land before 1850. Ian Duffield also refers to unpublished data on 'about 800 Africans' among Australia's convict settlers. C Pybus, 'Mannalargenna's daughters', *Out/Back: Heat*, vol. 15, 2001, p. 103; I Duffield, "'Stated this offence": high-density convict micro-narratives' in L Frost and H Maxwell-Stewart (eds), *Chain letters: narrating convict lives*, MUP, Melbourne, 2001, p. 135; J Fox, 'R v Tibbs (1824): a case of mistaken identity', *History Australia*, vol. 8, no. 2, 2011, pp. 21–41.

74 *Hobart Town Gazette*, 23 January, 28 May 1824; West, p. 82.

75 Fox, pp. 28–30.

76 See, for example, Bennett, 2003, p. 68, and A Haebich, *Broken circles: fragmenting indigenous families, 1800–2000*, Fremantle, Fremantle Arts Centre Press, 2000, p. 96; extract of the minutes of the Executive Council, 23 February 1831, in AGL Shaw (ed.), *Van Diemen's Land: copies of all correspondence between Lieutenant-Governor George Arthur and His Majesty's Secretary of State for the Colonies on the subject of the military operations lately carried out against the Aboriginal inhabitants of Van Diemen's Land*, facsimile edition, Tasmanian Historical Research Association, Hobart, 1971, originally published House of Commons, London, 1831, p. 82; J Bonwick, *The last of the Tasmanians; or, the Black War of Van Diemen's Land*, Sampson, Low, Son & Marston, London, 1870, p. 240.

77 L Ryan, 'How many? The doctrine of the self-extermimating savage and the debate about estimating the population of Aboriginal people in Tasmania in 1803', CAIA/Riawunna seminar, UTAS, 2009.

78 H Reynolds, *Fate of a free people*, Penguin Books, Melbourne, 1995, p. 202. The perspective is evident in the titles of contemporary histories of indigenous Tasmanians. See, for example, Bonwick, *The last of the Tasmanians* (1870) and *The lost Tasmanian race* (1884), and JE Calder, *Some account of the wars, extirpation, habits, &c., of the native tribes of Tasmania*, Henn & Co., Hobart, 1875.

79 See, for example, B Madley, 'Patterns of frontier genocide, 1803–1910: the Aboriginal Tasmanians, the Yuki of California, and the Herero of Namibia', *Journal of Genocide Research*, vol. 6, no. 2, 2004, pp. 174–5. Anna Johnston and Mitchell Rolls characterise Bonwick's text as an exemplar of the 'racial science of high imperialism'. A Johnston and M Rolls, 'Reading *Friendly Mission* in the twenty-first century: an introduction' in A Johnston and M Rolls (eds), *Reading Robinson: companion essays to Friendly Mission*, Quintus Publishing, Hobart, 2008, p. 17.



Writing almost forty years after the Executive Council meeting in which the policy of island expatriation was debated, Bonwick asserted in *The Last of the Tasmanians; or, the Black War of Van Diemen's Land* (1870) that 'Mr Chief Justice Pedder protested vigorously against the scheme of transportation' to the islands. Putting words into Pedder's mouth, Bonwick reported that, 'He declared it an *unchristian attempt to destroy the whole race*, as once taken from their ancient haunts they would, he said, soon die' Emphasising the apparently inexorable fate of the indigenous people, Bonwick completes his retrospective gloss with the claim that, 'Sir John Pedder, in after years, saw the fulfilment of his prophecy'.<sup>80</sup>

It is unclear from Bonwick's account that Pedder raised doubts about the policy of indigenous expatriation in his extra-curial capacity as an Executive Councillor. A close reading of the Executive Council minutes of meeting for 23 February 1831 draws attention to the fact that Pedder's own words cannot be interpreted as a straightforward 'protest' against an unmistakably genocidal policy. Instead, they reflect a range of humanitarian and policy concerns particular to the circumstances of February 1831. In the aftermath of the Black Line operation of October–November 1830 and the unanticipated 'success' of George Augustus Robinson's Friendly Mission, the majority of Executive Councillors supported the resumption of Robinson's 'mission ... with a view to conciliate others of the hostile Natives, and endeavour to induce them to go voluntarily to the establishment in the Straits, and there place themselves under the care and protection of the Government'. Here, however, the chief justice raised a dissenting voice. The minutes of meeting and Arthur's report to the Colonial Office record that Pedder did 'not coincide in opinion with the other Members, and *does not recommend the adoption of measures tending to induce the Natives in tribes to consent to expatriation*'. Where Arthur emphasises Pedder's alternative recommendation that 'we should still strive to negotiate [sic] with them', the minutes record the chief justice's insistence that he could not agree to the policy of wholesale 'expatriation and imprisonment, until the absolute necessity of such measures was clearly manifested'.<sup>81</sup> From Pedder's perspective, the unexpected results of Robinson's mission indicated that the potential for negotiation had not been exhausted in February 1831. As a result, the 'absolute necessity' of expatriation of whole 'tribes' could not yet be demonstrated.

Conscious of the government's obligations under international law, and of practice in other British settler colonies, Pedder made two alternative suggestions: negotiating separate zones of occupation, and deploying European 'agents' to live with indigenous tribal or clan groups. The minutes of meeting record that Pedder informed the Executive Council that he 'wished it to be ascertained whether some treaty could not be made with these people, by which their chiefs should engage for their tribes not to pass certain lines of demarkation [sic], which might be agreed upon'. He also argued for the deployment of government agents, who would live among the indigenous people to perform the dual role of protecting and 'civilising' the 'tribes'. As the chief justice explained, 'Up to the present moment, when aggressions have been made upon the Natives, they have not known to whom to complain, nor, had they known, could their evidence have been used to bring the offender to justice'. If indigenous leaders accepted a proposal to 'allow an [sic] European agent to reside with or accompany each tribe', Pedder's legal mind reasoned, these individuals would be competent to give evidence on their behalf.<sup>82</sup> As with his preference for further negotiation, Pedder's proposed use of European agents indicates that he was familiar with a repertoire of strategies from around the British settler-colonial world, which, he argued, should also be deployed in Van Diemen's

80 Bonwick, p. 240. Editorial emphasis.

81 Extract of the minutes of the Executive Council, 23 February 1831. Arthur to Murray, 4 April 1831, in Shaw, *Military Operations*, p. 78; extract of the minutes of the Executive Council, 23 February 1831. Editorial emphasis.

82 Extract of the minutes of the Executive Council, 23 February 1831.



Land. Only after these strategies had been attempted without success could he agree to wholesale expatriation as the option of last resort.<sup>83</sup>

For Bonwick, as for the sympathetic twenty-first-century reader, Pedder's apparent foreboding that indigenous people would 'soon die' when 'taken from their ancient haunts' is of particular humanitarian interest. Writing about the 'Tasmanian catastrophe', frontier genocide scholar Benjamin Madley argues that the colonial authorities should have known that the Flinders Island 'offshore detention centre' would be fatal: 'Even before it was established', he asserts, 'officials warned that Wybalenna would be unhospitable, if not deadly'. The official to whom Madley refers is Chief Justice Pedder. While Madley quotes the Executive Council minutes rather than Bonwick, his reading that Pedder 'warned' the Executive Council that 'Aborigines held on any Bass Strait island "would pine away when their found their situation one of hopeless imprisonment"' similarly obscures the focus of Pedder's concern.<sup>84</sup>

In Madley's model of international settler genocide, the 'final phase of the frontier genocide pattern' centres on the incarceration of indigenous people in an 'ethnic gulag' under conditions that are 'likely or even intended to destroy significant numbers through malnutrition, insufficient provision of clothing, exposure to the elements, inadequate medical care, and unsanitary conditions'.<sup>85</sup> These extrinsic factors were soon identified by officials on Flinders Island as contributing to the high indigenous mortality rate at Wybalenna. However, they were not the factors identified by Pedder in 1831 as likely to cause indigenous deaths. An attentive reading of the Executive Council minutes highlights Pedder's apprehension that expatriated indigenes would die 'however carefully' they 'might be supplied with food', for example. In Pedder's view, it was not the adverse conditions of the island or inadequate provisions per se, but the restraints imposed upon indigenous people as a result of disconnection from their own country and traditional ways of life. Pedder specifically rejected Robinson's opinion that the indigenes would not 'regret their inability to hunt and roam about in the manner they had previously done on [the main] island', and, in the culturally inflected language of the time, expressed his anxiety that the 'bounds' of an island reserve would be 'so narrow as necessarily to deprive them of those habits and customs which are the charms of their savage life'. Where Robinson was 'confident' that the indigenous exiles would 'be enabled to fish, dance, sing, and throw spears, and amuse themselves in their usual way', Pedder recognised that a sedentary settlement on a small island was incompatible with what he described as 'that unbounded liberty of which they have hitherto been in the enjoyment'. The lack of geographical constraint was an essential component of the Aboriginal people's nomadic lifestyle and culture, as Pedder identified with his further acknowledgement of 'their known love of change of place, their periodical distant migrations, [and] their expeditions in search of game'.<sup>86</sup>

As an expatriate, separated from his own native land for an extended period, Pedder was perhaps sensitive to the pernicious effects of homesickness. Moreover, he belonged to a generation which regarded 'nostalgia' as a potentially fatal medical condition. Since the late seventeenth-century, European physicians had documented cases of fatal homesickness or *mal du pays*, especially among the Swiss mercenaries first observed to suffer from it while stationed in the French lowlands.<sup>87</sup> During the

83 Similar strategies were employed in British North America. Haebich, p. 96. The influence of Pedder's old friend, Saxe Bannister, who had acted for Mohawk leaders in London the early 1820s and continued to advocate for indigenous peoples throughout his life, is an area for potentially fruitful future research.

84 Madley, 'From terror to genocide', p. 101, citing P Chapman, 'Introduction', *HRA*, III, XI, p. liv.

85 Madley, 'Patterns of frontier genocide', pp. 174, 175.

86 Extract of the minutes of the Executive Council, 23 February 1831.

87 S Bunke, 'Heimweh' in B von Jagow and F Steger (eds), *Literatur und Medizin im europäischen Kontext: ein Lexikon*, Vandenhoeck & Ruprecht, Göttingen, 2005, pp. 333–4; L Hutcheon, 'Irony, nostalgia, and the postmodern', University of Toronto English Library Criticism and Theory Resources, 1997, [n.p.], [www.library.utoronto.ca/utel/criticism/hutchinp.html](http://www.library.utoronto.ca/utel/criticism/hutchinp.html)

later nineteenth-century, medical opinion increasingly categorised homesickness as a psychological, rather than a physical, illness.<sup>88</sup> Fatal homesickness was also invoked in Van Diemen's Land to account for the 'extinction' of the indigenous people. In *The Last of the Tasmanians*, Bonwick draws an explicit parallel between Aboriginal deportees on Flinders Island and Swiss emigrés:

The *Ranz des Vaches* [Swiss herdsman's song believed to provoke nostalgia] appeals to the imagination, and excites romantic impulses, though proceeding from the lips of voluntary exiles from their Swiss mountain-home. Can it be less affecting to witness the tear-dimmed glance of the Tasmanian at the hills from which he was stolen ... ?<sup>89</sup>

In a passage which resonates with eighteenth-century accounts of European soldiers who pined for their homelands, Bonwick cites the opinion of a medical attendant on Flinders Island, who believed that the indigenous exiles 'pine away, not from any positive disease, but from a disease they call "home sickness"'. As Dr Barnes explained, 'They die from a disease of the stomach, which comes on entirely from a desire to return to their own country'.<sup>90</sup>

In contrast, then, to Bonwick's belief in a 'doomed race' and his post-hoc evocation of the 'romantic' trope of fatal homesickness, Pedder's apprehension that indigenous people would 'pine away' was not a prophecy of inevitable 'extinction'.<sup>91</sup> Instead, it recognised that, even with their 'consent', the expatriation of whole indigenous communities from the main island of Van Diemen's Land would sever their connection to their traditional lands and irrevocably interfere with their capacity to practise their ancient 'habits and customs'.<sup>92</sup>

### A solitary ascetic?

To the three longstanding constructions of Pedder which recur in the secondary sources, John Bennett's 2003 judicial biography adds a further unsupported stereotype. While colonial sources indicate that Pedder's contemporaries warmed to a 'very friendly' and 'agreeable man', Bennett constructs Pedder as 'cold, lacking friends and ... insecure even in the company of such friends as he had'.<sup>93</sup> Further emphasising the limitations of his sources and his focus on Pedder's public persona, Bennett reports that the judge had 'no private interests or recreations apart from his churchgoing and a few philanthropic commitments'.<sup>94</sup> In short, he imagines the judge as 'the epitome of dullness' and a 'humourless' workaholic, who 'derived little enjoyment from his life of unremitting asceticism'.<sup>95</sup>

Bennett provides the only substantial appraisals of Pedder's official career, in a 'pilot study' published in 1977 and an expanded short-format judicial biography published in 2003 as *Sir John Pedder: First Chief Justice of Tasmania*.<sup>96</sup> The revised biography of 2003 belongs to a projected series of forty volumes of *Lives of the Australian Chief Justices*, through which Bennett seeks to address what he regards as the marginalisation

88 Bunke, p. 335; Hutcheon, [n.p].

89 Bonwick, p. 390.

90 Bonwick, p. 390.

91 Bonwick, p. 390.

92 Extract of the minutes of the Executive Council, 23 February 1831.

93 Ellen Viveash to [her mother] Mrs Tanner, 26 January 1834, in P Statham (ed.), *The Tanner letters: a pioneer saga of Swan River and Tasmania, 1831–1845*, University of Western Australia Press, Nedlands, 1981, p. 76; Anna Maria Nixon to Echo, 21 July 1843 and 23 August 1843, in N Nixon (ed.), *The pioneer bishop in Van Diemen's Land, 1843–1863: letters and memories of Francis Russell Nixon, D.D., first Bishop of Tasmania*, J Walsh & Sons, Hobart, 1953, pp. 9, 11. Bennett, 2003, pp. 112–13, 135 n. 61.

94 Bennett, 2003, pp. 112–13, 135 n. 61.

95 Bennett, 2003, p. 113.

96 JM Bennett, *Sir John Pedder: first chief justice of Tasmania*, University of Tasmania, Hobart, 1977, pp. x, 1.

of the law in Australian historiography by writing about its judicial agents.<sup>97</sup> Each of his volumes is prefaced with an authoritative foreword by an eminent judge.<sup>98</sup> Combined with favourable reviews in legal history journals, Bennett's authority as a pre-eminent Australian legal historian ensures that his *Lives* have all the gravity of official history.<sup>99</sup>

In a scholarly survey of the genre of judicial biography, Canadian legal historian Philip Girard reflects that the 'fluidity' of colonial judicial careers has more in common with those of early modern judges than of twentieth-century jurists, and proposes what he calls a 'window on an age' model for writing their lives.<sup>100</sup> In contrast to conventional judicial biography (which is often written by and for lawyers), Girard's approach recognises the significance of law to society, but also creates a space in which the political and social contributions of colonial judges can be explored.<sup>101</sup> Thus, Girard explains, 'the "window on an age" approach focuses outward. We take the judge's life as the starting point and look out from there at the surrounding society'.<sup>102</sup> Pedder's pivotal position in the government and settler-colonial community of Van Diemen's Land makes him an ideal starting point from which to 'look out'. Following Girard, my research has been concerned to reconstruct aspects of Pedder's life-world – the experiences, activities, and connections that constitute the world of the individual. While no discrete collection of personal papers remains extant, a sensitive reading of the archive demonstrates that the silences around Pedder's private life are only partially arbitrary. The historical record is fragmentary, but many traces can be salvaged and reconnected, if one observes Nick Salvatore's exhortation to follow the biographical subject away from the sites of his public life and pursue the archival 'byways wherever they may lead'.<sup>103</sup> In this pursuit, the tools and interpretive strategies of family and social history are particularly valuable.

Accurately mapping Pedder's familial connections is a fundamental aspect of reconstructing his life-world. Pedder and many of his close relatives were born before the advent of civil registration in England and Van Diemen's Land, so I have used other genealogical records, such as wills, parish registers and newspaper announcements, to identify family links and construct the pedigree chart (opposite) which delineates four generations of Pedder's family, from his grandparents to his brother's children.<sup>104</sup> This visual representation clearly shows that Pedder and his wife, Maria Everitt, were maternal first cousins who left no descendants.

97 Conceived in 1969, Bennett's series represents an extension of the nineteenth-century short biography tradition of Lord Campbell's *Lives of the Chief Justices of England*. B Kercher, 'Book review. Lives of the Australian chief justices. Sir Francis Forbes: first Chief Justice of New South Wales 1824–1837; Sir James Dowling: second Chief Justice of New South Wales 1837–1844; and Sir William A'Beckett: first Chief Justice of Victoria 1852–1857', *Australian Journal of Legal History*, vol. 7, no. 2, 2003, p. 287.

98 For North American parallels, see P Girard, 'Judging lives: judicial biography from Hale to Holmes', *Australian Journal of Legal History*, vol. 7, no. 1, 2003, p. 89.

99 For a selection of extracts from highly favourable reviews, see the publisher's website, [www.federationpress.com.au/bookstore/book.asp?isbn=9781862874824](http://www.federationpress.com.au/bookstore/book.asp?isbn=9781862874824).

100 Girard, p. 90. See also the seminal texts: EP Thompson, *Whigs and hunters: the origin of the Black Act*, Penguin Books, Harmondsworth, 1977; D Hay, P Linebaugh, JG Rule, EP Thompson and C Winslow (eds), *Albion's fatal tree: crime and society in eighteenth-century England*, A Lane, London, 1975; and M Foucault (trans A Sheridan), *Discipline and punish: the birth of the prison*, Penguin, Harmondsworth, 1979.

101 In the United States, significant scholarly debate surrounds the 'nature and purpose of judicial biography', but the genre still speaks primarily to a 'relatively small coterie of lawyers, legal academics and political scientists'. WM Billings, 'Judges' lives: judicial biography in America, 1607–1995' in TL Coggins (ed.), *The national conference on legal information issues: selected essays*, FB Rothman, Littleton, 1996, p. 194; Girard, p. 89. Peter Karsten contrasts the 'exceptionalist' traits of US legal historians and their focus on the Supreme Court with the comparative approach of their Canadian and Australasian counterparts. P Karsten, 'The CANZ approach to legal history', *Law and History Review*, vol. 21, no. 3, 2003, p. 617.

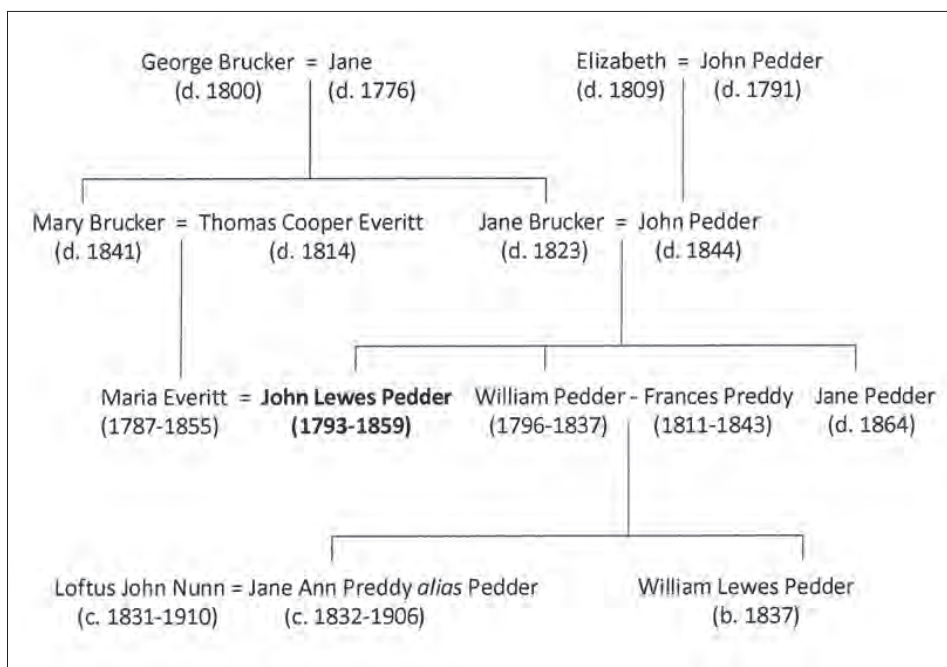
102 Girard, pp. 89–90.

103 N Salvatore, 'Biography and social history: an intimate relationship', *Labour History*, vol. 87, 2004, p. 190.

104 Civil registration was introduced in England and Wales in 1837 and in Van Diemen's Land the following year, with the passage of 2 Vic. No. 8, *An Act for registering births, deaths and marriages in the island of Van Diemen's Land and its dependencies* (1838).

## John and Maria: a companionate marriage

Alison Alexander's pioneering collective biography of governors' wives in Van Diemen's Land contrasts the significant role played by official spouses with the limited attention they have received in the historiography.<sup>105</sup> As the wife of the chief justice, Maria Pedder has received a similar lack of scholarly attention, and emerges only fleetingly from the historical record.<sup>106</sup> Appearing briefly in Henry Savery's satirical *The Hermit in Van Diemen's Land* (1829) as 'Mrs Doubtmuch' – in reference to her husband's reputation for 'judicial hesitancy' – Maria is portrayed as a lady 'on the shady side of forty' with 'rather a flushed complexion, darkish expressive eyes' and a 'countenance altogether beaming with much beneficence'.<sup>107</sup> Savery's image of the benevolent judge's wife is borne out by contemporary sources. On her death in 1855, Lady Pedder was eulogised in the *Maitland Mercury* as a virtuous matron 'much esteemed for an unostentatious but always active benevolence', while the *Hobart Town Courier* remembered a 'kind benefactress of the poor' whose 'virtues endeared her to a large and numerous circle of friends'.<sup>108</sup> These sentiments are echoed in Pedder's choice of inscription for the tombstone of his 'dearly beloved wife': '*Multis Illa Bonis Flebilis Occidit*' – many a good man wept at her death.<sup>109</sup>



Pedigree chart of John Lewes Pedder.

<sup>105</sup> A Alexander, *Obligated to submit: wives and mistresses of colonial governors*, Montpelier Press, Hobart, 1999, pp. 1–3.

<sup>106</sup> See Bennett, 2003, pp. 16, 112, for a misogynistic dismissal of the isolated and 'very prosaic life' of the 'childless' judge's wife.

<sup>107</sup> Bennett, p. 16; C Hadgraft and M Roe (eds), Henry Savery, *The Hermit in Van Diemen's Land*, University of Queensland Press, St Lucia, 1964, pp. 74, 198. At the time Savery was writing, Maria would have been forty-two-years-old.

<sup>108</sup> Supplement to the *Maitland Mercury*, 3 November 1855. *Courier*, 24 October 1855. Maria Pedder died on 23 October 1855 from 'Paralysis and [an] abdominal Tumour', and was buried at St John's Church of England, New Town. TAHO, RGD 35/5, Reg. No. 297/1855; NS656/74, No. 421, p. 28.

<sup>109</sup> The inscription is adapted from Horace's ode, 'To Vergil, on the death of Quintilius', *Carmina* 1:24. My thanks to Rosie Davidson of the Friends of the Orphan Schools for supplying a transcription of the tombstone, and to Dr Andrew Turner at the University of Melbourne for deciphering the damaged Latin inscription.

John and Maria's consanguineous marriage is confirmed by the identification of their mothers as sisters Jane and Mary Brucker.<sup>110</sup> Pedder's marriage to his cousin grounds his strong connection to family in shared values and social background in an age which valued broad kinship connections.<sup>111</sup> Maria has previously been identified only as the daughter of 'Lt-Col Everett [sic]'.<sup>112</sup> Genealogical investigation establishes her father's identity as Colonel Thomas Cooper Everitt (d. 1814); tracing his military appointments via the *London Gazette* reveals that Maria came from a family with solid links to the armed forces.<sup>113</sup> Her brother Henry also served in the army, while her paternal grandfather and uncle were naval officers.<sup>114</sup>

The marriage of John Lewes Pedder, Esq., of the Middle Temple, to Miss Everitt, on 8 July 1823, was announced in the *European Magazine*.<sup>115</sup> The site of publication of the marriage notice provides clues to Pedder's religious, social and political values: like the more popular *Gentleman's Magazine*, this 'nonpartisan' literary journal was 'unswervingly loyal to Church, King, and Constitution'.<sup>116</sup> It also suggests Pedder's cultural interests, social pretensions, and the connections of the extended family. Emily de Montluzin identifies the magazine's readership as 'clergymen, landed gentry, magistrates, physicians, antiquaries, and lovers of literature' – a broader group than might be expected from Pedder's metropolitan legal and commercial connections.<sup>117</sup> Strong family support for the marriage is also indicated. John and Maria were married in the bride's parish church in Brighton – a town which appears to have become the family base. Witnesses included Pedder's brother, William, Maria's brother, Henry, and their cousin, Ellen Anne Weir.<sup>118</sup>

The timing of the marriage is also significant. The process of Pedder's selection for the judgeship in Van Diemen's Land occupied the period from March to October 1823, when his appointment was formalised with the issue of Letters Patent.<sup>119</sup> Earls notes that some early colonial legal and judicial appointees married immediately before their departure from Britain, possibly due to the need for an acceptable consort and the

110 The National Archives, PROB 11/1341, Will of George Brucker, esquire, of Clapham Common, Surrey, dated 8 March 1800, proved 5 May 1800. Mary Brucker married Thomas Cooper Everitt, 15 September 1783; Jane Brucker married John Pedder, 13 March 1787. Both marriages were solemnised at St Nicholas Cole Abbey, Old Fish Street, London. Ancestry.com. London, England, Marriages and Banns, 1754–1921 [database on-line]. Provo, UT, USA: Ancestry.com Operations, Inc., 2010, Guildhall, St Nicholas Cole Abbey, Register of Marriages, 1755–1812, P69/NIC2/A/01/Ms 5690/1.

111 NF Anderson, 'Cousin marriage in Victorian England', *Journal of Family History*, vol. 11, no. 3, 1986, pp. 285–6, 291–96.

112 RL Arrowsmith, *Charterhouse Register, 1769–1872. With appendix of non-foundations, 1614–1769*, Phillimore, London, 1974, p. 289; Bennett, 2003, p. 9.

113 Everitt served in the 3rd Regiment of Dragoon Guards in the 1770s, and was Major-Commandant of the Hampshire Fencibles Light Dragoons in the 1790s. At the time of his death, he was on the Hospital Staff as Deputy Purveyor to the Forces. He was succeeded in this post by his son, Henry. *London Gazette*, 25 February 1772, 20 May 1794, 3 July 1813, and 31 May 1814; War Office, *A list of the officers of the Army and of the Corps of Royal Marines, with an index*, J Hartnell, London, 1832, p. 386; TNA, PROB 11/1567, Will of Thomas Cooper Everitt of Saint Marylebone, Middlesex, dated 12 June 1809, proved 14 April 1815.

114 Henry Yarburgh (or Yarborough) Everitt (1791–1847). *London Gazette*, 15 November 1817; *Jackson's Oxford Journal*, 15 May 1847. Captain Michael Everitt's commands are outlined in a 'Biographical memoir of Arthur Phillip, Esq. Vice-Admiral of the Red Squadron', *The Naval Chronicles containing a general and biographical history of the Royal Navy*, Institute of Naval History, [www.royal-navy.org/lib/index.php?title=Biographical\\_Memoir\\_of\\_Arthur\\_Phillip%2C\\_Esq](http://www.royal-navy.org/lib/index.php?title=Biographical_Memoir_of_Arthur_Phillip%2C_Esq). Maria's uncle, Admiral Charles Holmes Everitt Calmady (d. 1807) took the name and arms of Calmady by royal licence on his marriage to the heiress, Pollexfen Calmady. *London Gazette*, 5 February 1788.

115 *European Magazine*, and *London Review*; *illustrative of the literature, history, biography, politics, arts, manners, and amusements of the age, embellished with portraits. Volume 84, From July to December, 1823*, Sherwood Jones & Co, London, 1823, p. 91. John and Maria were married in the parish church of St Nicholas, Brighton, on 8 July 1823. 'England Marriages, 1538–1973', *FamilySearch*, [www.familysearch.org](http://www.familysearch.org)

116 EL de Montluzin, 'Attributions of authorship in the *European Magazine*, 1782–1826', The Bibliographical Society of the University of Virginia, viewed 18 August 2009, [etext.lib.virginia.edu/bvuva/euomag/1EM.html#1](http://etext.lib.virginia.edu/bvuva/euomag/1EM.html#1)

117 Montluzin, [n.p.].

118 Ellen was probably the daughter of John and Maria's maternal aunt, Elizabeth Brucker, and John Weir. With her grandfather, George Brucker, and aunt, Elizabeth Everitt, Maria Everitt had witnessed John and Elizabeth's marriage in 1802. 'England Births and Christenings, 1538–1975', *FamilySearch*, [www.familysearch.org](http://www.familysearch.org); St Marylebone, Middlesex, Parish Registers, Marriages, John Weir Esquire to Elizabeth Brucker, by licence, 13 May 1802, p. 220, n. 660, 'London, England, Marriages and Banns, 1754–1921', [ancestry.co.uk](http://ancestry.co.uk).

119 *HRA*, III, IV, p. 481.



perceived lack of suitable marriage partners in the colonies.<sup>120</sup> A comparable marriage was that of New South Wales Solicitor-General John Hubert Plunkett, who married his cousin Maria Charlotte McDonougha between the time of his colonial appointment and departure for Sydney in 1832.<sup>121</sup>

While it is possible that John and Maria entered into an endogamous marriage of convenience, other evidence suggests that the couple were already close and Pedder's colonial appointment provided the financial security which formed a major determinant of age at marriage during the nineteenth century. At twenty-nine and thirty-five years respectively, the difference in age between John and Maria drew the attention of contemporaries.<sup>122</sup> In 1834, a new arrival in Hobart Town reported that a family friend who had known the Pedders in England regarded John and Maria as 'the happiest couple he knows tho' [sic] she is older than Mr Pedder'.<sup>123</sup> Correspondence between Maria's women friends in Van Diemen's Land further confirms that the Pedders were a 'very united couple' who enjoyed 'many years of happy and affectionate union'.<sup>124</sup>

John Lewes Pedder Esquire of the Parish of Middle Temple London Bachelor  
and Maria Everitt Spinster of the Parish of St Nicholas Brighton  
were married in this Church by License with Consent of the Parish  
this eighth Day of July in the Year One thousand eight hundred and twenty three  
By me H. J. Taylor Curate  
This Marriage was solemnized between us John Lewes Pedder Maria Everitt  
In the Presence of Charles Carter Maria Anne Allen  
No. 8

Record of the marriage of John Lewes Pedder and Maria Everitt, St Nicholas, Brighton, 8 July 1823. (East Sussex County Record Office, Brighton St Nicholas, Parish Registers, Marriages, PAR 255/1/3/4, 1823-26, Item 3, p. 3, no. 8. FHL British Film 1067115, Genealogical Society of Utah.)

120 Earls, 'Three waves of Australian judges'; personal communication 20 January 2009. My thanks are due to Tony for sharing insights from his doctoral prosopography of the nineteenth-century Australian bench and bar.

121 T Earls, *Plunkett's legacy: an Irishman's contribution to the 'rule of law' in New South Wales*, Australian Scholarly Publishing, Melbourne, 2009, p. 52.

122 Maria's age at marriage is calculated from her baptism in the parish of Windlesham, Surrey, on 9 September 1787, and information on her death certificate. 'England Births and Christenings, 1538-1975', *FamilySearch*, [www.familysearch.org](http://www.familysearch.org); TAHO, RGd 35/5, Reg. No. 297/1855.

123 Ellen Viveash to Mrs Tanner, 26 January 1834, in Statham, *The Tanner letters*, p. 73. This assessment is attributed to 'Mr Simpson', probably James Simpson, who later acted as Pedder's agent in Port Phillip and was named as an executor in his younger brother's will. Argus, 3 October 1848; TAHO, AD961/1/2, Will No. 166 (1843) and TNA, PROB 11/1992, Will of William Pedder, Captain in His Majesty's Sixty Third Regiment of Foot of Hobart Town, Van Diemen's Land, 26 December 1833; CA McCallum, 'Simpson, James (1792?-1857)', [adb.anu.edu.au/biography/simpson-james-2665/text3713](http://adb.anu.edu.au/biography/simpson-james-2665/text3713)

124 Royal Society of Tasmania Library Collection, RS8/F7, William and John Clark of Cluny, Bothwell, Family Papers, 1812-1872. William Pritchard Weston to sister-in-law, Jane Clark, 1833-1836, 1855-1861: Mrs Weston to Jane Clark, 1 November 1855.



In an era when the work of gentlewomen was largely centred on the home, Maria Pedder's philanthropic activities provide insights into acceptable public roles for elite colonial women. From the 1830s to the 1850s, she was actively involved with free female immigration to the colony, and was a founding member of the Ladies' Immigration Committee.<sup>125</sup> With the support of her husband, Maria led by example, employing a number of free women emigrants as domestic servants.<sup>126</sup> Behind the scenes, Maria Pedder also supported her husband's professional life: she acted as his amanuensis, copying documents and drafting correspondence to Pedder's dictation.

Letters to his close friend and superior, Governor Arthur, reveal that Pedder also valued his wife's counsel. In 1836, the chief justice was compelled to resign from the Executive Council by the Colonial Office. Pedder disputed the incompatibility of his judicial and executive roles and was concerned to avoid public speculation about the timing of the resignation. Pedder entreated Arthur 'not reveal to any one [sic] the real cause of it', confiding that he had 'not dropped the slightest hint of it to any one [sic] except Mrs Pedder'.<sup>127</sup> A few months later, the governor was recalled to London after twelve years in Van Diemen's Land. Arthur sent a copy of his response to the imperial government's decision to Pedder, who assured his friend that 'I have read with attention and so has Mrs Pedder the paper you sent me ... We both think it would be a pity to alter a single word'.<sup>128</sup> These examples suggest that the Pedders' marriage was a partnership (albeit unequal), in which Maria acted as a trusted adviser and confidante.<sup>129</sup> Illuminating Maria's role in this companionate marriage clearly adds a valuable new dimension to understanding the chief justice, yet it is an aspect of his life which has been conspicuously neglected in existing accounts.

### Pedder's extended family in Van Diemen's Land

Genealogical investigation newly recovers the presence of John and Maria's extended family in Van Diemen's Land. Between July 1830 and December 1833, Pedder's younger brother was stationed in the colony with the 63rd Regiment of Foot.<sup>130</sup> Captain William Pedder (1796–1837) had already seen colonial service as a member of the first contingent of British settlers at the Swan River colony in 1829, before he was transferred to the regiment's headquarters at Hobart Town in 1830.<sup>131</sup> The following year William bought a cottage in Davey Street where he set up home with twenty-year-old Frances

125 In the 1850s, Lady Pedder served as a patroness of the Tasmanian Female Emigration Association. Hobart Town Courier, 28 August 1850; Colonial Times, 20 August, 6 September 1850; Fund for Promoting Female Emigration, First report of the committee, March 1851, pp. 63–4, *LSE Selected Pamphlets*, [www.jstor.org/stable/60225485](http://www.jstor.org/stable/60225485); and C Dickens (ed.), *The Household Narrative of Current Events* (for the year 1851), being a monthly supplement to *Household Words* conducted by Charles Dickens, Bradley and Evans, London, 1851, p. 19, [www.archive.org/stream/householdnarrati51dick/householdnarrati51dick\\_djvu.txt](http://www.archive.org/stream/householdnarrati51dick/householdnarrati51dick_djvu.txt). The Ladies' Immigration Committee first met on 23 August 1832. Mrs Pedder's name appears at the head of the list of Sub-Committee 4. TAHO, GO33/1/11, Duplicate despatches, ff. 808–9, reel Z430.

126 The Pedders employed several emigrants as housemaids, including Margaret Drummond, 24, from the *Sarah*, and Matilda Moth, 19, from the *Boadicea*, at £12 per annum. 'An alphabetical return of the disposal of the free female immigrants per "Sarah"', 25 February 1835, TAHO GO33/1/19, ff. 281–2, reel Z437; 'An alphabetical return of the disposal of the free female immigrants per *Boadicea*', enclosure in George Everett to the Colonial Secretary, 29 February 1836, TAHO GO33/1/22, f. 163, reel Z440.

127 State Library of NSW, ML ZA 2170, Papers of Sir George Arthur, vol. 10, Pedder to Arthur, 1 March 1836. Editorial emphasis.

128 State Library of NSW, ML ZA 2170, Pedder to Arthur, 5 July 1836. Editorial emphasis.

129 Penny Russell argues that Maria's contemporary, Jane Franklin, understood her marriage to Governor Sir John Franklin as 'an unequal contract in which her own inferior place was clearly defined'. P Russell, 'Wife stories: narrating marriage and self in the life of Jane Franklin', *Victorian Studies*, vol. 48, no. 1, 2005, p. 46.

130 William Pedder arrived at Hobart Town on 3 July 1830, having paid £45 to Captain Hudson for his passage aboard the *Orelia*. TAHO, NS363/1/2, Accounts, letters and associated papers used by William Sorell in the administration of the estate of Captain William Pedder.

131 Lieutenant William Pedder is named among the officers as part of a detachment of '100 persons', including free women and children, who settled at Swan River in 1829. He was gazetted captain, by purchase, in August 1830, but his brother was already referring to him as 'Captain Pedder' in correspondence from 1829. Somerset to Twiss, 24 January 1828, *HRA*, III, VI, p. 598; *London Gazette*, 3 August 1830, pp. 1685–6; State Library of NSW, ML ZA 2169, Pedder to Arthur, [n.d.] [1829].

Ann Preddy (1811–1843).<sup>132</sup> Formerly a milliner from the fashionable spa town of Bath, Fanny Preddy had also been a free settler at Swan River.<sup>133</sup> Their relationship produced two natural children: Jane Ann Preddy alias Pedder, born in Hobart Town in 1832, and William Lewes Pedder, born in Madras, c. 1837.<sup>134</sup>

Although they never married, William supported his partner. From the time of his departure with his regiment for the Madras Presidency at the end of 1833, Captain Pedder continued to pay for accommodation for Fanny and Jane in Hobart Town, as well as providing a regular income, via a local agent, until Fanny joined him in India *circa* 1836.<sup>135</sup> In Madras, William made further attempts to provide for his young family. In a letter written only weeks before his sudden death in 1837, Captain Pedder instructed a colleague to ensure that all his property ‘may be handed over to Fanny in order that she may do as she likes with it and that it may not be sold according to the usual course of military usage’. William clearly intended this letter to suffice in case of any dispute involving his estate, and entreated Lieutenant Darling, ‘Pray shew [sic] this to all concerned and be pleased to see my wishes complied with’.<sup>136</sup> On his deathbed, William again indicated that he ‘intended all “for Fanny and her two Children”’.<sup>137</sup> The chance survival of papers relating to this contested nuncupative will provides a rich seam of evidentiary material from which to reconstruct these forgotten family relationships.

Fanny Preddy had returned to Hobart Town with her son by the beginning of 1839, and again took charge of Jane, who had remained in the care of foundry-owners, Mr and Mrs Harris, with whom they had boarded before Fanny’s departure for India.<sup>138</sup> Sir John Pedder clearly had every confidence in the couple, writing later that William Harris was a ‘very good man and both he and his wife were very kind to the child’.<sup>139</sup> In August 1839, Fanny married emancipist police clerk, John James Holland.<sup>140</sup> How John and Maria Pedder reacted to the marriage is unclear. Where the illegitimacy of Fanny’s children transgressed bourgeois constructions of feminine morality, her marriage protected them with the semblance of legitimacy. Indeed, the marriage notice which appeared in the *Colonial Times* refers to ‘Mrs Frances Anne Preddy, late of Madras’, further obscuring her identity and the children’s origins.<sup>141</sup> Holland’s respectability, on the other hand, was challenged by his status as an emancipist: any link to convictism threatened to exclude all family members, including step-children, from respectable society. The Preddy-Holland

132 William Pedder paid £400 to Richard Lane, ‘being the full consideration ... for the House in Davy [sic] Street’. TAHO, NS363/1/2, receipt dated 27 October 1831.

133 State Records Office Western Australia, Colonial Secretary’s Office, Series no. 2941, Correspondence – Inwards, item no. 15, consignment no. 36, Government Resident, Fremantle, to the Colonial Secretary, 4 May 1831, ff. 35–6.

134 There was little incentive or compulsion for free women to register illegitimate births in Van Diemen’s Land before the advent of civil registration in 1838, and Jane’s exact date of birth and parentage are not recorded in the official record. Indirect evidence suggests she was born between August and October 1832. R Kippen and P Gunn, ‘Convict bastards, common-law unions and shotgun weddings: premarital conceptions and exnuptial births in colonial Tasmania’, Social Science History Association Conference, 2005, p. 15; TAHO, NS363/1/2, John James Holland to William Sorell, 17 April 1843, and Statutory Declaration of John James Holland, 5 May 1843. William Lewes Pedder matriculated at Exeter College, Oxford, aged 19, on 27 June 1856, suggesting that he was born between June 1836 and his father’s death in June 1837. J Forster (ed.), *Alumni Oxonienses: the members of the University of Oxford, 1500–1886: their parentage, birthplace, and year of birth, with a record of their degrees: being the matriculation register of the university*, vol. III, Kraus Reprint, Nendeln, 1968, p. 1088; TAHO, NS363/1/2, John James Holland to William Sorell, 17 April 1843.

135 Captain Pedder departed Hobart Town per *Lord Lyndock*, 28 December 1833, TAHO, MB2/39/1/1, Reports of ships arrivals with lists of passengers, 1829–1833, p. 446, reel Z2185. He paid William Harris £8–5– for ‘1 Months Board &c’ for ‘Miss Preddie’ and ‘Child’, 21 April 1835, TAHO, NS363/1/2. It is unclear when Fanny joined William in Madras, but it is likely to have been in 1836, as William Lewes was born *circa* 1837. The family appears to have been living at Vepery, just outside Fort St George, Madras. TAHO, AD961/1/2; TNA, PROB 11/1992, William Pedder to Lieutenant Darling, 30 March 1837.

136 TAHO, AD961/1/2; TNA, PROB 11/1992, W Pedder to Darling, 30 March 1837.

137 TAHO, NS363/1/2, Holland to Sorell, 17 April 1843.

138 TAHO, NS363/1/2, Statutory declaration of JJ Holland, 5 May 1843. In 1835, Harris’ foundry was located at 86 Macquarie Street; the Pedders’ home was at number 29. H Melville, *The Van Diemen’s Land almanack for the year 1835*, H Melville, Hobart Town, 1835, pp. 152, 159.

139 TAHO, NS363/1/2, JL Pedder to William Sorell, 6 May 1843.

140 Fanny married Holland, a widower, at St David’s Church by ‘Special License [sic]’ on 17 August 1839. *Colonial Times*, 20 August 1839, p. 7; TAHO, RGD37, Reg. No. 415/1839.

141 *Colonial Times*, 20 August 1839. Editorial emphasis.

marriage therefore adds another layer to our understanding of why the children were not publicly recognised as part of the chief justice's family while their parents were alive.

Following the sudden death of Fanny Holland in 1843, Jane and William Lewes joined their aunt and uncle at semi-rural *Newlands* – a significant change of circumstances for a childless couple in their fifties.<sup>142</sup> Pedder's correspondence confirms that the children had been 'living in, and as a part of, my family' since the death of their mother.<sup>143</sup> Installed in the judge's household, the children now took their place in respectable society. As their step-father explained in 1843, 'tho' [sic] the dear Creatures were illegitimately born', they were 'legitimately bred in every respect'.<sup>144</sup> 'Miss Jane', in particular, Holland wrote, was 'a young Lady, of rather high notions, (truly legitimate)'.<sup>145</sup> In a small community where 'everybody knows everybody's birth, parentage and education', Jane's genteel upbringing allowed her to marry within her father's class, despite her illegitimacy.<sup>146</sup> When she married Ensign Loftus Nunn of the 99th Regiment at St David's Cathedral in 1851, 'Jane Ann Pedder' was acknowledged as the 'niece of Sir John Pedder of *Newlands*' – her parentage obscured, on the public record at least, by the status of her eminently respectable uncle.<sup>147</sup>

In 1846, William Lewes was sent to England with the Reverend Thomas Ewing and his family, possibly for his education.<sup>148</sup> The Pedders' affection for their nephew is highlighted by Lady Pedder, who wrote to a family friend in 1847 that she and Sir John were eagerly anticipating the return of 'our little William ... We are very anxious to see him again'.<sup>149</sup> William Lewes rejoined the family in Van Diemen's Land at the beginning of 1848, and by the early 1850s was boarding at Christ College.<sup>150</sup> Pedder's intention that his nephew should be educated as a gentleman is reflected in his choice of this Anglican institution, described by a contemporary visitor to Van Diemen's Land as 'a sort of school and university for the education of the elder youths, preparing for the higher professions and upper walks in life'.<sup>151</sup> At the end of 1854, William Lewes was named as one of those leaving the college 'to study at university'.<sup>152</sup>

Pedder's emotional and financial investment in his brother's children continued until his death in 1859. In poor health following a stroke, and in mourning for Maria, who had died only a few months earlier, he departed for England in February 1856.<sup>153</sup> It was understood publicly that Pedder's 'late domestic bereavement' and 'continued indisposition' compelled him to 'seek a change of climate'.<sup>154</sup> Privately, additional domestic concerns dictated the timing of Pedder's repatriation, and it was a family

142 Fanny died on 30 July 1843, and 'had charge of her (Jane) until that day'. *Courier*, 11 August 1843; TAHO, RGD37/1, No. 1758; TAHO, NS363/1/2, Holland to Sorell, 3 October 1843.

143 Pedder writes in the context of the provisions in his brother's Hobart Town will for Jane's educational and other expenses. TAHO, NS363/1/2, Pedder to Sorell, 6 November 1851.

144 TAHO, NS363/1/2, Holland to Sorell, 17 April 1843.

145 TAHO, NS363/1/2, Holland to Sorell, 29 April 1843.

146 GT Lloyd, *Thirty-three years in Tasmania and Victoria*, Houlston and Wright, London, 1862, p. 283.

147 John and Maria Pedder witnessed the marriage. Jane is described in her father's will as 'the daughter or reputed daughter of Frances Anne Preddy'. *Courier*, 10 December 1851; TAHO, NS282/10/1/4, Register of marriages, St David's, Hobart, no. 102, reel Z2247; TAHO, AD961/1/2; TNA PROB 11/1992.

148 'Mr Pedder' departed Hobart Town for London with the Reverend Ewing and his family aboard the *Jane Frances*, on 9 January 1846. Ewing was chaplain of St John's Church of England and the Queen's Orphan Schools at New Town, but had been dismissed as headmaster of the Orphan Schools in 1841, following a scandal involving a teenage girl under his protection. TAHO, CUS36/1/297, cargo, passenger and crew lists, manifests and associated documents relating to ships clearances; AJ Hagger, 'Ewing, Thomas James (1813?–1882)', [adb.anu.edu.au/biography/ewing-thomas-james-2031/text2505](http://adb.anu.edu.au/biography/ewing-thomas-james-2031/text2505).

149 Royal Society of Tasmania Library Collection, RS8/F44, William and John Clark of Cluny, Bothwell, Family Papers, 1812–1872: Maria Pedder to Jane Clark, 8 June [1847]. Editorial emphasis.

150 'Master Pedder' arrived from London aboard the *Tasmania*, 28 January 1848. TAHO, MB2/39/1/10, Reports of ships arrivals with lists of passengers, 1847–1848, p. 41, reel Z2188.

151 TH Forster to Reverend George Fyler Townsend, 24 February 1849, in *An account of a voyage in a convict ship, with notes of the first itinerating missionary in Tasmania*, The Society for the Propagation of the Gospel, London, 1847, Project Canterbury, Church in the Colonies, No. XXIII, [anglicanhistory.org/aus/spg23.html](http://anglicanhistory.org/aus/spg23.html)

152 *Courier*, 28 December 1853, and 26 December 1854.

153 Pedder suffered partial paralysis, following a stroke on 19 July 1854. *Hobart Mercury*, 22 July 1854; Bennett, 2003, p. 111.

154 *Courier*, 6 February 1856.

party that boarded the *Wellington* on 4 February.<sup>155</sup> The widowed Pedder travelled with William Lewes, Jane Nunn, her husband Loftus, and their two young children.<sup>156</sup> In his late teens, William Lewes was ready to attend university, and Captain Nunn's regiment had recently been recalled to Britain.<sup>157</sup> In his will of 1859, Pedder left the bulk of his estate to the 'natural' children of 'my late Brother William'.<sup>158</sup>

### A benevolent employer

In addition to his extended family, Pedder's Van Diemen's Land household included a number of assigned convict servants. The judge's relationship with two of the convicts who lived with his family at his official residence in Macquarie Street illustrates that he was a benevolent employer, who also believed in convicts' capacity for reform. Pedder's repeated support for a free pardon for his assigned servant, William Rice, clearly refutes Kathleen Fitzpatrick's unsupported claim of 1949 that he was 'always predisposed ... to bear hard on the defects of ... opponents of ... government, on the poor, and on the convict population'.<sup>159</sup> Rice was one of the 'Yorkshire Rebels', a group of young men transported for their involvement in economically driven disturbances in the aftermath of the Peterloo riot of 1819.<sup>160</sup> Having pleaded guilty to the capital offence of high treason, Rice was transported in 1820, and assigned to Pedder as a constable in 1824. As a result of this master/servant relationship, Rice's petition for a free pardon 'excited [Pedder's] strong commiseration' in 1828.<sup>161</sup> In his supporting testimonial, Pedder confirmed that he had known Rice since 1824, and explained that he had also

made enquiries into his conduct and character and I have great pleasure in stating my sincere belief that by his good morals his industry and the exemplary way in which he has brought up his family, he is highly deserving of the favour he requests.<sup>162</sup>

Unsuccessful in 1828, Pedder supported a renewed petition in 1835, and his second testimonial specifies the qualities he admired in a 'respectable' transportee. By now, the chief justice had known Rice 'upward of eleven years and during nine of them', he wrote,

I was in the habit of seeing him almost daily. I can say that he is one of the most respectable men of his class in life that I have ever met with either here or elsewhere, honest, sober, industrious, a good husband and a good father. He is much respected in my family and generally by all who know him. I should have the greatest pleasure in hearing that he has obtained the free pardon he prays for.<sup>163</sup>

Diligence in his work and commitment to his family were clearly the basis of Pedder's respect for Rice, and his ability to disregard the original offence of high treason further gives the lie to Fitzpatrick's assertion that Pedder 'sincerely believed that an opponent of

---

<sup>155</sup> *Colonial Times*, 4, 6 February 1856.

<sup>156</sup> Pedder sailed with 'Wm. Pedder, Esq., ... Mr and Mrs Nunn, two children, and servant'. In April, the ship was 'obliged to put in to Pernambuco [in Brazil], for want of water'. Pedder, his nephew, and the Nunn's later joined fellow passengers in publicly thanking the ship's captain for his 'uniform kindness, attention and gentlemanly conduct' during the 'somewhat protracted voyage'. *Colonial Times*, 2 February 1856; *Times*, 18 June 1856; *Hobart Mercury*, 15 September 1856; *Courier*, 22 August 1856.

<sup>157</sup> William Lewes matriculated at Exeter College, Oxford, in 1856, but did not complete a degree. Forster, p. 1088. The 99th Regiment was garrisoned in Van Diemen's Land, 1848–1856. For their departure from Hobart Town, see *Colonial Times*, 10 January 1856.

<sup>158</sup> Her Majesty's Courts Service, York, Will of Sir John Lewes Pedder, of 8, Bedford Square, Brighton, Sussex, dated 3 March 1859, proved 13 April 1859. His sister, Jane, was the other main beneficiary.

<sup>159</sup> Fitzpatrick, p. 106.

<sup>160</sup> On their uprising and lenient treatment by the courts, see *HRA*, III, VII, pp. 780–1, n. 289.

<sup>161</sup> Arthur to Huskisson, 9 June 1828, *HRA*, III, VII, p. 338.

<sup>162</sup> Testimonial of J.L. Pedder, 7 June 1828, *HRA*, III, VII, p. 341.

<sup>163</sup> Pedder's certificate to Rice's petition, 8 June 1835, cited in C Cartwright and B Mortimer, 'Doomed to exile: a Yorkshire Rebel's struggle to obtain his freedom', *THRA P&P*, vol. 58, no. 1, 2011, p. 45.

authority could not also be a respectable citizen'.<sup>164</sup>

A second example of Pedder's benevolence as an employer is revealed in his efforts to help a convict servant who repeatedly demonstrated that he did not live up to the respectable ideals of industry and sobriety. Robert Browett was transported for life for burglary and arrived in Hobart Town in 1825.<sup>165</sup> His conduct record indicates that he was employed as a 'Constable at the Judges [sic]' by 1829.<sup>166</sup> As a 'petty constable' in Arthur's new police system, Browett received a salary of £10 per annum as well as additional food and clothing.<sup>167</sup> In the opinion of Pedder's close friend, Chief Police Magistrate Matthew Forster, 'Browett had a good place, for ... he was ... in possession of nearly equal advantages as if he had been free'.<sup>168</sup>

In April 1829, Browett was dismissed from the police when he appeared before Chief Justice Pedder in the Supreme Court, charged with stealing a watch.<sup>169</sup> He was convicted and sentenced to seven years secondary transportation. On review, his sentence was reduced to two years in a chain gain, and Browett had returned to Pedder's service by 1831.<sup>170</sup> In November 1834, he appeared before a magistrate, charged with being 'drunk and out after hours'.<sup>171</sup> His punishment was 'to be placed in a Cell, and fed upon bread and water only, for four days and four nights'.<sup>172</sup> Pedder twice informed the authorities that he 'did not wish to have Browett back again' and, at a time when 'so many well conducted prisoners cannot be assigned', Chief Police Magistrate Forster concluded that there 'would be but little justice in allowing a man like Browett to remain in assigned Service'.<sup>173</sup> On Forster's recommendation, Governor Arthur ordered Browett to twelve months hard labour on the road party at Grass Tree Hill on top of the magistrate's original sentence.<sup>174</sup>

Browett's situation was complicated by the fact that he was an assigned convict servant: his drunken absence was not a criminal offence, but a breach of convict discipline. Pedder's response to his additional punishment reveals both a concern for procedural fairness and compassion for his servant. In a meeting with Arthur and two follow-up letters, Pedder pointed out that Browett had already served the sentence which had been imposed by the magistrate 'for the only faults of which he has been convicted'. 'I should ever feel so uncomfortable', he told Arthur, 'if my servant Browett ... were to be sent to a road party, especially since it is plain that he is ... to be sent there for punishment'. If Arthur remained determined to impose additional punishment, however, Pedder offered to assume personal responsibility for an alternative penalty: 'I entreat that he may be returned to my service [and] I will undertake to be his gaoler'.<sup>175</sup>

Pedder's anxiety for Browett is particularly interesting for what it reveals about his capacity for empathy. Perhaps surprisingly for a judge who regularly sentenced

---

164 Fitzpatrick, p. 106.

165 TAHO, CON14/1/1, Indents of male convicts, p. 7, [search.archives.tas.gov.au/ImageViewer/image\\_viewer.htm?CON14-1-1,46,14,S,80](http://search.archives.tas.gov.au/ImageViewer/image_viewer.htm?CON14-1-1,46,14,S,80)

166 TAHO, CON31/1/1, Conduct registers of male convicts arriving in the period of the assignment system, p. 202, no. 807, [search.archives.tas.gov.au/ImageViewer/image\\_viewer.htm?CON31-1-1,433,300,L,80](http://search.archives.tas.gov.au/ImageViewer/image_viewer.htm?CON31-1-1,433,300,L,80)

167 *Hobart Town Gazette*, 1 November 1828, p. 2. Constables were also entitled to rations and two suits of slop clothing. S Petrow, 'Policing in a penal colony: Governor Arthur's police system in Van Diemen's Land, 1826-1836', *Law and History Review*, vol. 18, no. 2, 2000, pp. 363, 365-6, 373.

168 TAHO, POL318/1/3, Letterbook of the Chief Police Magistrate with the Colonial Secretary, 1834-1835, f. 97, Chief Police Magistrate to the Colonial Secretary, 6 December 1834.

169 *Hobart Town Courier*, 4, 18 April 1829.

170 TAHO, MM71/1/7, ff. 502-3, reel Z3234. In 1834, Pedder confirmed that Browett had been living in his Macquarie Street household 'upwards of three years'. *Colonial Times*, 30 October 1829; Appendix 5: criminal trials, 1829, *HRA*, III, IX, p. 999; Conduct record, Robert Browett; State Library of NSW, ML ZA 2170, Pedder to Arthur, 6 December 1834.

171 Conduct record, Robert Browett.

172 Conduct record, Robert Browett; TAHO, POL318/1/3, f. 94, Chief Police Magistrate to the Colonial Secretary, 6 December 1834.

173 TAHO, POL318/1/3, ff. 95, 97, Chief Police Magistrate to the Colonial Secretary, 6 December 1834.

174 Conduct record, Robert Browett; TAHO, POL318/1/3, ff. 95-7, Chief Police Magistrate to the Colonial Secretary, 6 December 1834.

175 State Library of NSW, ML ZA 2170, Pedder to Arthur, 6 December 1834.



prisoners to capital and non-lethal corporal punishments, Pedder was deeply concerned about the physical and psychological impacts of the road party on Browett. Construction of the Grass Tree Hill road had begun the previous year and harsh conditions for the convict road gang were exacerbated by inadequate clothing and provisions.<sup>176</sup> Pedder did not disguise his belief that Browett was 'unequal to the labour and hardships endured by men in the road parties'. Implicitly questioning the reformatory value of hard labour, he also feared that sending Browett to the road gang 'would render him either hardened or broken hearted'.<sup>177</sup> Having twice refused to take Browett back into his service, Pedder now preferred this to the alternative.

In contrast to his respectable fellow servant, Rice, Browett was a dissolute recidivist. Forster had reported that Browett's 'connexions' in Hobart Town were of the 'very worst description ... his habits of life were of the loosest and most immoral Kind, and ... he was a professed Gambler'. Forster also had 'strong Grounds for believing' that Browett had been involved in a number of recent felonies.<sup>178</sup> The chief justice had read Forster's report, and had himself sentenced Browett for stealing only five years earlier.<sup>179</sup> Ignoring what he knew of Browett's criminality and dissipation, Pedder chose instead to emphasise that he was 'not without good qualities'.<sup>180</sup> Browett's convict records do not indicate whether Pedder's advocacy was successful, but the traces of his efforts on his servant's behalf reveal an important dimension to the judge's character, which is not obvious from his official persona or existing accounts of his life.

## Conclusions

A sensitive excavation of the archival traces of Pedder's lived experience reveals a complexity which belies conventional representations of his official persona. As chief justice, he undoubtedly condemned many individuals to the gallows. Uncritically reiterating the trope of the 'hanging judge', however, diminishes our capacity to make sense of a profoundly different penal philosophy. The dictates of Pedder's multi-functional appointment 'at pleasure' suggest that the chief justice was less the puppet of government than a component part of a system of governance which differs markedly from our own, but which was no less legitimate. In light of contemporary discourses of Aboriginal dispossession and reconciliation, Pedder's construction as an indigenous champion appeals to a modern audience in search of a benevolent foundation narrative. The more complex reality of his engagement with settler-indigenous conflict raises conceptually challenging questions around race and law, which require further investigation by scholars from a range of disciplines.

By following the 'archival byways' away from the sites of Pedder's official life, my research disproves the myth that the chief justice was a solitary ascetic, who lived only through his work.<sup>181</sup> The tools and interpretative strategies of social and family history shed new light on personal relationships and family dynamics, as Pedder is rediscovered as a devoted and affectionate husband, brother, and foster-father/uncle. He was also a benevolent employer, whose respect and concern for the welfare of his convict servants is recorded in his many supplications on their behalf.

Critically engaging with Girard's 'window on an age' model, my research demonstrates the value of taking Pedder as a 'starting point' from which to 'look out

176 P MacFie, 'Dobbers and cobbors: informers and mateship among convicts, officials and settlers on the Grass Tree Hill Road, Tasmania, 1830–1850', *THRA P&P*, vol. 35, no. 3, 1988, pp. 113, 116–17.

177 State Library of NSW, ML ZA 2170, Pedder to Arthur, 6 and 9 December 1834.

178 TAHO, POL318/1/3, f. 95, Chief Police Magistrate to the Colonial Secretary, 6 December 1834.

179 State Library of NSW, ML ZA 2170, Pedder to Arthur, 9 December 1834; *Colonial Times*, 30 October 1829.

180 State Library of NSW, ML ZA 2170, Pedder to Arthur, 6 December 1834.

181 Salvatore, p. 190.



... at the surrounding society' – rather than *forward* to the present day.<sup>182</sup> By tracing the diverse aspects and implications of Pedder's colonial life, this approach offers a nuanced and historically sensitive alternative to the conventional whiggish trajectory in which Pedder is valued as the starting point of a judicial lineage which continues in the post-federation Supreme Court of Tasmania. It also points to new ways of conceptualising his involvement in some of the key themes and events in the island's colonial history.

---

182 Girard, p. 89–90. Editorial emphasis.