SUPREME COURT
LIBRARY QUEENSLAND

CHALLENGES AND QUESTIONS[1]

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History

1. The right of an accused person to trial by jury can be traced back to Norman England.[2] It was and remained a common law right, albeit modified to some extent by statute, when New South Wales was settled in 1788. However even after free settlers were permitted in the colony it did not immediately become part of the colonial heritage, it being perceived as unsuitable for the condition of the colony. It was introduced into New South Wales and regulated by a series of statutes enacted before 1859, the net effect of which was to establish the right as it then stood in England at common law, as modified by statute.[3] The right as so established passed to Queensland on separation. As the Court of Criminal Appeal held, "It cannot be doubted that by these means the common law and then current imperial statute law concerning challenges, both as to substance and as to procedure, became the law of Queensland."[4] And as the Court wrote, "There has been at common law of challenge as long as there has been a system of trial by jury."[5]

2. The Queensland statute law relating to juries was consolidated in *The Jury Act of* 1867[6]. It regulated some aspects of challenges for cause and prescribed the number of peremptory challenges open to the defence. It did not purport to codify the law relating to juries, some of which was in any event contained in the *Supreme Court Act of* 1867.

3. Three forms of challenge were recognised: challenge to array, challenge for cause and peremptory challenge. The existence of all three was assumed in the criminal code and it was enacted in 1899.[7] Time does not permit an historical examination of how these developed in Queensland. However one oddity should be noticed. At some time in the second half of the 19th-century a practice developed of calling through the jury panel one extra time.[8] This occurred on the first call and both the

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1 Paper delivered to the Supreme Court Judges' Seminar, 13 August 2013.

2 Holdsworth, vol 1, p 313.

3 Barker, I, *Sorely Tried: Democracy and Trial by Jury in New South Wales, Francis Forbes Society for Australian Legal History*, Dreamweaver Publishing, 2002, at 58 ff; Windeyer, W J V, *Lectures on Legal History*, 2nd ed, Law Book Company of Australasia, 1957, at 312; McPherson, B H, *The Supreme Court of Queensland 1859-1960*, Butterworths, Brisbane, 1989, at 115-116; *R v Valentine* (1871) 10 SCR (NSW) 113; *Miller & Co v Wilson* (1932) 32 SR (NSW) 466; *R v Manson* [1974] Qd R 191.

4 *R v Manson* at p 197.

5 *Ibid* at p 198. The leading judgment, with which the other members of the court agreed and from which the quotations have been taken was delivered by Wanstall SPJ. It contains a slip by omission. At p 196 His Honour referred to s 24 of the *Jurors and Juries Consolidation Act* 1847 (NSW) as having (among other things) "assimilated into the law of challenge all the more as 'established used and practised … in her Majesty's Courts of record at Westminster'." He held that this result obtained in Queensland notwithstanding the omission of the relevant part of s 24 from the corresponding provision in *The Jury Act of* 1867 (s 33). His Honour did not refer to s 22 of the New South Wales act, which was in effect copied by s 46 of *The Jury Act of* 1867. That section imported the procedure of Westminster when no other mode of proceeding was prescribed by the act. His Honour's conclusion was undoubtedly correct.

6 31 Vic No 34.

7 Sections 609 (challenge to array), 610(1) (challenge for cause) and 610(2) and 611 (peremptory challenge).

8 See for example *R v Freeman* (1895) 6 QLJ 281 at p 282.

Crown and the accused were allowed to stand by or challenge peremptorily without using any of their allocated rights. The effect was that on the first call of the panel the accused had an unlimited number of peremptory challenges. McPherson described this "preliminary canter"[9] as "unique in the common law world"[10]. It was not abolished until 1995.

4. *The Jury Act of* 1867 was repealed by the *Jury Act 1929*. The only provision in that act referring to challenges in criminal trials was s 33, which simply provided a cross reference to the relevant provisions of the *Criminal Code*.

The *Jury Act 1995*, s 42(3)

5. The next major reform of the jury system was the *Jury Act 1995*. I have referred to the circumstances which gave rise to that act elsewhere.[11] Like its predecessors it does not pretend to be a codification of the law, but it must be said that it is more detailed in its treatment of challenges than was previously the case. Two of its provisions are particularly relevant to today's topic. The first is s 42(3):

> "**42 Peremptory challenges**
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> …
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> (3) In a criminal trial, the prosecution and defence are each entitled to 8 peremptory challenges."

By that one provision Parliament returned to the Crown right of which it had been deliberately deprived more than 700 years ago.

6. In *Patel (No 4)* I described the circumstances which led to the abolition of the right of peremptory challenge by the Crown by reference to English cases.[12] I need not have ventured so far afield. The history was described in the Full Court of this court in 1907. Cooper CJ wrote:

> "Since the signing of Magna Charta there has never been any doubt about the right of a prisoner to be tried by a jury selected in a proper way. The Crown has always had the right to object to those jurymen who were thought to be not indifferent for the King. The Crown always had that right of objection, but very early in the history of trial by jury some abuse must have crept in, for about a hundred years later we find further legislation on the subject. The abuse was of the following nature:- The Crown had objected to so many jurymen as being 'not indifferent for the King,' that, in some cases, it was impossible to hold the trial at the sittings appointed for it, and, consequently it had to go over to the next sittings, to the great inconvenience and oppression of the prisoner. And therefore, in the reign of Edward I., a statute was passed to the effect that an inquest should not remain untaken for the cause assigned that the jurors, or some of them, were not indifferent for the King, but that the Crown must assign for their challenge a cause certain. That enactment

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9 McPherson, B H: *The Supreme Court of Queensland 1859-1960* (1989), p 116, n 249, quoting T J Ryan in (1913) QPD 1976.

10 *Op cit*, p 116.

11 *R v Patel (No 4)* [2013] QSC 62 at [5] ff.

12 [2013] QSC 62 at [51] ff

received a construction soon after it was passed, and has ever since been taken to mean that the Crown is not bound to show cause of challenge at once, but must be called upon to show cause only in such cases as require it, in order to prevent the inconvenience and injustice of the inquest remaining untaken. The provisions of the statute of Edward I. (4 Stat., 33 Edw. I.) were re-enacted by 6 Geo. IV., c. 40, s. 29, and now are embodied in s. 33 of *The Jury Act of* 1867.

…

That enactment has always been interpreted to mean that the Crown has still the right to order any jurymen to stand by, pending the selection of an indifferent panel.

The whole object of trial by jury is that twelve men may be obtained from those who have been called together to act as jurors to decide upon questions of fact; twelve indifferent men free from bias or prejudice. In order to secure this result the prisoner is allowed at least twelve peremptory challenges. The Crown has no such right, and can exercise no peremptory challenge, but the Crown may stand any juryman aside as not being indifferent. If, however, as the result of the Crown so standing jurors aside the inquest may not be taken, then the Crown must show cause of challenge."

His Honour applied the decision of Bramwell B in *Mansell v The Queen*[13], the decision which founded the English decisions to which I referred in *Patel*. As Cooper CJ noted, that was the approach taken by Griffith CJ sitting at first instance in *R v Freeman*[14].

7. Real J's reasoning was similar:

"I think the passage read by the learned Chief Justice from Baron Bramwell's judgment in *Mansell v. The Queen* (1) is directly in point. That learned Judge points out that the practice of allowing the Crown to continue to postpone the obligation to show cause for its challenges, even though the panel had been gone through, has been so long continued that any attempt to alter it would now amount almost to a denial of an established right, but, at the same time, the learned Judge also points out that the Statute 33 Edw. I., which governs these matters, was probably intended to mean that the Crown should not challenge except for cause, and so this practice, in its inception, was really an evasion of the statute.

The statute was passed in 1305 to prevent a scandal which had crept into the administration of justice — viz., that, although juries were summoned, trials were not held at the sessions of the Court for which they were set down owing to the practically unlimited right of peremptory challenge which was exercised by the Crown as a prerogative. Whether that power of challenging was illegal or not, the Legislature recognised the abuse which was caused, and provision was made against it by 33 Edw. I., Stat. 4, which has been adopted in Queensland by s. 33 of *The Jury Act of* 1867.

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13 (1857) Dears & B 375; 8 El & B 54; 27 LJ MC 4.

14 (1895) 6 QLJ 281.

> It seems to me that the words of that section are plain, and were intended to enact that the Crown should not have a right to challenge in any case without showing cause of challenge. However, a practice soon grew up that the Crown had not to show cause for its challenges unless the jury panel had been gone through, and it appeared that the trial could not be held. As Cockburn C.J. says : ' … On the statute became engrafted the practice of allowing the challenge, and directing the person challenged to be put on one side till the panel should be gone through, and if there were sufficient without him, then it became unnecessary to show cause …'. Thus arose the power of 'standing by' or 'standing aside' a juror, and this power was practically a challenge by the Crown and a postponing of the inquiry whether the person challenged was competent to try the issue. Such was the practice that had been established in reference to the Act of Edw. I., when its provision became the law in Queensland by the enactment of *The Jury Act of* 1867."

Power J agreed with the orders proposed without any further reasons.

8. The statute of Edward I embodied in s 33 of *The Jury Act of* 1867 ceased to be part of the law of Queensland when that act was repealed. That did not revive the Crown's right of peremptory challenge.[15]

9. Section 42(3) received remarkably little attention at the time the bill was passed. The Parliamentary library published a legislation bulletin which simply noted that the section "provides that, in a criminal trial, the accused and the Crown are each entitled to a maximum of eight peremptory challenges, as recommended by the Queensland Litigation Reform Commission."[16] However that was not what the Commission had recommended. It had proposed:

> "On balance we think a uniform system with eight challenges and standbys available in all criminal trials would be an improvement, and that the retention of different numbers of challenges for treason and murder is no longer justified."

At some point in the drafting process standbys were transformed into challenges.

10. Why was this done? It may have been deliberately intended to place the prosecution in the same position as the defence not only by limiting the number of persons with whom the Crown could deal peremptorily, but also by abolishing standbys. It might have been considered that with limited numbers of challenges and the relatively large jury panel is brought to court in modern times, panels would never be exhausted, with the consequence that it would never be necessary to recall those stood by. If so, it is surprising that there was no contemporary discussion of this. It was not mentioned in the legislative bulletin, nor in the explanatory memorandum for the bill. The Attorney-General did not refer to such a rationale in his second reading speech, nor when the clause was discussed in committee[17]. It is possible that the change was made unwittingly.

11. Could "challenge" in s 42(3) be interpreted to include "stand by"? In my view the wording of the section is too intractable to permit "challenge" to have an ambulatory

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[15] *Acts Shortening Act of 1867*, s 2.

[16] Sampford, K: *Reforming Queensland's Jury System: The Jury Bill 1995*, (1995) Queensland Parliamentary Library.

[17] (1995) QPD 209, 736.

meaning. "Challenge" is a term of art. Moreover the different consequences of challenging and standing by suggest that different treatment of each would be required if standbys were referred to. The words mean what they say. The Crown now has a limited right of peremptory challenge. Once again Queensland is unique in the common law world.

12. A more interesting question is whether s 42(3) has by implication abolished the right of the Crown to stand by a prospective juror. The act was apparently intended to put the parties on an equal footing, so the implication would not be difficult to draw. If the right to stand by remains, the Crown not only has eight challenges, it also has an unlimited number of standbys. That is hardly equality. Cases where the panel is exhausted through challenges and standbys are very rare, so the need for the process is not great.

    - It is an issue which we might usefully debate today.

The *Jury Act 1995*, s 47

13. Section 47 is also a unique provision, but this time intentionally so. There is little that I can add now to what I wrote in *R v Patel (No 4)*. I have annexed my reasons to this paper. I suggest we discuss the following questions

    - when does a trial begin for the purposes of the act;
    - what amounts to "special reasons" in s 47(1);
    - what circumstances, if any, would justify closing the court for cross-examination under s 47(5);
    - how could the questionnaire used in *Patel* have been improved.