[HIGH COURT OF AUSTRALIA.]

NEWELL . . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF TASMANIA.

H. C. OF A. 1936.

MELBOURNE, *Oct.* 29.

Latham C.J., Dixon and Evatt JJ.

Criminal Law—Trial by jury—Statute—Retrospective operation—Arraignment—Plea—Joinder of issue—Adjournment of trial—Statute substituting majority verdict for unanimous verdict—Jury Act 1899 (*Tas.*) (63 *Vict. No.* 32), *sec.* 48 (*Jury Act* 1936 (*Tas.*) (1 *Edw. VIII. No.* 2), *sec.* 2.

A prisoner was arraigned in the Supreme Court of Tasmania on an indictment for manslaughter to which he pleaded not guilty. The trial was then adjourned. Before the trial proceeded the *Jury Act* 1936 (Tas.) was enacted, which provided that "on the trial of any criminal issue," except upon a capital charge, the decision of a majority of jurors might be taken as the verdict of the jury after two hours' deliberation.

Held that the enactment did not apply to a trial already begun, and the prisoner could not be convicted except on a unanimous verdict.

Decision of the Court of Criminal Appeal of Tasmania reversed.

APPLICATION for special leave to appeal and APPEAL from the Court of Criminal Appeal of Tasmania.

The relevant facts are contained in a case stated by *Clark* J. for the Court of Criminal Appeal of Tasmania. The case was, in substance, as follows:—

On 27th February 1936 an indictment was filed in the Supreme Court of Tasmania against John Manly Newell charging him with having committed the crime of manslaughter.

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He was arraigned on the indictment at the criminal sittings of the court at Launceston which commenced on 26th March 1936, and on that date he pleaded "not guilty"; and, issue being deemed to be joined thereon (sec. 359 of the *Criminal Code* (Tas.)), he was to be deemed to have demanded that the issues raised thereby should be tried by a jury, and he became entitled to have such issues tried by a jury (sec. 361 of the *Criminal Code*); and thereupon a jury was empannelled to try the issues and Newell was given in charge to the jury.

Thereupon the trial proceeded, but the jury did not agree upon any verdict, and Newell was thereupon remanded to the next criminal sittings of the court to be holden at Launceston, but he was subsequently granted bail.

The next criminal sittings of the court at Launceston commenced on 9th June 1936, and on 12th June 1936 Newell duly appeared as required by his recognizance, but, owing to the absence of a material witness, and on the application of counsel for Newell and with the consent of the Crown, he was further remanded until the then next following criminal sittings of the court to be holden at Launceston. He was subsequently granted bail.

On 10th August 1936 the *Jury Act* 1936 (Tas.) came into operation.

The next criminal sittings of the court at Launceston commenced on 18th August 1936, and on 28th August 1936 Newell duly appeared as required by his recognizance and acknowledged the plea of "not guilty" pleaded by him on 26th March 1936; and thereupon another jury was empannelled to try him upon the issues joined upon that plea and the trial proceeded and was continued on 31st August 1936 and 1st September 1936.

After the jury had retired to consider their verdict I asked counsel whether they desired to submit any contention as to whether or not the *Jury Act* 1936 applied to the case.

The Solicitor-General submitted that it did, but counsel for Newell made no submission.

After the jury had deliberated for two hours their foreman announced that twelve of them had not agreed upon a verdict, but that ten of them had done so, and stated that the jury wished to know whether the verdict of the ten was to be accepted.

Although I had some doubt as to whether the *Jury Act* 1936 applied to the case, I accepted the decision of the ten jurymen and it was duly entered as the verdict of the jury, and the allocatus having been put to Newell and nothing having been said by him in arrest of judgment, I remanded him for judgment.

Judgment has not yet been pronounced.

On 3rd September 1936 Newell gave notice of his intention to appeal to the Court of Criminal Appeal on certain grounds, which were amended in the Court of Criminal Appeal; and on the same date counsel on his behalf made an application to me to grant bail to him pending the determination of the appeal.

As the question raised by the notice of appeal was raised by me during the course of the trial and I thought it desirable to invoke the power of postponing judgment conferred by sec. 387 of the *Criminal Code*, I decided to reserve the question hereinafter stated, and, having stated my intention so to do, I postponed judgment and granted (the Crown consenting) the application for bail.

The question of law reserved is :—

Whether on the facts above stated the *Jury Act* 1936 applied to the case ?

In the Court of Criminal Appeal *Nicholls* C.J. held that the jury's verdict of " guilty " was correctly accepted, but *Crisp* J. held that the majority verdict should not have been accepted. In these circumstances the question of law asked in the special case was answered in the affirmative and the appeal was dismissed.

From this decision the applicant sought special leave to appeal to the High Court.

During the hearing of the argument the court intimated that the application for special leave would be treated as the appeal, and granted special leave.

Gorman K.C. (with him *T. W. Smith*), for the applicant. Until 10th August 1936, when the *Jury Act* 1936 came into force, the appellant's trial was governed by sec. 48 of the *Jury Act* 1899 and the appellant had the right to require that there should be a unanimous verdict before being convicted. The *Criminal Code* provides that the trial is deemed to commence when the prisoner is

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called upon to plead (secs. 351 and 359). No formal issue is required. The joinder of issue was, therefore, on 26th March, and the accused is entitled to have the issues tried by a jury (sec. 361). The accused has both a privilege and a right to a unanimous verdict. The right accrued on the joinder of issue (*Colonial Sugar Refining Co. Ltd.* v. *Irving* (1)). To take away the right of the accused would require a retrospective effect to be given to the amending provision. An amendment does not affect any right or privilege already accrued (*Acts Interpretation Act* 1931).

Griffiths K.C. and *Coppel*, for the respondent. The trial on which the jury was discharged was a nullity and had no legal effect, and the trial of the issue was on 28th August, after the *Jury Act* 1936 had come into operation. That Act applies only to procedure; it comes into effect as soon as it is passed and is not affected by the *Acts Interpretation Act*. The right to trial by jury is to such a trial as is directed by the relevant Jury Act (*Wright* v. *Hale* (2); *Cox* v. *Thomason* (3); *Kimbray* v. *Draper* (4); *In re Lord* (5); *Ex parte Pratt* (6); *Republic of Costa Rica* v. *Erlanger* (7); *Williams* v. *Goose* (8)). *Colonial Sugar Refining Co. Ltd.* v. *Irving* (9) is distinguishable. The expression "on the trial of any criminal issue" means "during the trial" of any such issue.

Gorman K.C., in reply, referred to *Craies* on *Statute Law*, 4th ed. (1936), p. 338.

The following judgments were delivered:—

LATHAM C.J. In this case special leave has been granted to appeal from a decision of the Court of Criminal Appeal of Tasmania. One Newell, who was charged with manslaughter, was presented for trial at the criminal sittings at Launceston on 26th March, and on being arraigned pleaded not guilty. Upon the trial the jury failed to agree, with the result that on 12th June he came before

(1) (1905) A.C. 369.
(2) (1860) 6 H. & N. 227, at p. 232; 158 E.R. 94, at p. 96.
(3) (1832) 2 Cr. & J. 498; 149 E.R. 211.
(4) (1868) L.R. 3 Q.B. 160.
(5) (1854) 1 K. & J. 90; 69 E.R. 382.
(6) (1884) 12 Q.B.D. 334, at p. 340.
(7) (1876) 3 Ch. D. 62.
(8) (1897) 1 Q.B. 471.
(9) (1905) A.C. 369.

the Supreme Court again and was asked by the clerk: "Have you already pleaded not guilty to this indictment?" to which he replied: "Yes." An application was made for an adjournment. On 18th August he again appeared at the Bar, and the same question was put and the same answer was given. On 28th August a trial was had before a judge and jury of twelve men. At the end of two hours' deliberation the jury had not agreed, and a verdict of the majority, ten to two, was taken. An amendment to the *Jury Act* had come into force on 10th August. The question arose on appeal to the Court of Criminal Appeal, whether the amendment applied to this trial. Sub-sec. 2 of the section substituted for sec. 48 of the *Jury Act* 1899 (63 Vict. No. 32) by sec. 2 of the *Jury Act* 1936 (1 Edw. VIII. No. 2) provides: "If, on the trial of any criminal issue, other than a charge of a crime punishable with death, when the jury shall have remained for two hours in deliberation they shall not have arrived at a unanimous decision as to their verdict but ten of them have agreed as to a verdict, the decision of such ten jurors shall be taken and entered as, and shall be the verdict of the jury, and, in default of agreement as to a verdict by ten or more jurors, the jury may be discharged at any time after such period of two hours unless in the opinion of the judge further deliberation is desirable." It was the opinion of the Chief Justice of Tasmania that the new section was applicable to the trial, and in the Court of Criminal Appeal the opinion of the Chief Justice prevailed under secs. 400 and 402 of the *Criminal Code*. It is a general proposition that a statute is not presumed to be retrospective unless a special intention appears, but we have been referred to authorities to show that it is otherwise with regard to the retrospective operation of procedural statutes. Most of the decisions on procedural statutes relate to civil proceedings commenced before a statute comes into operation.

The matter debated before us was whether or not this is a procedural statute. The cases draw a distinction between substantive rights and rights under laws of procedure relating to proceedings in which substantive rights are in question. The right to a jury is one of the fundamental rights of citizenship and not a mere matter of procedure, and so the courts have said. In *Looker* v. *Halcomb* (1),

(1) (1827) 4 Bing. 183, at pp. 188, 189; 130 E.R. 738, at pp. 740, 741.

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per *Best* C.J., it is said : " An Act of Parliament which takes away the right of trial by jury, and abridges the liberty of the subject, ought to receive the strictest construction ; nothing should be holden to come under its operation that is not expressly within the letter and spirit of the Act ". When I come to the words of the section, it appears that they may apply either to all trials that may hereafter begin or to all trials whether not yet completed or not yet commenced. The *Criminal Code* provides that the trial in criminal cases shall be deemed to be begun when the prisoner is called upon to plead, and this took place in March. Accordingly we have to consider the application of this section to a trial beginning many months before. In my opinion, the rules of strict construction of Acts relating to trial by jury, of which I have cited an example, apply to this case ; and further, the right to have only the verdict of the full twelve was an essential part of the right to trial by jury which the accused had before the amendment was made. It is not merely a procedural matter. The question is not free from doubt, but the general principle of construction must, in my opinion, be applied.

The appeal will be allowed.

DIXON J. I agree. When the prisoner was arraigned and pleaded not guilty, then under sub-sec. 6 of sec. 351 of the *Criminal Code* (Tas.) his trial began. Issues were joined between himself and the Crown. Under sec. 361 his plea amounted to a demand that he be tried by a jury, and he became entitled to be tried accordingly.

The right which his plea so asserted had this conspicuous feature, namely, that although he was placed in jeopardy, he was placed in jeopardy of the unanimous verdict of twelve men. This was the position he occupied when the *Jury Act* 1936 altered the law and made the concurrence of ten sufficient for a conviction or acquittal. When it says that this should be so " on the trial of any criminal issue," should these general words be understood as applying to a trial already begun of issues already joined ? In my opinion they should not. They should be taken to mean on the trial of any criminal issue joined after the commencement of the Act. They should not be construed as depriving a prisoner standing in peril at

the time of their enactment of so important a thing as his protection from conviction except by a unanimous verdict.

EVATT J. I agree. On 26th March 1936 when the appellant answered the charge contained in the indictment by pleading not guilty, he became entitled to have the question of guilt determined by the unanimous decision of a jury of twelve. The only question before us is whether, in August, 1936, when the principle of unanimity in criminal cases was abrogated in Tasmania, the Act used terms sufficiently clear to show that it operated to deprive the appellant of his pre-existing right to a unanimous decision. It was argued that, in criminal issues, unanimity, as opposed to majority, decision is a mere matter of procedure. But this argument is answered by the fact that in Tasmania, as elsewhere in common-law countries, trial by jury has been universally regarded as a fundamental right of the subject, and unanimity in criminal issues has been regarded as an essential and inseparable part of that right, not a subordinate or merely procedural aspect of it (Cf. *Stephen, History of the Criminal Law of England* (1883), vol. I., pp. 304, 305; *Ford* v. *Blurton* (1), per *Atkin* L.J.; *R.* v. *Armstrong* (2), per *Hewart* L.C.J.; *Australian Law Journal*, vol. 10, Supplement, p. 64).

In the United States, the principle of unanimity has been treated as an integral part of the constitutional guarantee of the jury system, and a similar guarantee (in respect of offences against the laws of the Commonwealth) is contained in sec. 80 of the Commonwealth Constitution. For the Supreme Court of the United States, *Brewer* J. said, in *American Publishing Co.* v. *Fisher* (3):—

> "Now unanimity was one of the peculiar and essential features of trial by jury at the common law. No authorities are needed to sustain this proposition. Whatever may be true as to legislation which changes any mere details of a jury trial, it is clear that a statute which destroys this substantial and essential feature thereof is one abridging the right. It follows, therefore, that the court erred in receiving a verdict returned by only nine jurors, the others not concurring."

In view of this overriding principle, which cannot be overlooked on the question of construction, the better interpretation of the

(1) (1922) 38 T.L.R. 801, at p. 805.
(2) (1922) 2 K.B. 555, at p. 568.
(3) (1897) 166 U.S. 464, at p. 468; 41 Law. Ed. 1079, at p. 1081.

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recent Tasmanian Act is to confine it to "criminal issues" joined *after* the Act was passed. On that view the majority rule was inapplicable to the present issue.

The appeal should be allowed.

Appeal allowed.

Solicitors for the appellant, *Shields, Heritage & Stackhouse.*

Solicitor for the respondent, *A. Banks-Smith*, Crown Solicitor for Tasmania, by *F. G. Menzies*, Crown Solicitor for Victoria.

H. D. W.

[HIGH COURT OF AUSTRALIA.]

GOLDMAN . . . . . APPELLANT;

AND

BRAMLEY . . . . . RESPONDENT.

H. C. OF A. 1936.

MELBOURNE, *June* 4.

SYDNEY, *Aug.* 13.

Starke, Dixon and Evatt JJ.

Patent—Provisional specification—Amendment—Validity—Duty of commissioner—Patents Act 1903-1930 (*No.* 21 *of* 1903—*No.* 76 *of* 1930), *sec.* 42.

The Commissioner of Patents communicated to an applicant for letters patent the contents of an examiner's report to the effect that the provisional specification did not state the title of the invention and did not sufficiently describe the invention, and stated that "if desired" argument in rebuttal of the examiner's objection or amendment with a view to the removal of the objection might be submitted. The applicant submitted another document as an amended specification, and the amendments were allowed.

Held that sec. 42 of the *Patents Act* 1903-1930 had been complied with. The section did not require that the precise amendments be directed or that a time be fixed within which amendment should be made.