CRIMINAL LAWYERS ASSOCIATION OF THE NORTHERN TERRITORY

in conjunction with

THE CRIMINAL LAW SECTION OF THE LAW INSTITUTE OF VICTORIA

8th Biennial Conference

Bali Hyatt Hotel
Sanur Beach, Bali

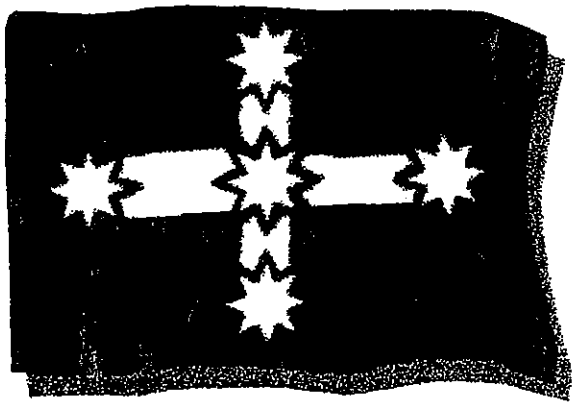
23 – 29 June 2001

The Eureka Trials – R v Hayes, Joseph & Ors

A play reading by the delegates

Presented by

Rex Wild
Director of Public Prosecutions (NT)



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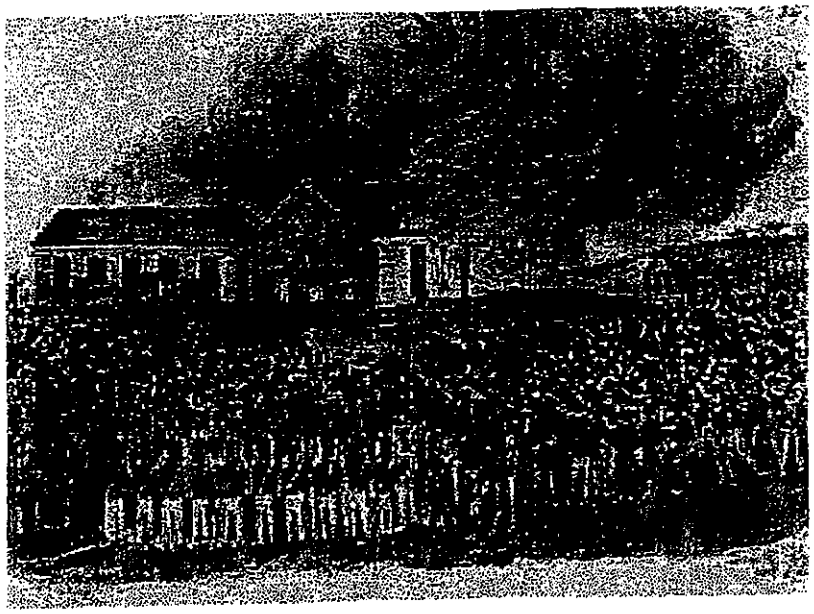
THE EUREKA TRIALS

THE QUEEN v TIMOTHY HAYES, JOHN JOSEPH AND ORS



THE EUREKA TRIALS

THE QUEEN v TIMOTHY HAYES, JOHN JOSEPH AND ORS

Treason doth never prosper, what's the reason?
For if it prosper, none
dare call it treason.
Sir John Harington 1561-1612
Bk IV No 5 *Of Treason.*

INTRODUCTION

The Eureka story has often been told. The trials that followed were then regarded as of tremendous public importance. They had a considerable influence on subsequent mining legislation in the State of Victoria, then in the middle of its gold rush era. They are unique as being the only Australian trials for the most serious offence in our law, high treason. They also represent the culmination of a period of repression and injustice pursued by the Government of which Hotham was head and in which the Attorney-General, Stawell, was a powerful figure.

The resilience of the jury system and its capacity to diffuse conflict were demonstrated when 13 survivors of the Eureka rebellion were subsequently tried for high treason. The trials represented examples of the independence of the jury, both from the political and financial masters of the infant colony.

The Diggers

The men at the Ballarat gold fields in 1854 were a particularly colourful, exotic group. Those charged with treason were described as a *mongrel crew of German, Italian and Negro rebels*. The best known, Raffaello Carboni, was an Italian. John Joseph was an American Negro. Another black man, James McFie Campbell, came from Kingston, Jamaica. Jan Vannick was a Dutchman. A number of the accused were of Irish origins: Timothy Hayes (who had been a mining partner of Peter Lalor[1]), John Manning, Michael Tuohey, John Phelan, William Molloy and James Beattie.

Like most historical events, the Eureka rebellion was a product of many factors. But it is clear that a major factor in the dispute was the enforcement of the licence fee and

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1 In different contemporary documents this spelling sometimes appears as *Lawler* to equate with phonetic pronunciation.

the intransigent official reaction to the miners' genuine grievances. *Digger hunting* proved to be a popular sport amongst the officers. Miners were required to carry the licence with them at all times and were likely to be asked to produce them at any time and as part of a sport played by arrogant officials.

If *digger hunting* was a major factor in producing a setting for a rebellion, a number of incidents in late 1854 inflamed the situation. These included the killing of the digger Scobie, apparently at the hands of the publican Bentley, the arrest of Gregorius, who was a crippled servant of Father Smyth, and a protest meeting outside Bentley's hotel which resulted in its conflagration.

The response of Sir Charles Hotham to miners' complaints and deputations was to send reinforcements of soldiers to the gold fields. In desperation the diggers moved to an area to the east of Bakery Hill, set up a crude stockade and commenced carrying out military drills. Commissioner Rede planted a couple of spies among the diggers at the stockade and prepared for an attack. At 2.30 am on Sunday 3 September 1854, 276 men (182 mounted and foot soldiers and 94 mounted and foot police) were ordered to assemble. After receiving directions, the men were provided with a ration of rum. At 3.30 am the troops set out to follow a semi-circular course to the back of the stockade. At about 4.30 am, shortly before dawn, they attacked. With the advantage of surprise and superior numbers, the invading troops soon overpowered the diggers. Twenty-two diggers were shot dead, while four of the troops were killed. After some of the police set fire to tents, the troops commenced the job of rounding up the surviving diggers.

Two or three of the ringleaders escaped and *wanted* posters were put out for Peter Lalor (who lost an arm in the fighting) and others. Thirteen of the diggers were charged with treason. It seemed very much as if they were a *representative* group. At Ballarat police court on Friday 8 December these 13 were committed by Police Magistrate Sturt to take their trial at the Supreme Court in Melbourne on the charge of high treason. It is remarkable how quickly the wheels of justice moved in those days. The authorities had decided to prosecute the accused in Melbourne, fearing that Ballarat juries might acquit. In fact ***The Age*** newspaper, which had only begun publication in October 1954 and was campaigning vigorously for the release of the prisoners, gave its opinion that an acquittal of the diggers was inevitable since it was impossible to find 12 honest men in Victoria who would find them guilty.

The Lawyers and Judges

The main prosecutor at the trials was the Anglo-Irish Attorney-General, William Foster Stawell. He was assisted in the first trial by the Acting Solicitor-General and fellow Irishman Robert Molesworth. A prominent member of the defence team was Richard Davies Ireland, another Irishman. Other members of the defence team included Henry Samuel Chapman, Butler Cole Aspinall, Archibald Michie and two other Englishmen, Cope and Dawson. The Chief Justice of the time was Sir William

a'Beckett. He was privately and personally opposed to gold mining and may well have been temperamentally as well as politically unsuited to presiding over trials of the Eureka rebels. Certainly his behaviour at the trials indicated a very pro-prosecution attitude. Redmond Barry, the same judge who was later to become notorious for his role in the Ned Kelly trial, had recently assumed the bench and might also be said to have had a *cosy relationship with the Executive*. It does seem, however, from reading the trials and the commentary of the period that he provided fairer trials for the 11 accused who came before him than did the Chief Justice.

The whole issue excited tremendous public interest and a great deal of support for the miners. The lawyers who appeared for them had offered their services free of charge.

The Indictment

Prisoners had been charged with high treason. The selection of such a charge instead of murder, or conspiracy, was no doubt made by the Attorney-General but it involved the prosecution in sustaining a very difficult burden. All 13 persons were accused of treason and all were charged on the one indictment. This contained four counts of treason in which the general allegation was the same but the particulars differed. The language of the counts followed that of English statutes. The general words of the first count were:

> *Be it remembered that William Foster Stawell, Esq., Attorney-General of our Sovereign Lady the Queen for the Colony of Victoria informs the Supreme Court of General Gaol Delivery now holden here on the 15th day of January in the year of our Lord One thousand eight hundred and fifty-five at Melbourne in the Colony of Victoria aforesaid that [the thirteen accused are then named] on the 3rd day of December in the year of our Lord One thousand eight hundred and fifty-four together with divers other false traitors to the said Attorney-General unknown armed and arrayed in a warlike manner that is to say with guns muskets blunderbusses pistols swords bayonets pikes and other weapons being then unlawfully assembled and gathered together against our Lady the Queen wickedly maliciously and traitorously did levy and make war against our said Lady the Queen within that part of her dominions called Victoria and did then maliciously and traitorously attempt and endeavour by force of arms to suborn and destroy the Constitution and Government of the said part of her dominions as by law established and deprive and depose our said Lady the Queen of and from the style honour and kingly name of the imperial crown of the said part of her dominion in contempt of our said Lady the Queen and her laws to the evil example of all others in the like case offending contrary to the duty of them the said [the accused are again named] against the form of the Statute in such case made and provided and against the peace of our Lady the Queen her crown and dignity.*

The second count is a mere re-arrangement of the language of the first and adds nothing to it. The third count does much the same but concludes with the words:

> *.... and traitorously did raise upon a pole a certain flag as a standard and collect round the said standard and did then solemnly swear to defend each other with the intention of levying war against our said Lady the Queen'.*

It adds also an allegation that the accused and others formed bands under leaders and were marched and drilled and trained in military exercises and movements to prepare for fighting against the soldiers and other loyal subjects of the Queen. The count goes on to refer to the erection of a stockade and to the firing at the soldiers and the wounding and killing of some of them.

The fourth count repeats a number of the matters set out in the others but adds nothing of importance.

The counts are referred to in some detail because they dominated the whole trial. However appropriate such counts may be to, say, the Monmouth rebels in 1688, they do not seem appropriate to the events of Eureka. They were a gift to the Counsel for the defence who, while unable to deny most of the facts set out, rested their defence on the question of the intent with which they were done, contending that the intents alleged were not established. In Hayes' case, the Attorney-General, the defence Counsel and the presiding Judge discussed with the jury the law of treason and the nature of the intent at great length, and quoted many authorities to them, no doubt to their utter confusion. Modern criminal lawyers will appreciate to the full how greatly the prosecution had played into the hands of the Counsel defending the accused who made the utmost use of the Attorney-General's gifts.

The Trials

On Thursday 22 February 1855 the 13 prisoners were crowded into the dock at the Supreme Court at Melbourne and arraigned before Sir William a'Beckett. This was followed by a good deal of manoeuvring and procedural skirmishing about the sequence in which the trial should take place. The Crown had intended to proceed against all of the accused in one indictment but had chosen Timothy Hayes as first-named on the indictment. The defence manoeuvres included a plea in abatement, an application from the prisoners to sever their challenges and applications for postponement. The result of all this was that the indictment was severed and it was necessary, at the outset at least, for there to be 13 separate trials. The defence continued to put difficulties in the way of the Crown and ultimately it was the fourth-named defendant on the indictment whose trial commenced first.

The first trial was therefore of John Joseph who was a Negro from New York. It seems very probable that the preliminary skirmishing by defence counsel was contrived with the object of having Joseph's trial heard first, for the strategy of the defence was to ridicule the notion of this unsophisticated, head-scratching, illiterate Negro having formed the esoteric intentions alleged in the indictment and, in particular, to *levy war against our Lady the Queen.*

In fact, eventually, there were seven separate trials in respect of which each of the accused was acquitted outright. One of the many interesting little sidelights is that the 12 jurors eventually sworn in for the first trial all had surnames commencing with the letter *W.*

It is not intended in this introduction to summarise any of the trials, although the following table is provided to give some idea of the speed with which the matters proceeded. The first two trials were conducted by the Chief Justice and the remainder by Justice Barry. Each of the trials was prosecuted by the Attorney-General and the names of defence counsel are shown.

No.	Name	Trial Date(s)	Counsel
1	Joseph	Thursday 22/Friday 23 February	Chapman/Aspinall
2	Manning	Monday 26 February	Michie
3	Hayes	Monday 19/Tuesday 20 March	Ireland/Cope
4	Carboni/Vennor	Wednesday 21 March	Ireland/Aspinall/Michie
5	Vannick	Thursday 22 March	Ireland/Aspinall/Michie
6	Beattie/Tuohey	Friday 23 March	
7	Reid/Campbell/ Molloy/Sorensen/ Phelan	Monday 26/Tuesday 27 March	

It will be seen that no trial took more than two days and a number of them were concluded within the space of a day. In most cases the jury went out very late in the evening and verdicts took little time. The longest jury deliberation appears to be about 40 minutes; the jury in the seventh trial (which involved 5 accused) were out for 7 minutes only. All of them were greeted with a great deal of public acclaim both in and out of the court. There was so much noise after the acquittal of Joseph that Chief Justice a'Beckett chose, more or less by random it seems, two of the spectators in court and gave them two weeks each for contempt.

Apart from what appeared to be the unseemly haste in which the trials were conducted, 13 men tried in seven trials in less than 11 days, there were a number of other features of the trials that are disquieting from a modern perspective. They include questions relating to evidence by identification, the onus and standard of proof, the roles of the judge and the jury and judicial intrusions into counsel addresses.

Another striking feature of the trials was the poor treatment of the accused, each of whom was invariably referred to as *the prisoner* although not yet convicted.

The procedural technicalities were extraordinary and defence counsel exploited those to the full in manoeuvring to have the Joseph trial heard first and in the manner in which they exposed the difficulty of the Crown position once its indictment was framed. Nevertheless, the accused men were better off with a jury trial than they would have been with the alternative. After all, they were all acquitted!

The Play

A great deal of dramatic licence has again been adopted. There exists verbatim reports of two of the trials, those involving Joseph and Hayes. These reports were made by GHF Webb, a government reporter of the time and later himself a Supreme Court judge. They are in the *State Trials* series. I have obtained a copy from the Victorian State Library of those trials from which much of the dialogue in the ***Joseph*** trial comes. The later trials were conducted by Redmond Barry, later to achieve general fame and notoriety as the judge in the ***Kelly*** trial. It seems that by comparison with the role in the ***Joseph*** trial played by Chief Justice a'Beckett, Barry's conduct of the ***Hayes*** (and remaining) trial(s) was reasonably fair.

The thrust of the message, I hope, will remain. The astute conference delegate will note that although the miners were clearly guilty of some offence (was it riotous assembly?) it was not proved to be treason. All of them were properly acquitted, it might be thought, of treason. This compares reasonably with the results in the three previous plays performed for you at this conference. The ***Popish Plots*** (1995), ***Ned Kelly*** (1997) and ***Tuckiar*** (1999) were all examples of convictions following what were obviously or, at least arguably, unfair trials. In the ***Eureka trials***, the defence fought back!

Acknowledgements

In researching for the play I have been much assisted by Peter Thomas (who has lent me his selection of material about Eureka; his great-grandfather was behind the barricades) and my daughter Emily Wild who obtained the trial transcripts for me from the Victorian State Library. I found the articles by Graham Fricke QC (former Victorian Court judge) *The Eureka Trials* (1997) 71 ALJR 59 very useful. I have used it in writing this introduction together with *A Multitude of Counsellors* by Sir Arthur Dean. This latter is a history of the Victorian Bar written in 1968 by a former judge of the Supreme Court of that State.

Once again, I thank on your behalf those delegates who have been forced into service, volunteered their participation or forced their way in as members of the cast. I hope the play provides some diversion whilst confirming the part that a strong and independent bar, and the jury system, plays in ensuring that liberty and justice prevail.

The Trial of John Joseph

As I have already indicated, there is a full transcript of this trial and it is very interesting to follow the way in which it was conducted. The procedure is quite similar to that which you would expect in a modern trial with some notable exceptions. I thought that some minor further commentary on the players in the trial was justified. It is clear enough that Chief Justice a'Beckett was quite irascible and demonstrated a deal of bias during the course of the trial. He seems to have assumed that the onus of proof was on the prisoner in some regards. The suggestion was that if the prisoner was there for an innocent purpose then he could call evidence to this effect. This was very unfair as the accused person at that time was unable to give evidence himself.

The Attorney-General, William Stawell, was very much *interested* (using that expression in the way in which you might use it in respect of American District Attorneys) in the outcome of these cases. He took it upon himself to prosecute them personally. The degree of importance attached to the cases can be gauged by the fact that his junior, at the first one or two trials, was the Solicitor-General, Robert Molesworth. Although he was clearly a very determined prosecutor, there are signs of fairness from him which creep through in the first trial and are well-demonstrated towards the end when, perhaps, he had become resigned to the crushing defeats which he endured. He at least seems to have acknowledged that it was the prosecution duty to prove the offences to the satisfaction of the jury, even if the judge seems to have somehow changed the onus.

Henry Chapman, lead counsel for the defence, was an experienced and senior counsel who was regarded by his brethren at the time as having conducted the defence in an exemplary fashion. To him is given a great deal of the credit for the victories which then followed. There was, of course, some manoeuvring for position to enable his trial to proceed first. At this distance in time, this might partly have been because of Chapman's reputation as well as the unique position in which the particular defendant found himself. Having said that, those who read and watch the play will notice what seems to be a clear breach of rules of advocacy in cross-examination in the way in which Chapman makes a number of the identification witnesses testify even more positively to that identification. (Those who adhere to the *Ten Commandments of Cross-Examination* as espoused by Irving Younger, Professor George Hampel and others would never approve.) In the popular press, junior counsel Butler Cole Aspinall is given a great deal of the credit for the victory in the first trial. The fact is this was Aspinall's first trial, he was then aged 25 and his only part in the trial was to make the second defence closing speech (which was then allowed in treason trials apparently). It must have been a fine address because it got a great deal of popular press. However, it was full of racial commentary which would be totally unacceptable today. He received the credit for destroying the Crown case but this was actually done by Chapman in his cross-examination.

The jury went out late on the second day of the trial and was only out for 30 minutes. Some have criticised the practice of sending out juries very late after a great deal of evidence and a number of addresses. The alternative was, of course, for them to be locked up.

It may be noted from the transcript that there was a great deal of chit-chat between the counsel and interruptions even during the course of addresses both by counsel and by the judge. Counsel tended to personalise their submissions to the jury and almost to the extent of giving *evidence at the bar table*. In the later trials, in which the Irish barrister William Ireland appeared, there is a great deal of vituperative interchange between counsel. The cross-examination was full of invective, as were the defence final addresses.

The other matter worthy of comment is the obvious interest in which the press followed the cases. In earlier days (and we even saw this in the ***Tuckiar*** case) the media followed trials much more closely and verbatim reports of evidence were often published. The two major papers in Victoria at the time were ***The Argus*** and ***The Age***. They seemed to take directly opposite views on the merits of these proceedings. Chapman, in his final address in the Joseph trial, was very concerned that the jury should put out of their minds the things that they had read in the press which might prejudice them against the defendants. If they had been reading ***The Age*** they would have found themselves influenced in a very different direction. ***The Argus*** seemed to reflect what might be regarded as a conservative rightist view whilst ***The Age*** lined itself up with the *liberty of the subject*. Not a great deal has changed, I suspect.

The play itself is faithful to the transcript of the original trial. As always, an endeavour has been made to give the proper flavour to the proceedings without unfairly caricaturing witnesses, lawyers or the judges. It has been necessary, of course, to truncate the number of witnesses, the quantity of the evidence and also of the addresses. Nevertheless, what does appear is very close to the actual words of the participants. In this connection, do not think that the evidence of Allen (*Old Waterloo*) is in any way intended as light relief. The evidence he gives is precisely in accordance with the transcript!

REX WILD
Director's Chambers
Darwin

THE EUREKA TRIALS

THE QUEEN v TIMOTHY HAYES, JOHN JOSEPH AND ORS

Dramatis Personae

Chief Justice :	Sir William a'Beckett
Prosecutors:	William Foster Stawell, Attorney-General Richard Molesworth, Solicitor-General
Defence:	Henry Samuel Chapman Butler Cole Aspinall
Prisoner:	John Joseph
Witnesses:	Henry Goodenough (Trooper and Spy) Andrew Peters (Trooper and Spy) Patrick Lynott (Soldier of the 40th Regiment) John Donelly (Private in the 40th Regiment) Gilbert Andrew Amos (Commissioner of Crown Lands) Thomas Allen (*Old Waterloo*) (Store Owner and Ex-Soldier)
Other Counsel:	Richard Davies Ireland
Foreman of the Jury:	James Westwood
Other Prisoner:	Timothy Hayes
Judge's Associate/ Tipstaff:	
Spectators in Court:	[*Crowd scene*,playing themselves] George Hartley Wojciech Karczewski

THE EUREKA TRIALS

THE QUEEN v TIMOTHY HAYES, JOHN JOSEPH AND ORS

The Players

The Chief Justice	Tom Pauling
Judge's Associate/Tipstaff	Barbara Tiffin
Attorney-General	Jenny Blokland
Solicitor-General	Richard Refshauge
Mr Chapman	John Lawrence
Mr Aspinall	Grant Hayward
Mr Ireland	Mark Trowell
John Joseph	Glen Dooley
Timothy Hayes	Louise Bennett
Henry Goodenough	Dean Mildren
Andrew Peters	Stephen Apps
Patrick Lynott	Stephen Myall
John Donelly	Suzan Cox
Gilbert Amos	Richard Coates
Thomas Allen	Austin Asche
James Westwood	Melanie Little
Spectators in contempt of court	Peter Thomas (acting as George Hartley) Jack Karczewski
Narrator	Rex Wild