175TH ANNIVERSARY OF THE SUPREME COURT OF NEW SOUTH WALES

17 MAY 1999

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The Sydney Gazette of 20 May 1824 records that at 2 pm on Monday 17 May the Supreme Court was opened, and that on the evening of 17 May there was a dinner at Government House to celebrate the great benefits that this would bring to the people described, interestingly, as "the inhabitants of Australasia."[1]

> The account of the opening of the Court remarked:
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> "We need hardly say that the auditory on this occasion was the most respectable, distinguished and crowded, that has been witnessed for years. The inhabitants seemed to have awakened, as it were, to the valuable extension of their liberties so graciously conferred by Parliament and approved and confirmed by His Majesty".[2]

The Parliament referred to was the Parliament at Westminster, which on 19 July 1823 had enacted the statute pursuant to which the Charter of Justice was promulgated three months later.

The essence of the Charter of Justice, (the name applied to instruments by which the Crown set up courts of justice for Britain's

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1 (1974) 98 ALJ 356 at 357.

2 C H Currey, "Chapters on the Legal History of New South Wales 1788 – 1863", p 183.

overseas territories), was expressed succinctly by Sir Victor Windeyer[3]. Its purpose, and effect, was to make the Government of the colony, and all persons in the colony, subject to the law. The role of a Supreme Court is to maintain the rule of law in the polity for which it is established. The Australian Constitution established what it referred to as a Federal Supreme Court, called the High Court[4], and recognizes the continuance of the Supreme Court of each State.

It is instructive to recall the context in which the rule of law was established in New South Wales.

In 1824 the territory of New South Wales extended over the whole of the eastern half of the mainland. Indeed, for a time, it included part of New Zealand.

Napoleon had been dead for three years. King George IV had been on the throne for five years. Nine years previously the French had been subdued by an international peace-keeping force, led by the Duke of Wellington and General Blucher, but they were still seen as a threat.

New South Wales was a remote outpost of the British Empire. Positions of command and influence were almost all occupied by Englishmen. However, the foundations were being laid for later waves of Celtic immigration. The Scottish highlands were being cleared. People were forced to leave for North America, and later Australia. The manager of Lord Stafford's estates wrote:

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3 (1974) 48 ALJ 356.

4 Constitution, s 71.

> "The adoption of the new system by which the mountain districts are converted into sheep pastures, even if it should unfortunately occasion emigration of some individuals is, upon the whole, advantageous to the nation at large."[5]

In 1824 the Australian Agricultural Company, so important in fostering immigrants, was formed. The company took a large tract of land between the Hastings River and Port Stephens[6].. That area includes the Manning River Valley. In 1824 a Lowland Scots tenant farmer, John Murray, married Isabella Scott. They were my great-great grandparents. They had ten children. After John Murray died, his widow and children emigrated to New South Wales, two of the sons working for the Australian Agricultural Company[7]. The family settled in the Manning Valley. One of their descendants is a famous poet.

The Celtic Irish, who were also to play an important part in populating the colony, were not doing well. Catholics were forbidden to own land, enter a profession, or attend school or university. Most lived in conditions of great poverty, and many of them were soon to starve.

Of the aboriginal inhabitants of the area around Port Jackson, Robert Hughes wrote in "The Fatal Shore"[8]:

> "On the shores of Sydney Harbour, whites outnumbered blacks from the moment the First Fleet arrived; no black could ever have seen so many people before. One is apt to think of Sydney and its outlying penal settlements ... as

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5 John Prebble, "The King's Jaunt, Geo IV in Scotland 1822", Collins, 1988, p 165.

6 John Ramsland, "The Struggle Against Isolation, A History of the Manning Valley", 1987 pp 10-11.

7 P Ruthven-Murray, "The Murrays of Rulewater", RCS Ltd, London 1986, p 139.

8 Robert Hughes, "The Fatal Shore", Collins Harvill, 1987 p 272.

small and weak. So they were, but to the Aborigines they looked large, strange and imposing, and the malign gravitational field they emitted would destroy their culture."

In 1824, Governor Brisbane proclaimed a state of martial law in the district from the Blue Mountains to Bathurst because of conflicts between the aborigines and white settlers[9].

These were small parts of the setting in which the first Chief Justice, Francis Forbes, took up his responsibilities.

Forbes was not the first judge in New South Wales. There had been two judges in the settlement before then.

The first was the inauspiciously named Jeffrey Bent. He had been appointed in 1814. Doctor Currey, in his "Chapters on the Legal History of New South Wales", familiar to all law students of my generation, described him as "vain, pretentious, insolent and unconciliatory".[10] He is generally regarded, not only as the first judge in New South Wales, but also as the worst. The one thing he had to recommend him was a spirit of independence. He gave an early display of his mettle upon arrival in Sydney, by refusing to disembark from his ship until the Governor arranged for a proper battery of guns to salute him. He refused to pay the road toll levied on users of Sydney's main road. He said he would be damned if he would pay any illegal tax. He called the gatekeeper a scoundrel, and threatened to put him in gaol. As a result, he was charged with toll evasion, convicted by a magistrate

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9 Theo Barker "A Pictorial History of Bathurst", 1985, p 6.

10 CH Currey, above, pp 158-160.

and fined two pounds. There being no Judicial Commission in those days, the matter was allowed to rest there.

The Court presided over by Judge Bent only ever sat to hear one item of civil business. That was an application by three ex-convict attorneys for admission to practice. The judge, who was at risk of being outvoted by the two magistrates with whom he sat, peremptorily announced that the application was refused, and that he would never preside in a court where ex-convicts were admitted to practice. Soon afterwards he was recalled to England.

Jeffrey Bent was replaced by a man of literary accomplishments, or at least interests, named Barron Field. In 1819, following his arrival in the colony, he published a book entitled "First Fruits of Australian Poetry". His poems attracted critical derision. One commentator wrote:

> "Thy poems, Barron Field, I've read,
> And thus adjudge their meed,
> So poor a crop proclaims thy head,
> A barren field indeed."

The establishment of the Supreme Court followed from recommendations made by Commissioner Bigge, who conducted an investigation into the administration of New South Wales, commencing in 1819. In one respect, however, the Court had reason not to be grateful to Bigge. The architect, Francis Greenway, had designed what is now St James' Church, for use as a courthouse. Commissioner Bigge thought it was too grand for that purpose. The Secretary to the Commission was Bigge's brother-in-law, Mr T H Scott, formerly a wine merchant of London. Commissioner Bigge recommended to Scott that he take Holy Orders, and recommended to the authorities in Westminster that the new building should be a church. Both these suggestions were accepted, and by a happy coincidence Archdeacon

Scott became the first rector of St James church. The building used for the court was of more modest proportions, and was immediately to the west of the church[11]. I believe, that to this day, title to that land is vested in the judges of the Supreme Court of New South Wales.

Francis Forbes, who came originally from the West Indies, and, who had previously been Chief Justice of New Foundland, was described by a biographer as "a sound lawyer and a good judge .. A man of strong and upright character, tempered by a conciliatory manner."[12] Two additional judges were appointed, one in 1825 and one in 1827. Forbes had been the principal draftsman of the Charter of Justice, but the drafting was inadequate in one respect, which caused trouble in relation to the administration of the court. The Charter did not make it clear that the powers of the court could be exercised by any one of its members. There was controversy for some years about whether it was necessary for members of the court to sit in Banc in order to make effective orders. The issue was later clarified by legislation, but its existence was an early embarrassment.

There is another respect in which the drafting of the Charter was unfortunate. When he was offered the position of Chief Justice, Forbes was promised that he would be provided, at Government expense, with an official residence. The Charter of Justice made express reference to this matter. In 1833, however, civil servants at Whitehall, in an economy drive, decided that the arrangement would no longer be honoured, and demanded that he pay rent. They took the point that,

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11 J M Bennett, "A History of the Supreme Court of New South Wales", Law Book Company 1974, pp 2-3.

12 J M Bennett "Portraits of the Chief Justice of New South Wales", John Ferguson, p 11.

although the Charter referred to the provision of an official residence for the Chief Justice, it did not say that it would be permanent. This would not be the only time a draftsman has been scratched by his own pen[13].

The decisions of Chief Justice Forbes have been described as revealing strength and clarity of mind, and his personal demeanour as displaying a touch of austerity and aloofness[14]. On the other hand, his successor, Sir James Dowling, was said to be "popular and jovial"[15]. Jovial, Dowling may have been, but his patience was tested, to the limit, by one of his colleagues, Mr Justice Willis. Willis is generally regarded as the second worst judge in the history of New South Wales. In 1838 the Chief Justice wrote of Mr Justice Willis:

> "His conduct since he has been here has been a source of perpetual annoyance. He is influenced by the most malignant and diabolical displays."

In another letter, the Chief Justice wrote:

> "Some people have the opinion that he is cracked".[16]

In 1841 Willis was appointed resident judge in Melbourne. In a letter dated 14 February 1841, Dowling wrote:

> "That detestable Willis is going tomorrow to Port Phillip as resident judge, where I pray he may stick and that I may never see his face again".

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13 CH Currey, above, pp 190-191.

14 J M Bennett, "Portraits of the Chief Justices of New South Wales" p 17.

15 J M Bennett, "Portraits of the Chief Justices of New South Wales" p 17.

16 C H Currey, above pp 187-188.

The high point of the career of Mr Justice Willis was an occasion when he sentenced to death a man who had been convicted of a misdemeanour. Since the maximum penalty prescribed for the offence was considerably less, the offender had to be pardoned by the Governor. Dr Currey records of Willis[17]:

> "On the bench he engaged in lengthy harangues which had not the slightest connection with the business before or of the Court, but which bristled with insulting references to individuals, public and private, in Sydney and Melbourne".

Mr Justice Willis was removed from office by Governor Gipps in 1843, but he appealed successfully to the Privy Council on the ground that he had not been given a proper hearing.

One of the notable figures in the early legal history of New South Wales was present when the Supreme Court was opened on the 17th of May 1824. He was sworn in as Attorney-General on that occasion. He was Mr Saxe Bannister. One of his principal functions was, where necessary, to prosecute for libel the rather vigorous journalists of the day. In the event, he only instituted one such prosecution, and that was when he himself claimed to have been the victim of a libel. The prosecution failed for want of merit. In due course, Bannister resigned. He selected a substantial parcel of land in the Goulburn area. The land is now called Bannister Station. It is owned by another former Attorney-General, T E F Hughes QC.

The figure who towers above all others in the history of the Supreme Court during the 19th century is Sir Alfred Stephen, Chief

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17 C H Currey, above p 188.

Justice from 1844 until 1873. He was a judge of great capacity and distinction. The strain of office bore heavily upon him. On a public occasion, he appealed to the humanity of the citizens of Sydney requesting that they kill no more Chief Justices[18]. In a commendation from Westminster, it was said to him:

> "So good a judge as yourself has never existed in the Colonial Empire."[19]

The early Chief Justices also sat in the colonial legislatures. Forbes had, in effect, a power of veto over legislation, which brought him into serious conflict with the Governor. When representative government came to the colony in 1858, Stephen, who was then serving as Chief Justice, was appointed first President of the Legislative Council. He remained in that office for two years, although there was controversy as to the appropriateness of judges sitting in the legislature. He resigned his office because the pressure of judicial duties made it impossible for him to carry on as the President of the Legislative Council at the same time.

One 19th century Chief Justices, Sir James Martin, who held office from 1873 until 1886, had previously been Premier of the colony. Dr J M Bennett, in his "Portraits of the Chief Justices of New South Wales", records two interesting facts concerning Sir James Martin[20]. The first is that he and his wife had 15 children. The second is that their marriage was not happy. It seems reasonable to infer that he was a persuasive man.

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18 J M Bennett, "Portraits of the Chief Justices of New South Wales" p 21.

19 J M Bennett, "Portraits of the Chief Justices of New South Wales" p 21.

20 J M Bennett, "Portraits of the Chief Justices of New South Wales" p 25.

The first Australian born Chief Justice of New South Wales was Sir William Cullen, who was appointed in 1910. When Chief Justice Spigelman was appointed last year, I read in the press that he was an immigrant. During the first ninety years of the Court's existence, all of its Chief Justices were immigrants. Even so, the point was worth making. It is a source of great satisfaction to see the present Court with such excellent leadership.

The many outstanding judicial figures who were members of the Supreme Court during the 20th century are well-known to an audience such as this. They include three members of the Street family who served as Chief Justice of the Court. It is no doubt with great pride that my distinguished predecessor, Sir Laurence Street, has participated in today's celebrations.

It is not only the Judges and the Masters who have contributed to the work of the Court as an institution. The prothonotaries, registrars and deputy registrars, sheriffs, court officers and staff, and, most significantly during the last 25 years, executive officers, and more recently , public information officers, have made notable contributions to the work and character of the Court.

In the early days, one of the most important and controversial aspects of the Court's civil business was the matter of admission to practice of barristers and solicitors. The sensitivity was in part related to the origins of New South Wales, and social problems associated with the development from a penal settlement to a self-governing colony. There were also disputes affecting the relations of the two branches of the professions. The fact that legal practitioners were admitted as officers of the Supreme Court has always been a defining circumstance

in relations between the Court and the profession. The Supreme Court has always taken an active and important role in legal education. What is now the Legal Practitioner's Admission Board still administers, in co-operation with the University of Sydney, one of the State's most important centres of legal education. Barristers and solicitors in New South Wales have always been barristers and solicitors of the Supreme Court. The role of the court in their education, the maintenance of professional standards and discipline, and their regulation, is central to their professional status.

The structure of the Court, and the nature of its work, has varied from time to time, but some features never seem to change. Since 1824, the Court has been conducting, in one form or another, programmes of delay reduction. In 1860, in a public speech he made before an overseas journey, Sir Alfred Stephen, made a desperate appeal to the citizens of Sydney to assist in efforts to overcome delays in the administration of justice. The mismatch between workload and resources has existed since 1824. Let me give an illustration of the problem by reference to a well-known judge of recent times. In 1966 Jack Lee QC was appointed an acting Judge of the Supreme Court. The Sydney Morning Herald of 3 June 1966, reporting the fact, said that Attorney-General McCaw had decided to appoint four acting Supreme Court judges to help dispose of the great congestion in common law cases before the Supreme Court. In due course, Jack Lee became a judge of the Court, and ultimately Chief Judge at Common Law. He retired in 1991. Attorney-General Dowd promptly announced that Jack Lee would be appointed an acting Judge in order to help dispose of the back-log of cases in the Common Law Division.

For all its problems, and for all the shortcomings resulting from the human imperfections of those who have participated in its work, the

Court, for 175 years, has adhered faithfully to its central commitment to maintain the rule of law. The citizens of this State are able to take for granted that the Government, and the people, are both bound, and protected, by law. This is the ultimate safeguard of their liberty and their dignity. This is their inheritance. The principles which the Supreme Court was established to protect and enforce have been declared, again and again, by its Chief Justices and its judges. There has been no finer expression of those principles than that given by the first Chief Justice, in a letter he wrote to the Under-Secretary of State for the Colonies in 1827, explaining the role of the Court, and its relationship with the Government[21]:

> "The King, by the constitution of our country, is the head of every political institution. But it is equally true that His Majesty has delegated his powers to the different departments of government. His judicial power is altogether delegated to his judges, and his executive, to the great officers of state. In England, the judicial authorities are independent of the ministerial, as the ministerial are of the judicial. In New South Wales, in the same way, the King has delegated his jurisdictions to his judges. The notion of control is inconsistent with the nature of a Supreme Court, which stands in the same relation to the king in New South Wales as the Superior Courts at home stand to the King in England. His Majesty may remove the judges here, and so may the two Houses of Parliament at a home; but the judicial office itself stands uncontrolled and independent, and bowing to no power but the supremacy of law."

The Court has many challenges ahead of it. Its greatest challenge is to ensure that the administration of civil justice remains relevant to the lives of ordinary citizens. I agree with Chief Justice Spigelman that the way to meet that challenge is by constant adaptation to the changing environment in which the Court operates.

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21 Some Papers of Sir Francis Forbes, ed J M Bennett, NSW Parliament, 1998, p 143.

The Supreme Court is one of Australia's great and enduring institutions of State. Such institutions frequently need development, modernisation and revitalisation. They need to be able to change in order to remain the same. But the institutions which support our communal life are not like free-standing trees in an avenue. They are more like tangled vines. Sometimes they need to be pruned, or even cut back hard, but that is a job for a gardener, not an axeman. Whatever changes be ahead, the essence of the Court's character will remain unchanged. As in the past, so in the future, it will be as explained by Francis Forbes: uncontrolled and independent, bowing to no power but the supremacy of law.