Dinner in Canberra for the New Silks

A Toast

Susan Kiefel

We owe many thanks to the person or persons behind the "High Court (Australia) Trivia" Twitter account (@HighCourtTrivia) who brought Susan Kiefel's long-ago toast to our attention. In a thread posted recently, in February 2023, they tweeted:

> In 1987 new QC Susan Kiefel spoke at the dinner (held at the Court) for new silks. Her topic was early Australian judges. This thread is just a taste of the dry humour; complete speaking notes [linked].

Kiefel is now Chief Justice Kiefel of the High Court of Australia. What follows is our transcription of her notes, reprinted with her permission. The original notes are typed and untitled, with "Dinner in Canberra for the new silks. 1988 by S. Kiefel" handwritten in pencil at the top of the first page.

— *The Editors*

Preliminary

1. Since my ~~toast~~ response tonight is to the Judges, I must say something about the judiciary. Using the bicentennial year as an excuse for extreme caution, I though[t] I would speak of our first Judges in Australia.

Susan Kiefel has served on the High Court of Australia since 2007, and as Chief Justice since 2017. *Editors' note: Bracketed material and illustration added by us.*

THE SEARCH FOR LAWYERS

2. The first judicial roles were taken by men unencumbered by knowledge of the law – or at least training in it. The first Judge Advocate of the Colony, David Collins, who was appointed had been a captain in the Army with no experience in law apart from Courts Martial. This "promising 32 year old" (as Manning Clark describes him) did however have other virtues *not necessarily* unjudicial for he was described as "remarkably handsome and his manners extremely pre-possessing. …"

3. Whether it was lack of legal disciplines or whatever, something however changed. In the ascendancy of his career in Van Diemen's Land in later years, M. Clark says he developed the habit of watching men flogged, whilst taking snuff in handfuls.

4. It was not until 1798 that a Judge Advocate was in fact a qualified lawyer, one Richard Dore. These Judges Advocate enjoyed a close relationship with the Governor. Indeed they had little choice – since he paid them and they were subject to his direction. (It was his Court). Although early Judges received income of near 1000 pounds it must not have been enough for one Ellis *Bent* (a name which would not now be likely to achieve promotion in Queensland, in law enforcement circles) appointed in 1809 supplemented his income from the Court fees actually paid – another 800 pounds per annum. Additionally, showing an early interest in commerce that this profession displays so well today, he sold wine which he had imported. I suppose they would be called "futures" if the ship had not arrived. It is difficult to say whether this problem with *"funding"* gave rise to the following comment by the political prisoner Maurice Margarot who was transported to Australia in 1794 and wrote to a friend in these terms:

> "You are very young in this Colony; do not fancy that Courts of Justice exist here as they are constituted at home; if you sent a present to the Judge and it be greater and more valuable than that sent by your adversary, you will succeed by it, not otherwise; never rely here upon what Englishmen call the justice of their case. Bad as the Mother country is, the Courts there are purity in comparison".

THE COURSE OF JUSTICE IS SLOW

6. The appointment of the first Judge of the new Supreme Court in New South Wales (under the Second Charter) may have achieved a measure of independence from the Governor. However there is reason to suspect that the Governor later regretted his earlier support for this: for the new problem which faced the legal system was to actually get the Court *open* and then when it did, *to keep it open*.

7. Justice Bent's (Ellis' brother – there is a lot of this in the *early* days at least of the legal system) Letters Patent had issued on 7th February 1814. However he declined to open his Court for *four and a half months* since he considered there were not premises suitably "dignified" in Sydney. Pressed by the Governor (he was drawing his salary) His Honour determined there was no point in opening his Court since there were no lawyers. Certainly there was no-one then to present a paper on delay in litigation.

8. The good Judge declined to follow his brother's earlier habit of allowing ex-convict (lawyers) to appear – Instead he had nominated two English barristers who were willing to migrate to New South Wales and he was awaiting their arrival.

9. Unfortunately when he *finally* decided to open his Court in May 1815, only one of them *had* arrived – the other's ship having been attacked by privateers. The two Magistrates with whom Justice Bent was required to sit thought however that having one barrister was a little unfair – and that the ex-convicts ought be allowed to make up the difference. His Honour then refused to take his seat upon the Court. As a result the Court remained closed for two years until 1817 (he still drew his salary).

(10. In the meantime, justice must apparently have been done in the two other Courts, the Governor's Court and the Lieutenant Governor's Court – under the older system.)

11. Justice Bent took great exception at the suggestion that the lay Magistrates could question the opinion of "a barrister of more than 10 years standing" as it is reported. The report is even more interesting since some biographical detail suggests that he had only been called to the Bar 9 years before. He was 33.

Experience and Age

12. The extent of legal experience, or even age, was certainly no bar to the appointment of Justices in those days. The first Chief Justice of the Supreme Court of South Australia, Sir John Jeffcott arrived in 1837 having had all of four years experience at the Bar before his appointment as Chief Justice in the Colony – Sierra Leone. Indeed, he had not enjoyed success at the Bar in England. Colonial positions were the solution for such young men. But, as his biographer notes, the Home Office were more concerned with Judges in colonial posts being "sound of limb".

13. Justice in one sense continued to move slowly in South Australia after Jeffcott's arrival. The historical records note that whilst capital punishment was common there, no execution took place until at least May in the year following Sir John's arrival. Now it *may be* that Sir John had a little more sympathy for the accused than the average Judge – borne out of his own experience. Three years prior to his appointment (and in the month when he was knighted no doubt for his services of Chief Justice of Sierra Leone and Gambia) the young knight shot and mortally wounded a doctor in a duel. Medical advice promptly suggested he should take himself to France. Whilst there a warrant issued for his arrest on the charge of murder. However, the world then being run by gentleman, he was acquitted before the Exeter Assizes – no evidence being tendered against him.

14. Now Sir John Jeffcott *also* had a brother – but he was reasonably experienced. He took appointment in Sydney when Willis was suspended by the Government. This Jeffcott was credited with reforming the Court. From "a bear garden, it became a decent well behaved place".

15. Indeed, he seems to have done nothing wrong. A man of some principles, when Willis petitioned against his removal, Jeffcott resigned and returned to practice in Dublin.

Relations with Governors

16. If the Justices Bent had their problems with Macquarie in New South Wales, in Van Diemen's land relations between a puisne judge of that Supreme Court and the then Attorney-General showed all the hallmarks of the closeness of relations which would subsist over the history of the Colony. The Judge wrote to the Attorney:

Sir John William Jeffcott (circa 1836). Courtesy of the State Library of South Australia, B 464.

> "Sir: in your official capacity I shall always treat you with the courtesy and respect due to you. Were you elsewhere I should treat you, after your conduct with less courtesy than a dog".

17. Amongst other crimes, apparently the Attorney had eaten sandwiches in the Judge's presence.

PROBLEMS BEFORE THE COURTS

18. Whilst the questions before these early Courts were not all "dry bones" one can see why the legal mind was so needed. For example, in 1844 the Supreme Court of New South Wales had to grapple with the difficult jurisprudential problem as to its discretionary powers over the *body* of an executed person. In fact it determined that it had the power to direct *either* that the body be dissected *or* that it be hung in chains – questions which no longer perturb *our* Judges since the media has so developed in Australia.

19. Sir John Jeffcott was not the only young barrister who had *not entirely succeeded* at the Bar in London. William a'Beckett although relatively old when he was appointed to the Bench in Victoria (and suffering from a cricket injury sustained at Lords) had had to supplement his income at the Bar as a writer. Indeed in Australia he apparently wrote under a pseudonym in the Argus magazine even whilst a Judge, until he was exposed.

20. But in another respect the law in the Colony was to his advantage for following his wife's death he married her younger sister, an offence in England but not in the Colony.

20. a'Beckett was not the only Judge to supplement his income by writing. Meanwhile in Queensland as they say (and say quite a lot at present) *Lutwyche* had been appointed the first Judge of the Supreme Court in 1859. A writer, he had worked on a newspaper with Dickens.

21. Lutwyche could be remembered for his fair summings up. For example "if the prisoner did not commit the murder, who did?" – showing the enquiring mind which came to [be] the hallmark of our Australian Judges. He can also be credited with what became almost an Australian custom i.e. suing the Fairfax Corporation for defamation – when it attributed to him an article which apparently reflected adversely on Australian womanhood. Perhaps the subject matter of the article did not commend itself too much to the (male) jury for they awarded him two pounds damages.

22. But lest it be thought that it is only recently that Queenslanders have shown their ability to add up figures (or sums of money) the first Chief Justice, James Cockell, although not a writer was a mathematician. Indeed he showed the uncanny ability to be able to move directly from his paper on a certain sextic algebraic equation to proceed to draft the "Jurisdiction in Homicides Act".

23. One can of course only speak of men in the law at this time. Indeed it is a little difficult to refer to women in the law in this context. The first female graduate in Law in Australia (N.S.W.) graduated in 1902. If she had wanted to practice in New South Wales she would not have been able to do so until 1921 – when enabling legislation was passed.

Conclusion

24. Law is sometimes described as the dead ruling the living. The personal background and eccentricities of these gentlemen is [of] no real importance now, except to *entirely desperate* after dinner speakers. It is only what they utter in Court that remains for us.

25. Our Judges now *are* lawyers; they don't take snuff (or at least I don't think they do); they tend to enjoy wine (and ensure each of the States have access to it) but they don't sell it to us; they don't fight duels – (with pistols) – and I suspect, sadly, they don't receive the equivalent income. I'm not sure if they write under assumed names.

26. In one respect however our Judges (and the Bar) [are] identical[] with those early gentlemen. I refer to our dress. The S.M.H. [*Sydney Morning Herald*] (during a heatwave in 1896) admonished the profession for what it described as an *unsuitable* and *unhygenic* mode of dress. The reluctance to dispense with clothing which took no account of climate, it attributed to "superstition": the journalist thought a solution would be forthcoming in the 20th century. As we approach the 21st century it may be that the need for ritual and symbolism is even greater.

(toast)

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