

# Sketches on Territory Legal History

## The First Supreme Court Sitzings in the Northern Territory

By the Hon. Justice Mildren

Darwin, or Palmerston as it was then known, was founded on February 6th 1869 when George Goyder, then Surveyor-General of South Australia, landed at Port Darwin with his party to undertake the survey of town and country allotments in accordance with the *Northern Territory Act 1863-68 (SA)*.

With the discovery of gold, the new settlement flourished and lower courts, including mining warden's courts, were soon established. Originally such of these courts as sat in Palmerston were conducted on the verandah of the Residency (or Government House, as it later came to be known) until the first courthouse was built. This was a wooden structure situated at The Esplanade on the present site of the Administrator's office, which was completed and opened on February 14th 1874<sup>1</sup>, although it was apparently not used for court hearings until May 8th 1874, when there was a ceremonial sittings with "a few appropriate remarks" made by Dr James C Kaufmann, LL.D.<sup>2</sup>, presumably representing the local profession which consisted of himself, Mr William James Villeneuve-Smith and a Mr Rudall.

Among the many legal problems facing the new colony, were disputes involving claim jumping and other disputes as to title in the warden's courts, due in part to inadequacies in the then *Gold Mining Act*, and in part to the ineptitude of the Government Resident, Capt. Bloomfield Douglas, who failed to ensure that miners were able to obtain appropriate legal title to their tenements. By 1873 these problems led the government of South Australia to send the Commissioner of Crown Lands, The Hon. Thomas Reynolds to the Territory on a fact finding mission. Reynolds completed his report by the end of July 1873<sup>3</sup>. One of the results of his inquiry was to

draw attention to the difficulties facing litigants who might wish to approach the Supreme Court. But, the problem of criminal trials for serious offences was seen as being particularly acute. In July 1874, the *Northern Territory Times* called for urgent legislative action to deal with the problem:

*His Honour, Justice Dean Mildren has agreed to write a series of articles on the history of this jurisdiction.*

*Balance is delighted to present the first of these here and looks forward to presenting further sketches in later issues.*

"The absurdly cumbersome, expensive, and inconvenient method of bringing prisoners and witnesses to Adelaide in cases of committal to the Supreme Court, cannot be allowed to continue."<sup>4</sup>

In the meantime, the South Australian government considered a bill to establish a Supreme Court of the Northern Territory of Australia to exist as a separate court from the Supreme Court of South Australia. The court was to exist for one year, after which all suits were to be transferred to the Supreme Court of South Australia. However, the bill was defeated and instead it was decided to send a circuit judge periodically. By August 1874, the N.T. Times reported:

"We believe there is some probability of a Judge being sent to the Northern Territory at an early date. The public will be glad of this, if it is only with the hope that a change will be commenced in the manner of conducting the business of our Courts. The "scenes" which take place at present between counsel and

magistrates are most discreditable, and are calculated to bring the administration of justice into contempt."<sup>4</sup>

Undoubtedly the administrative inconvenience of having to send witnesses including police officers all the way to Adelaide for serious criminal trials was the main reason which prompted the decision.

The first sittings were scheduled to commence on February 8th 1875<sup>7</sup> before His Honour, Justice William Alfred Weir, the most junior judge of the Court, but, as the *SS Gothenburg*, upon which the judge and his party had sailed to Palmerston was late, the sittings did not commence until Wednesday February 10th, a notice in the meantime having been fixed to the door of the Court adjourning the sittings from day to day. Also on the *Gothenburg* was the Judge's associate, Lionel James Pelham, and the Crown Prosecutor, Joseph James Whitbaker.

The list consisted of four matters: *R v Ah Kim*; *R v Ab Doolah*; *R v Charles Christianson alias Johnson*; and *R v Henry Hazel*. The sittings commenced with His Honour's commission being read by his associate. His Honour having dealt with applications for exemption from jury duty, Ah Kim was arraigned on a charge of "having committed an unnatural offence at Palmerston on 25 April 1874" to which he pleaded guilty. Ah Kim's counsel, Villeneuve-Smith, asked for a special mixed jury, and accordingly six 'foreigners' were sworn in<sup>9</sup>. I expect that the jury was a *jurymedietate linguae*, a species of jury which at common law was allowed both civil and criminal trials if one of the parties was an alien, not speaking understanding English. Such juries were composed of six ordinary jurors, and of the accused's own countrymen<sup>10</sup>. The

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is the only known instance of a jury of this kind in the Northern Territory.

The report in the *N.T. Times* of the evidence in the case coyly suggests that the witnesses said much the same as they had said at the committal. After summing up, the jury having retired for about ten minutes returned saying they could not agree, the six Englishmen being of the view the prisoner was guilty, but "the Chinamen and Malays" being in doubt. The Judge ordered them to return for further deliberation, and after a "short time", the jury returned with a verdict of guilty with a recommendation that his pre-trial custody be taken into consideration. Wearing J sentenced the prisoner to imprisonment for life with solitary confinement (the only sentence available), his Honour pointing out that this did not mean solitary confinement for the whole of every day, and also that a remittance of a good part of the sentence was usually given by the Executive. Another charge against Ah Kim was not pressed. A few weeks later, Ah Kim escaped from custody and committed suicide.

Later the same day, the second trial, *R v Ab Doolah*, began on a charge of larceny. The prisoner, an Arab, conducted his own defence. The Crown case was that one John Williams had, at Southport, on July 10th 1874, spent a night at a public house in the same room as the prisoner. When he awoke he discovered a pouch containing money orders and silver was missing, the money orders and pouch being later found in the possession of the prisoner. The prisoner's account was that he had found the items in the bush. The jury entered a verdict of not guilty, and court was adjourned for the day.

On Thursday February 11th, proceedings began with the trial of Charles Christianson alias Johnson, for having, at Pine Creek, fired a pistol at Charles Keenan with intent to kill him. The accused was represented by Villeneuve-Smith. The Crown case was that the accused and Keenan had an argument in Keenan's tent over the price of some tinned meat, which resulted in the prisoner getting a loaded revolver and firing it at Keenan's head, the bullet grazing his forehead. The next day,

Keenan saw a bullet mark in a table in his tent (the relevant portion of the table was cut out and tendered in evidence) and the police located a bullet which was also produced. After Smith had cross-examined Keenan at considerable length with a view to showing that Keenan was quarrelsome, that the prisoner was a quiet man up to the time of the dispute and that the mark on the table was not made by a bullet at all, one of the jurors said he felt sick and was unable to continue. The juror was discharged, a new juror was empanelled, the whole jury re-sworn, and the trial proceeded. I presume that the new juror would have had to rely on the other jurors as to what had happened in the trial thus far! After further cross-examination of Keenan, who maintained that the gun could not have been discharged accidentally, his Honour asked the prosecutor whether there was any evidence that the chamber of the pistol which had discharged contained "lead shot" as alleged in the information, as that would be necessary in order to support the indictment. The prosecutor conceded there was not, and his Honour instructed the jury to acquit, which they accordingly did. His Honour in discharging the prisoner,

*"told him that it was a most dangerous practice to present a loaded pistol at any one. In this case it was proved that the prisoner had lifted this deadly weapon against the other man; and supposing he had killed him, what then would have been the prisoner's position? He would have been charged with murder and tried for his life. Probably both he and the prosecutor were the worse for drink on this occasion, and no doubt both were to blame, squabbling as they were over a paltry matter concerning a few shillings. It was a pity that men should fall out about so trivial a matter, instead of living together peaceably, and keeping a bridle on their passions. Moderate drinking was not to be condemned, but excessive indulgence led to crime. He hoped, therefore, that the prisoner (who was now discharged) would take this matter as a caution, and that the public generally would see the evil of such practices as he had referred to."*<sup>11</sup>

The Crown Prosecutor then indicated that there was not sufficient evidence to proceed with the case of burglary against Henry Hazel, and his bail was discharged.

His Honour then thanked the jury, and after commenting that the temperature in the court-room had been less trying than he had been led to believe was usually the case, observed that "things were not so bad as they had sometimes been represented to be," that the community was an orderly and law abiding people, and that the fact that there were only three trials after such a long time (presumably he meant since the committal of Ah Kim) "looked well and spoke volumes for the character of the Northern Territory." The sittings then terminated.

Regrettably, on the return journey to Adelaide, the *SS Gothenburg* sank on a reef in Flinders Passage off Townsville on February 24th 1875 following a cyclone, with great loss of life including that of Wearing J, his associate, the Crown Prosecutor, the Hon. Thomas Reynolds (who had returned to the Territory to prospect for gold) and his wife, as well as of those of a great many other prominent citizens. This tragedy persuaded the government that circuit court sittings in Palmerston was too hazardous, and some other solution had to be found. As a consequence, this was to be the first and only occasion that a judge of the Supreme Court of South Australia ever sat in Palmerston, although it took the government until September 1875<sup>12</sup> to announce the decision, and prisoners who had been committed for trial and not granted bail since February had to wait until December 21st 1875<sup>13</sup> before other arrangements were put into place and their trials could be heard.

## ENDNOTES

1. N.T. Times 20/2/1874
2. N.T. Times 20/2/1874
3. see generally *Pegging the Northern Territory*, Timothy G. Jones (N.T. Government Printer, 1987, Ch 1)
4. N.T. Times 17/4/1874
5. N.T. Times 15/8/1874. The "scenes" referred to were a reference mainly to the

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# Supreme Court Library Notes

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personal injury : two recent law reform reports examined" by Frances McGlone. Torts Law Review. Volume 6. Pages 81-90

"Tort litigation in the context of intra-familial abuse" by Joanne Conaghan. Modern Law Review. Volume 61. 1998. Pages 132-161

## Universities

"Judicial opinion, the Federal registration of FAUSA and the Dawkins restructuring : concepts of the University and Sui Generis revisited" by Helen Finlay. Australian Journal of Legal History. Volume 3. 1997. Pages 205-236

## Work safety

"Employers face maximum penalty for at-work deaths" by Joe Catanzariti. Law Society Journal. Volume 36. May 1998. Page 36

## NT LEGISLATION

Legislative changes in April 1998, notified in the *NT Government Gazette*

## New Acts

21/1998 Mining Amendment Act (N/C)  
22/1998 Coroners Amendment Act (29.4.98)(S.8-3.4.94)  
24/1998 Australasia Railway Corporation Amendment Act (25.8.97)  
25/1998 Unit Titles Amendment Act (N/C)  
26/1998 Water Supply & Sewerage Amendment Act (30.3.98)  
27/1998 Interpretation Amendment Act (30.3.98)  
28/1998 Agents Licensing Act (6.5.98)  
30/1998 Unclaimed Superannuation Benefits Act (30.4.98)  
31/1998 Lands Acquisitions Act (1.5.98)

## New regulations

Nil

## New reprints

Radiation (Safety Control) Act - Reprinted 5.5.98

Water Supply & Sewerage Act - Reprinted 5.5.98.

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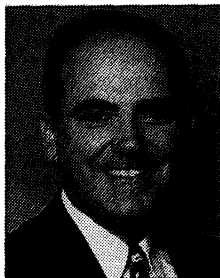
performances of W. Villeneuve-Smith who took particular delight in treating the local Magistrates, justices of the peace and wardens with utter contempt.

6. N.T. Times 13/2/1875
7. N.T. Times 16/1/1875
8. N.T. Times 13/2/1875
9. N.T. Times 13/2/1875
10. Such juries are now abolished vide Jurie Act, s65
11. N.T. Times 13/2/1875
12. N.T. Times 11/9/1875
13. The government decided to grant special permission to persons supposedly suitably qualified to exercise the powers of Judge of the Supreme Court. This required the passage of special legislation. The first sittings by a commissioner were held on December 21st 1875 but that is another story. This system remained in place until 1884.

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