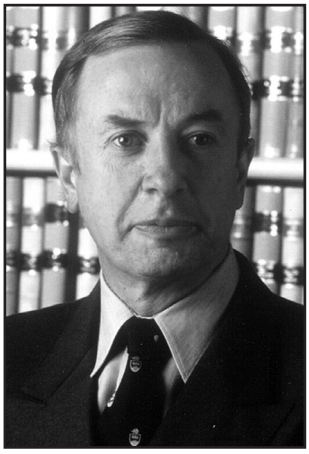
Foreword

BY THE HON J J DOYLE AC
CHIEF JUSTICE OF SOUTH AUSTRALIA



The system of government inherited by Australia's Commonwealth and State Governments is one that finds no need to define exhaustively by law the functions and powers of its principal institutions and offices.

Much of what is significant is left to be regulated by the common law, which can change over time, and by conventions and practices. When it is necessary or convenient to resort to statute law, as often as not the statute will deal with a mix of core and peripheral matters, still avoiding a complete and systematic treatment of the subject.

The contents of the Constitution of the Commonwealth and of the Constitution Act 1934 (SA) illustrate this point. Neither of them defines comprehensively the powers and functions of the three arms of government, the legislative, the executive and judiciary. They say relatively little about the principal offices that they assume or create. Sometimes provisions that one would expect to find in a constitution are found in other legislation.

This explains why the office of Chief Justice is one that lacks legal definition in our Constitution Act, and even in the Supreme Court Act 1935 (SA). Characteristically, the Constitution Act refers to the office of

Chief Justice only in provisions relating to the appointment of the Electoral Districts Boundaries Commission. It does not refer to the Supreme Court as such. In two short provisions it deals only with the tenure of the office of a judge, and with removal from office of a judge. The Supreme Court Act is not much more informative about the office of Chief Justice. Section 9A provides that the Chief Justice is "the principal judicial officer of the Court", and is "responsible for the administration of the Court". Part 6 gives the Chief Justice control over appointments to a number of administrative offices in the Court. Section 45 gives the Chief Justice power to direct at what "times and places" the Court will sit. Beyond that, little can be gleaned from the Supreme Court Act about the role of Chief Justice.

It is characteristic of our legal system that the law will, as in the case of South Australia, state the qualifications for the office, make some general statements about the powers of the office holder, and leave all else to be deduced from the manner in which the Court functions and from occasional glancing references in statute law to functions of a Chief Justice.

This comes as no surprise to one brought up in a common law system. The common law itself is a system of law the content of which must be deduced and identified from the manner in which the system operates, and from individual decisions.

Such systems have the advantage of flexibility. But with that comes a lack of systematic legal definition that surprises those familiar with other legal systems.

This lack of definition also gives rise to some difficulty in describing the office, and in identifying change in the manner in which it is discharged. The difficulty arises because so much depends on the practice of the office holder, and the manner in which the office is discharged from time to time. And these details are barely visible to those outside the system, because they are largely unrecorded.

Dr Emerson's study of the lives of the five Chief Justices who have held office since Federation is an attempt to remedy the lack of information about this office. Reflecting the point that I have made, he says:

> Because of the importance of personal interpretation of the role, the book is divided accordingly into chapters on each successive Chief Justice. This biographical structure acts as a foundation for a more socio-historical exploration of the way each Chief Justice dealt with

not only changing community expectations of justice but broader changes in society overall.

This approach puts each of the five office-holders firmly in the context of his (they were all men) time and place.

Not surprisingly, the chapters tell us as much about the history of the State, and about the relationship between judicial office and the administration of justice on the one hand, and the community on the other, as they do about the individual office-holders.

Between 1900, when Sir Samuel Way held office, and 1995, when the Hon LJ King AC retired, the law became increasingly pervasive in our society and, I believe, more complex.

Reflecting that, the five chapters reveal a gradual process through which the Chief Justice changed from being a leading actor in the life and affairs of the State, to an office holder whose working life (as Chief Justice) became the law and the work of the courts. It would not be practical, and probably not acceptable, for a Chief Justice to be engaged in the life of the State in the way in which earlier Chief Justices were.

The strength of Dr Emerson's approach to the subject is the way in which it reveals the role of Chief Justice, and the gradual change in that role, in its socio-historical aspect.

Inevitably, the book is unable to tell us how each of the five Chief Justices functioned within his Court, although some of that can be deduced. This kind of detail is lost in the past, because it would never have been recorded.

A point that Dr Emerson's treatment brings out is the manner in which the term of office of my predecessor, the Hon LJ King AC, serves as a marker in the changing nature of the office.

Changes in his time, largely initiated by him, resulted in the Chief Justice assuming a more significant role in the administration of the Supreme Court and of the other Courts of the State. They also resulted in him, more clearly than in the past, representing to the community the Courts and the administration of justice. There is a noticeable contrast between the exercise of the office in his time, and the exercise of the office in the past.

His tenure can be seen, I think, as marking the beginning of a new phase in the office of Chief Justice. It is a change which occurred, around about this time, throughout Australia. The Chief Justice began to be seen

as representing the judicial arm of Government, and as responsible for the efficient and effective administration of justice in a way in which that office holder had not been previously so regarded.

The Honourable Dr JJ Bray AC, the predecessor of the Hon LJ King AC, bridged what we now see as an unwanted gap between the Courts and the community. The Hon LJ King AC continued on that path, but as well developed aspects of the role of Chief Justice that in earlier times had not been contemplated.

This book contains much of interest to the general reader, not only to those who are part of or linked to the legal profession. As well, through exposing the link between the administration of justice and the community, by describing the discharge of the office of Chief Justice, the book tells us a good deal about the life of our State and the administration of justice during the twentieth century.

J J Doyle
Chief Justice's Chambers
Adelaide, June 2006

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Preface and Acknowledgments

Occasionally, historical books are written according to strict conventions, but I adopted the view during my doctoral thesis that material should dictate the form, not the reverse. Hopefully readers, particularly professional historians, will forgive me for this slightly idiosyncratic approach.

This means that each chapter in *First Among Equals* will vary in individual character as it follows an otherwise similar path. Sir Samuel Way, for example, left thousands of letters revealing strong opinions which gave his chapter a flavour that, for example, differs from Sir George Murray's, who revealed considerably less in the way of personal opinions in his correspondence.

The chapters also differ according to the photographs available. There are fewer for Sir Samuel Way, because photographic technology was still in its early days during his lifetime. In later periods, however, photographs existed but we found ourselves under the yoke of new copyright laws that have hardened under the Howard government. No longer can a photograph in copyright (after 1 January 1955) be published without specific permission from its copyright owner. Making "all attempts" at locating copyright owners is no longer enough, although unworkable restrictions such as these are already under review. In the chapter on

Dr Bray I was unable to locate copyright holders for many excellent photographs taken after the beginning of 1955, and held in the State Library of South Australia's archival collection, so I have compensated by publishing a relatively disproportionate number taken prior to that date.

But not only photographs have suffered from these recent laws. In the chapter on Sir George Murray I was unable to publish a one-page letter he wrote as a ten-year-old in 1874 because it had never been published. The fifty-years-after death rule (now increased to seventy in any account) did not apply since the letter had never been published. I am under the impression that generally I am a logical person and I remain completely unable to comprehend such a restriction. This law is under review too.

But I hope you will enjoy this book. I have attempted to maintain a conversational style and bring long-forgotten events to life as best one can. I found the lives of these Chief Justices fascinating and the background history of the developing South Australia held some surprises. I am hoping it will make a contribution to putting South Australia's history on the map. There is more to Australian history than Captain Cook and Ned Kelly.

The task of researching and writing this history required the kind assistance of many people. I should first thank the Hon. Justice Tom Gray who commissioned me to write it for the John Bray Law Chapter of the University of Adelaide's Alumni Association.

I needed a base and Kath McEvoy, the Dean of Law in 2002 offered me the most amazing environment an historian could hope for: the Law School's Staff Library. It will be the only period in my life when I benefit from funding cuts. The Staff Library had ceased being restocked around the mid-1990s and was falling into disuse as it grew increasingly out of date. But I was only interested in the period that ended then. There I spent over two years, surrounded by many of the old books and journals I needed, some dating back to the nineteenth century or further. The new Dean, Professor Paul Fairall, continued the Law School's support and found me an office when funds finally became available to transform the area into a 21st-century Moot Court.

I thank the Law Foundation under the Presidency of the Hon. Justice Margaret Nyland AM for awarding an initial grant so the research could begin. For the additional funding that enabled me to complete the book over the period it required, I thank former University of Adelaide interim Vice-Chancellor Professor Cliff Blake AO.

Michael Jacobs did a superb job editing not only the text but also the final layout.

The book would have been substantially lacking without help and advice from the following people: Michael Abbott QC, Sam Abbott, Angela Bentley, Peter Burdon, Sally Burgess, Hon. Clyde Cameron AO, Rob Cameron, the late Professor Alex Castles, Ray Choate, Dr Steven Churches, Pam Cleland, Anthony Crocker, Satish Dasan, Di Dawson, Garry Downs, Hon. John Doyle AC, John Edge, Hon. Bob Fisher QC, Caitlin Gill, Bruce Greenhalgh, Sandy Hancock, Lorna Hartwell, Patricia Hawke, Henry Heuzenroeder, Panita Hirunboot, Helen Horton, Hon. Sam Jacobs AO QC, Kate Jennings, Hon. Elliott Johnston AM QC, Dr John Keeler, Hon. Len King AC QC, Carolyn Lam, Mrs Sarah Lang, Hon. Christopher Legoe QC, Professor Horst Lücke, Professor Fred McDougall, Prue McKechnie, Professor James McWha, the late Professor Brian Medlin, Sue Milne, Rowan Mitchell, Hon. Robin Millhouse QC, the late Hon. Bob Mohr, Robyn Nagel, Master Peter Norman, Hon. Justice John Perry, Sharon Polkinghorne (*Advertiser*), Professor Wilfrid Prest, Margaret Priwer, Sandra Ross, Professor Tom Shapcott, Kym Tilbrook (*Advertiser*), Chris Tonkin, Mary Walters, Peter Ward, Allayne Webster and Sarah Wickham. I am also specially grateful to Prue McDonald, Anthony Laube and Joyce Garlick in the Reading Room of the State Library for their help. If I have inadvertently omitted anyone, I apologise.

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September 2006

ILLUSTRATIONS: KEY TO ABBREVIATIONS

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Chapter 1

Introduction

The Office of Chief Justice

The office of Chief Justice is part of the common law legal system that South Australia inherited from Great Britain. Yet the office predates even common law, established in the early thirteenth century by Henry II. It is the direct descendant of Norman customary law's "Chief Justiciar", brought to England in 1066 by William the Conqueror.[1]

After a thousand years little formal detail exists as to what the office entails. There is no modern-style "job description" listing the duties of the Chief Justice in the South Australian statutes, nor in those of England. As a result, the most important component of the office is without doubt the personality of the individual who fills it. This is why literature on Chief Justices tends to be as much biographical as historical. It is through the eyes of individual Chief Justices that we discover how they interpret the formal role of the office, and how well they adapt to the particular social and historical changes of their time.

What is the difference between the Chief Justice and other judges in the court? How is a Chief Justice chosen? Why would there be

1 John Campbell, *The Lives of the Chief Justices of England* p. 1.

differences between one Chief Justice and another? How do they know what to do the first day at work as Chief Justice?

The most obvious duty of the Chief Justice is to sit as a judge on trials and appeals. As a judge, she or he is equal to any other judge. Because the independence of Supreme Court judges in South Australia is protected by the Constitution, the Chief Justice cannot exert any influence over the judgment of another judge. The clear signs of this judicial independence are those Full Court appeal judgments when the Chief Justice is the dissenting judge. So it is not as a judge that a distinction between the Chief Justice and the other judges can be found. Nevertheless, Kenneth Umbreit found in his study of the Chief Justices of the United States that the Chief Justice can exert influence in subtle ways:

> He is the presiding officer both in the court room and in the conference room. As such, he has considerable control both over the course of the argument before the judges and over the course of the discussion among the judges. He can direct attention to a point or away from it more easily than any of his colleagues.[2]

This unofficial influence at the Full Court stage has perhaps grown increasingly important as the number of judges has grown. In a small court the Chief Justice may sit on as many trials as appeals. But as the court grows in size, so does the number of appeals, and the Chief Justice generally sits on the appeals rather than trials.

The key date in the history of the office of Chief Justice in South Australia is 1993. Before that date all the courts were under the administrative control of the Attorney-General. The Chief Justice fulfilled judicial and ceremonial functions, but had little say about the administration of the courts. The South Australian Courts Administration Act 1993 delineated the Chief Justice's administrative role as the presiding officer of the Courts Administration Council, which oversees all the courts in South Australia. The Chief Justice since then, therefore, has been the administrative head of the entire State's court system, not just the Supreme Court. The power of being head is that no proposal can be a decision of the Council unless the Chief Justice supports it.

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2 Kenneth Bernard Umbreit, *Our Eleven Chief Justices*, p. xiii.

The formal qualifications of a Chief Justice are as indeterminate as the job description. The South Australian Supreme Court Act 1935 only distinguishes the Chief Justice from puisne (ordinary) justices or Masters by the length of time that they must have spent in legal practice to qualify for appointment:

> The Chief Justice must have been a practitioner of the court at least 15 years standing, or a Puisne Judge; a Puisne Judge must be a practitioner of the court of at least 10 years standing and a Master must be a practitioner of at least 7 years standing.[3]

It is crucial to understand then that without any clear delineation of duties, or of qualifications, a high degree of discretion is allowed both in the choosing of a Chief Justice and in the interpretation of what the office means. The person who makes the recommendations to Cabinet for judicial appointments is the Attorney-General. This means that each person appointed Chief Justice, even if not the first person asked, must conform to a large degree to the image that the incumbent Attorney-General has of the office of Chief Justice.

According to the English custom, the Attorney-General has also had the possibility of appointing himself. This has happened on one occasion in South Australia, and that was when Samuel Way recommended himself in 1876. This caused some controversy, which we discuss later, but Way proved more than just a good judge; under him the office of Chief Justice in South Australia became very prominent.

The legal system that South Australia inherited from England in 1836 was a mess. Six hundred years of evolution had produced parallel and conflicting court systems without clearly defined boundaries to their jurisdictions. Litigants could take a case all the way through to the House of Lords only to discover that from the very start they had chosen the wrong court. There were twenty-year waits in the Chancery Court for estates to be settled. The legal profession bickered about the duties to be carried out by its various divisions: barristers, solicitors, proctors, attorneys and scriveners overlapped in many areas.

Reform was in the air, pushed by writers and philosophers such as Jeremy Bentham, John Stuart Mill, Robert Owen, Thomas Arnold,

3 Supreme Court Act 1935, sections 8 and 9.

Thomas Carlyle, Charles Dickens and Mrs Gaskell. One of the city of Adelaide's streets is named after Jeremy Bentham. England had to wait for the Judicature Act of 1873 to get some relief, but South Australia, the new colony, benefited straight away. From the purely practical point of view, the new colony had not the population to support more than a single court system. Thus while England then had four primary court systems and four heads, the Chief Justice of the King's Bench, the Chief Justice of Common Pleas, the Chancellor of the Chancery Courts and the Chief Baron of the Exchequer, in the colony a single judge was appointed to satisfy their entire combined jurisdictions.

That judge was Sir John Jeffcott, but he was not South Australia's first Chief Justice. Jeffcott had been Chief Justice of Sierra Leone and the Gambia, in Africa, but the sole judge of the yet to be settled colony in Australia was not given that title – he was just the "Judge". Jeffcott arrived in South Australia in May 1837. He had been unable to travel on the Buffalo as creditors were waiting for him on the quay. As well as leaving unpaid debts behind him, he had also killed a man in a duel in Exeter. He was only forty-one, and therefore could have lived until the title of Chief Justice was introduced. But his life was as short as it was colourful, and he drowned in December 1837 at the mouth of the River Murray, on his way to Tasmania to see his fiancée.

He was temporarily replaced by Henry Jickling, a myopic eccentric who wore bright green glasses, until Charles Cooper arrived in 1839. Cooper was sole judge until 1850, when Dr George Crawford was appointed Second Judge. Crawford – who held a Bachelor of Arts, and both a Bachelor of Laws and Doctor of Laws from Trinity College, Dublin – unfortunately died two years later at just forty and was replaced by Benjamin Boothby. Around this period, according to Ralph Hague, the push began for the title of "Chief Justice":

> Although both Sir John Jeffcott and Sir Charles Cooper were from very early days frequently styled "Chief Justice", even in acts of parliament, the title was not legally created until 1856. Mr Justice Cooper had asked for it in 1844, without result. When Mr Justice Crawford was appointed, the judges were styled "First Judge" and "Second Judge". In 1853, Mr Justice Boothby, with an eye to his future prospects, recommended that the senior judge should be called Chief Justice and that his successor in that office should be

> nominated thereto by the Crown. The title of Chief Justice, he said, was given to the head of the Supreme Court in all the other Australian colonies, and in every British colony where there was more than one judge.[4]

Charles Cooper's attempt to formally call himself "Chief Justice" in 1844 had been ignored, and he does not appear to have tried again. Boothby, however, never let go of an issue. He was a pedantic Anglophile who insisted on everything being done as if everyone were still in London. His continual obstruction of the business of the courts drove Charles Cooper to retire early in 1861, and eventually led to Boothby's own removal in 1867. But in the 1850s, Boothby was one of those who pressured successive governments to retitle the judges' offices.

The titles of "Chief Justice" and "Puisne Justice" were finally approved on 19 June 1856 in the first section of Act No. 31 1855-1856:

> That the said Supreme Court, so established as aforesaid, shall continue, and shall be holden by or before one or more Judge or Judges appointed, by the Governor, with the advice and consent of Executive Council, one of whom shall have the title of Chief Justice, the present Judges being Charles Cooper, Esquire, and Benjamin Boothby, Esquire; and that the said Charles Cooper shall be the first Chief Justice (…).

The Act then described the functions of the Supreme Court and its officers, but did not suggest any distinction between the role of the Chief Justice and a puisne justice. After Richard Hanson was appointed Charles Cooper's successor, not him, Benjamin Boothby took up this lack of distinction before a select committee of the House of Assembly in 1861:

> I would remark on the great mistake made by the Government and others, as to the Judges; it would seem as though the other Judges are regarded as inferior in power and functions to the

4 Ralph Hague, *Hague's History of the Law in South Australia*, 1837-1867, p. 183.

> Chief Justice. Correspondence goes on between the Government and the Chief Justice, and I know nothing at all about the matter, until it has been decided ... In this Colony the Chief Justice can do nothing which the other Judges cannot do. The duties are precisely the same. It is merely a title given to the headship of the Supreme Court, and the Chief Justice is simply primus inter pares.[5]

How correct was Justice Boothby? If the duties of all the judges are indeed the same, then how can the Chief Justice be, as Boothby described him, a "first amongst equals"? Yet the very term does suggest a distinction.

In fact, the "first among equals" term encapsulates the essence of the office of Chief Justice. As we already mentioned, as a judge she or he will be on equal terms with the other judges. But in relation to the outside world, as titular head the Chief Justice will be the first point of contact in regard to fundamental matters concerning the courts.

In South Australia there is no formal, constitutional separation of powers. Nevertheless, there is a constitutional judicial independence, and in practice, this has produced an unofficial separation of powers between the judiciary, and the legislature and executive.[6] By extension, the Chief Justice is head of this judicial arm of government. Other heads, such as the Premier and the Governor, consult the Chief Justice about matters concerning their internal relationships. For the courts, the Chief Justice is the spokesperson for the other judges and magistrates. Since Len King's term of office (1978-1995), he has also become a spokesperson to the media, with the aim of increasing public understanding of the courts and justice.

The Chief Justice also had a traditional role as a substitute Governor. On the official table of precedence, the Chief Justice is seventh – after the Governor-General, the Governor, the officer administering the government, the Lieutenant-Governor, Governors of other states, and the Premier. But if both the Governor and the Lieutenant-Governor are absent, then the Chief Justice acts as the "officer administering

5 Hague, as above, p. 184.

6 Bradley M Selway, *The Constitution of South Australia*, p. 120.

the government".[7] From 1891 until 1967 the Chief Justice was in fact always the lieutenant-governor, but John Bray declined to accept the lieutenant-governorship because he believed that the judicial and executive arms of government were best kept apart. The Chief Justice swears in new Governors, newly elected members of parliament and new puisne justices.

The Chief Justice to some degree controls the membership of the senior bar. All applications for Queen's Counsel must be made each year to the Chief Justice, and although they consult with the other judges and the South Australian Bar Association before any recommendations to the Attorney-General, only those applicants the Chief Justice agrees with ultimately will be recommended. But the Chief Justice is not – as is the Chief Justice of the United States – the titular head of the bar. That role for centuries in England, and more recently in Australia, is reserved for the Attorney-General.

From 1883 until 1983 the Chief Justice was also almost always the Chancellor of the University of Adelaide. The first Chancellor of the University was Chief Justice Richard Hanson, from 1874 until he died suddenly in 1876. His replacement as Chancellor was Bishop Short, head of the Church of England in South Australia. Bishop Short resigned in 1883 and went to England and died the same year:

> A successor was not immediately appointed and the idea was raised in the press that the Church of England was waiting for Dr Short's successor as Bishop, so as to make the office of Chancellor an attachment in perpetuity to the Bishop's throne.[8]

But Hanson's successor to the Chief Justiceship, Samuel Way, was voted Chancellor. Except for two separate periods of six years each, the Chief Justice would also be the University of Adelaide's Chancellor for the next hundred years.

The role of the Chief Justice has changed somewhat from the first days of the King's Bench in fourteenth-century England when his role was primarily to preside at treason trials and ensure that those ac-

7 Same, p. 95.

8 W G K Duncan and Roger Ashley Leonard, *The University of Adelaide 1874-1974*, p.9.

cused were found guilty and executed.[9] But over the mere hundred year period that we study in this book, the office has changed little in its essential duties. It has no doubt faded in public prominence from the days when Samuel Way was Chief Justice. But South Australia was smaller then – 160,000 people lived in the capital and 200,000 in the rural areas. And Way dominated in many other areas during the founding of institutions like – to name only some – the University of Adelaide, the Art Gallery, the Museum, the Children's Hospital, and the Methodist Church. He also filled in as Governor when that role was more prominent.

From Federation until Len King's retirement in 1995, the State of South Australia changed dramatically. It added a million people to its population. The two world wars and the Depression stripped away the old class structure. Technology and industry replaced the old rural economy. Mass-produced cars and airlines gave ordinary people unprecedented mobility. Electricity, public housing, multicultural immigration, radio and television broadened lifestyles and perspectives beyond the imagination of the Victorian age. A moral and cultural revolution in the 1960s challenged and revised generations of barely questioned values.

How well did each Chief Justice adapt the courts to these changes? Should he have changed them at all? Surely the basic principles of justice do not change? One of the hardest roles of a Chief Justice is to reconcile contemporary expectations with unchanging principles. When Gerard Brennan was being sworn in as Chief Justice of the High Court in 1995 he stressed that a court of law is not a "parliament of policy":

> Judicial method is not concerned with the ephemeral opinions of the community. The law is most needed when it stands against popular attitudes sometimes engendered by those in power and when it protects the unpopular against the clamour of the multitude.(…)
>
> Judicial method starts with an understanding of the existing rules; it seeks to perceive the principle that underlies them and, at an even deeper level, the values that underlie the principle.[10]

9 Anthony Mockler, *Lions Under the Throne*, p. ix.

10 http://www.hcourt.gov.au/brennanj/brennanj_swearing.htm

Even a long-serving judge can make a mistake in the approach to "judicial method". The whole of the South Australian criminal justice system was shown to be out of touch in 1959 by the Rupert Max Stuart trial and the Royal Commission that followed. Although Stuart was still found guilty of murder, several aspects of the case, from the circumstances of the initial arrest and confession to the trial, appeals and Royal Commission, revealed serious systemic flaws. Chief Justice Sir Mellis Napier was not the only person guilty of error but most certainly the most important. The Stuart case radically diminished his influence over his judicial colleagues, and the Supreme Court's reputation between then and his retirement in 1967 was at its lowest ebb.

The five Chief Justices come from surprisingly different backgrounds. Each one filled the office differently; emphasis on one or other aspect of the office varied according to individual personality. For that reason people sometimes speak of the "Murray court" or of the "Bray court". All except for John Bray remained for over twenty years - Samuel Way was Chief Justice for almost forty. The lengthy periods of office, in contrast with the much shorter terms of the other heads of government, gave stability to South Australian justice. The lengthy terms also gave each Chief Justice the opportunity to mould the office according to their own interpretation, and distinguish South Australia from other jurisdictions. South Australia had just seven Chief Justices in 156 years (if we count Charles Cooper from his arrival in 1839). Over that period England had fifteen (from Denman to Taylor); New South Wales, fourteen (from Dowling to Gleeson); Queensland, sixteen (from Cockle in 1861 to Macrossan); and Victoria, ten (from a'Beckett to Phillips).

Because of the importance of personal interpretation of the role, the book is divided accordingly into chapters on each successive Chief Justice. This biographical structure acts as a foundation for a more socio-historical exploration of the way each Chief Justice dealt with not only changing community expectations of justice but broader changes in society overall. This is a somewhat unconventional methodology, risking criticism from both biographers and historians, but one I felt was born of the topic and hopefully yields the best results.

Chapter 2

Sir Samuel Way (1876-1916)

The Lead into Federation

When the province of South Australia became the State of South Australia on the first day of January 1901, Sir Samuel Way was its "most distinguished citizen" according to J J Pascoe's *History of Adelaide and Vicinity*, published that same year. But Way was not in the State for that famous New Year's Day. He was part of the South Australian delegation for the proclamation of the Commonwealth in Sydney with Premier Frederick Holder and ex-Premier and constitutional draftsman Charles Kingston, who would subsequently be a minister in the first federal government.[1]

Way held an impressive list of offices and honours: Chief Justice since 1876, Chancellor of the University of Adelaide since 1883, Lieutenant-Governor since 1890, Australasian representative on the Judicial Committee of the Privy Council since 1897 and a Baronet since 1899. He was also Grand Master of the United Grand Lodge of South Aus-tralian Freemasons, President of the Public Library, Museum and Art Gallery, President of the Adelaide Children's Hospital and on the board of several other organisations.

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1 Alex C Castles and Michael C Harris. *Lawmakers and Wayward Whigs*, pp. 223-224.

Samuel Way was involved in founding an impressive array of South Australia's core institutions. Not long after being appointed Chief Justice he convinced the government of the need for the Adelaide Children's Hospital, and in June 1878 he laid its foundation stone as Acting Governor. Through his leadership of the Acclimatisation Society, he helped establish Adelaide's zoological gardens on the bank of the Torrens in the early 1880s. He also helped establish North Terrace's reputation as the cultural heart of South Australia. Since 1872 he had been involved in the plans to set up the University of Adelaide, which started teaching in 1876, and he was Vice-Chancellor when it opened its first building – called since 1961 the Mitchell – in 1882. He presided over the building of the Art Gallery next door which opened in 1890, of the Museum next door to the Art Gallery, which opened in 1895 – and of the University's Elder Hall in 1900.

Adelaide during Samuel Way's lifetime was a completely different city from the over-extended metropolis it would later become. At the end of its first year in 1837 its population had reached 2,220. The first colonists lived in tents, and huts of mud or reed, along streets that were mere tracks scratched through the gums between Colonel Light's survey pegs. By 1901 its population had grown to 162,094, and 39,000 of those inhabitants lived in the city centre and North Adelaide.[2] In between there had been a too-often-forgotten sacrifice: the end of thousands of years of the Kaurna people's culture. Even Pascoe in 1901 already recognised the loss:

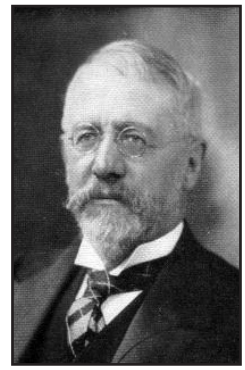
> Soon the opportunity of close observation will be gone, for the Exterminator has immolated nearly all. Contrary to the general opinion, their customs and habits offer supremely interesting matters for study. (…) Few peoples have secured less scientific attention and the omission is almost a slur on the British student.[3]

In King William Street, the towers of the Town Hall and the General Post Office were the tallest constructions in sight. Elsewhere, since commercial buildings and hotels rarely exceeded three storeys, the

2 J J Pascoe (ed.), *History of Adelaide and Vicinity* , p.617.

3 As above, pp. 12-13.

city skyline was noticeably spiked by church steeples and factory chimneys billowing smoke. In the centre of the busy city streets, horses struggled to pull trams laden with workers and shoppers. Grand carriages and humble carts filed by on either side.[4] The first motor car was yet to interrupt the clamour of hooves. The city speed limit was 12 miles per hour (18 km/h). But the drivers of the trams would risk a fine for exceeding 10 miles per hour, or for carrying prostitutes. Beyond the parklands in all directions, the suburbs were scattered unevenly from the sea to the foothills, separated by tracts of scrub so that they resembled a collection of English villages. The metropolitan population at this stage was still less than that of the country – then around 200,000 – and it would be twenty years before metropolitan Adelaide would outnumber rural South Australia.


Sir Samuel Way in 1901 (SCLSA)

The city had infiltrated international literature through the visits of two of the world's most famous writers of the time: Anthony Trollope and Mark Twain. Trollope (1815-1882) arrived in Adelaide as the guest of Thomas Elder in April 1872 during his grand tour of Australia. He wrote eighty pages on South Australia in *Australia and New Zealand*, published in 1873, introducing Adelaide as a "pleasant, prosperous town".[5] The celebrated author praised the Botanic Gardens, the parklands and the buildings, in particular the size of the Town Hall and the Post Office, given the metropolitan population then of only 60,000.

Twenty years later, Mark Twain (1835-1910) arrived by train in the hills and was taken by open carriage down to the city:

> The road wound around gaps and gorges, and offered all varieties of scenery and prospect – mountains, crags, country homes, gardens, forests – color, color, color everywhere, and the air fine and fresh, the skies blue, and not a shred of cloud to mar the downpour of the brilliant sunshine. And finally the mountain gateway opened, and the immense plain lay spread out below

4 Derek Whitelock, *Adelaide 1836-1976: A History of Difference*, p. 134, illustration 45.

5 Anthony Trollope, *Australia and New Zealand*, p. 636.

> and stretching away into dim distances on every hand, soft and delicate and dainty and beautiful. On its near edge reposed the city.[6]

Twain was also impressed by the wide streets, the fine homes and the imposing public buildings. He was especially impressed by the religious diversity of such a relatively small population – it had reached 320,000 – that he published the statistics from a recent census of all the denominations represented. It is true that two-thirds of the population were Church of England (89,271), Roman Catholic (47,179) or Methodists of some kind (76,575). There were also several hundred Jews, Muslims and Confucians. But among the category of "other religions" were listed 3 Cosmopolitans, 9 Infidels, 2 Maronites and one each of Memnonists, Shakers, Hussites and Zwinglians.[7]

Beatrice (1858-1943) and Sidney Webb (1859-1947), the English socialists, arrived in Adelaide in November 1898. Sidney Webb found Adelaide "a charmingly attractive city" that resembled a "German Residenzstadt" – the capital of a little principality, with its parks and gardens, its little court society, its absence of conspicuous industrialism, and its general air of laying itself out to enjoy a comfortable life."[8] Beatrice Webb found Adelaide "perhaps the pleasantest of all the Australian colonies":

> The luxuriously laid out city surrounded by beautiful hills, the pleasant homely people, the air of general comfort, refinement and ease give to Adelaide far more amenity than is possible to restlessly pretentious Melbourne, crude chaotic Sydney, or shadily genteel Brisbane.[9]

The key personalities in the province's original colonisation had all died by 1901, but many of those in influential positions had known them. Way, for example, remembered Henry Jickling (1800-1873) who had filled in as the sole judge of the Supreme Court from when Sir John Jeffcott drowned in December 1837 until Sir Charles Cooper's arrival in March 1839. Jickling had been Master of the Supreme Court when

6 Mark Twain, *Following the Equator*, p. 181.
7 As above, p. 182.
8 A G Austin, *The Webbs' Australian Diary 1898*, p. 93.
9 As above, p. 96.

Way was admitted in March 1861. Charles Kingston (1850-1908), who had been Premier from 1893 to 1899, was the son of George Strickland Kingston, Colonel William Light's Deputy Surveyor. Both George Kingston and William Light were part of the group waiting on the Glenelg shore on 28 December 1836 to greet the arrival of HMS Buffalo at 2pm and witness the proclamation of South Australia as a province of the British Empire.[10]

Early South Australia was governed– to borrow R M Hague's term – by a "reign of squabble". Governor Hindmarsh's quarrels with Charles Mann, his Advocate-General, had begun even before the Buffalo had left England. The enforced closeness of the five-month journey on board the Buffalo founded his hatred for Resident Commissioner James Hurtle Fisher and his scorn for his own secretary George Stevenson. Robert Gouger and Osmond Gilles – Colonial Secretary and Colonial Treasurer respectively – were arrested in August 1837 for fighting in public outside a gin shop in Franklin Street. Even the only person capable of mediating the warring factions – first Supreme Court judge Sir John Jeffcott – had arrived in the colony having only narrowly missed being convicted of murder after killing an opponent in a duel, and the very idea of colonising South Australia had come to Edward Gibbon Wakefield while he was in Newgate prison serving time for abducting a schoolgirl.[11]

Almost sixty years later the colony's leaders had changed but there was no less a reign of squabble. Premier Charles Kingston – who had done his legal training with Samuel Way – was on a good-behaviour bond when he was elected in June 1893. Two years later – and he would be Premier for four more – he was in a fight on the corner of Grote Street and Victoria Square with Henry Sparks, the manager of the South Australian Company. The statue erected in Kingston's honour in Victoria Square in 1916 gazes defiantly over the very spot where this scuffle took place.[12]

Kingston was also responsible for illegally detaining a political opponent and one of the two leaders of the bar. Paris Nesbit QC was a gifted lawyer, but suffered occasional psychotic episodes. In 1896 he ran unsuccessfully for Parliament and inflamed the incumbent Premier

10 J J Pascoe, cited earlier, pp. 34-35.
11 R M Hague, *Sir John Jeffcott*, pp. 65-87.
12 Derek Whitelock, cited above, pp. 21-24.

by encouraging electors to "thrust Kingston's great fat unwieldy despotic carcass on to the Opposition benches". Two years later, when Nesbit was spending time in Parkside asylum, Kingston took revenge. He held a special cabinet meeting and sent Dr Cleland, the medical superintendent at Parkside, a memo which ordered that: "Mr Nesbit must not be released on any pretext whatever without Ministerial authority". This directive was entirely illegal and effectively made Nesbit a political prisoner. Four months later Justice Bundey ordered his immediate release.[13]

Samuel Way's former articled clerk left State politics in 1901 to become the first Commonwealth Minister of Trade and Customs. The legal profession at this time numbered around 170 practitioners. Such a small legal profession meant that everyone inevitably knew each other and that the four practising silks led almost all the major cases. At the beginning of the 1890s these were Kingston, Nesbit, John Downer (1843-1915) and Josiah Symon (1846-1934), who was Samuel Way's former partner. Kingston and Downer became more and more involved in their political careers and this left just Symon and Nesbit to dominate the Bar from the mid 1890s. This was not always a happy affair, as Graham Loughlin describes:

> On one occasion, for example, they opposed each other in court shortly after Nesbit had been released from the asylum. During Nesbit's address to the court Symon suggested that the judge should disregard the opinion of a lunatic. Symon, who was the father of one or more retarded children, instantly regretted his remark, for Nesbit scornfully retorted: "I may be a lunatic but at least I have the decency not to populate the countryside with imbeciles!"

Unlike the other arms of government at the beginning of the twentieth century, the judicial one had been at its most stable. Way had been appointed in 1876, James Boucaut (1831-1916) had replaced Justice Edward Gwynne in 1881, and Henry Bundey (1838-1909) had replaced Justice R. B. Andrews in 1884. This meant that for sixteen years the bench had had the same three judges, and that unbroken run would

13 Graham Loughlin, "Paris Nesbit, QC" *Journal of the Historical Society of South Australia*, vol. 3, 1977, pp. 55-61, for all on Nesbit on this page.

remain until Bundey retired from ill-health in 1903. Boucaut followed him two years later. All three of these long-serving judges had been Attorney-General at some time before their appointment – Boucaut from 1865 to 1867, Way from 1875 to 1876, and Bundey from 1878 to 1881. Combined legal and political careers appear more intricately intertwined than a hundred years later.

Samuel Way in his sixty-fifth year could look back with special pride at his collection of achievements. Unlike Kingston, Downer, or Baker – the now President of the Legislative Council who Kingston had challenged to a duel – Way did not have the advantage of a wealthy and influential father. James Way was an impoverished Bible Christian minister earning just twenty-eight pounds a year when Samuel was born in Portsmouth, Hampshire, on 11 April 1836. To get an idea of the buying power of that income, James Way two years earlier had bought the eight volumes of Clarke's Commentary on the Holy Scriptures second hand for nine pounds, when he was earning then just twelve pounds a year.[14] John Jeffcott in April 1836 was arguing for five hundred pounds a year as Judge of the Supreme Court of South Australia instead of the four hundred offered to him.[15] In England then, the annual salary of Lord Chief Justice Thomas Denman was eight thousand pounds.[16]

The Bible Christian denomination had formed only in 1815 in Shebbear, North Devon, as a direct response to the lack of any support in the region from any of the churches – not just Anglicans but even the Wesleyan Methodists. James Way was frequently transferred, continually uprooting his growing family. After Portsmouth they lived in Exeter, the Isle of Wight, Bideford and finally Chatham. By this time – 1850 – many Bible Christians had gone to South Australia to work in the Burra Mines, and they needed a minister. James Way was asked if he would like to fill the position.[17] He hesitated at first, as his wife's aging father lived in Chatham, but he accepted and took his wife and his four younger children – Florence, Elizabeth, Edward and Jane. They left Samuel in Chatham to continue his schooling. By the time he left England in November 1852, Way had completed a total of five years

14 A J Hannan, *The Life of Chief Justice Way*, pp. 7-8.

15 R M Hague, cited above, pp 55-56.

16 Anthony Mockler, *Lions Under the Throne*, p. 194. Lord Denman's predecessor, Charles Abbott, had been paid 10,000 pounds a year for the position.

17 A J Hannan, cited above, pp 1-9.

– two at Shebbear College and three in Chatham under the Reverend Joseph Means. This was the only formal education he ever had.

At this point Way apparently had no specific ideas on what ca-

Shebbear College in Devon where Samuel Way completed the first two years of his five years total formal schooling around the 1840s. (SLSA)

reer he would pursue. He had already visited a court but this early experience is likely to have put him off the law. He accompanied a family friend, a butcher called Veale, who had been called to jury duty in Exeter:

> When the jury went into the box I was left alone and the Judge inquired who I was and did me the honour of ordering me out of the Court. I did not know the way out and a small procession was formed, a javelin man, myself, and a policeman, and thus ended my first appearance in a Court of Justice.[18]

In England, Samuel Way could never have been called to the bar and hence become a judge. Neither could he have been articled as a solicitor. The costs for both professions were prohibitive and had the

18 Sir Samuel Way, letter to Reverend T Braund, 19 July 1910. SLSA Archival Collection, South Australia, PRG 30. Javelin men were part of the sherriff's retinue whose duty was to carry pikes.

effect of generally restricting the profession to the sons of gentlemen with large incomes.[19]

Neither could have Way entered Oxford or Cambridge, as they did not grant degrees to dissenters, that is, non-Anglicans, until the 1850s. His decision at the age of 16 to follow his family to South Australia was the most important one of his life, as during this early period of the colony he would be exposed to opportunities that would never have been possible had he remained in England.

Way arrived in Adelaide after four months at sea on Sunday, 16 March 1853. The colony was sixteen years old with a total population of 126,830. The city of Adelaide had 18,303 residents, and the fast-expanding areas of Kensington, Norwood, Port Adelaide, Glenelg and Gawler already had municipal councils. There were still no railways (first line 1856), no telegraph lines (1856), nor mains water (1861). Copper had just been discovered in Wallaroo and Moonta. Young Way made the journey from Port Adelaide on a bullock cart drawn by oxen, and being the end of summer, the unpaved road would have been billowing dust.[20]

At some time in the afternoon he arrived at his parents' home in Gouger Street (they moved later that year to Gilbert Street), and surprised them and his three younger sisters and a younger brother – they had not seen Samuel for two and a half years, and with only a very slow international mail service would not have known exactly when he was due to arrive. In the evening, according to a letter written in December 1911, they all went to the Sunday service.[21]

But from Monday Samuel Way had to look for work, as his father was in no different a financial situation than he ever had been. One advantage Samuel Way had was that ship-loads of men had for months been leaving Adelaide and South Australia to go to the gold diggings in Ballarat. There was therefore less competition for available jobs. On the other hand, the local economy was consequently very depressed, and there were not many jobs on offer.

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19 See Richard L Abel, *The Legal Profession in England and Wales*, p. 39.

20 J J Pascoe, as above, p. 617 and Derek Whitelock, cited above, p. 75.

21 A J Hannan, as above, pp. 17-18.

Way firstly had the idea of following the example of so many of the men – going to the gold diggings – but his father disapproved. Then he wondered if he would be suited to farming. In order to find out, he went out to a farm near Noarlunga owned by an old couple, the Looneys, who were Bible Christians and friends of James Way. The Looneys must have been quite impressed by their friend's eldest son, as they offered him a section of land if he stayed in South Australia. Samuel accepted it, named it "Seaview", and used it all his life as a holiday home.[22]

Without any real prospect of immediate income and no capital to invest, Samuel Way applied for work with the Bank of South Australia, the Post Office, the Public Service and the Burra Copper Mining Company – all without success. Eventually, after four months of rejected applications, he was offered a job as a junior clerk in John Tuthill Bagot's law office in King William Street.

John Bagot's practice was small and he also devoted much of his time to his pastoral and mining interests near Burra. Nevertheless, he later became a member of the Legislative Council, and his two male clerks at the time – Samuel Way and Henry Bundey – would become judges of the Supreme Court. A.J. Hannan believed that it must have been during his employment at Bagot's that Samuel Way became aware of the possibility that he could become a lawyer. But Way did not commence articles with John Bagot. After a year as junior clerk with him, Way joined Alfred Atkinson and R B Andrews in their conveyancing department as a searching clerk. This was a much larger practice located at 69 King William Street. He worked a further 18 months before entering into articles under Alfred Atkinson – at the beginning of 1856.

That Way could have entered into articles is an excellent example of the opportunities offered in South Australia then. Mr Atkinson asked a similar premium to that asked in England, but the difference was that he also paid Way a salary of three pounds a week. Thus – unlike his English counterparts – Way avoided the greater expense of his own maintenance. Apparently, during his two-and-a-half years of working he had saved enough for the premium. Even better, like all lawyers in the State since Charles Mann was admitted by Sir John Jeffcott in May 1837, Way was admitted in 1861 as a "barrister, solicitor, attorney and proctor", thus having the best chance of future success by being able to take on the complete range of legal work.

22 A J Hannan, as above, pp. 20-24.

An observer at this time would have been justified in predicting an average legal career for Samuel Way. He himself did not foresee anything remarkable, yet just over eight years after arriving in Adelaide, with little idea of what of he would like to do with his life, Samuel Way was the sole partner of one of the city's largest established legal practices. He had only just turned 25. He writes of the amazing sequence of events that made it possible in a letter to his uncle, 31 July 1861:

> You will have seen in the newspapers which I forwarded that Mr Atkinson died on the 4th of June. I purchased the goodwill of the business, the lease of the offices, the furniture and the book debts of his executrix for 1000 pounds, payable by two instalments of 500 pounds each. The first is paid – the other is due in June next. The purchase was settled on June 24th, but I was too busy to notify it for some weeks, and then I determined to delay issuing circulars until July 31st, because on that day seven years ago I entered this office as a searching clerk. At that time Mr Atkinson was less than 30 years of age and in the zenith of his popularity; his conveyancing clerk was an able lawyer, the mainstay of the business; and there was articled in the office a young man, the son of a wealthy and influential member of the legislature. Soon after, Mr Atkinson went into partnership with one of the ablest barristers in the colony [R B Andrews], who took a relative into the office with a promise of a future share in the firm, and articled his own stepson [Atkinson's]. So that there was no likelihood of my ever becoming the head of the office. However, in the course of a few years, he quarrelled and separated from the partner and the relative I have mentioned – the young man and the conveyancing clerk got involved in intrigues and had to leave the Colony – his stepson didn't like it and left the law – he himself, poor man, went mad and died, and I became his successor.[23]

Way had revealed in an earlier letter that Alfred Atkinson had been certified insane in October 1860. This had meant that Way had been managing the firm even before he had been admitted.

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23 SLSA Archival Collection, PRG 30, but also quoted in A J Hannan, cited above, pp. 30-31.

The year 1861 was a particularly dramatic one in South Australia's legal history. The profession in Adelaide at this time numbered around 30 practitioners. The reputation of the Supreme Court was at its lowest ebb, exclusively because of a judge called Benjamin Boothby. He had been terrorising and bullying his brother judges, barristers, politicians and the Governor since his appointment as Second Judge in 1853. Boothby had been directly appointed from England by the British government and would be the last judge to be so. His attacks expanded from the courtroom to parliament from 1857 when South Australia gained self-government. Boothby did not recognise the new State government as valid and consequently viewed every piece of its legislation as illegal and every office holder as an usurper.[24]

By 1861 his behaviour had become such a threat to effective government that a special ministry was formed whose sole purpose was to carry out the necessary official steps to have him removed from office. Petitions complaining about his behaviour had totalled 7,000 signatures. Although they hoped for a quick amotion – removal from office – it would take six years. The situation was further exacerbated when Richard Davies Hanson was appointed the State's second Chief Justice in November 1861 to replace Charles Cooper, whose frail health could no longer cope with the disputatious Boothby. Boothby was appalled as he had been admitted to an Inn of Court in London, whereas Hanson and Edward Gwynne – already Third Judge– had been mere attorneys in England. Boothby refused to accept their appointments as Supreme Court judges and he told them so frequently. In a petition against Hanson's appointment to the House of Lords, Boothby even refused to recognise the office of Chief Justice, praying "that the instrument by which Mr Hanson claimed to act and preside as Chief Justice should be declared null and void, as being unjust and contrary to law."

That year was also the one when a shepherd named Ryan discovered copper near Moonta. The amoval of Justice Boothby and the court case resulting from the Moonta copper discovery would play key roles in establishing Samuel Way's reputation as a barrister over the next few years. But Way's first two years in practice were devoted more to solicitor's work, at least if one examines his court appearances. Before the South Australian Law Reports began appearing in 1865, the daily

24 See Castles and Harris, cited above 126-134, and 143-148, but for greater detail R M Hague, *Hague's History*, pp 219-528.

newspapers – *The Advertiser* and *The Register* – provided the sole written record of court proceedings and judgments. In Way's first year he appeared in eight reported cases and in 1862, in seven. He got his big break in 1863 when he was briefed to appear before a Select Committee of the House of Assembly in the Moonta mines case.[25]

The details of Way's involvement in this case appear in A.J. Hannan's biography. The case would drag on through the courts until 1866 and become South Australia's first appeal to the Privy Council. The core problem was that Mr Ryan had been unable to convince anyone at first of the truth of his discovery, and then had ended up forming agreements with two syndicates. One was led by Samuel Mills and the other by Walter Watson Hughes, the owner of the land and Ryan's employer. The Mills syndicate arrived at the Lands Office at 8.30 am and the Hughes syndicate at 10 am. The office opened at 10.15, and because the Chief Clerk knew Hughes's representative personally, he served him first.[26]


Justice Boothby (SCLSA)

Way represented the Mills syndicate which claimed that they should have been given priority at the Lands Office. In the end, the Privy Council ruled against the Mills group, but Way was able to obtain a settlement for his clients of ten thousand pounds from Walter Hughes. This was a certainly a large sum of money – at around a hundred times the median annual wage – but was nothing in comparison to the total value of the copper produced at Moonta until it ran out in 1923: twenty million pounds.[27] But it made possible the early establishment of the University of Adelaide in 1874, for Walter Hughes and Thomas Elder (1818-1897) – one of the mine's main investors – each contributed twenty thousand pounds, and over the following 23 years Thomas Elder added a further seventy-five thousand pounds including the legacies in his will.

For Way, the Moonta Mines case gave him an indispensable opportunity to demonstrate his ability as a barrister. It was the State's biggest case so far, with Bagot, Boucaut and Way acting for Mills; and Bakewell, Fenn, Strangways and Ingleby acting for Hughes. The case

25 A J Hannan, cited above, p. 41.
26 Hannan, pp. 34; 41-8; 61; 68-69.
27 Derek Whitelock, cited above, p. 102.

had not been made any easier or less drawn out by Justice Boothby's frequent denials in court of the existence either of an Attorney-General or of a Chief Justice in South Australia. The failure to remove Boothby had the effect of making him even more confident in his opinions and therefore more obstructive.

Samuel Way at 34, the age he holidayed in England (SCLSA).

Among other incidents, at the May Criminal Sessions of 1866, Boothby refused to acknowledge the legitimacy of the Attorney-General in the colony and released prisoners waiting in the cells, much to their surprised glee. In June 1867, Governor Sir Dominic Daly (1798-1868) set up an inquiry and gave Way the job of conducting it. In a document drafted by former Attorney-General Boucaut, Justice Boothby was charged on five accounts:

1. Conduct and language contumacious and disrespectful to the Court of Appeals, and obstructive to the said court in the performance of its duties.
2. Perverse refusal to recognise the authority of Parliament, and to administer the laws of the Province.
3. Expressions on the Bench disparaging of and insulting to the Legislature, the Government, and the institutions of the Province, and language and behaviour on the Bench calculated to bring the administration of justice into contempt.
4. Language on the Bench offensive and irritating to the other Judges, and public denial of their authority.
5. Allowing private and personal feeling to interfere with the fair and impartial administration of justice.

On 4 July Way made his final address. Justice Boothby predictably considered the entire proceedings illegal and attended on the first day to say only that. On the evening of 29 July 1867 a Gazette Extraordinary published the finding of the Governor and Executive Council ordering the amoval of Justice Boothby. A week later, Attorney-General and Crown Solicitor William Wearing replaced Mr Boothby as Second

Judge. His shocked predecessor spent his newly gained spare time preparing a petition to the Privy Council but died in June 1868 before he had completed his submission.[28]

In 1868 Way took on a partner, James Brook. The arrangement worked so well that by the following year Way was confident enough of his firm's reputation to take a year off to go to England. He went both to take a holiday and revisit his friends and family and to appear in two Privy Council appeals on behalf of his clients.[29] He was away from Adelaide from May 1869 until April 1870.

At this point Samuel Way could look with considerable pride on his life. He had in sixteen years become one of Adelaide's leading junior barristers. From the humblest of social backgrounds, he was now regularly mixing with leading politicians and business people. He turned 33 just before he left for Britain. He was dedicated to the Bible Christian church that he had grown up with and he was a member of the Freemasons. But to 1869 we can trace the beginnings of the two great regrets of his life.

The first was widely known, and that was his desire to live in England. His correspondence from his return to Adelaide in 1870 until his last letters in 1915 show how he was constantly preoccupied with the great legal world of London. For example, he writes to a friend in England after being appointed Queen's Counsel at the age of 35 years in September 1871, thus placing him at the top level of the bar in South Australia:

> I often think of the happy holiday I had in 1869-70, and wish it were just beginning again. There are no incidents in it I more frequently recur to or which I wish more I could live over again than my return and first visit to Chatham and the happy Christmas I spent there. (…) I have no intention of being transported for life, and if I can't live in England I will, if I am spared, visit it as often as I can.[30]

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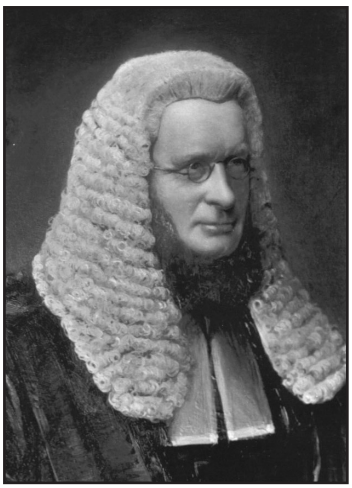
28 See Hannan, already cited, pp. 55-75 for more on Way's role in the amoval of Justice Boothby.

29 *National Bank of Australasia v Mullen* [1869] SALR 157 and *Randall and Others v South Australian Insurance Company* [1869] SALR 151.

30 Hannan, p. 89; and p. 79 for the second quote on the demands of his practice.

The month before he had written to a London tailor, ordering a silk gown, waistcoat, knee-breeches, black stockings and a pair of shoes with silver buckles, telling him: "I could get them in Melbourne, but prefer your work to Colonial". Symptom of a fading dream rather than concern for quality was behind these words.

The second great regret of Samuel Way's life would remain a secret in Adelaide during his lifetime: the five children that he fathered with Susannah Gooding. It would take another 120 years until legal historian Alex Castles was examining some Tasmanian shipping records and realised there was a curious pattern to Way's visits. Way usually went to Tasmania annually, but every so often he returned after nine months. Further researchers uncovered the truth.[31] Way's first biographer A J Hannan must have known as he curiously omits Way's holidays in Tasmania in their entirety. It may be true, as John Bray notes, that Way's sister destroyed his personal diaries.[32] But Way records his trips to Tasmania in other diaries available in his SLSA Archival Collection files. This alone contradicts Hannan's introduction to Chapter 5, "A Visit to England", referring to his trip in 1890:



Sir Richard Hanson, Chief Justice 1861-1876 (SCLSA).

> The substantial justification for the journey to England was that Way badly needed a holiday. He had for years been giving unremitting attention to the demands of his expanding practice (…).

Way worked hard and never wasted a moment, but he took advantage of any break in the Supreme Court program to travel, particularly the summer break of two months. In 1890 he gave a speech to the Tasmanian Masons and confirmed that he had been in the habit of visit-

31 Anne Rand, Margaret Glover, Shirley Eldershaw and Sue Edgar. Investigated further by Andrew Parkinson who then published "The Regret of Samuel Way." (1995) 1 *Aust J Leg Hist* 239-257.

32 J J Bray, "Sir Samuel Way", *Australian Dictionary of Biography*, 1891-1939.

ing Tasmania regularly for 22 years, which dates his first visit to 1868. Parkinson found circumstantial evidence suggesting that Samuel Way and Susannah Gooding met slightly earlier – in the mid-1860s.

The fact that Way's trips to Tasmania were not always during the summer court breaks, and that he did not necessarily go even then, made it easier to trace the connection between him and the births of the five children. On five particular visits to Tasmania, or to Melbourne in the case of the fifth child, there had been an earlier visit precisely nine months before. The researchers located baptisms, and the names of the children revealed the truth: James Samuel Gooding was born on 16 July 1869 – not long after Way had arrived in England. Frank Brook Way Gooding was born on 4 October 1872; Alfred Edward Rowden Gooding on 5 November 1874; Florence Elizabeth Jane Gooding on 9 January 1877; and Edward Rowden Gooding was born on 14 November 1881. Way's middle name and father's name was James; James Brook was his first partner – who notably died in August 1872; Rowden was the surname of his maternal grandfather; and his three sisters were Florence, Elizabeth and Jane.[33]

Way's relationship with Susannah Gooding lasted until her death in 1888. He moved her and the children to Melbourne in 1881. Here they took the surname of White. He set her up in a millinery business and sent the sons to Geelong Grammar. James died in 1895 and Frank in 1902, and the two younger boys, Alfred and Edward, became medical practitioners. Alfred became a well-known philanthropist in Melbourne and gave many thousands of pounds for medical research, libraries and art. He was knighted and it is after him that the Rowden White Library in the Union Building at the University of Melbourne is named. Edward's son James Northcote Rowden White is listed in the Geelong Grammar School Register along with his father and uncles. He was born in 1921 and enlisted in World War II, dying in March 1942 after the first Japanese air-raid on Darwin. James White knew about his distinguished grandfather in South Australia.[34]

Why did Way keep this relationship with Susannah a secret? Was it simply because she was a servant? He would have been aware of the

33 Andrew Parkinson, "The Regret of Samuel Way", *Australian Journal of Legal History*, vol. 1, 1995, pp. 242-247.

34 One of his fellow soldiers was the Hon. F R Fisher QC, South Australia's first federal court judge, and direct descendant of Joseph Fisher (1834-1907), joint owner of *The Register* and politician. .

hardening of attitudes towards the notion of class over the course of the nineteenth century. Susannah Gooding had been a servant. Way would have sympathised more than many would have realised with Chief Justice Sir Richard Hanson, who was ostracised by respectable society in Adelaide for having married his housekeeper, a higher position than a servant. This apparent gaffe was maliciously seized upon in 1863 when Justice Boothby tried to prevent Mrs Hanson from attending a ball at Government House with the aid of, among at least fourteen others, Bishop Short, Joseph Fisher (a joint owner of *The Register*) and John Morphett. Both Fisher and Morphett were members of the Legislative Council. Colonel Light had earlier been ostracised by Adelaide's founding fathers for cohabiting with his mistress, Maria Gandy.[35] The righteous conveniently forgot that in order to secure the Hanoverian succession King William IV himself had been obliged to leave his defacto partner of twenty years and marry Princess Adelaide of Saxe-Coburg and Meinengein, after whom the city of Adelaide is named.

Why Way decided to keep his family a secret from all but perhaps a few intimate friends will itself remain a secret. He records his visits to her in the diaries available, but only briefly.[36] It shows the extent to which he was a pragmatist, as opposed to Colonel Light and Sir Richard Hanson, who were visionary and idealistic. Hanson had even been sacked in England from the legal firm of Bartlett and Beddome for his utopian ideals. But neither of these two had grown up in the extreme poverty that Way had known. It is very likely that in his own career he wanted to put himself as far as possible from having to endure that misery again, and to him that seems to have meant conforming to established practices, rather than challenging them. If it was not the done thing to marry a servant if one aspired to high public office, then he would keep that side of his life to himself. This division of private and public life was no exception in Victorian society. As Parkinson points out, Way's friend in Melbourne, Justice Redmond Barry, also had a mistress and children living near Susannah Gooding and hers in Carlton.[37]

So after Susannah's death in 1888 Way was more a widower than a bachelor when, aged 62, he married Katherine Blue in 1898. His

35 Whitelock, cited above, p. 6. Maria Gandy was a grandmother of future Justice Herbert Mayo.

36 SLSA Archival Collection, PRG 30/1.

37 Parkinson, pp. 253-254.

Way bought Montefiore in 1872, now part of the University of Adelaide's Aquinas College (SLSA).

history with his new wife may also have been longer than is publicly known. Being wise after the event about the reality behind the cryptic references in his official diaries to the "W's" or "my dear S" leads too easily perhaps to reading other entries by extension as also meaning more. In 1903 Samuel Way celebrated the jubilee of his arrival in Adelaide. An article in *The Register* cites a speech in which he mentions that he had fallen in love with his wife when she was still a child.[38] In fact, fifteen years before they married, and while she was still married to Dr Blue and living in Strathalbyn, she was a regular guest of Samuel Way at his house in North Adelaide. For example, his entry for Friday, 26 October 1883 notes: "Annual [unreadable] Children's Hospital. Mrs Blue arrived." At the head of each page until the 5 November is written "Mrs Blue's visit continues." She stays again from 12 November until 21 November, and then again from 22 November until 24 November. This was not long after Susannah and the family had moved to Melbourne.[39]

In the light of Way's private life, the discipline and energy which he applied to his professional life is even more impressive. On his appointment as Queen's Counsel in 1871 he and Randolph Stow constituted Adelaide's senior bar. Two years later, Stow entered politics and

38 SLSA Archival Collection, PRG 30/36.

39 SLSA Archival Collection, PRG 30/1, diary for 1883.

won representation of the electorate of Light in a by-election in 1873. Then in February 1875 he was appointed to the Supreme Court to replace Justice Wearing, who had drowned off the Queensland coast after the first circuit session in the Northern Territory. Way entered politics in June that year as one of the two representatives for Sturt. James Boucaut formed a government, and Samuel Way became his Attorney-General. This would prove the key event in his eventual appointment as Chief Justice.

In the early 1870s, Samuel Way was also becoming involved in another activity in which he would dominate during his life: the University of Adelaide. This was to be Australia's third university after Sydney's, established in 1850, and Melbourne's, established in 1853. The initial idea in Adelaide was not the establishment of a university but a training college for Baptist, Congregational and Presbyterian ministers. Classes began in 1872 and proved successful enough to justify immediate expansion. The college leaders approached Walter Watson Hughes, who had made a fortune from the Moonta mines for a donation. His offer of twenty thousand pounds was so significant that the college leaders realised that they could establish a university.

A meeting was held in September 1872, and the organisation and appointment process began. After a lot of debate in Parliament about the site and the avoidance of denominational and sectarian tendencies, the University Act was finally passed in November 1874. It provided for a council of twenty members, no more than four of whom should be ministers of religion. The Chief Justice, Sir Richard Hanson, was elected Chancellor, and Bishop Short Vice-Chancellor. This was an surprising combination, since Bishop Short was part of the group in 1863 that boycotted Sir Richard Hanson's wife from Government House. Samuel Way was one of the founding members of the Council. The Government assisted by donating five acres of land on North Terrace.[40]

Sir Richard Hanson died suddenly on 10 March 1876 and Samuel Way's life changed very quickly as a result. As Attorney-General, he had the responsibility of recommending a successor as Chief Justice, and under English law could recommend himself. This he did, but backed by Premier Boucaut and the rest of the cabinet. He was 39 years old

40 W G K Duncan and Roger Ashley Leonard, *The University of Adelaide Centenary 1874-1974*, pp. 4-9.