

**BE SUBSTANTIALLY GREAT IN THY SELF:**

Getting to Know C.E.W. Bean,  
Barrister, Judge's Associate, Moral Philosopher

**APPENDIX V**

**Deniliquin Circuit Court Business**  
**October, 1905**

**CONSTITUTION OF THE CIRCUIT COURT AT DENILIKUIN**

Administrative arrangements for constitution of Deniliquin Circuit Court in October 1905 are noted (in Appendix V) in connection with constitution of the Wagga Wagga Circuit Court that, for Charles Bean, immediately preceded it. Exactly when, and how, Charles made his way from Wagga to Deniliquin, and whether a return to Sydney between Court sittings occurred, is unknown.

The fact that Charles left Wagga before the court business there concluded suggests that his role in administration of the court business at both Wagga and Deniliquin was more substantive than ceremonial. His responsibilities would have included, at least, management of court records and compilation of court lists under the supervision of the presiding judge. It is not difficult to imagine that, by the time he left Wagga, the likely course of the balance of the sittings there had been settled to the satisfaction of Rogers AJ, the staff at the Wagga Court House and barristers and solicitors engaged in particular business before the Court.

The civil work remaining to be done by the Judge's Associate in that context could be handled by a surrogate: attending to the Judge in, and outside, court; packing up court files; and liaising with the profession in management of incidental business preparatory to a return to Sydney. The more critical administrative tasks for Charles, at that time, probably would have related to organisation of Deniliquin business.

That said, Deniliquin was never likely to be as busy as Wagga Wagga. It was a smaller town and, as it happened, there appears to have been less business requiring attention.

**NEWSPAPER REPORTS**

Proceedings in the October 1905 sittings of the Deniliquin Circuit Court were, in part, reported in the *Deniliquin Chronicle*, a local newspaper published weekly each Wednesday. The Court was not the subject of report on either

Wednesday, 11 October 1905, or Wednesday, 25 October, 1905. It was the subject of four articles (on pages 2-3) in the issue published on Wednesday, 18 October 1905. The quality of the print of that issue from which this summary was taken was sufficiently doubtful that a caveat as to accuracy and completeness of the summary must be recorded.

Two articles focussed on the incidental. A third reported a criminal trial. The fourth reported the latest round in a civil dispute that, in another guise, had been to the Privy Council and, in its present one, would return to the Full Court of the Supreme Court of NSW.

## **INTRODUCTORY BUSINESS**

The leading articles on page 2 of the *Deniliquin Chronicle* manifested local concerns. The first reported on the incidence of jury service:

*“David James Henderson was excused by His Honor [sic] Judge Fitzhardinge at the Circuit Court [on Wednesday, 11 October 1905] for his absence through illness. JLP McCrae was excused through not having been served with the summons [to attend for jury duty]. Chas Uphill was fined 40s for non-attendance, but his Honor remarked that he had received a telegram from Mr Uphill. He would have an opportunity of explaining a reason for not attending, and probably the fine would be remitted”.*

To a lawyerly mind, the idea of a person being excused through not having been served with [a] summons is a quaint misconception. Ordinarily, there would be no duty to attend court, and no failure to be excused, without service of a summons or some other form of compulsory process.

In a broader perspective, the newspaper article illustrates the mechanics of organising trial by jury in a democratic society. The full majesty of the law in action, administered by a judge conscious of a need for judicial firmness, had to be accompanied by reservation of space for diplomatic retreat. Whether Mr Uphill's fine was, in fact, remitted is unknown.

The second introductory, incidental article contained a report under the heading, “*Complimentary Remarks*”:

*“His Honor [sic] Judge Fitzhardinge made complimentary remarks last week at the Circuit Court, on the absence of crime in the south-western district, of which Mr FW Garstang PM is Deputy Sheriff”.*

Of the three trials reported by the newspaper, the criminal trials were presumably the first to be conducted. That would have conformed to the natural order for the conduct of court business on circuit: criminal business took (and takes) precedence over civil.

## **CRIMINAL JURISDICTION: Attempted Rape**

*R v Broadick* appears to have been the first substantive business conducted at the commencement of the sittings on Wednesday, 11 October 1905. Gordon Broadick, an Aboriginal, was charged with having, on 14 August 1905 at Canally, assaulted Elizabeth Goodman with intent to commit a rape.

The appearances of counsel in this, and a later phase of the civil trial conducted at Deniliquin, suggest something of the fluidity of practice at the Bar. Although AB Piddington<sup>1</sup> had been gazetted as the Crown Prosecutor for the sittings, he is not reported to have appeared at them. His place appears to have been taken by FS Boyce<sup>2</sup>. Perhaps as a *quid pro quo*, Piddington led Boyce when the sitting's civil proceedings subsequently found their way to the Full Court.

At all events, the *Deniliquin Chronicle* reported that Mr Boyce appeared for the Crown and Mr Bavin (later a Premier of NSW and, later still, a Judge of the Supreme Court of NSW), instructed by Mr Windeyer, appeared for the accused, Broadick.

A plea of not guilty was entered, and a jury of 12 was empanelled<sup>3</sup>.

In the Crown Case, evidence was given by Sergeant George Edward Loomes, the arresting officer; the prosecutrix, Elizabeth Goodman; her two children, Betsy Jane Goodman and Willie Dalton Goodman; and Roderick Bremner, a selector who resided about two miles away from where the alleged assault took place and to whom the prosecutrix had apparently complained of the assault.

The prosecutrix was the wife of John Goodman, a rabbitier, away from home at the time. ~~His~~ home was a tent. On the evidence of Elizabeth (corroborated, the newspaper could not forbear to report, by evidence of her children characterised as ~~the~~ most intelligent) the accused attempted to force his attention on her in the early hours of the morning and threatened to kill her (and her son) when her daughter went to Mrs Bremner's place for assistance. The prosecutrix subsequently recognised the accused as her assailant. He was one of only two ~~blackfellow~~ blackfellows in the district. She had known him as ~~the~~ little black boy. Identification was an issue.

The accused ~~made~~ made a statement as to his actions on the night in question, and in support of his innocence, John Dewar, Butcher, gave evidence. An unsworn ~~black~~ statement by an accused was not susceptible to cross examination whereas ~~evidence~~ evidence was.

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<sup>1</sup> Albert Bathurst Piddington was admitted to the NSW Bar in 1890: Lindsay and Webster (ed), *No Mere Mouthpiece* (Lexis Nexis Butterworths, Sydney, 2002), pp. 337 and 345; (1988) 11 ADB 224.

<sup>2</sup> Francis Stewart Boyce was admitted to the NSW Bar in 1897: *No Mere Mouthpiece*, pp. 330 and 346; (1979) 7 ADB 369.

<sup>3</sup> H Danckert, WH Jones, WF Glenn, JT Simpson, WC Watson, GW Hariot, WB Pollard, HE Holmes, WT Powell, Jas. Nestrom, JB Jameson and Geo. Hetherington.

After addresses by counsel and the Judge<sup>4</sup> summing up, the jury retired to consider their verdict. After 25 minutes deliberation they returned a verdict of guilty. On sentencing, four prior convictions (of an unreported character) were proved. The prisoner was sentenced to three years imprisonment in Grafton Gaol.

### **CRIMINAL JURISDICTION: Alleged False Pretences**

*R v. Costellos*<sup>4</sup> appears to have been the next substantive business of the sittings. The accused, Joseph Costellos ~~on~~ bail, was charged with having on 22<sup>nd</sup> July, 1905 at ~~the~~ .., falsely pretend[ed] to ~~P~~ Singh, an Indian hawker, that he was one William Travers, and that by means of those false pretences he obtained goods to the value of £~~5~~ +.

The accused pleaded not guilty. He was represented by ~~Mr~~ Windeyer+. That might have been Richard Windeyer of the Bar<sup>5</sup> or Arch. H. Windeyer of the firm of solicitors, Alexander and Windeyer, practising in and from offices in Deniliquin. Both were listed in the 1905 ~~NSW~~ Law Almanac+. In favour of the barrister is that he had extensive experience as a criminal law advocate, he did ~~country~~ work+ and the newspaper might have deferred to him in identifying him simply as ~~Mr~~ Windeyer+ because he was a barrister. Against him is the fact, as it appears from the newspaper, he had no other appearance work before the Deniliquin Circuit Court at the October 1905 sittings. In favour of the solicitor, Windeyer, is that he was local, and we know from the newspaper report of the civil trial *Malone v Williams* that he was active in the sittings. Against him is the fact that, in the report of *Malone v Williams*, he was specifically identified as a local solicitor instructing counsel in that case.

The newspaper report of the trial descended to particularity in naming the jurors empanelled. ~~the~~

The newspaper did not, however, trouble to report any detail about the evidence. In relation to the Crown case it contented itself by recording that ~~the~~ [similar] evidence to that given to the lower court (which have already been published in these columns), was given on behalf of the Crown+.

The defence case fared no better: ~~the~~ [after] evidence had been tendered by the accused and James Hynes, contractor, his Honour summed up, after which the jury retired to consider their verdict+.

The jury took 10 minutes to return a verdict of not guilty.

In discharging the accused the judge is reported to have advised him ~~to~~ pay for the goods he had obtained from the Indian+.

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<sup>4</sup> *Deniliquin Chronicle*, Wednesday 11 October 1905, p. 2.

<sup>5</sup> Richard Windeyer was admitted to the NSW Bar in 1894: *No Mere Mouthpiece*, pp. 339 and 346; (1990) 12 ADB 359.

## **CIVIL JURISDICTION: Recovery of Money Paid by Mistake**

In the civil trial conducted before Fitzhardinge AJ, *Malone v Williams*: Mr Pike<sup>6</sup>, instructed by Mr AH Windeyer of Alexander & Windeyer (Deniliquin), appeared for the Plaintiff; and Mr Boyce and Mr Wilkinson appeared for the Defendant, a nominal defendant appointed to represent the Crown.

The nature and procedural history of the litigation is reported in *Malone v Williams* (1905) 5 SR (NSW) 665; 22 WN (NSW) 205, a judgment in favour of the Defendant given by the Full Court of the Supreme Court of NSW (constituted by Darley CJ, Cohen and Pring JJ) on that Court's determination (on 8-9 November 1905) of the Defendant's Motion for a New Trial.

The trial conducted before Fitzhardinge AJ, with a jury of four<sup>7</sup> had resulted in a verdict for the Plaintiff after the Judge had refused the Defendant's application that the Plaintiff be non-suited or that a verdict be entered for the Defendant.

The proceedings arose out of a dispute between the Plaintiff (Malone) and another local man (O'Keefe) as to their respective entitlements to occupy Crown land. That dispute found its way to the Full Court of the Supreme Court of NSW on 28 April 1902, when a Court constituted by Stephen, Owen and GB Simpson JJ found (by majority) in favour of Malone: *O'Keefe v Malone* (1902) 2 SR (NSW) 91. The leading judgment in favour of Malone was delivered by Owen J, whose Associate Bean became three years later. O'Keefe appealed to the Privy Council which, on 13 May 1903, reversed the Supreme Court's judgment and restored an earlier jury verdict in favour of O'Keefe: *O'Keefe v Malone* (1903) 3 SR (NSW) 581.

Pike had appeared for Malone in the Full Court proceedings against O'Keefe, but not in the Privy Council. The English Bar appeared on both sides of record there.

Back in New South Wales after the decision of the Board (ie. the Privy Council), Malone sought to recover from the Crown three years' rent he had paid (in 1900, 1901 and 1902) when, pending determination of the O'Keefe litigation, he had been in occupation of the disputed Crown land pursuant to what (erroneously) was then presumed to have been a valid Crown lease.

In reviewing the verdict of the Deniliquin jury in Malone's failure, the Full Court held that his claim must fail. He had paid his money to the Crown under a mistake of law (as to his entitlement to occupy the land) with full knowledge of the facts (including knowledge that his entitlement was contested by O'Keefe), and with the benefit of full consideration (in the form of actual occupation of the land) received from the Crown. A later generation of academic lawyers might say that there had been no unjust enrichment of the Crown at

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<sup>6</sup> George Herbert Pike was admitted to the NSW Bar in 1892: *No Mere Mouthpiece*, pp. 337 and 345; (1988) 11 231

<sup>7</sup> MJ Oakew, AT Barry, JF Graham and CW Matthews.

Malone's expense in its retention of the money he had paid to it; Malone had no entitlement to restitution of the money.