STATEMENT BY THE PRESIDENT ON THE 200TH ANNIVERSARY OF THE FIRST CIVIL COURT HEARING IN AUSTRALIA

Friday 1 July 1988

IN THE SUPREME COURT)
OF NEW SOUTH WALES)
COURT OF APPEAL)

CORAM: KIRBY P
MAHONEY JA
CLARKE JA

FRIDAY 1 JULY 1988

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KIRBY P: Before proceeding with the business of the Court, it is appropriate that I draw attention to a significant matter of history. Today is the two hundredth anniversary of the hearing of the first civil case by a court, as we know it, on the continent of Australia.

Between 1788 and 1823 the best known tribunal in the new colony of New South Wales was the Court of Criminal Jurisdiction. It held sway over the lives of all in the infant colony. Its chief officer was the Judge-Advocate. It applied English criminal law and procedure, except to the extent that this was unsuitable to the circumstances of the colony. Its first sitting took place on 11 February 1988, within a fortnight of the arrival at Sydney Cove.

Between 1788 and 1814, the chief tribunal for dealing with civil claims was the Court of Civil Jurisdiction. An appeal lay from that court to the Governor and, in some

circumstances to the Privy Council. That court was replaced in 1814 by a Supreme Court established to deal with civil matters only. In due course under the Charter of Justice, the Supreme Court, as we now know it, was established. The Court of Appeal is part of that Supreme Court, which is continued by the Supreme Court Act 1970.

For more than 20 years a rudimentary form of civil justice was dispensed by the Civil Court sitting in Sydney. Most of the cases before it related to debts. The first sitting in the Court took place on 1 July 1788, exactly two hundred years ago this morning.

The proceedings in the first case held on that day are recorded. They have been criticised by subsequent commentators. They are described thus by Professor Castles in his notable book "An Australian Legal History", Law Book Co, 1982, 96:-

> "Two convicts were the plaintiffs in the cause. Under the English law of the day it seems clear that felons like these, whose punishment had been commuted to transportation, could not be allowed to sue in a civil court. Perhaps with this in mind, the records show that one of the plaintiffs, Henry Cable, was described judiciously in the minutes of the Court as a 'labourer'. Interestingly, too, the original summons which initiated the action referred to Cable and his wife as 'New Settlers in this place'. However, this phrase was struck out to leave no reference to their status. Whatever their status might have been under English law, however, Cable and his wife were permitted to recover £20 in damages from Duncan Sinclair, the Master of the transport Alexander, one of the ships of the First Fleet. Before leaving England, Sinclair had taken charge of a parcel of clothes and other articles which had been provided for the Cables by a group of well-wishers. These were either lost or stolen on the voyage to Australia."

Sir Victor Windeyer in an essay on the case "A Birthright and an Inheritance, the Establishment of the Rule of Law in Australia" (1962) Tas L Rev 635, 662 acknowledged that there were "some things to criticise" in this first sitting. The apparently deliberate refusal to apply the law of misprision of felony may have been seen as a necessity if there were to be even rudimentary justice available within the colony. Perhaps it was thought that this rule, which was to offend many later commentators following Dugan v Mirror Newspapers Limited (1978) 142 CLR 583, was not appropriate to the exigencies of the place and time. However that may be, Sir Victor Windeyer concluded that the case involved "a vindication of the rule of law". So it would appear.

From the very beginning of the colony an endeavour was made to apply the forms and principles of English law, as they were understood. From the beginning of the history of the administration of civil law in this country, the doors of the court were opened to disadvantaged litigants. The principle of the rule of law was asserted, even against the seemingly powerful Master of a transport ship. The disadvantaged litigants were successful in their case. The principle of the peaceful resolution of claims and disputes, in a court of law, was asserted, even in the rustic circumstances which obtained, less than six months after the landing of the First Fleet at Sydney Cove.

Since that time, in differing courts and with a vastly expanded body of law and company of the legal profession, the courts of the colony and later of the State of New South Wales, have performed their duty. The duty to administer justice without fear or favour, affection or ill-will spread, in time, to courts sitting in every corner of this vast land. Many mistakes were made on the way, and doubtless some continue to be made which even the painstaking processes of appeal and of law reform cannot repair.

But it is worth calling to mind, as we embark upon the third century of the administration of civil justice in Australia, the beginnings in the rude circumstances of the early settlement. It is also worth remembering how, from the very start, the endeavour was made to translate to this country the substance of the principles of English law and to improve upon and adapt those principles so that they would be applicable to the circumstances of the new country.

As the President of the Bar (Mr K R Handley QC) is in the part-heard case which is now before the Court, I thought I should call this historic occasion to his notice and, through him, to the notice of the legal profession of the State and beyond. Many achievements lie behind us in the past 200 years. Many challenges lie ahead. What began in the litigation of Cable v Sinclair continues today in this Court and in courts sitting in every part of Australia.