

THE OFFICE OF PROTHONOTARY

ITS HISTORICAL DEVELOPMENT IN ENGLAND AND IN NEW SOUTH WALES

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I. GENERAL †

“The history of institutions cannot be mastered — can scarcely be approached — without an effort. It affords little of the romantic incident or the picturesque grouping which constitute the charm of history in general.” So wrote Bishop Stubbs,¹ and with some truth, but although the history of the office of Prothonotary in England and New South Wales can scarcely be described as romantic it is by no means lacking in interest, or for that matter, in incident. It is submitted that, even from such a brief treatment as that which follows, three main points emerge.

First, like so many institutions of the common law, the office of Prothonotary has played many different roles since its establishment in the thirteenth century, fulfilling a wide variety of functions to meet varied needs at different times. Second, a study of the office emphasises the fact, often obscured by Whig historians desiring to make history seem respectable, that

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The following abbreviations have been used:

Forbes Papers: Private letters of Sir Francis Forbes to R. Wilmot Horton, 1825 (typescript copies)

G. D.: New South Wales Governors' Despatches and Enclosures (MS. and typescript copies)

Hastings, Common Pleas: Margaret Hastings, *The Court of Common Pleas in Fifteenth Century England* (1947).

H.R.A.: *Historical Records of Australia* (citing Series, Volume and page numbers).

H.E.L.: W. S. Holdsworth, *A History of English Law* (3 ed. 1923).

M. & O.: An anonymous paper in the custody of the Prothonotary of the Supreme Court, entitled “Ministers and Officers of the Court” (undated)

Plucknett, History: T. F. T. Plucknett, *A Concise History of the Common Law* (2 ed. 1936).

Stephen: (Sir) Alfred Stephen, *The Constitution, Rules and Practice of the Supreme Court of New South Wales* (1843-5).

Stephen Supplement: M. Henry Stephen, *Supplement to the Supreme Court Practice* (1851).

V. & P.: *Votes and Proceedings of the Parliament of New South Wales.*

¹ Stubbs, *1 Constitutional History of England* (5 ed. 1891) iii.

office-holding as a service to the public paid by money from the public treasury is a modern conception. Third, it can be shown that much of the difficulty encountered by the governments of early nineteenth-century New South Wales in establishing the office in the colony and defining its functions was caused by the decay of the institution in the courts at Westminster, which led to its abolition in England in 1837.² It is one of those strange accidents of history that led to the establishment of an office in New South Wales destined to fulfil a vital need in the courts here, at the very time when the office, as such, was abolished in its original home. This paper consists of two chief parts: (i) a general sketch of the English experience, drawn essentially from secondary sources (ss. II-VI) and intended as a background for (ii) a detailed treatment of the growth of the office in New South Wales (ss. VII-IX).

II. THE ORIGIN OF THE OFFICE

The Prothonotary appears to have emerged as part of the machinery of the royal courts which gradually evolved from the *Curia Regis* in the thirteenth century. The word "prothonotary" is in itself exotic, but its meaning is more mundane than its sound. In fact it is simply a hybrid word meaning chief clerk, deriving from the Greek *protos*, one, and the Latin *notarius*, a scribe or clerk.³

It had been the name given to the chief clerk of the Appeals Court of the Byzantine Emperors at, and probably before, the time of Justinian. The term was also used in the Papal Court to designate the seven, later twelve, members of a college of prothonotaries whose function was to keep a record of consistories, canonisations and to draft and sign Papal bulls. The office still exists in the Roman Catholic Church, though it would appear to have lost some of its original significance and is sometimes now bestowed as a title of honour.⁴

Miss Hastings⁵ suggests that it is probable that the term came into English law in the thirteenth century when the writing in the Courts was done by clerics,⁶ and this seems a likely explanation. By the fourteenth century it had become the name of certain senior clerks in the Common Pleas, Kings Bench, Exchequer and Chancery. The famous Six Clerks of the Chancery, who wrote and examined writs, were termed Prothonotaries.^{6a} The title "Prothonotary" was not used in an exact or specific way, however, and in the Common Pleas, for instance, both this title and that of "Chief Clerk" seem to have been shared with the *Custos Brevium* or Keeper of the King's Writs and Rolls.

² 7 Will. 4 & 1 Vic., c. 30.

³ 2 *Shorter Oxford Dictionary* (2 ed. 1950) 1606, *Webster's International Dictionary* (2 ed. 1946), 1991. It should be noted, however, that the Latin word *notarius* itself is derived ultimately from the Greek.

⁴ In the Roman Catholic Church at the present time the title Prothonotary is assigned to those members of the College who still carry out the ancient functions of the office, but it is also used as a title of honour as it was in the case of Archdeacon R. Collender P.P., of Sydney, who died this year (1958).

⁵ *Hastings, Common Pleas* 117.

⁶ J. Cowell, *The Interpreter or Booke Containing the Signification of Words* (Cambridge, 1607). It has been suggested also that the Norman Kings may have introduced the term, since there was a prothonotary at the Norman Court in Sicily, see *Hastings, Common Pleas*, 117. T. F. Tout in 1 *Chapters in the Administrative History of England* (1920-1933) 133-5, 162, 182, suggested that Richard I heard the title "prothonotary" during his captivity, and on his return home bestowed it on one, William. It is interesting to note that the famous Hubert Walter was prothonotary in 1189, prior to his appointment as Lord Chancellor.

^{6a} *Fleta* II, 13, 15; 2 *H. E. L.* 421.

III. THE PROTHONOTARIES AND THE YEAR BOOKS

Before dealing with the duties of these officials it might be as well to consider a belief concerning the prothonotaries current in the legal profession until the late nineteenth century. This professional tradition linked the compilation of the Year Books from Edward III's reign until the time of Henry VIII with the three prothonotaries and the *Custos Brevium* of the Common Pleas. This belief that official reporters were appointed by the Crown to draw up law reports seems to have stemmed from a statement of Plowden, echoed by Coke, Bacon⁷ and Blackstone; the last of whom clearly takes the view that these clerks wrote the Year Books.⁸ However, this theory of compilation by official reporters would seem in the highest degree unlikely and Holdsworth attacks it vigorously⁹ on a series of grounds. Of these the most compelling is that, "the picturesque nature of the contents of the Year Books forcibly suggests that they owe their origin to the enterprise of private members of the legal profession."¹⁰ Certainly those responsible for the work have simplified facts, expanded arguments, and omitted detail in a most cavalier fashion. It is at least highly unlikely that specially appointed Crown reporters, much less court clerks of considerable experience and legal training, would have treated official work in such a way.¹¹ Failure to attend to formal detail was not a mediaeval failing.

IV. THE FUNCTIONS OF THE OFFICE IN ENGLAND

The early history of the official staffs in English courts of law is, as Plucknett points out,¹² largely unknown, but certainly by the 15th century ecclesiastics no longer staffed the common law courts.¹³ Many of the clerks of the Common Pleas court in the 14th century had held benefices in the Church. In the fifteenth century this was not so, for by then the royal appointees to court clerkships "were drawn from the secular members of the King's Court, and the appointees of the Chief Justice from the seething ranks of Students in the Inns."¹⁴

The chief functions of the prothonotaries of the common law courts in the Middle Ages were, firstly, to enter records of cases on the plea rolls, and secondly, to issue judicial writs of process in the course of actions at law. To appreciate the importance of the first task it is necessary to deal briefly with the nature of mediaeval pleading, the plea rolls and some of the more important changes that occurred within the system of pleading itself.¹⁵

In origin, pleadings were oral altercations between the parties present in court. They were an integral part, and the central stage, of the litigants' case. These oral sworn statements of the parties were aimed at defining the issues involved and contributing towards the proof of a suitor's case. On the basis of these brief formal statements the court would award the burden (or

⁷ Plowden, preface; Co. Rep. iii, preface; 5 Bacon, *Works* 86.

⁸ *Comm.* i, 71, 72.

⁹ 2 *H. E. L.* at 532-36.

¹⁰ *Id.* at 535.

¹¹ For further views concerning the origins of the Year Books see 3 *H. E. L.* 534ff.

¹² Plucknett, *History* 256.

¹³ *Hastings, Common Pleas* 112.

¹⁴ *Ibid.*

¹⁵ See generally Plucknett, *History* 317-77, 3 *H. E. L.* c. 6.

benefit) of proof by, for example, compurgation or ordeal. At about the time of the Conquest, a change took place, pleadings became rather less formal and the oath was postponed until the parties had disputed the facts of the case orally at some length. This seems to be the system taken over by the royal courts as they encroached on local jurisdiction in the twelfth and thirteenth centuries. At the Conquest the spoken language of the courts had become French,¹⁶ and the written records of the royal courts, the court rolls, were entered in Latin.¹⁷

By the thirteenth century it had become the practice of the royal courts to enter the oral unsworn pleadings of parties or their representatives on the court roll, at first, in a brief informal way to serve as memoranda for official use. This practice, in time, led to a permanent establishment of enrolling clerks in the common law courts. The clerks' entries became longer, more formal and by the time of Bracton "they bear a fixed relation to the oral forms which were used in Court"¹⁸ by the sergeants, apprentices and attorneys. This came about directly through the work of the clerks, whose efforts made it increasingly possible to decide a case from the enrolment and hence made it essential for counsel to say things in court in such a way as to make a good impression on the record, rather than on the judge. This placed the court clerks, headed by the prothonotaries, in a position of great importance and strength since the roll was for the use of the court, not counsel, and counsel were not granted access to it as of right. Counsel's freedom of argument in licking their pleas into shape before the judges, was offset by the uneasiness they must have felt about what actually had been entered on "the mysterious roll"¹⁹ in the keeping of the court clerks.

Hence, the prothonotaries became persons of considerable dignity and importance in the courts. One, at least, John Bacon, Prothonotary of the Common Pleas between 1292 and 1313, was even raised to the bench of that Court. Plucknett goes so far as to say that for a period in the fourteenth century "the lead passed from the hands of the bar to those of the clerks."²⁰ Even if this be an overstatement, certain it is that the prothonotaries were frequently called upon by counsel and the court to give opinions upon the technicalities of procedure and pleading. Miss Hastings cites a Year Book case²¹ where Collow, counsel for the defence, questioned the validity of the plaintiff's declaration. "Copley, le Chief Prothonotary" said it was valid, and, the Court having accepted the Clerk's opinion, the defence went on to enter another plea. Many other examples could be cited.²²

The importance of the roll and the growing complication of oral pleading — caused in part no doubt by the self-interest of the prothonotaries — led counsel to ask that a plea entered on the roll might be amended either in the same term, or before final judgment with the Court's consent. Such a right was granted in 1340.²³ Counsel also evolved the practice of leaving a note of their pleas with the prothonotary who would then enter them on

¹⁶ The spoken language of the courts was changed to English in 1362, although the procedure of the courts remained as before and pleadings were still spoken in law French.

¹⁷ The Court rolls continued to be entered in Latin until 1731 (4 Geo. 2, c.26). For the general nature of the record and its growth see *Hastings, Common Pleas* 119-124.

¹⁸ *Plucknett, History* 356.

¹⁹ *Id.* at 357.

²⁰ *Ibid.*

²¹ Y. B. Hil., 22 Ed. 4, pl. 6, and see *Hastings, Common Pleas*, 115ff.

²² Other examples are cited in *Hastings, Common Pleas* at 114-15.

²³ 3 H. E. L. 643.

the record after verdict, which had been found the most convenient time to draw up the entire record of the case. Oddly enough the judges seem at first to have disapproved of the prothonotaries drawing up the record at the end of a case,²⁴ holding that the record should be written up day by day.

Enough has been said to show that where the litigant was represented by counsel, the prothonotary's task was important; but where a party appeared in person or by a mere attorney, the prothonotaries had an even more important task — that of actually drafting the pleadings. It even became common for the parties to employ the prothonotaries as their attorneys.^{24a} The possibilities of sharp practice in such a situation are obvious, and were so at the time. In fact, the Commons petitioned twice²⁵ that the practice should cease, but to no avail.²⁶ Continuing until well into the seventeenth century, it must have been the source of much revenue to the clerks, despite some restriction of the practice in the sixteenth century,²⁷ and it did not cease until the growing mass of litigation made it no longer possible for the prothonotaries and their clerks to act for private clients. They had too much other business to do, and the job of drawing up written pleadings out of court was left to the attorneys, almost always with the aid of counsel. By the seventeenth century a system of pleading very much akin to the present system had emerged; the prothonotaries' active participation in it had ended. Parties merely exchanged pleadings and a copy of each was lodged with the court. Nevertheless, the prothonotaries still continued to draw their ancient fees from the litigants²⁸ in their respective courts, fees which multiplied and increased as time passed and the real importance of the prothonotaries waned. As late as 1810 an attorney who refused to pay the customary fee to the Prothonotary of the Common Pleas was told by the court that he must pay it, as it was ancient and just.²⁹ It was certainly ancient.

Of the prothonotaries' second chief function, that of making out judicial writs of process there is little to say, except that it was shared with other clerks of the courts. In the fifteenth century Common Pleas, for example, there was no clear division of labour or fees. The prothonotaries were chiefly responsible for the entry of pleadings, as has been seen, and also for the procedures involved in the later stages of an action³⁰ the issue of writs of *venire facias* to summon a jury, and so on,³¹ while the filacers, or filing clerks of the court, were generally responsible for mesne process, but also might enter pleadings in common form, verdict, judgment and final process. Later³² the functions of prothonotary were more clearly distinguished, and the prothonotary's jurisdiction extended in theory but the practical importance of the office was growing less, as the processes of litigation changed.

By the 19th century the active duties still discharged by the prothonotaries

²⁴ *Id.* at 645.

^{24a} *Plucknett, History* 359.

²⁵ In 1392-93 and 1410.

²⁶ Even if these petitions had been granted they would not necessarily have ended the close alliance of prothonotary and attorney, a combination aimed at enriching both at the client's expense, since it was a rule of practice that every attorney on his admission should attach himself to some one prothonotary, and not afterwards leave him without good reason. See 6 *H. E. L.* 436.

²⁷ 3 *H. E. L.* 651-2, citing *Smith's Republic*.

²⁸ 3 *H. E. L.* 653.

²⁹ 1 *H. E. L.* 259.

³⁰ *Hastings, Common Pleas* 113.

³¹ *Hastings, Common Pleas* 40 for a lively description of the First Prothonotary of the Common Pleas at work.

³² Under an agreement drawn up in the time of James I. See *Hastings, Common Pleas* 113.

in the courts were to advise the courts on procedural matters, and to tax costs. The latter was the only really onerous duty left to the prothonotaries. It had been acquired at some time in the fifteenth century, but besides being paid for this work the prothonotaries were still receiving the ancient fees payable for entering pleadings and issuing process.³³ In the King's Bench, by 1800, the Chief Clerkship had become a complete sinecure as also had the office of *Custos Brevium* of the Common Pleas.

V. APPOINTMENT AND REMUNERATION

During the Middle Ages, when the official staffs of the royal courts grew up, many of the officials owned their offices,³⁴ and until the nineteenth century these were regarded, for the most part, as freehold, or property, which like freehold, gave the owner certain definite rights and duties. The office-holder had the right to receive fees, usually direct from the client, and the duty to see that the functions of the office were carried out, although there was generally no need for the duties to be performed in person. Often they were performed by a deputy, while a household favourite, knowing nothing of the work done, occupied the title.

The office-holder bought his property, and the official staff of the central courts, with the exception of the judges, was almost entirely self-supporting. In the King's Bench and Common Pleas, for instance, the prothonotaries until 1665 were entitled to a share of damages awarded in actions at law, to the extent of two shillings in every pound awarded, provided the judgment exceeded five marks, i.e., £3/6/8.³⁵

This, clearly, could be a considerable source of income for those senior clerks entitled to it, but the largest part of the remuneration of the clerks came from fees in connection with the numerous formal steps necessary to put, and keep, the machinery of the law in motion. The Black Book of the Common Pleas, the work of a commission on fees appointed by James I to investigate the offices in the various courts, gives a most interesting list of the customary fees charged in that court,³⁶ one shilling for a declaration to be entered on the record, sixpence for a copy of an opponent's plea, two shillings for the entry of a replication, and so on.

Central court offices were indeed valuable property and it can well be understood that those who owned them were resentful of any increase in the numbers of official staff, since any such, however necessary, diminished the value of the office.³⁷ It is not surprising either that there grew up a series of rules relating to their creation, tenure, transfer and devolution modelled upon the legal rules relating to freehold land. Nor was it unusual to have litigation concerning the right to present.^{37a} Perhaps the best-known example

³³ Parl. Pap. 1819-20, ii, 202.

³⁴ 1 *H.E.L.* 257.

³⁵ See C. G. Cook, *English Law* (1651) at 46-47. This share of damages paid to the clerks was known as *damages clere*, or *damna clericorum*. It seems that originally they were exacted as a kind of personal tithes by the clergymen who were the earliest royal clerks. The court clerks were finally forbidden to take *damages clere* by the statute, 17 Car 2, c. 6.

³⁶ *Hastings, Common Pleas*, App. I, 246-55.

³⁷ *Cavendish's Case* (1587) 1 And. 152. See also *Bridgman v. Holt* (1693) Shower, P.C., at 115.

^{37a} E.g. the Prothonotaries of the Common Pleas had the right to appoint their

is *Cavendish's Case*³⁸ where the judges refused to admit a grantee of Queen Elizabeth I on the ground that to do so would be to disseise existing prothonotaries and exigenters of their freeholds, an action which the judges considered would be quite contrary to Magna Carta! Shocking as this system may seem at the present time, according to mediaeval ideas the right to appoint to an office in the State, or in the Church for that matter, carried with it the right to sell. Although from the fourteenth century onwards statutes³⁹ were passed to curtail the practice, it was not until the nineteenth century that it was abolished.

The form and nature of appointments to court clerkships were neither simple nor uniform, some offices were carried out in person, many by deputy, and the result, by the nineteenth century, was a regular hierarchy in which the dignified holders of the chief offices did little and profited much, the minor clerks did much and profited little.⁴⁰

Some of the officials had absolute sinecures by the time the Parliamentary Commissioners carried out their inquiry in the early nineteenth century. The Chief Clerk of the King's Bench was one of these. He had originally been entrusted with enrolling the pleadings and judgments of the court, but had long since ceased to do so. The Chief Justice nominated to this office, and could, by that means, "provide for himself . . . or his family." Another absolute sinecure was the position of *Custos Brevium* in the Common Pleas, held in trust for the Lichfield family.⁴¹

Although the Chief Clerkship of the King's Bench had become a sinecure, and the Exchequer prothonotaries appear to have had little to do, the prothonotaries in the Common Pleas were still actively employed when the nineteenth century Commission made its enquiry. They no longer entered pleas on the rolls, their original function, but they did report to the court on matters referred to them, they taxed costs, advised the court of its practice and generally did much of the work now done in England by Masters. Although they were performing valuable work reasonably adapted to the needs of the time, the manner of appointment of the Prothonotaries of the Common Pleas was still mediaeval, the First and Third Prothonotaries being appointed by the Chief Justice without restriction upon his choice, the Second Prothonotary by the Chief Justice on the nomination of the *Custos Brevium*.^{41a} This anomalous link between the *Custos Brevium* and the Second Prothonotary seems to stem from the time when the court "record" consisted of the collective memory of the bench of a court rather than the court roll,⁴² but like so much else in the machinery of the courts it bore no relation to nineteenth century realities or needs.

VI. REFORM

By 1800 the offices attached to the courts were nests of abuses and anomalies, because the courts had been staffed gradually and silently, accord-

Secondaries (assistant clerks).

³⁸ (1587) 1 And. 152.

³⁹ E.g. 12 Ric. 2, c. 2; 2 Hy. 6, c. 13; 5 & 6 Ed. 6, c. 16.

⁴⁰ Parl. Pap., 1818, vii, 302-3 and see 1 H.E.L. 257.

⁴¹ Parl. Pap., 1819-20, ii, 187.

^{41a} It may be noted that the Master of the Crown office was appointed by the Chief Clerk of the King's Bench.

⁴² *Hastings, Common Pleas* 119.

ing to no principle or design, sometimes to meet real need, sometimes to create patronage. "Payment by fees, saleable offices and sinecure places were the predominant characteristics of a bureaucracy which could not be defended even upon historical grounds."⁴³ In the time of James I some enquiries had been made into the work and fees of the staff of the law courts, and further enquiries followed under Charles I, during the Commonwealth, and after 1688, but none of these had produced effective results.⁴⁴ A commission reported in 1810 upon saleable offices in the law courts, but this report was limited in scope, and it was in the reports issued by the Commissioners between 1818 and 1822 that a thorough survey of the existing position was made.

A series of statutes followed, perhaps the most important general Act being that of 1837.⁴⁵ The preamble to the Act speaks for itself:

Whereas in Her Majesty's Superior Courts of Common Law at Westminster there are many Officers whose Duties have wholly or in part ceased, or are executed by Deputy, and whose Offices have become by Changes in the Law useless, and inapplicable to the present Practice and Proceedings in those Courts, though the Fees in such Offices continue payable by the Suitors as heretofore: . . . and whereas the Continuance of sinecure and useless Offices tends to impair the effective administration of Justice, and to cast upon the Public and the Suitors in those Courts unnecessary Burthens and Costs; and it is expedient to abolish the said Offices.

The Act abolished twenty offices in the King's Bench, including the Chief Clerkship, sixteen in the Common Pleas, including the prothonotaries, and nine in the Exchequer, again including the prothonotaries.

The old offices thus abolished were replaced by the establishment of fifteen Masters, given a fixed salary, five Masters being attached to each common law court. The result of these and other changes was that by the time the Judicature Act was passed there were two chief classes of official attached to the common law courts, Masters and Associates.⁴⁶

The duties of the Masters were to attend court in rotation, to hear summonses and make interlocutory orders, to hear matters referred to them by consent of the parties or by court order, to tax bills, and to report on matters referred to them by the court. In fact the action of the court in all its stages was initiated and recorded in their offices — the writ of summonses office, the appearance to the summons office, the rule office, judgment office, and so on. Three Associates were also attached to each court, their functions being much as at the present time, to sit with the judge at *nisi prius*, to impanel juries, call on causes, read documents put in and receive verdicts, and, in Chambers, to make abstracts of the record of causes to be tried, receive the list of suitors and generally assist the judge.

Two reports issued in 1874⁴⁷ suggested that the separate departments attached to the different courts should be formed into one general department. This was effected by the Act of 1879⁴⁸ which established a Central Office of the Supreme Court which regulated the tenure and duties of the Court staff.

⁴³ A commission appointed in 1733 had reported only on the Chancery. In the interests of space the position in the Chancery has not been dealt with in this essay, but see 55 *L.Q.R.* 375 and 29 *L.Q.R.* 418.

⁴⁴ 1 *H.E.L.* 647.

⁴⁵ 7 *Will.* 4 & 1 *Vic.*, c. 30.

⁴⁶ 1 *H.E.L.* 263.

⁴⁷ 1 *H.E.L.* 648.

⁴⁸ 42 and 43 *Vic.*, c. 78.

It took fifty years of effort in England to abolish the old office of Prothonotary and to set up in its place a new series of offices designed primarily for service. Oddly enough, it was towards the end of this period that the office was instituted in New South Wales.⁴⁹

VII. THE INTRODUCTION OF THE OFFICE INTO NEW SOUTH WALES

The office of Prothonotary in New South Wales appears to have been the inspiration of Judge-Advocate Ellis Bent who, as early as 1811, urged Lord Liverpool to send out "a professional person as Clerk of the Peace" who "might also hold the situation of Registrar or Prothonotary in the Civil department of the Court".⁵⁰ Again, in 1815, Bent wrote to Earl Bathurst, "I should recommend a proper person to be sent out as Prothonotary, Registrar, and Clerk of the Crown, as there is no . . . person in this Colony properly qualified for such office".⁵¹ The legal adviser to the Colonial Office doubtless drew upon Bent's ideas when, in 1823, he suggested that the New South Wales Supreme Court should have a Registrar, a Master, a Sheriff and "an officer . . . to issue all writs, in whose office all the written pleadings of the Court will be filed and who will be the Keeper of the Accounts of the Court".⁵² To the last-mentioned officer the name "Prothonotary" was assigned by the Statute 4 Geo. IV, c. 96 which provided for "a Registrar, a Prothonotary, a Master and a Keeper of Records"⁵³ in the Supreme Court.⁵⁴

The Colonial Office exhibited reluctance in allotting any office-bearers to the Court which it had so elaborately staffed in name. When the Supreme Court opened in 1824 not one commissioned ministerial officer had arrived from England;⁵⁵ although a Registrar and a Master reached Sydney some months afterwards. In the meantime the Chief Justice, Sir Francis Forbes, had been obliged to carry on by appointing his clerks, Gurner and Moore, acting Registrar and Prothonotary respectively.⁵⁶ The first commissioned Registrar, Colonel George Gallwey Mills, and Master William Carter, were of

⁴⁹ It is interesting to notice that the 18th-century conception of a public office as an incorporeal hereditament, a saleable right, was introduced into the colonies. Two cases, one from the 17th century another from the 18th, illustrate something of what lay in store for New South Wales, during the early days of the settlement. *Blankard v. Galdy* (1694) 4 Mod. 222, concerned a lease of the office of provost-marshal in Jamaica, while in *R. v. Vaughan*, (1769) 4 Burr, 2494, it was said *arguendo* that "the office of clerk of the Supreme Court of the island of Jamaica was sold under a decree in Chancery, upon the cestui que trust of it dying insolvent. Mr. Lawton bought it, and afterwards devised one moiety of it. The representatives of Mr. Paxton sold the other moiety. The sub-divisions of it have since been both devised and sold. The office was consequently very carelessly executed by deputies." See *infra* 56-57 for the careers of Mills and Manning in New South Wales.

⁵⁰ *H.R.A.* IV/i, 64.

⁵¹ *Id.* at 167.

⁵² *Id.* at 468.

⁵³ A Keeper of Records was never appointed "nor could there, perhaps, conveniently be one; those of the different Departments being, almost of necessity, distributed . . . according to the particular Jurisdiction to which they respectively belong." *Stephen* 70. "Having regard to the terms of the Charter of Justice requiring that the four superior officers appointed should discharge duties corresponding with those performed by similar officers of the Courts of Record at Westminster it is practically certain that the "Keeper of the Records" was to be identical with the *Custos Brevium* and to have duties of the same nature as those performed by the officers of that name in the King's Bench and Common Pleas Divisions" *M. & O.*, 8; *cf.* W. Tidd, *Practice of the Court of King's Bench* (9 ed. 1828) 38.

⁵⁴ Section IX.

⁵⁵ *Forbes Papers*, letter to Huskisson 26 Feb. 1828, 302.

⁵⁶ "The Governor has been pleased to appoint, until the Arrival of Officers from Home, or His Majesty's Pleasure may be communicated, Mr. Joshua John Moore to act as Prothonotary and Mr. John Gurner, as Registrar of the Supreme Court, about to be

little assistance to the Chief Justice. Mills was a "Man of profligate character and dissolute habits"⁵⁷ who, after becoming hopelessly insolvent,⁵⁸ committed suicide in 1828.⁵⁹ Forbes considered his appointment "as a provision for past services"⁶⁰ and never troubled him with the Court's clerical duties. Mills was "always willing to do what he may be required"⁶¹ but his regular duties of attending the Court and signing all common process afforded him such little employment that Forbes was obliged to occupy him with an "important and increasing branch of the business of the Court", the Curatorship of Intestate Estates.⁶² Mills was incompetent, Master Carter was not given any responsibility.⁶³ In three years, only eight cases on simple matters of fact were referred to him.⁶⁴ There being "comparatively little occasion for resorting to a Court of Equity" in the early stage of the Colony's development,⁶⁵ Carter had scarcely any work to do. Forbes delegated to him the taxing of costs and taking of examinations *de bene esse*, but even these additions did not save the office from being a sinecure.

In 1828, Carter having accepted a new appointment as Sheriff and Mills having committed suicide, the Chief Justice proposed that the offices of Registrar and Master be abolished. He contended that there was "at that time no sufficient employment in the Court for officers with such names,"⁶⁶ and that official duties were so unreasonably distributed that most of the work devolved upon the Chief Clerk, who received only half the salary of his superiors. Forbes also felt that the ministerial offices should be created "with reference to the business of the Court, as it is transacted in this Colony, in preference to retaining the names of offices as they exist in England, and which have only a very remote analogy to the operative duties of the Supreme Court".⁶⁷ His solution was to dispense with the titles used in 4 Geo. IV, c. 96 "and instead thereof to appoint officers by the name of Chief Clerk and assistant Clerks in the Supreme Court".⁶⁸ In these circumstances an application by Mr. Francis Stephen to Earl Bathurst for appointment as Prothonotary had not been warmly received.⁶⁹ The Chief Justice answered the Governor's enquiry whether a Prothonotary was "necessary for the better performance of the duties of

opened." Government and General Orders. *Sydney Gazette* no. 1070, 20 May, 1824, 1. Cf. n. 165 *infra*.

⁵⁷ Darling to Hay, *H.R.A.* I/xiii, 784, Sir James Dowling, C.J., described him as "a decayed gentleman, without the knowledge or habits of business, suited to such an office" *H.R.A.* I/xxi, 632. Mills admitted himself to be "a very harmless sort of old Gentleman"* *Dowling Papers* (Mills to Harriett Dowling, 8 May 1827). Only the *Sydney Gazette* commented favourably upon him. 18 Feb. 1828. vol. xxvi, no. 1466, 2.

⁵⁸ *H.R.A.* I/xv, 15.

⁵⁹ This "catastrophe of no common import" (*Sydney Gazette*, *loc. cit.*) was committed by Mills during a fit of insanity. One witness, a constable, "stated that he saw the deceased yesterday in the street . . . and was quite surprised at his haggard appearance; he had an umbrella in his hand, which he swung about with considerable violence, and was talking very loudly to himself; witness heard him say, as he passed, "that must be it;" he saluted witness in his usual way, but he seemed gnawing the handle of the umbrella as he went by". *Id.* no. 1465, 2. (15 Feb. 1828).

⁶⁰ "It were impossible to suppose that he could have been expected to perform the duties of his Office." *H.R.A.* I/xii, 820; and *id.* at 681.

⁶¹ *Id.* at 680.

⁶² *Ibid.*

⁶³ William Carter was the first Master of the Supreme Court and subsequently the Colony's first Registrar-General. At other times he acted as Sheriff and as Master in Equity.

⁶⁴ *H.R.A. loc. cit.* 681.

⁶⁵ *Id.* at 682.

⁶⁶ *H.R.A.* I/xxi, 628 (Dowling to Gipps).

⁶⁷ *Ibid.*, cf. *G.D.* A1227, 31.

⁶⁸ *H.R.A. loc. cit.*, cf. *G. D.* A1227, 46-47.

⁶⁹ In England "no opinion (could) be formed . . . of the propriety of making the appointment in question." Hay to Darling *H.R.A.* I/xii, 587.

the Supreme Court⁷⁰ by expressing his opinion that the office was not required.⁷¹ The Government was quite ready to save the expense of a Prothonotary, but Sir George Murray, the Secretary of State, had reserved the Registrarship for his protégé John Edye Manning and the Shrievalty for Thomas Macquoid.⁷² Carter had to stand down for Macquoid and was obliged to take the position of Master.⁷³

The shattering of Forbes' plan for reform was attended with disastrous results. Within four years, Carter, having been overwhelmed by insolvency, was dismissed and the office of Master abolished.⁷⁴ Manning survived for a longer period as Curator of Intestate Estates, using the funds entrusted to him for his own aggrandizement in the belief "that a considerable source of emolument would belong to him in the custody of Intestate Estates with a percentage on the amounts received".⁷⁵ Security for the money officially received was only exacted from him under protest after the strongest insistence by the Government. Nevertheless, he was left for a decade entirely to his own devices, there being no rules of court to govern him and no supervision of his administration. The truth only came to light when Mr. Justice Burton sponsored rules of court requiring the Registrar and Curator to pass accounts and pay over the balances in hand. The rules and an auxiliary statute⁷⁶ were not effected without a storm of objection from the Registrar.⁷⁷ And well might he have objected, for the subsequent enquiry into his accounts disclosed "that Mr. Manning had no day book — no cash book — and no ledger — that he had kept no accounts at all — that his papers were confused and imperfect — that he really owed £3085/2/2 though he had debited himself with £1989/17/½ only".⁷⁸ Remarkably, no local authority seems to have been at all concerned by the disclosure⁷⁹ — "from that day all vigilance seems to have ceased. From the 31st October 1838 to 27th October 1841, the Judges permitted Mr. Manning to go on receiving and misapplying Funds without once calling on him to account or exacting from him any security."⁸⁰ Not until the displeasure of Her Majesty's

⁷⁰ *Forbes Papers*, Darling to Forbes, 20 Sept., 1827, 309.

⁷¹* "Upon the necessity of the office I beg leave to state it as my opinion that it is not at present required in the Supreme Court. The duties of the offices already are very unequally placed, some having large salaries with comparatively little duty to perform and others being very inadequately paid for the labour they undergo". *Id.* Forbes to Darling, 28 Sept., 1827, 310; *cf.* *H.R.A.* I/xiii, 823.

⁷² Sir George Murray's action was highly embarrassing to the Governor who had already "appointed" his own nominee — John Stephen — to the vacancy; *cf.* n. 149 *infra*. Darling to Goderich, *H.R.A.* I/xii, 782; Murray to Darling, *H.R.A.* I/xiv, 447.

⁷³ Darling to Goderich *H.R.A.* I/xii, 648; Darling to Murray *H.R.A.* I/xv, 205.

⁷⁴ The office of Master in Equity was "revived" by the statute 4 Vic., No. 22. (An Act to provide for the more effectual Administration of Justice in New South Wales and its Dependencies 1840) s. 22.

⁷⁵ *H.R.A.* I/xix, 473. Manning's career and defalcations are recorded in correspondence printed in *V. & P.* 1843, 313 *et seq.*

⁷⁶ *Id.* at 328 *et seq.* 1 Vic., No. 4 was "An Act for the Investment of moneys belonging to Intestate Estates by the Supreme Court in the New South Wales Savings' Bank at Sydney" (1838).

⁷⁷ He considered that the Rules were "threatening to take from him a source of legitimate income, on the faith of which he immigrated to the Colony." *V. & P.* 1845, 1005. The Judges were reported to have received "an indignant, and, indeed, a very vapouring letter from Mr. Manning in which he moists upon the indignity of being called upon to give securities! and maintained his right to use the Suitors moneys for his own benefit".* *G. D.* A1267-20, 2865.

⁷⁸ *Id.* at 2863.

⁷⁹ "It is surprising that Manning survived results so discreditable, but there is no evidence that he was even censured. His previous unimpeachable conduct, his social status, and confidence in his honour appear to have been his shield. His practical reply to the rules of the Court was to ignore and evade them". C. H. Currey, *Chapters on the Legal History of New South Wales 1788-1863* (Unpublished Thesis — 1929), 226B. 80 *G. D.* A1267-20, 2863.

⁸⁰* *G. D.* A1267-20, 2863.

Government was made known did the Judges order Manning to pay into court the proceeds held by him in trust.⁸¹ With this order the Registrar and Curator was wholly unable to comply since he had by that time misappropriated funds amounting to roughly £30,000.⁸² He plunged rapidly into the precedent of insolvency established by Mills and Carter, his estate returning to the representatives of intestates less than one shilling in the pound which they took *pari passu* with his private creditors.⁸³

When Manning was suspended it appeared to the then Chief Justice, Sir James Dowling, that reform could not be further delayed. From the inception of the court all the administrative work had devolved upon the clerks. John Gurner, the Chief Clerk at that time, was obliged to attend the court at all trials, take minutes, record proceedings, and superintend "the whole of the duties of the office of the Court, Exercising at once the various jurisdictions of all the Kings Courts at Westminster and Doctors Commons"⁸⁴ After the abolition of the Master's office, the Chief Clerk was further required to sign all writs and process, draw rules orders and decrees in the common law and equity jurisdiction, attend the court *in banco* or at the hearing of causes in equity and, in the ecclesiastical jurisdiction, to receive petitions for grants of probate or letters of administration.⁸⁵ He had as assistants the Second and Third Clerks who kept the Clerk's book, entered all conveyances and deeds, made abstracts of issues of cases and engrossed office copies of documents.⁸⁶ Under this system Sir Francis Forbes had hoped always to secure the services of an efficient Chief Clerk.⁸⁷ In fact it had the opposite effect, the clerical offices being unattractive to competent men "by reason of the inadequacy of the salary payable . . . and the temptation held out . . . to become a practising Attorney".⁸⁸

Sir James Dowling refused to tolerate the inefficiency of the system. "To remedy the evil", he wrote to Governor Gipps, "I venture to recommend with the concurrence of my brother Judges, that the office of Prothonotary contemplated by the Charter of Justice be now filled up".⁸⁹ The recommendation must have been surprising to local lawyers who admitted their ignorance of the duties to be undertaken by the new officer.⁹⁰ Moreover it was anachronistic, some years having passed since the abolition of the office of Prothonotary in England.⁹¹ Clearly Dowling's suggestion was accidental rather than designed, and made in a spirit of experiment, seeking to overcome the defects in court administration.

VIII. THE PROTHONOTARIES OF NEW SOUTH WALES

Governor Gipps did not immediately agree with Sir James Dowling's hope

⁸¹ "I cannot acquit from blame the Judges who, if they had vigilantly performed their duty, might in all probability, have prevented the loss which has occurred". Stanley to Gipps, *V. & P.* 1843, 324, no. 4. and *id.* at 326.

⁸² *Id.* at 323.

⁸³ *V. & P.* 1845, 1005.

⁸⁴ *H.R.A.* I/xiii, 681; *cf.* Gurner to Forbes, *G. D.* A1204, 588 and *G. D.* A1267-13, 1301.

⁸⁵ *Id.* at 1296.

⁸⁶ *H.R.A. op. cit.* 682.

⁸⁷ *H.R.A.* I/xxi, 628. Dowling to Gipps, 3 Dec., 1841.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.* "In my opinion it (*scil.* the office of Prothonotary) should be filled either by a Barrister of the Court at Westminster, or an attorney."

⁹⁰ Stephen, 70: "It has been intimated . . . that a Prothonotary is shortly to be appointed; but what are to be his duties, the writer is not able with sufficient certainty to state."

⁹¹ *Supra* 54.

that "the public interest will be served by guaranteeing the respectability, and permanency of the Office of Prothonotary, and render this department of the Supreme Court more agreeable to practice and usages of the Courts at Westminster".⁹² The Governor being anxious to save expense wished for a reduction rather than an increase in the Court's personnel. It seemed to him that the duties of Registrar, Prothonotary or Chief Clerk were "nearly identical or at any rate (might) be performed by one Officer"; what that Officer should be called was immaterial to him.⁹³ After some exchanges between the Chief Justice and the Governor in which the former carried his contention that the Court staff could not possibly be reduced, the latter agreed to recommend to the British Government as his own idea the appointment of a Prothonotary in place of the Chief Clerk and the removal of the Registrar from the Supreme Court so that he could act as Registrar-General for the Colony.⁹⁴ Lord Stanley compromised by creating the office of "Prothonotary and Registrar of the Supreme Court",⁹⁵ leaving it to the local authorities to decide what its scope should be. Neither Lord Stanley nor Governor Gipps seems to have understood fully the implications of his recommendation.⁹⁶ The Judges at least were convinced that the effect was to consolidate the offices of Prothonotary and Registrar; not to abolish the office of Chief Clerk.⁹⁷

As no suitable nominee existed in New South Wales,⁹⁸ the selection of "the efficient and permanent services of a Gentleman of professional standing"⁹⁹ was left in British hands. By good fortune the choice was entrusted to Sir Frederick Pollock and Sir William Follett who "saw at once that, as *Registrar and Prothonotary*, the new officer would be at the head of all the branches of the Court's jurisdiction, and . . . that men of competent experience and character would not undertake such duties at a diminished salary".¹⁰⁰ After three or four gentlemen had declined the appointment at £650 (the maximum allowed by Lord Stanley), George Phillips Foster Gregory accepted it for a salary of £800.¹⁰¹ The Judges committed to him the following responsibilities:¹⁰²

He will perform all those duties assigned to the Registrar¹⁰³ . . . He will

⁹² *H.R.A.* I/xxi, 628, 633.

⁹³ "Whether therefore, that Officer be called by one or the other name appears to His Excellency to be a matter of little importance but it is, he considers, important that the officer who receives the best Salary should be the Chief Officer of the Court; and so long as there remain an Officer receiving a high Salary under the name of Registrar the Governor cannot . . . with a due regard to . . . economy . . . consider that it would be proper to give the Chief Clerk the title of Prothonotary and a large increase of salary, especially so soon after he has by the appointment of a Master been relieved from nearly one half of his duties." Deas Thomson to Dowling, *H.R.A. op. cit.* 629.

⁹⁴ *G. D.* A1227, 33.

⁹⁵ "I think it is sufficiently shown that an officer with the title of "Prothonotary and Registrar of the Supreme Court" ought to be appointed", *G. D.* A1289, 697; *cf. G. D.* A1290, 167.

⁹⁶ "In what way Sir George Gipps meant the Equity and Ecclesiastical business to be superintended, it is impossible to tell; nor is it easy to say what division of duties between the Chief Clerk and the new officer was contemplated by Lord Stanley", Memorandum of Sir Alfred Stephen, *V. & P.* 1851, 633(6).

⁹⁷ *V. & P.* 1843, 429. The Governor's recommendation had in fact been "that a Prothonotary should be substituted for the Chief Clerk, but should do the same duties, that is to say, that he should be the real head of the office." Gipps to Russell. *H.R.A.* I/xxi, 626; *cf. V. & P.* 1851, 633(5).

⁹⁸ "We are not aware of any Gentleman in this Colony, who being recommended by his fitness, would be induced to accept the responsible office of Prothonotary." *H.R.A.* I/xxi, 633.

⁹⁹ *Id.* at 628.

¹⁰⁰ *V. & P.* 1851, 633(7)

¹⁰¹ *Ibid.* and *G. D.* A1290, 167. Gregory's appointment was notified in *N.S.W. Government Gazette*, 18 Aug., 1843.

¹⁰² *V. & P. loc. cit.*

¹⁰³ *Stephen*, 65 — "In his Office, all Laws or Ordinances of the Local Legislature

receive also the Accounts and Returns of the Collector of Intestates' Estates; which latter duty is to be undertaken by the Master. He will attend all Sittings of the Court, *in Banco*, or on Appeals; and compute Principal and Interest on Bills, and tax Costs. All writs, also, and Business, in the *Criminal* and *Exchequer* Jurisdictions of the Court, will be issued from, or conducted in, his Office.

His duties as Registrar were regarded as distinct from those as Prothonotary.¹⁰⁴

The Chief Justice was disappointed that a younger person had not been made available¹⁰⁵ and to him Mr. Gregory seemed "a broken man".¹⁰⁶ But Gregory, as a barrister who had "practised in every branch of legal business, with the exception of the inferior Courts"¹⁰⁷, was experienced and efficient in coping with the great volume of Court work.¹⁰⁸ He carried on without increased clerical assistance until a severe decline in his health rendered his department of "comparatively little service" to the Court and led to his early death.¹⁰⁹ The former Chairman of Quarter Sessions, Samuel Raymond LL.D., was chosen to succeed him, with a marked lack of enthusiasm by the then Chief Justice, Sir Alfred Stephen.¹¹⁰ The appointment was significant in that Raymond was Prothonotary only¹¹¹ and, from the time of his accession, the office of Registrar in the Common Law Jurisdiction of the Supreme Court ceased to exist. There had been a tendency to designate Gregory "Prothonotary" rather than Registrar,¹¹² chiefly through confusion of Registrar of the Court with Registrar of Deeds.¹¹³ Sir Alfred Stephen, though he did not countenance the abolition of the Registrarship of the Court,¹¹⁴ was fully aware of the misunderstanding which it caused and the recommendation to abandon the title of "Registrar" came from him.¹¹⁵ A further matter of significance was the making in 1856 of

have, hitherto, been enrolled. — Also, all Crown Grants, and Letters Patent; and other Instruments, "which by law or usage may be required to be enrolled, recorded, or registered in the Supreme Court" (S.R. 3) . . . All proceedings, also, on the Ecclesiastical side of the Court, (including the recordings of Wills, and the issuing of Probates, and Letters of Administration,) are here commenced and conducted. Lastly . . . he is directed to attend the Criminal Sittings, and perform thereat all the duties of *Clerk of Arraigns*. Of late, however, the Civil duties in his Office have been too onerous, to admit of his discharging these."

¹⁰⁴ *V. & P.* 1850, 579. *Stephen* (supplement) 75 — "The Prothonotary and Registrar shall, as *Prothonotary*, have charge of the Records in the Common Law and Criminal jurisdictions, and, as *Registrar*, in the Ecclesiastical Jurisdiction, of the Court; and shall, by himself or his Clerks, discharge all other duties, incident to the offices of Master, Taxing Officer, and Sealer of Writs, in the Queen's Bench, and to the office of Registrar in the Prerogative Court of Canterbury. Provided that the duties of Clerk of Arraigns, and Clerk and Associate at *Nisi Prius*, shall be discharged by the Judges' Clerks respectively; and that they shall also sit for the Prothonotary, *in Banco*, whenever he shall be unable personally to attend there."

¹⁰⁵ *V. & P.* 1851, 632.

¹⁰⁶ Sir James Dowling Correspondence, vol. 2 (*Dowling Papers* A486) August, 1843.

¹⁰⁷ *V. & P.* 1845, 900(3).

¹⁰⁸ "Mr. Gregory has already quite enough to do, without any additions whatsoever", Sir Alfred Stephen's *Letter Book* vol. 5 (A673) 6 Nov., 1845.

¹⁰⁹ *60 V. & P.* 1851, 632.

¹¹⁰ "You will take care, of course, not to let *Raymond's* appointment appear as being on my recommendation . . . For, indeed, it will be on the "recommendation" of nobody — It will be, and in fact is, a sheer matter of necessity." Stephen to Deas Thomson, *Deas Thomson Papers* (A1531) 978 (undated).

¹¹¹ He was appointed "to be Prothonotary of the Supreme Court." *N.S.W. Government Gazette*, 29 Sept., 1851.

¹¹² E.g. *V. & P.* 1843, 430; 1845, 900; 1849, vol. 2, 10.

¹¹³ *V. & P.* 1850, 634.

¹¹⁴ "The name is the common and appropriate one for the Chief Ministerial Officer in Court of Equity and Ecclesiastical Courts". *Ibid.*

¹¹⁵ "I recommend that Raymond's title shall be "Prothonotary" only. It tends to disembarrass matters — and prevent the confusion of ideas. It was the unfortunate adding of the other title to his name, ("and Registrar,") that made our excellent puseyite-radical, *Cowper*, & his compatriots, so rampant as to his registering *deeds*" *Deas Thomson Papers*, *op. cit.* 981.

Rules of Court¹¹⁶ which re-stated the Prothonotary's duties. His major obligation was henceforth the keeping of the Court records, except those in Equity, and he was also to discharge "all other duties incident to the office of master, taxing officer and sealer of writs, in the Queen's Bench, and to the office of registrar in the Prerogative Court of Canterbury".¹¹⁷

On Raymond's retirement, the Chief Clerk, David Bruce Hutchinson, "cheerfully accepted" an invitation to fill the vacancy.¹¹⁸ During his tenure there was a decrease in litigation at common law which accounted for his appointment to the Registrarship of the Divorce and Matrimonial Causes Court as an adjunct to the Prothonotary's department.¹¹⁹ "In the room of Mr. Hutchinson came Thomas Michael Slattery"¹²⁰ whose differences of opinion with the Government caused his early dismissal¹²¹ and replacement by Frederick Chapman, a man of such high efficiency and vigilance in discharging his duties that the Court revenue was substantially increased.¹²² His own salary did not reflect the Court's prosperity. Whereas the Prothonotaries of the 1860's had received £800, he was paid only £750.¹²³ His duties were three times heavier than those of the Master in Equity, yet the Master earned £1250.¹²⁴ Chapman's petition to the Government for a review of his status was unanimously supported by the Judges¹²⁵ and by the legal profession.¹²⁶ As witness of his diligence it appeared that much of his private time was devoted to the Divorce Jurisdiction.¹²⁷ He was obliged to give up the Curatorship of Intestate Estates which was carried on in a separate department until its merger with the Probate Department.¹²⁸

Charles Richard Walsh became Prothonotary in 1896 acquiring automatically the Registrarship of the Divorce and Matrimonial Causes Court and of the Vice-Admiralty Court; in addition he served as Registrar of the Court of Criminal Appeal from 1916.¹²⁹ During his time a further revision was made of the Prothonotary's duties, first by the *Regulae Generales* (1902)¹³⁰ and secondly by the Supreme Court and Circuit Courts Act, 1900¹³¹ to which in 1912, a new section 39A, was added whereby the Judges were authorized to make rules of court conferring power on the Prothonotary to sit in chambers in a judicial

¹¹⁶ See C. E. Pilcher, *The Common Law Procedure Acts* (2 ed. 1895).

¹¹⁷ *Id.* at Item 367.

¹¹⁸ *V. & P.* 1879-1880, vol. 3, 86. His appointment was gazetted on 12 Feb., 1862.

¹¹⁹ "Although the heavier Supreme Court duties are not lessened but in some respects seriously increased, the actual number of actions brought in this Court and consequently the labour in the office of the Prothonotary, have so much diminished during the last two years that the work of the Curator of Intestate Estates department can, I have no doubt, be now safely undertaken in the office." *Ibid.*

¹²⁰ His appointment took effect from 12 Jan., 1876, but was not gazetted until 25th. A survey of Slattery's curious career is given in Philip Mennell's *The Dictionary of Australian Biography* (1892) 419.

¹²¹ His dismissal is considered in detail *infra*. See n. 169-184 *infra*.

¹²² *V. & P.* 1885-1886, vol. 2, 471(5) (enclosures: opinions of Martin, C.J., Manning and Windeyer, J.J.) Chapman's appointment was effective from 9 Apl., 1880.

¹²³ *Id.* at 474, no. 14 (enclosure par. 6).

¹²⁴ *V. & P.* 1889 n. 2, 397-398, Letters of Darley, C.J.

¹²⁵ *V. & P.* 1885-1886, 471.

¹²⁶ The Incorporated Law Institute organised a petition and deputation on Chapman's behalf. *V. & P.* 1889, 399-400.

¹²⁷ "The business of the (Divorce) Court has increased very largely since the office was created, and Mr. Chapman's responsibilities are much greater than they were; not only has he to tax bills of costs, . . . but he has to prepare deeds of settlement which require care and an amount of attention that I am convinced he can only bestow upon them out of Court hours, as his time is fully occupied by the routine common law business connected with his office as Prothonotary." Windeyer, J. to the Minister of Justice, *V. & P.* 1885-1886, 472n., no. 10.

¹²⁸ N.S.W. *Law Almanacs* for 1887 and 1897.

¹²⁹ He was appointed Prothonotary on 25 June, 1896.

¹³⁰ Promulgated 22 Dec., 1902, r. 12.

¹³¹ No. 35 of 1900.

capacity.¹³² Rules were made accordingly in August 1912 enabling the Prothonotary "to do all such things and transact all such business and exercise all such authority and jurisdiction in respect of the same as by virtue of any Statute or custom or by the rules and practice of the Court in its Common Law Jurisdiction are now done, transacted or exercised by a Judge in Chambers".¹³³ Matters affecting the liberty of the subject or criminal proceedings were specifically excluded from this power, and in other cases the jurisdiction was limited to the making of orders by consent.¹³⁴ The nature of the office remained unchanged during the term of Mr. Prothonotary Saddington,¹³⁵ but it underwent some alteration in the time of Harrie Dalrymple Wood.¹³⁶ The suggestion was made by the Government of the day that the Judicature Act system should be introduced, the Prothonotary's office abolished and replaced by a number of Masters:¹³⁷ however, the plan was never carried into effect.

In 1935, following the addition of s. 15A(2) to the Supreme Court and Circuit Courts Act, 1900,¹³⁸ the Deputy Prothonotary was enabled to deputize in judicial matters during the Prothonotary's absence or incapacity, or during a vacancy in the office.¹³⁹ The question arose whether this was not inconsistent with s.39A of the Act and with the rules made under it authorizing the Deputy to perform all duties and powers of the Prothonotary in the event of his absence or indisposition, or *by his request*.¹⁴⁰ One theory was that s.15A(2) did not conflict with s.39A, but was inconsistent with the rules and to that extent precluded the Deputy from acting by request — "any judicial act by the Deputy Prothonotary when the Prothonotary is neither absent from Sydney nor incapable of acting, and the office is not vacant, is not a judicial act at all".¹⁴¹ That proposition was expressly rejected in *Kuhn v. Kuhn*¹⁴² where Herron, J. held that:

Section 39A clearly empowers the judges to make rules for empowering the Prothonotary and the Deputy Prothonotary to exercise certain jurisdiction, notwithstanding the use of the word "or" where it occurs in that section. This assumes a power in someone to appoint a Deputy Prothonotary, and an officer of this Court has been appointed Deputy Prothonotary, and by R.11, the duties and powers of the Prothonotary can be performed by the Deputy in certain cases.

His Honour concluded: "There is no inconsistency between s. 15A on the

¹³² Supreme Court and Circuit Courts (Amendment) Act, (N.S.W.). No. 9 of 1942, s. 9 *Cf. Delaney v. Flynn* (1955) 55 S.R. (N.S.W.) 520 at 524.

¹³³ Prothonotary: Chamber Work Rules — Gaol Delivery Rules, promulgated 12 Aug., 1912, r. 1.

¹³⁴ *Id.* items 3-15.

¹³⁵ Arthur Graham Saddington was appointed Prothonotary on 2 Mar., 1920.

¹³⁶ Appointed 22 Aug., 1931.

¹³⁷ "We have lagged behind Great Britain and the other Dominions, and it is proposed, as a matter of Government policy, to bring our procedure into general line with them . . . In this new method there will be a number of officers who will be what is known as "masters" in the different courts . . . The position of Prothonotary will become one of these new positions. The duties at present falling upon him will be filled by at least two officers, because it has been found that one officer cannot now fulfil the position and duties formerly belonging to that office". The Hon. L. O. Martin, Minister of Justice, in 143 *Parliamentary Debates*, 6052. "That was not done . . . Governments habitually forecast their intentions but do not always translate them into action". The Hon. V. H. Treatt in 187 *Parliamentary Debates* 3010.

¹³⁸ Supreme Court and Circuit Courts (Prothonotary) (Amendment) Act (N.S.W.) No. 14 of 1935, s. 2(1)(a).

¹³⁹ Supreme Court and Circuit Courts Act, 1900-1935, s. 15A(2).

¹⁴⁰ Prothonotary: Chamber Work Rules, 1912, r. 11.

¹⁴¹ (1945) 19 *A.L.J.* at 46; an anonymous contribution to "Practice Notes" *sub nom.* "The Prothonotary and His Deputy."

¹⁴² (1946) 63 W.N. (N.S.W.) 141.

one hand and s. 39A and the rules made under it on the other. There is no reason why the Prothonotary should not by request empower his deputy to do something notwithstanding that it has not yet become his deputy's legal duty to do it".¹⁴³

Subsequently to this decision s. 15A was rephrased by the Supreme Court and Circuit Courts (Prothonotary) Amendment Act, 1948.¹⁴⁴ The Governor was licensed, subject to the Public Service Act, to appoint an acting Prothonotary having the powers, duties and functions of the Prothonotary in the event of the latter's illness, incapacity or absence or during a vacancy in the office. The General Rules of Court retained power in the Prothonotary to delegate his duties in his absence, during his indisposition or *by his request* to the Deputy Prothonotary or Chief Clerk.¹⁴⁵

In 1937 William Henry Hazelton became Prothonotary, Registrar of the Admiralty Jurisdiction and Registrar of the Court of Criminal Appeal.¹⁴⁶ He was not Registrar of the Divorce and Matrimonial Causes Jurisdiction, a position which has been separate from the other jurisdictions since that time.¹⁴⁷ In 1949 Mr. C. K. Body, through ill health, had to decline appointment to the office;¹⁴⁸ Ronald Earle Walker succeeded him.¹⁴⁹ In 1955 Mr. Walker was created Registrar of the Land and Valuation Court in addition to his ordinary duties.¹⁵⁰

The *Regulae Generales* were replaced in 1953 by the General Rules of Court¹⁵¹ which stated that the Prothonotary should have charge of the Court records, with certain exceptions, but which gave no further definition of his province.¹⁵² Passing reference was made to administrative matters requiring the Prothonotary's sanction or made exercisable in his discretion.¹⁵³ The more important duties of the office were separately stated in the Prothonotary (Chamber Work) Rules¹⁵⁴ made pursuant to s.39A of the Supreme Court and Circuit Courts Act, 1900-1935. A difficulty arose in the use of the word "now" in the Act which provided that the Prothonotary should have such powers as "are now . . . exercised by a judge sitting in chambers".¹⁵⁵ Maxwell, J., in *Delaney v. Flynn*,¹⁵⁶ posed the problem whether the Act meant that the Prothonotary could only be invested with jurisdiction as it existed in 1912 and was not amenable to changes in the law, or did "the word 'now' indicate something which relates not merely to the power under specific Acts or by specific custom or

¹⁴³ *Id.* at 144.

¹⁴⁴ Act No. 22 of 1948, s. 2(1)(a).

¹⁴⁵ The General Rules of the Court, promulgated 4 June, 1952, O.XXIX r. 7.

¹⁴⁶ N.S.W. Public Service List.

¹⁴⁷ "The Government cannot with satisfaction fill the office of Prothonotary at the present time . . . the work is too much for one man, and the Government proposes to constitute another office, which will be that of Registrar in Divorce." 143 *Parliamentary Debates* 5817.

¹⁴⁸ He was Acting Prothonotary from Feb. 1, 1949.

¹⁴⁹ On 22 Oct., 1949. *N.S.W. Government Gazette*, 21 Oct., 1949, 3199.

¹⁵⁰ N.S.W. Public Service List, 1955, 83.

¹⁵¹ Promulgated 4 June, 1952, effective from 1 Jan., 1953

¹⁵² O. II r. 2.

¹⁵³ For example, O. VII, r. 1 (signature of writs), O.XIII, r. 9, r. 11 (entry of causes), O.XVIII, r. 1 (disposal of exhibits), O.XXII, r. 4 (procedure on appeals). As to production of documents see (1958) 32 *A.L.J.* 100.

¹⁵⁴ The Special Rules of the Court, promulgated 4 June, 1952.

¹⁵⁵ S. 39A(a).

¹⁵⁶ (1954) 55 S.R. (N.S.W.) 520. The case arose from the Prothonotary's refusal to entertain an application made out of time under the Workers' Compensation Act, 1926-1951. Herron, J., held: "I think that it is not correct to assert that the word 'judge', where it appears in s. 63 of the Workers' Compensation Act refers to a judge as a *persona designata*. It refers, I think, to a judge, or in accordance with the Rules of Court, any delegation of that power to the Prothonotary". (At 525).

practice", or did it "apply to things, business, authority and jurisdiction of the nature that are exercised, transacted or done by a judge sitting in chambers?"¹⁵⁷ His Honour decided that the last was the proper construction so that an application made to the Court on a matter coming within the jurisdiction and authority exercised by a judge sitting in chambers could properly be delegated to the Prothonotary. Any doubt was resolved in 1957 by the Supreme Court Procedure Act which deleted the offending word "now" from s.39A.¹⁵⁸

The Rules of 1953, if compared with those of 1843 which laid down the Prothonotary's duties reveal only superficial similarities. The nature of the office is seen to have undergone a complete change. Whereas the early Prothonotaries were accountants and administrative officers, their 20th century descendants have acquired judicial powers so extensive that it has become necessary to delegate some of the clerical work.

IX. THE CONSTITUTIONAL BASIS OF THE OFFICE

For the greater part of the history of the office in New South Wales competing claims were made to appoint or control the Prothonotary. Even before any Prothonotary was installed a similar conflict had arisen between the Governor and the Chief Justice concerning the Registrar of the Supreme Court. Two days after the death of Mills in 1828 Governor Darling nominated John Stephen (Junior) to become Registrar and issued Letters Patent "appointing" him.¹⁵⁹ When Stephen presented himself at Court to be sworn in, Sir Francis Forbes declined to administer the oath, pointing out that the Statute 4 Geo. IV, c.96 required the appointment of Registrar, Prothonotary, Master or Keeper of Records to be "under the Royal Sign Manual".¹⁶⁰ After further consideration the Chief Justice agreed that "looking at the case as an unforeseen contingency" he would admit Mr. Stephen, reserving his opinion as to the legality of appointment by Letters Patent from the Governor.¹⁶¹ *The Australian*, affirming "this . . . wise and proper precaution on the part of the Court"¹⁶² suggested that the statute contemplated direct appointment by the Crown, exclusive power of nomination by Charter or Letters Patent being vested in the King.¹⁶³ By contrast *The Sydney Gazette* was surprised at the Court's decision: "it occurred to us very singular that the authority of the Governor . . . should for a moment be disputed, as regarded the appointment of subordinates in the Supreme Court".¹⁶⁴ It contended that just as the Governor had power to make provisional suspensions from the court, so he could make appointments to it and that, where a case of emergency occurred, he had power even to appoint a Chief Justice. In particular Sir Francis Forbes was accused of inconsistency — "we are satisfied that the Chief Justice, with his characteristic candour, would have felt it his duty to state, that Mr. Joshua John Moore and Mr. Gurner were unduly appointed

¹⁵⁷ *Id.* at 522.

¹⁵⁸ Act No. 13 of 1957, First Schedule, 33.

¹⁵⁹ Government Order (No. 9) 15 Feb., 1828; *Sydney Gazette*, vol. xxvi, no. 1467, 20 Feb., 1828, 1; *id.* no. 1466, 18 Feb., 1828, 2; Darling to Goderich *H.R.A.* I/xiii, 782.

¹⁶⁰ "Now it is within the knowledge of the Court, which is bound to have judicial knowledge of its own officers, that the late Registrar (had) been only two days dead, and that, therefore it is physically impossible (that) any warrant under the Royal Sign Manual, according to the provisions of the Charter, could be in existence. We shall, therefore, defer our decisions." *Sydney Gazette* vol. xxvi no. 1466, 18 Feb., 1828, 2 *The Australian*, no. 276, 20 Feb., 1828, 2.

¹⁶¹ *Sydney Gazette*, vol. xxvi, no. 1467, 20 Feb., 1828, 2.

¹⁶² *The Australian*, no. 276, 20 Feb., 1828, 2.

¹⁶³ *Id.* at 3.

¹⁶⁴ *Sydney Gazette*, vol. xxvi, no. 1468, 22 Feb., 1828, 2.

and illegally acted, during the several months those Gentlemen did act — the one as Prothonotary, and the other as Registrar".¹⁶⁵ The resolution of the argument in favour of the Chief Justice confirmed the Crown's exclusive power to assign ministerial officers to the Court.¹⁶⁶

A radical change was made in 1855 when the Constitution Act provided that "all public offices under the Government" to become vacant or to be created should be vested in the Governor with the advice of the Executive Council, excepting only "minor appointments" which might properly be made by departmental heads.¹⁶⁷ The Statute was not at variance with and did not repeal by implication an earlier ordinance of the local Legislature, which, while it conferred powers on the Judges of the Supreme Court to make rules (*inter alia*) for "the government and conduct of all . . . officers and ministers" of the Court,¹⁶⁸ did not vest appointment of officers in the judges. The court officials were therefore "officers under the Government" and, according to law, they were appointed by the Government, but took their orders from the judges. Although this caused no dissension for many years, disputes began to arise in the 1880's and the ensuing "free fight" between the Executive and the Judiciary, in which each party asserted its right to complete control over the court's ministerial servants, was waged particularly over the office of Prothonotary.

Mr. Prothonotary Slattery, as Curator of Intestate Estates, had been in the habit of deputing agents and charging commission on estates to meet the agents' expenses.¹⁶⁹ The Government, being advised that his action was illegal,¹⁷⁰ demanded an explanation from him. Slattery declined to answer to the Government on the ground that 11 Vic. No. 24¹⁷¹ required all disputes and matters touching the collection management or administration of estates to be decided by the Court or by one of the Judges.¹⁷² He averred his inability to "alter the practice of the Court, which (had) been in existence many years", and he maintained "that the questions . . . (did) not relate to departmental matters at all, but, on the contrary, (were) questions of law only as to the interpretation of a Statute. Such questions consequently (could) only be decided in the way provided in the Act."¹⁷³ Concurring, the Primary Judge, Hargraves, J., protested at the attempt to reduce the Curator to "a mere conduit pipe for executive authority".¹⁷⁴ To the Minister of Justice the Constitution Act was decisive of the matter.¹⁷⁵ In his view the Curator was under the direct control of the Executive and amenable to the ministerial head of his department. He

¹⁶⁵ *Id.*, no. 1466, 15 Feb., 1828, 2. See n. 56 *supra*. The Chief Justice had been very conscious of the unsatisfactory tenure of Gurner and Moore; he made the appointment in order to keep the Court functioning. "I recommended the following arrangement — that Mr. Moore and Mr. Gurner; who had acted as Clerks in the late criminal and civil courts, should be retained in the Supreme Court, until the proper officers should arrive from England; and in order to clothe them with as much formal authority as could be had in the colony, that the Governor should nominate them to the respective offices of Prothonotary and Registrar of the Supreme Court, and I would appoint them Clerks." Forbes to Huskisson, 16 Feb., 1828, *H.R.A.* I/xiii, 822.

¹⁶⁶ *The Australian*, *op. cit.* 3.

¹⁶⁷ S.37. The date 1855 refers to the passing of the enabling Statute 18 & 19 Vic. c. 4 to which 17 Vic., No. 41 was annexed as a First Schedule.

¹⁶⁸ An Act to provide for the more effectual Administration of Justice in New South Wales and its Dependencies (1840), s. 23. Such rules were to have the same effect as if they had been inserted in and formed part of the Act.

¹⁶⁹ *V. & P.* 1879-1880, vol. 3, 70, 76; 1 *V. & P.* 1878-1879, 582.

¹⁷⁰ Opinion of Mr. Attorney-General Windeyer. *V. & P.* 1879-1880, vol. 3, 73.

¹⁷¹ An Act for the better preservation and management of the Estates of deceased persons in certain cases, s. 3.

¹⁷² *V. & P.* *op. cit.* 74.

¹⁷³ *Id.* at 75.

¹⁷⁴ *Ibid.*

¹⁷⁵ "Whatever claims Mr. Slattery might make to be an officer of the Supreme Court,

indicated that, if Slattery persisted in obeying the directions of the Primary Judge, he would suspend him. Slattery did persist and the Minister was true to his word.¹⁷⁶ Slattery at once objected that the Government had no power to suspend him *qua* Prothonotary and, as the Curatorship was an integral part of the Prothonotary's office, it could not suspend him in that capacity either.¹⁷⁷ On his submission, the appointment or dismissal of the Curator was vested exclusively in the Court.¹⁷⁸ He was "the officer appointed by the Judges, and responsible *only* according to law to their Honours", to whom, he contended, he would have "shown unpardonable disrespect" by complying with the requirements of the Minister of Justice.¹⁷⁹ The latter, expressing surprise that the Prothonotary should have been "so entirely ignorant of the position he (occupied) as a servant of the Government",¹⁸⁰ had no doubt that the Legislature could suspend and remove him, and that removal from the higher office of Prothonotary implied removal from the lower office of Curator.¹⁸¹ Slattery retorted that, even were the Government competent to dismiss him as Prothonotary, the Constitution Act had expressly excluded "*minor* appointments" from its provisions, and that the Minister himself admitted the Curatorship to be only a minor office.¹⁸² He concluded that "the power given to the Judges by 11 Vic., No. 24, to appoint a Curator of Intestate Estates (was) so clearly kept in full force and operation" that the matter was "beyond argument."¹⁸³ It was indeed put beyond argument by the Minister's laconic minute — "I now recommend that Frederick Chapman . . . be appointed Prothonotary and Curator of Intestate Estates . . . *vice* Slattery removed."¹⁸⁴

Sir James Martin, C. J., was very conscious that the attitude of the Government could seriously prejudice the organization of the Court. In 1883 he proposed to the Colonial Secretary that "absolute control in all respects" over court officials should be vested in the Chief Justice.¹⁸⁵ In explanation he pointed out that this would conform to the English system and would be more practical, as the judges would be the persons best qualified to understand the shortcomings or inefficiency of their staff. However, the Colonial Secretary was uncompromising: "it must be quite evident . . . that Parliament would not sanction the transference of other officers of the Court from the Governor-in-Council to the Court itself".¹⁸⁶ In these circumstances Frederick Chapman found himself forced into difficulties similar to those which had confronted his predecessor. In 1884 the Chief Justice directed him to terminate the licence of a Trade Protection Association, to search Court Records and to publish details from them, as that body had been wont.¹⁸⁷ The Association thereupon called for political aid in consequence of which the Minister of Justice demanded a

receiving his appointment from the Judges under the Act . . . 11 Vic. No. 24, can have no force, since the passing of the Constitution Act". *Id.* at 76. 11 Vic., No. 24 was not in fact repealed by the Constitution Act; it did not purport to confer on the Judges the appointment, but only the "Government and control" of Court officers.

¹⁷⁶ *V. & P. op. cit.* 77. Letter of the Under-Secretary of Justice to the Curator, 18 Mar. 1880.

¹⁷⁷ *Id.* at 80(2).

¹⁷⁸ *Ibid.*

¹⁷⁹ *Id.* at 81(7). "The Curator . . . , whoever he may be, is bound by the Statutes, as a matter of duty to the Court, to obey their Honours the Judges, and no one else." *Id.* at 83(3).

¹⁸⁰ *Ibid.* Letter of the Under-Secretary of Justice to Slattery.

¹⁸¹ *Ibid.* Minute for Executive Council.

¹⁸² *Id.* at 84.

¹⁸³ *Id.* at 85.

¹⁸⁴ *V. & P.* 1885-1886, vol. 2, 470, No. 2.

¹⁸⁵ *V. & P.* 1883-1884, vol. 6, 1054.

¹⁸⁶ *Ibid. cf. The Sydney Morning Herald*, no. 14507, 24 Sept., 1884, 8.

¹⁸⁷ *V. & P. op. cit.* 1163.

report from the Prothonotary. The report was withheld on the order of the Chief Justice who considered the Minister's demand "an interference with an officer of the Court, in a matter in which the Court alone" had jurisdiction.¹⁸⁸ That did not appeal to the Minister as a sufficient reason; he had always been accustomed "as the Minister at the head of the Department, of which the Prothonotary is an officer" to approach the Prothonotary directly.¹⁸⁹ On principle he declined to concede to the Court officials "that independence of all interference which alone belongs by law to the Judges",¹⁹⁰ because they were, in his view, members of the Public Service, paid by and answerable to the Executive Government.¹⁹¹ In effect, he saw the relationship of the court staff as "direct subordination to the Minister charged with the administration of the Department in all their duties save only those connected with the administration of justice".¹⁹²

"It is difficult," replied Sir James Martin, C. J., "to conceive by what means the Minister of Justice has fallen into so great an error as to suppose that he or anybody but the Supreme Court itself has any power whatever to determine upon the 'efficient and rightful discharge of duty' of any officer of the Court while engaged in connection with the Administration of Justice".¹⁹³ In confirmation of his opinion all the Judges ratified a Rule of Court on 23rd June, 1884, preventing search of court records without the leave of a Judge. The Prothonotary advised the Minister of the Judges' decision and the Chief Justice received in reply such an "excessively impertinent letter" that he declined to accept it.¹⁹⁴ The apparent settlement of the feud in favour of the Chief Justice was not favourably received by the Press. *The Sydney Morning Herald* expressed the view that "the quarrel over the Prothonotary's case (was) an illustration of the tendency in Judges to strain their prerogative."¹⁹⁵ It considered that the Government could remove not only a Prothonotary, but any minister of the court, that it had power to call the judges themselves to account and could move the Crown to dismiss them, and that the court's privileges, including the custody of its records, were enjoyed by courtesy of the legislature.¹⁹⁶ It may have been more than chance that, before the end of the year 1884, the passing of the Civil Service Act placed all permanent employees of the Crown (with some stated exceptions) under the control of the Civil Service Board, vesting in the Board full powers of appointment, dismissal, payment, promotion and determination of duties of members of the Civil Service.¹⁹⁷ Vacancies occurring in any office were to be filled by the Governor on the Minister's advice.¹⁹⁸ Because of

¹⁸⁸ *Id.* at 1160 — no. 2 (minute to enclosure).

¹⁸⁹ *Ibid.*

¹⁹⁰ *Id.* at 1166 — no. 8.

¹⁹¹ *Id.* at 1163 — no. 6. "The important question involved in this matter is whether the officers of the Supreme Court, — whose appointment to and removal from the Public Service belong exclusively to the Executive Government, . . . can be wholly withdrawn from supervision and made independent of the authority from which they hold their offices, by which they are paid, and by which they may for a sufficient cause be dismissed."

¹⁹² *Id.* at 1167 — no. 9.

¹⁹³ *Id.* at 1162 — no. 5.

¹⁹⁴ *Id.* at 1169 — no. 16. This appeared to the Minister to be "essentially in harmony with the previous minutes of his Honour."

¹⁹⁵ *Loc. cit.* col. 6.

¹⁹⁶ *Ibid.* "This official (the Prothonotary) found himself in the position of having two masters, giving contradictory orders, puzzled to know which to obey, but with the fact very vividly in his recollection that his predecessor was dismissed for disobeying a Minister in obedience to the Judge. A practical man might be expected to ask himself "Who appointed me, and who can dismiss me?" and Mr. Chapman ultimately acted in the light of the answers to those questions".

¹⁹⁷ 48 Vic., No. 24, s. 2.

¹⁹⁸ *Ibid.*

the continued efficacy of 4 Vic., No. 22 the Court officers were placed in "a unique position in the Civil Service" being "subject to the government and control of two separate authorities each of which . . . (seemed) to be vested with statutory powers in that behalf".¹⁹⁹ This position was not altered when the consolidating Public Service Act of 1902 retained power of appointment to the Public Service Board in the Governor with the advice of the Public Service Board in substitution for that of the Minister.²⁰⁰ The Master in Equity was expressly excluded from the provisions of the Act but the Prothonotary, even when judicial functions were conferred on him in 1912, remained subject to it.

The Prothonotary's status underwent alteration following the passing of the Supreme Court and Circuit Courts (Prothonotary) (Amendment) Act, 1935, which added a new Part IIA to the original Act.²⁰¹ By s. 15A(1) of the new Part the appointment of the Prothonotary was vested in the Governor with the concurrence of the Chief Justice, and exclusion of the Prothonotary was noted by amendment to the Public Service Act.²⁰² The Stevens Ministry acknowledged that "during the course of years, the importance of the office and the duties attaching to it (had) greatly changed."²⁰³ In debate the Minister of Justice said "the Prothonotary is a senior judicial officer of this State, who decides in court matters of great importance, and deals with property values that are greatly in excess of those coming within the jurisdiction of the District Court".²⁰⁴ The Opposition of the day disagreed with the measure on the ground that, by extending the Prothonotary's retiring age from 65 to 70 years, it was contrary to their policy. When the political tide turned the opportunity was taken to introduce the Supreme Court and Circuit Courts (Prothonotary) (Amendment) Act, 1948, relegating the appointment of the Prothonotary once more to the Public Service Board.²⁰⁵ Explaining the alteration, the then Attorney-General, after reviewing the status of the Master in Equity²⁰⁶ said: "So far as the other jurisdictions of the court are concerned — the Probate Registrar, the Divorce Registrar and the Prothonotary, who is administrative head of the common law branch, appointments have always been from the Public Service and through the agency of the Public Service Board".²⁰⁷ He submitted the Bill as "a piece

¹⁹⁹ *M. & O.* 1.

²⁰⁰ No. 31 of 1902, s. 5.

²⁰¹ No. 14 of 1935, s. 2(1)(a).

²⁰² "It was surely a salutary move to have the office . . . removed from the control of the Public Service Board in view of the judicial duties he is required to perform." *M. & O.*, 22.

²⁰³ The Hon. L. O. Martin, in 143 *Parliamentary Debates* 5817.

²⁰⁴ *Ibid.*

²⁰⁵ Act No. 22 of 1948.

²⁰⁶ "Now the Master in Equity is in a special position. His functions are primarily and predominantly judicial. For this reason he has always been appointed by the Government from members of the practising Bar just as the judges are." 187 *Parliamentary Debates* 3008. It is suggested that this statement exaggerates the "special position" of the Master (see note by D. F. Barton in Parker's *Equity Practice*) (1949) 259 and fails to show that the Master had a superior status to the Prothonotary. As a matter of history "although the Master in Equity or Lunacy was the only one of the ministers of the Court who was in the first instance exempted from the operation of the Public Service Act there is nothing in the earlier legislation to indicate that he should have superior status to the Prothonotary. Perhaps the reason for the preference shown to the office of Master in Equity in that respect was due to the fact that under the Act 4 Vic. No. 22 he was required to have the qualification of a barrister of England or Ireland of at least five years' standing. Nevertheless it might have been expected that if there was to be any precedence it might have been in favour of the Prothonotary as the chief administrative officer of the common law jurisdiction." *M. & O.* 22.

²⁰⁷ Hon. C. E. Martin in *Parliamentary Debates*, *op. cit.* 2844. The statement was misleading: the Crown, the Governor-in-Council, and the Governor with ministerial advice, had the right to appoint the Prothonotary before the introduction of the Public Service Act. The duties of the Registrars were originally vested in the Prothonotary himself and the appointment of those officers had no analogy to the appointment of the Prothonotary.

of legislation — minor in scope it is true, since it merely rectifies an anomaly — but important in that it seeks to restore a principle.”²⁰⁸

It is open to doubt whether the Act was minor in scope, and it would seem that it put in issue again some unsolved constitutional difficulties. The opinion has been expressed that

The history of the creation of the Court and its staff and more particularly their essential functions, indicates that it is practically impossible to depart from the system of dual control. Probably the only solution to the problem of avoiding future disagreements and of retaining a degree of discipline conformable with efficiency in a staff that must obey two masters, may be found in some reasonable agreement . . . as to the limit of interference permissible on the part of one authority and the other.²⁰⁹

How far the 1948 Act, by curtailing the Chief Justice's influence in the appointment of Prothonotaries, limited the “system of dual control”, and how far it left the way open for revival of conflicts between the Executive and the Judiciary, are matters for conjecture.

X. CONCLUSION

In this paper the development of the offices of Prothonotary in England and in New South Wales has been traced very broadly in chronological sequence, but there was little real continuity between them. It has been shown that the lawyers in New South Wales in the early days of the settlement were unaware of the duties of a Prothonotary, and the office was revived only by accident. It would certainly not have been restored had the early Registrars and the Master been competent and conscientious. In sharp contrast to the cumbersome and specialised law and administration of Georgian England, the Colony of New South Wales had to create new legal institutions to serve a strange, rapidly expanding community. However, when the office of Prothonotary was created it took on a surprising likeness to its mediaeval ancestor. The main prothonotarial duties were repeated in the keeping of the Supreme Court's records, the issuing of writs, attending to matters of procedure and taxing bills of costs. These same duties are still carried on by the Prothonotary in person, or by a delegate in his name. Were one of the famous mediaeval Prothonotaries, Copley or Brown or Cumberford, to visit the present Supreme Court offices in Sydney he would find many changes. He would find that the present office holders “are no longer housed in churches, and that typewriters, fountain pens, and paper have replaced goose quills and parchment.”²¹⁰ He would find a modern filing system. He would find that pleadings are now drawn out of court. He would find that modern court officers are regarded as servants of the public and are paid from public funds. But he would certainly be able to find a common ground of conversation with the Prothonotary, his assistants, and the other officers of the Court. “He would undoubtedly recognise many of the forms terms and abbreviations which they use every day in their records.”²¹¹

The common law of England has always been empirical. Throughout its

²⁰⁸ *Ibid.*

²⁰⁹ *M. & O.* 1.

²¹⁰ Hastings, *Common Pleas* 41.

²¹¹ *Id.* 42.

long history legal offices have been moulded, though often slowly, to meet the needs of the time. The working of that tradition can be clearly seen in the growth of the office of Prothonotary in New South Wales, which starting from experimental beginnings has come to match the importance and dignity of the Prothonotaries of the Middle Ages.

ADDENDUM

The Prothonotary of the Supreme Court (R. E. Walker, Esq., LL.B., B.Ec.) has kindly supplied the following additional notes.

Having frequently been called upon during the past twenty years to define "a Prothonotary", I am relieved that I can now reply in a manner worthy of that office's ancient lineage by referring the enquirer to this issue of the *Sydney Law Review*. With the concurrence of the authors, I venture to offer their readers a brief résumé of the present duties of the office.

A. Present Duties. The Prothonotary retains his historic duty of issuing the Sovereign's writs, of taxing solicitors' bills of costs and of arranging the judicial hearing of civil actions at law. Subject to the direction of the Chief Justice and of the State Executive, whether through the Attorney-General, Minister for Justice or Departmental Head, and again subject to the limitations imposed by the Public Service Act, he is the principal administrative officer of the Court with the exception of the internal administration of the Equity, Probate and Matrimonial Causes jurisdictions. The judicial duties added in 1912 exercised either in Public or in Private Chambers have steadily increased in volume and complexity, with the result that in the performance of his duties at large he requires in addition to clerical staff the assistance of two Deputies and a Chief Clerk, each of whom must possess the qualifications of a barrister or solicitor. Another aspect of the Court's operations which is channelled through the Prothonotary relates to the admission of students-at-law, articulated clerks, barristers and solicitors, the calling to note of any departure from proper standards of practice, and acting as the intermediary between each branch of the profession and the judiciary.

B. The Prothonotary and the Public Service Board. The records do not disclose any occasion between 1884 and 1935 when the Prothonotary was unable to serve his two masters. In the latter year, however, his status arose for consideration in quite a different manner. Mr. H. D. Wood reached his retiring age in May 1934 but the Government desired to extend his term until he attained 70, and notified Parliament that it intended to introduce legislation re-defining the duties attached to the office of Prothonotary and certain other offices. To effect this the Government proposed to take the appointment of Prothonotary out of the Public Service Act and confer the power on the Governor with the concurrence of the Chief Justice. The Opposition attacked the bill because no ground had been shown for treating the Prothonotary differently from other public servants, including those whose duties were mainly judicial, e.g. magistrates. Finally, by reason of dissension within the Government's own ranks Mr. Wood's appointment was extended for two years only and his immediate successor was the only Prothonotary to be entitled to continue in office until 70 and enjoy the two pensions provided by the Act of 1935. In 1940 the provision for the two pensions was repealed and in 1948 the Opposition of 1935, having become the Government, restored the position to the Public Service Board and both Mr. Body's appointment in 1949 and Mr. Walker's later in the same year were on the same basis as that prevailing from 1895 to 1935. Only thirteen years (1935-1948) elapsed between the removal of the Prothonotary from Public Service Board control and his return to it, but during that period the question of control of the Prothonotary arose acutely. Considering the transfer of an officer from the Divorce Office to the Common Law Office, the operation of a joint seniority list between those offices, and the seconding of a senior officer to special duties elsewhere not in the best interests of the Court, the Judges (being of opinion that they still retained the power to do so) promulgated Rules of Court on 15th March, 1943 constituting a Staff Committee of Judges to determine the offices and duties of members of the Court staff, including the Prothonotary. A copy of these Rules was forwarded by the Chief Justice to the Attorney-General who, on 5th May, 1943, introduced a bill designed to subject the rule-making power of the Judges on staff matters to the Public Service Act. This bill passed through the Legislative Assembly but, before it was read in the Council, a *modus vivendi* was agreed to and after the Rule was amended by the Judges the bill was abandoned. When the Rules of Court were completely reviewed in 1952 the Staff Committee Rules were allowed to lapse without comment. Hence it will be seen that the occupant of the historic office of Prothonotary must still solve the problem of serving at least two masters (there are now 21 Supreme Court Judges) and peacefully navigating the administrative ship between Scylla and Charybdis.