



Australia: Marbury V. Madison in New South Wales in the Early 1800s

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AUSTRALIA

MARBURY V. MADISON IN NEW SOUTH WALES IN THE EARLY 1800s

Executive Summary

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I. Introduction

It is possible that the decision of *Marbury v. Madison* become known in New South Wales in the early 1800s via formal correspondence from the Colonial Office in London or reporting in either British or American newspapers that were received in New South Wales.

It is possible to find information on Australian legal history and colonial law from various publicly accessible Web sites. For example, information and links on Australian legal history is available on the Australian and New Zealand Law and History Society Web site¹ and on the University of Melbourne's Web site². Information and links on Australian colonial law is available at the Macquarie University Web site.³ The Library of Congress is not aware of the accuracy or completeness of any of these Web sites.

II. Applicable Law in Australia in 1803

As a British colony, the applicable law in Australia in 1803 was English law, although there is some suggestion that English law applied only so far as it was applicable to the situation and condition of the colony.⁴

As a colony, New South Wales would have been under the control of the Colonial Office in London, and it is very likely that this office would have provided the colony with copies of English laws or model laws, and the "governors' standing instructions required that all colonial bills,⁵ acts, ordinances

¹ Australian and New Zealand Law and History Society, <http://www.waikato.ac.nz/law/anzlhs/index.htm> (last visited Dec. 5, 2006).

² University of Melbourne, <http://www.law.unimelb.edu.au/lrc/pub/lhro/> (last visited Dec. 5, 2006).

³ Macquarie University, <http://www.law.mq.edu.au/scnsw/index.htm> (last visited Dec. 5, 2006).

⁴ This argument is made by Bruce Kercher, PERISH OR PROSPER: THE LAW AND CONVICT TRANSPORTATION IN THE BRITISH EMPIRE, 1700–1850, 21 LAW AND HISTORY REVIEW 548 (2003) (citing William Blackstone, 1 COMMENTARIES ON THE LAW OF ENGLAND (Garland Publ'g 1978) (9th ed., London 1783)). The argument is referred to as the viewpoint of Sir Stephen in the Colonial Office in London in P. KNAPLAND, JAMES STEPHEN AND THE BRITISH COLONIAL SYSTEM 1813-1847, ch. 9 (Univ. of Wis. Press 1953).

⁵ Prior to the colony of New South Wales' first legislature in 1824, the Governor of the relevant colony made all general orders and proclamations.

and regulations should be sent home for review.”⁶ It should be noted that some governors, particularly Governor McLachlan in New South Wales, frequently failed to fulfill this obligation.⁷

In Australia, civil court cases appear to have been decided as early as July 1788 (where two convicts sued the captain of their transport ship for return of their luggage).⁸ Many of these colonial court cases are available on line at the University of Macquarie Web site⁹ and may contain references to either *Marbury v. Madison* or other American case law.

III. Communication Between Australia and America in the 1800s

Given the role of the Colonial Office, it is possible that any official response or comment on the case of *Marbury v. Madison* would have been sent to New South Wales via the Colonial Office.

Records of the Colonial Office may be searched in either the National Archives in the United Kingdom¹⁰ or at the State Library of New South Wales¹¹ Mitchell Library.¹²

In correspondence with the author, Professor Finn¹³ has suggested that it is possible that information on *Marbury v. Madison* traveled from British officials in Washington to the Colonial Office in London and then onto the colonies. Professor Finn suggests reviewing the publication *James Stephen And The British Colonial System 1813-1847*, as he believes that this may refer to Sir Stephen quoting American case law in correspondence to Canadian colonies and thus establishes a possible conduit between America and New South Wales.

The decision of *Marbury v. Madison* was reported in American newspapers in 1803. For example, the Library of Congress has copies in its holdings of the following newspapers that report on or mention the decision of *Marbury v. Madison*.

- *National Intelligencer* - March 18, 1803 and March 25, 1803;
- *New York Herald* - February 26, 1803;
- *Virginia Argus* - May 11, 1803;
- *Balance and Columbian Repository* - March 1, 1803; and
- *Newbury-Port Herald* - March 1, 1803.

⁶ See Knapland, *supra* note 4, at 39.

⁷ *Id.*

⁸ In this instance, the court did not strictly follow English law - *Cable v Sinclair* as reported by Bruce Kercher. See Kercher, *supra* note 4, at 548, ¶¶ 35-37. Kercher reports that the law of attainment was not strictly followed because if such a law had been followed, as convicts previously under a capital sentence, they would have had not right to the goods let alone legal standing to sue for their return.

⁹ University of Macquarie, www.law.mq.edu.au/scnsw/ (last visited Dec. 5, 2006).

¹⁰ The National Archives, <http://www.nationalarchives.gov.uk/> (last visited Dec. 6, 2006).

¹¹ State Library of New South Wales, <http://www.sl.nsw.gov.au/> (last visited Dec. 5, 2006).

¹² State Library of New South Wales, at Mitchell, <http://www.atmitchell.com/findit/itemDetails.cfm> (last visited Dec. 6, 2006).

¹³ An academic working in the field of colonial law at the University of Canterbury, New Zealand.

We have not located any reference to *Marbury v. Madison* in a United Kingdom based newspaper at that time, although, it is known that the United Kingdom received American newspapers. For example, on June 25, 1803, the *London Times* reported that they had received the New York newspapers dated through May 20, 1803. Therefore, it may be possible to undertake research of either United Kingdom based newspapers or of American newspapers received in the United Kingdom to establish how widely reported, if at all, *Marbury v. Madison* was in the United Kingdom or how widely reported it was in American newspapers received in the United Kingdom.

By the 1820s, New South Wales had three main newspapers – the *Australia*, the *Gazette* and the *Monitor*. These newspapers “took on the de facto role of law reporting; editorials and letters would read like law journal articles.”¹⁴ Thus, it is possible that significant cases in America may have been reported in them. It is possible to examine copies of these newspapers at the New South Wales State Library.

It is also possible that in the period surrounding 1803 personal correspondence traveled between New South Wales and America; that Americans or Europeans who had visited or worked in America traveled to New South Wales; or that there was informal but direct links between New South Wales and America via trading or whaling vessels. For example, shipping records indicate that, in the early 1800s, American whaling and trading vessels traveled to various ports in the South Pacific including Australia.¹⁵

It is worth noting that the first chief justice of the New South Wales Supreme Court was Justice Francis Forbes (October, 13 1823 – July, 1 1837). Justice Forbes was previously a barrister with experience in North American colonies, having been appointed the chief justice of Newfoundland in 1816.¹⁶ It is argued by Dr. Kercher¹⁷ that Justice Forbes included some “North American” elements into the law of New South Wales,¹⁸ and it is certainly conceivable that Justice Forbes would have been aware of the decision of *Marbury v. Madison* (1803). However, in correspondence with the author, Dr. Kercher noted that he has read extensively within Justice Forbes’ papers (held in the Mitchell Library Sydney) and judgments and does not recall any mention of *Marbury v. Madison*.

Finally Mr. Brent Salter, a researcher, working with Dr. Kercher has referred to a recent speech by Australian Chief Justice Gleeson that suggests colonial courts and colonial officers did apply the principles in *Marbury v. Madison*.¹⁹

¹⁴ DAVID NEAL, *RULE OF LAW IN A PENAL COLONY: LAW AND POWER IN EARLY NEW SOUTH WALES* 77, 170 (Cambridge Univ. Press 1991).

¹⁵ THAR SHE WENT: AN INTERIM INDEX TO THE PACIFIC PORTS AND ISLANDS VISITED BY AMERICAN WHALERS AND TRADERS IN THE 19TH CENTURY BEING A SUPPLEMENT TO “AMERICAN WHALERS AND TRADERS IN THE PACIFIC: A GUIDE TO RECORDS ON MICROFILM (R. Langdon ed., Austl. Nat’l Univ. 1979).

¹⁶ More information on Sir Francis Forbes is available from the New South Wales Government LawLink Web site: <http://www.lawlink.nsw.gov.au/history/lah.nsf/pages/forbes> (last visited Dec. 6, 2006).

¹⁷ An academic in the field of colonial law with the University of Macquarie, Australia.

¹⁸ This argument is made by Bruce Kercher. See Kercher, *supra* note 4, at 548, ¶152.

¹⁹ Australian Bar Association, http://www.highcourt.gov.au/speeches/cj/cj_aba_conf.htm (last visited Dec. 5, 2006).

IV. Australian Constitutional Debates

Certainly *Marbury v. Madison* was known in Australia by the time of the Constitutional Conventions, including being directly cited by Sir Edmund Barton in debates in 1898.²⁰ Copies of documents from these constitutional debates are available on the Australian Parliament Web site.²¹

Prepared by Lisa White
Foreign Law Specialist
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²⁰ Hunt, Erling, AMERICAN PRECEDENTS IN AUSTRALIAN FEDERATION 197 (Columbia Univ. Press 1930).

²¹ Parliament of Australia, <http://parlinfoweb.aph.gov.au/piweb/browse.aspx?NodeID=9> (last visited Dec. 6, 2006).