

PLEASE NOTE

This is a draft paper only and should not be cited without the author's express
permission

**Australia's Early High Court, The Fourth Commonwealth
Attorney-General And the 'Strike of 1905'**

Susan Priest July 2007

**18th British Legal History Conference
St Catherine's College Oxford**

**Australia's Early High Court, The Fourth Commonwealth Attorney-General
and the 'Strike of 1905'.¹**

I would like to thank those who organised this conference for allowing me the opportunity to take part in it. I have chosen to approach the theme of the conference, 'Judges and Judging', with what I hope will prove to be a curious and unique narrative.

I begin this presentation with a photograph of a man in his late fifties with his wife and nine children on the verandah of his home in South Australia in the Australian Summer of January 1903. I would like to introduce you to Sir Josiah Henry Symon.²

Symon's extensive collection of personal papers tells us he was of Scottish origin, a wealthy landowner, a successful winemaker³ and was considered one of Australia's early scholarly authorities on the works of Shakespeare.⁴ The archives also tell us he was an exceptional lawyer particularly in the area of Criminal Law, an experienced State and Federal politician, and an individual who was passionate about Australia becoming a federated nation. So much so that in 1886,⁵ he declined a safe conservative seat in the House of Commons to dedicate himself to Australia's federal Cause, particularly with regards to the development of the Judicial branch of the Constitution.

Of significance for us today, however, is that in August 1904, Josiah Symon became the fourth Commonwealth Attorney General of Australia in Australia's first Coalition Government and, upon taking this position entered into what has since been regarded

¹ This paper is based on research undertaken as part of my PhD due for completion in 2008. See also WG McMinn, 'The High Court Imbroglia and the Fall of the Reid-Mclean Government' in *Journal of the Royal Australian Historical Society* June 1978 Vol 64 Pt 1 PP14-31; S Priest, 'Strike of 1905' in T Blackshield, M Coper and G Williams (Eds), *The Oxford Companion to the High Court of Australia* OUP 2001 PP650-651 and DI Wright, 'Sir Josiah Symon, Federation and the High Court' in *Journal of the Royal Historical Society* Sept 1978 Vol 64 Pt 2 PP73-86

² This photograph comes from the State Library of South Australia (SLSA) The Symon Family PRG 249.

³ National Library of Australia (NLA) The Symon Papers MS 1736. For the purposes of this presentation and for ease of referencing, the majority of the references from the Symon Papers which follow are sourced from the material which later became Parliamentary Papers and were published in one volume.

⁴ See JH Symon, *Shakespeare at Home* Adelaide 1905 and *Shakespeare the Englishman* Adelaide 1924.

⁵ DI Wright, 'Symon, Sir Josiah Henry (1846-1934)' in J Richie (Ed) *Australian Dictionary of Biography* Vol 12 1891-1939 MUP 1990 PP156-158.

as a bitter, escalating and ultimately public confrontation with Australia's original High Court. This incident culminated in May 1905, when the High Court adjourned proceedings and went on 'strike'⁶ due to continued uncertainty concerning the traveling expenses, accommodation costs and the provision of staff to run the Court. It is an event that remains exceptional in the Court's history and an event that in some way contributed to shaping the future operation of the court.

In August 1904, the Australian High Court was in its infancy, sitting for the first time in Melbourne October 1 1903, just three months after the enactment of the *Judiciary Act* of 1903 (Cth). The Court consisted of three members, Chief Justice Sir Samuel Griffith, a former Premier and Chief Justice of Queensland,⁷ and Justices Sir Edmund Barton Australia's first Prime Minister,⁸ and Sir Richard O'Connor who was recognised for his outstanding legal talent and 'sound commonsense'.⁹

All three members of the High Court, like Attorney-General Symon, had been involved in shaping Australia's Constitution, including the development of the Judiciary, throughout the 1800's.¹⁰ However, the judicial concepts entertained by Josiah Symon at the time of federation; that the original High Court be the final Court of appeal and be created with a permanent seat like the US Supreme Court were not realised.¹¹ His arguments against Privy Council appeals had been met with resistance by Samuel Griffith in 1900, and the courts practice of undertaking regular sittings in the state Capitals had been facilitated by the *Judiciary Act* 1903. I can also add that Symon had been considered, but not chosen for a place on Australia's first High Court,¹² and instead, upon becoming the fourth Commonwealth Attorney-General, became the head of a department that had already started to scrutinise the cost of running the newly formed High Court.¹³

⁶The use of the term 'strike' to describe the High Court adjourning proceedings in May 1905 was penned by Symon in a letter to Prime Minister Sir George Reid on May 22 1905. See Symon Papers NLA MSS 1736 11/591.

⁷ RB Joyce, *Sir Samuel Griffith* Queensland University Press 1984.

⁸ G Bolton, *Edmund Barton*. Allen & Unwin, 2000.

⁹ M Rutledge, 'O'Connor, Richard Edward' in f/n1 PP509-511.

¹⁰ CJ M Gleeson, 'The Constitutional Decisions of the Founding Fathers'. The Inaugural Annual Lecture at the University of Notre Dame School of Law (Sydney) 27 March 2007.

¹¹ WG McMinn, f/n1 PP14-16.

¹² Ibid PG14.

¹³ The Symon Papers contain copies of the correspondence between the former Attorney-General

Thus, perhaps these can be regarded as some of the main factors that combined to provide the impetus for what would become an escalating conflict between the Executive and the Judiciary. The disagreement was monitored closely by the Australian press and important enough for some members of the public to write poetry about the dispute to their local newspapers.¹⁴

With reference to what remains as archival material however, it has been said that the feud was fought out through reams of correspondence, preserved in original handwritten form or typeset most of which was later published as part of a Parliamentary enquiry.¹⁵ The conflict therefore as indicated, involved an exchange of regular telegrams and eloquent, frequently long letters primarily between Symon and Chief Justice Griffith. According to one commentator, they were on Symon's part, written with fiendish ingenuity and sinister powers¹⁶ and according to another, 'marked on both sides by suppressed fury, and deadly icy courtesy',¹⁷ So, in the time that remains, what narrative do these archives convey that remain significant for us today?

Towards the end of 1904, Griffith wrote to the Prime Minister Sir George Reid merely as a formality, indicating 'with some reluctance' his intention to move from his home in Brisbane and take up permanent residence in Sydney. The other Justices of the Court lived in Sydney and this was one way his travelling expenses could be reduced. He also requested that his chambers in Sydney be furnished with an extra 300 feet of bookshelves to accommodate his law library and exhorted the Prime Minister to seriously consider making Sydney the principal seat of the Court, on the understanding that all three Justices would continue to live there.¹⁸

HB Higgins and the High Court in this regard. NLA MSS 1736 11/720 and 11/849.

¹⁴ See 'Argument in the High Court' in the *Evening Journal*, Wednesday 29th March 1905 PG1 and 'The Passing Show' by Oriel, in the *Argus*, Saturday 25th March 1905 PG 5.

¹⁵ The Symon Papers NLA MSS 1736 11/720-735 and 11/849-868.

¹⁶ JA La Nauze *Alfred Deakin A Biography* Angus & Robertson Publishers 1976 PG383.

¹⁷ G Souter, *The Lion and the Kangaroo* Collins Publishers 1976 PG94.

¹⁸ The Symon Papers NLA MSS 1736 11/146-146a and 11/721.

When Griffith's requests were brought to the attention of the Attorney-General, it was Josiah Symon's prompt and blunt response however, that turned such formalities into an argument that Griffith and the Government was unprepared for.

Symon reminded Griffith of the Court's earlier and unsuccessful attempts to obtain additional finances for travelling purposes, particularly for its Associates, and indicated that travelling expenses accrued by the Bench had 'attained a magnitude which ... has occasioned remark and evoked sharp criticism'.¹⁹

He appealed to the Justices to consider his views on the matter of economy and not just their own. He emphasised that the High Court as a circuit Court was unnecessary and that 'the High Court *qua* Full Court ought not, unless under very exceptional circumstances, to incur any travelling expenses'. He also insisted that the proper seat of the Court was Melbourne, because it was also the seat of the Commonwealth Government. He went on and proposed that from the beginning of January 1905, all travelling expenses were to be reduced so that each Justice would receive a maximum of three guineas a day for travelling costs including those of his associate. The request for shelving was deferred.

In an immediate response on behalf of the Court, Griffith repeated the necessity for shelving in his chambers, and observed that Symon's position on the matter was no longer only an economic one but one he regarded as an intrusion by the Executive into the Court's discretionary powers.²⁰ He leapt to the defence of the Court being a circuit Court as a policy that had been 'adopted after full consideration and with warm concurrence of the Federal Government'. Further, as far as the Chief Justice was concerned, the practice of an ambulatory Court had 'received the approval of public opinion throughout the Commonwealth' and he felt justified that these arrangements 'would not be disturbed'.²¹

During the early part of 1905 Symon persisted with the necessities of reducing the running expenses of the Court but started to get much more personal and

¹⁹ The Symon Papers NLA MSS 1736 11/722 and 11/850.

²⁰ The Symon Papers NLA MSS 1736 11/722 and 11/851.

²¹ The Symon Papers NLA MSS 1736 11/723 and 11/851.

argumentative. He dismissed the continued requests for shelving by Griffith outright. 'In my experience, he said, the domicile of the Court and not the Judge's residence or place of an occasional circuit determines the situation of his furnished chambers ... I shall ... be most happy to sanction whatever shelving may be required for your chambers in Melbourne.'²²

Around this time, Prime Minister Reid, well aware of the circumstances and the implications it could have for his Government as a whole, intervened and suggested a compromise. He thought that the High Court's circuit system ought to be simplified so that NSW and Queensland appeals be heard in Sydney and all other appeals 'at the principal seat of the Court in Melbourne'.²³ The Justices made no formal response to this suggestion and opposition from the states and the legal profession to the possibility of curtailing the practice of circuits began to emerge in the newspapers.²⁴

The correspondence between the Attorney-General and the High Court continued and Griffith threatened to go public with the dispute if his library could not be accommodated in his Sydney Chambers. Symon, remained unmoved by this believing that what he was doing in his official capacity was correct.²⁵

Responding with a similar defiance, in early March of 1905, the Justices left for circuit in Hobart before moving to Melbourne. Symon wrote to Griffith immediately.

In a long and revealing letter, he reminded the Justices of the 'excessive' sum of £2285 that the Court's sittings had cost the Commonwealth since October 1903 and indicated, as a 'trustee for the public in relation to High Court expenditure', that he had every intention of continuing with his economic measures in order to 'prevent its recurrence'. Symon went on to say that he regretted the attitude of antagonism and unwillingness the Justices had adopted in the matter of circuits, and again emphasised that it was 'circuits which gave occasion for swollen travelling expenses'. He was indignant and unable to understand how the Chief Justice could doubt that

²² The Symon Papers NLA MSS 1736 11/851-852.

²³ WG McMinn f/n1 PG17.

²⁴ This was particularly true of the Legal Profession in Sydney who wrote to the *Sydney Morning Herald* throughout the early months of 1905.

‘Parliament, rightly following the Constitution [had] never contemplated circuits of any sort’.²⁶

In short, stepping back from the narrative, after four months of largely written debate a situation had arisen that had the indications that the likelihood of a public confrontation absolute. The Justices’ refused to comply with Symon’s views by abandoning the practice of circuits; nor would they allow him to make any changes to High Court expenditure. Similarly, Symon, for his part, refused to exercise any tempered measures of self-restraint or to reconsider his position.

In March 1905, reflecting on these remarkable events, the Leader of the Opposition, Sir Alfred Deakin wrote privately to a colleague about the ‘extraordinary action of the Government—or is it the A-G only paying off old scores? In any case [he continued] the action taken is more than indefensible no matter from what point of view it is regarded. It is indeed to me perhaps the most regrettable incident that has occurred outside the legislature since the Commonwealth began to be’.²⁷

Despite the conflict, The High Court continued sitting. Griffith wrote to Symon to inform him that the Court intended to go to Brisbane and asked for a courtroom to be placed at the High Court’s disposal.²⁸ In what has been described as a calculated attempt to escalate the dispute, Symon refused.²⁹ Furthermore, Symon notified Griffith that travelling costs would be limited to the provision of one associate and one tipstaff, rather than the customary three associates and three tipstaves. This has since been regarded as a deft move by one observer because both Griffith and Barton had sons for associates.³⁰

Finally, the archives also tell us that the number of telephones in the chambers of all Justices and their associates in Sydney was reduced from five to one, and payment for telephones in the private residences of the Justices would be discontinued. Moreover,

²⁵ The Symon Papers NLA MSS 1736 11/186-192.

²⁶ The Symon Papers NLA MSS 1736 11/213-226.

²⁷ JA La Nauze, *Alfred Deakin* Vol 2 MUP 1965.

²⁸ The Symon Papers NLA MSS 1736 11/858.

²⁹ WG McMinn, f/n 1 PG20.

³⁰ *Ibid* PG20.

Symon refused reimbursement for the cost of any additional travelling expenses incurred by the Justices outside the standard use of their government-issued railway passes. He also requested that detailed information be supplied to him about the all current costs associated with running the Court.³¹

This letter literally, according to an early commentator, proved to be the last straw,³² and the Court moved swiftly to bring the details of the crisis to public attention. O'Connor was due to hear a case in Melbourne on 1 May 1905, but the Justices had met in Sydney on the preceding Saturday and decided to suspend the sitting. The decision made newspaper headlines around the country.³³

On hearing about the adjournment, Symon, in absolute dismay, sent an urgent telegram to O'Connor: 'I shall, therefore, be obliged if you will state to me the reason for the adjournment of the Court, and also whether you propose to proceed with the trials next Tuesday ... forgive my pointing out the importance of an immediate reply.'³⁴

Griffiths' response on behalf of the Court was short and to the point. He defended the High Court's action as an imperative of judicial independence. In part he stated, 'We cannot recognise your right to demand the reasons for any judicial action taken by the Court, except such request as may be made by any litigant in open Court.'³⁵

Symon, in a frustrated response is reported to have scribbled on a scrap of paper: 'How can any Ct. because of disagreement as to Hotel expenses go on strike? ... no wharflabourers union do such thing.'³⁶

On 5 July 1905, as suddenly as the dispute had begun, it ended. Prime Minister George Reid resigned. The lack of support for his Coalition party in parliament had

³¹ The Symon Papers NLA MSS 1736 11/858.

³² RB Joyce, f/n 7 PG264.

³³ The *Argus* referred to the Court's action as 'High Court Friction' May 24 1905 PG7. The *Sydney Morning Herald* called it both a 'High Court Deadlock' May 24 1905 PG8 and a 'High Court Difficulty' June 10 1905 PG11.

³⁴ The Symon Papers NLA MSS 1736 11/859.

³⁵ Ibid 11/859.

meant he was unable to withstand a challenge from the Opposition with regards to the threat his proposed legislative reform would have for the future of protective tariffs in Australia.³⁷

Alfred Deakin was sworn in as Prime Minister and Sir Isaac Isaacs as Attorney-General. Isaacs wrote to Griffith less than a week later and in correspondence throughout August, the government was able to offer a 'satisfactory and permanent solution of the matters agitated'.

The Court would continue its practice of sitting in each state capital 'as may be required', the government would have full confidence in 'their Honours' wisdom' with regards to travelling expenses, the numbers of associates and tipstaves would not be reduced, and the 'trivial matter' of shelving was attended to.³⁸ The affair had ended.

Griffith was delighted. 'On behalf of my learned colleagues and myself I have pleasure in saying that we concur in the opinion of the Government that the conclusions set out in your letter constitute a satisfactory, and, as we trust, a permanent solution of the matters in question.'³⁹

Now, over a century later, I ask the same question posed in a letter to the Editor of the *Sydney Morning Herald* on June 13 1905. Can it be said that 'too much has been made of too little' in considering something about the nature of this bitter and protracted debate?

Certainly, Symon's political and personal embarrassment as Australia's fourth Commonwealth Attorney-General quashed any aspirations he may have had for a future place on the High Court bench yet for all the turbulence he caused, his legacy remains not just for his contribution to the legal profession and Australia's federal cause, but also because during his time as the Attorney-General, he was instrumental

³⁶ RB Joyce, f/n 7 PG265.

³⁷ WG McMinn, f/n 1 PG26.

³⁸ The Symon Papers NLA MSS 1736 11/868

³⁹ The Symon Papers NLA MSS 1736 11/869.

in giving life to the Commonwealth Conciliation and Arbitration Act, something which had proved to be the downfall of earlier Australian Governments.⁴⁰

Yet, what of the actions of the original High Court? Although it has been indicated that neither of the parties in the dispute can be ‘acquitted of all blame’,⁴¹ I would suggest that the strike of 1905 remains for us an early demonstration of judicial authority and independence and through this it consolidated the pattern of the Court’s sitting practice that, in a modified form, remains to this day. Perhaps it is for these reasons that one of the current Justice’s of the High Court describes the circumstances of the ‘Strike’ as ‘events whose importance should not be underestimated’.⁴²

Finally, I return to where I commenced, to the views of Australia’s founding fathers, Specifically to those of Sir Andrew Inglis Clarke; and perhaps as you consider some of the details of this somewhat curious and uniquely Australian narrative, might it be, that as America was celebrating the 100th anniversary of *Marbury v Maddison* (1803), Australia’s original High Court was also beginning the process of establishing a judicial supremacy of its own?⁴³

Susan Priest, July 2007.

⁴⁰ G Sawyer, *Australian Federal Politics and Law 1901-1929* MUP 1956 Chaps 3&4 and, R McMullin *So Monstrous a Travesty* Scribe Melbourne 2004 Chaps 4 & 6.

⁴¹ WG McMinn f/n 1 PG28.

⁴² The Honourable Justice Ian Callinan in M white QC and A Rahemtula (Eds) *Sir Samuel Griffith the Law and the Constitution* Lawbook Co 2002 PG13.

⁴³ M Kelly, ‘Marbury v Madison-An Analysis’ in *The High Court Quarterly Review* Vol 1 Issue 2 2005 PP58-59 and Justice Michael Kirby AC CMG ‘The High Court of Australia and the US Supreme Court:A Centenary Reflection’ in *The University of Western Australia Law Review* Vol 31(2) December 2003 PP171-201.