Sketches on Territory legal history

by The Hon. Justice Mildren

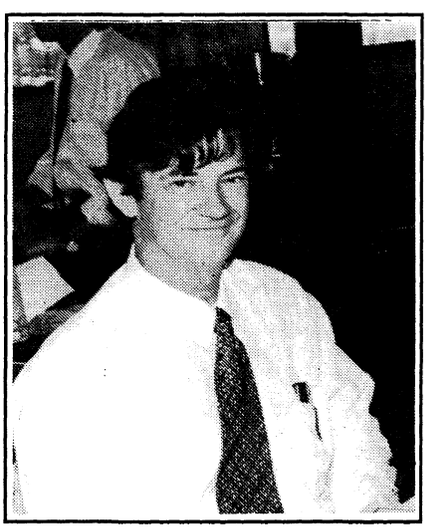
Charles James Dashwood, who in later life came to enjoy the sobriquet of "Northern Territory Charlie", was the longest serving of South Australia's Government Residents and Judges of the Northern Territory, having held both offices for 13 years between 1892 – 1905.

Born in South Australia on 17 July 1842, Dashwood was educated at St Peter's College and the University of Ghent before taking up station life in the South East of South Australia. In 1865 he became the Clerk of the Local Court of Woodside and in 1866 the Fourth Clerk to the Local Court of Adelaide. At the age of twenty-six he entered into articles with W.H. Bundey and after his admission to practice in 1873, he entered into partnership with him. In 1887, he entered the South Australian Legislative Assembly as one of the two members for Noarlunga, and held his seat until his N.T. appointments in 1892, following the death of John George Knight.

Dashwood was not a leader of the South Australian Bar at the time of his appointment, and indeed had had little experience in criminal matters. Moreover, he came from middle-class parentage, and it is probable that, despite the birth of a son in 1882, he was too poor to marry. However, he had gone to school with a number of establishment figures, some of whom were to hold high office and to assist his career opportunities, and he was a life-long friend of C.C. Kingston, who also held high office, and who was to do likewise. Nevertheless he was not the first choice for the positions which were originally offered to Patrick McMahon Glynn who refused the positions as the salary was inadequate. Nevertheless Dashwood was acceptable politically, and was willing to go at short notice. He clearly possessed characteristics which, if they had been brought to bear on the decision to appoint him, would have been favourable considered. He was Australian born, and politically a liberal progressive; he had had experience on the land (and therefore knew something about Aboriginals), was not xenophobic towards the Chinese, and was, as Elder says, "a robust man of practical sense not given to profundity, harbouring a strong conviction that fair-mindedness will cause all problems to yield."

Dashwood is of importance to Northern Territory history principally because he did much at a time when such notions were unpopular, to promote respect for Japanese and Chinese immigrants and to afford equal justice towards the Aboriginal people.

As to the Japanese and Chinese, whilst he considered them to be a malign influence upon Aboriginal women, he believed them indispensable to the future of the Northern Territory, as the only people willing to work in the Territory's harsh conditions. He was critical of the "White Australia" policy, and supported Asian labour and immigration both before the 1895 Northern Territory Commission, and in his own inquiry into the pearling industry conducted on behalf of the Commonwealth in 1902, the latter of which resulted in immigration exemptions being granted to non-European pearlers.



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His position so far as the Aboriginal people were concerned, evolved over time. In the late nineteenth century, it was common-place for white people to administer summary justice to Aboriginal people, sometimes with the assistance of punitive raiding parties organised by the police. In the first sittings he conducted involving Aboriginal accused, ten Aboriginal men were convicted of murder and sentenced to death in a sitting lasting but three days. The press reaction was to express concern on the one hand that a number of the defendants did not seem to have the slightest comprehension of what the trials were all about, whilst on the other, to urge that the sentences to be carried out as a means of teaching them the difference between right and wrong. Dashwood, as Government Resident, had the duty to advise the Government if (and how) the sentences should be carried out, or whether to recommend a reprieve. Until then, there had been no legal executions in the Northern Territory. Charlie Flannagan, a part-Aboriginal became the first condemned murderer to be hanged in Palmerston when he was executed on 15 July 1893. Dashwood also recommended that the sentence of death be carried out on a full blood Aboriginal, Wandy Wandy, but that the sentences on the other defendants be reprieved. Dashwood's decision depended upon his view of the extent to which the accused had experience of and understood the white man's ways, their understanding of English, and therefore their understanding of the consequences of their actions. Wandy Wandy was publicly hanged at Malay Bay, the scene of the crime, in the presence of about thirty members of his tribe, as a means of helping to preserve law and order in the region.

In 1894, the Government decided that Dashwood J should take over the running of the inferior courts, and from then on his Honour sat in the Local Court, the Police Court and the Coroner's Courts. As a result of this experience, Dashwood heard many cases involving police raids on Chinese brothels and gambling houses where many Aboriginal females were found in various stages of opium drunkenness which served to strengthen his view that there was a need for protective legislation for Aboriginal people, such as existed in all other states except South Australia at that time. Thereafter, his Honour's attitude towards Aboriginals began to modify. In the trials of Nyanko and Mulululrun for murder in August 1894, he publicly stated that it was unsatisfactory that the accused were "utterly ignorant of what is going on". In subsequent trials of Aboriginals for serious offences, interpreters were made available to interpret the whole of the proceedings to the accused. In 1896, in *R v Charley* he summed up strongly against a conviction for murder when the principal evidence against the accused was his own confession. Later in the same year in another murder case, R *v Jaydeada, Wallagoola and Cadininie*, he rejected confessions whilst conducting committal proceedings on the basis that the accused had not been cautioned, and refused to commit for trial, there being no other evidence of the accused's guilt. The same result occurred in the committal proceedings against Cammefor and Mungkir

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in 1900, his Honour observing that "the case was a striking example of the danger which might result from convicting natives on evidence out of their own mouths."

Part of the recognition for these relatively modest but important advances in the administration of justice towards the Aboriginal people belongs to E.P.G. Little and to Charles Herbert. Herbert had returned to Palmerston in 1896, to resume his practice after a stint of several years in New South Wales. Herbert was an experienced trial lawyer and it seems likely that his advocacy had a significant influence on Dashwood.

In 1990, there were several important decisions which reflected Dashwood's desire to ensure fairness towards Aboriginal accused. In *R v Jimmy*, which concerned the murder of a white man at Victoria River, the defence of provocation was left to the jury although the grounds for doing so were slender, as the provocation had not directly come from the deceased, but from the deceased's companion. Although Dashwood's charge to the jury did not favour the accused on the question of provocation, he deplored the violence which had been used upon the defendant saying that:

> "it was to be deeply deplored and condemned that people should use ropes or other violent methods in their dealings with these natives. The wilder a native was, the more likely he was to resent such treatment, nurse feelings of revenge, and seize upon the first available opportunity for retaliation."

In the same sittings, in *R v Long Peter*, an Aboriginal charged with the tribal murder of another Aboriginal as a result of the carrying out of tribal punishment was acquitted of murder but convicted of manslaughter. Dashwood J again left provocation to the jury, but went on to explain that:

> "strictly speaking no cognisance could be taken of individual or tribal customs as serving to excuse offences against British law. All persons living under that law – blacks or whites – were equally liable to punishment if they overstepped the boundaries laid down; but in this case the Jury might consider the fact of moment connected with the query of whether the prisoner was guilty of murder or the lesser crime of manslaughter. The jury was not there to inquire into the motives which might actuate natives in settling their tribal quarrels. The real question they had to consider was – did the evidence satisfy them that the prisoner was guilty of either murder or manslaughter? If it did, then only might the general facts as to the habits or customs prevailing with the query of whether the prisoner was guilty of murder or the lesser crime."

The jury returned a verdict of guilty only to manslaughter with a strong recommendation of mercy on the ground that the evidence shows that the prisoner's act was the result of tribal custom and that the deceased provoked the assault. Dashwood J imposed an extremely lenient sentence, especially for those times, of three month's imprisonment with hard labour. The report, whilst brief, suggests two things. First, that evidence of tribal custom was relevant to the question of whether the accused had what his Honour described as "malice afterthought", ie. the necessary intent to kill or cause grievous harm. Secondly, it was relevant to sentence, given the jury's recommendation and the very lenient sentence in fact imposed. This is the first known case where tribal custom was evidently taken into account on both of these issues.

In 1898, Dashwood, at the request of the Government prepared a report setting out at length his view regarding the treatment of the Aborigines and possible remedies. The Premier, Kingston, was impressed with the report and Dashwood was invited to prepare a Bill for the protection of Aboriginals. In July 1899 the Bill was introduced into Parliament, and Dashwood travelled to Adelaide at his own expense to lobby support. When the Bill was introduced to the upper house; it met opposition, and was referred to a select committee which took evidence from a number of witnesses, including Dashwood. The Bill had been modelled on the Queensland Act, and provided for a permit system for the employment of Aborigines, aimed to prevent slavery and the procurement of Aborigines for prostitution by imposing severe penalties for the removal of an Aboriginal from one district to another, and by imposing severe penalties for carnal knowledge of Aboriginal or part-Aboriginal females. The Bill was strongly opposed by pastoral interests, especially from Central Australia, who argued that the reforms were impractical. Ultimately the report of the Select Committee recommended that the Bill be withdrawn, and the Bill failed. Notwithstanding this loss, Dashwood continued to draw attention to the responsible Minister of cases where Aboriginals had been abducted or otherwise maltreated.

In 1905, Dashwood resigned to take up the position of Crown Solicitor in Adelaide, a position he held until his retirement in 1916. He was appointed a King's Counsel in 1906. He married in 1916, and died intestate in 1919.