Historical Document
Foreword: Richard Windeyer (1806-1847)

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A great, great grandson
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In 1844, when Richard Windeyer gave his lecture on the rights of the Aborigines – to their own customary laws, their land and the wild animals – he and his views were well known. In summary, he argued they had no rights as regards those matters but an entitlement to just and humane treatment by the institutions and individuals of the new colony.

When the rest of his family left for Australia in 1828, Richard stayed behind in England to complete his legal studies. He arrived in 1835 and soon was a prominent barrister in Sydney. Additionally, and relevant in the context of the lecture, he held considerable lands on the lower Hunter River, based on his property *Tomago* at Raymond Terrace. He was a foundation member of the Aborigines Protection Society; and from 1843 he was one of the twenty-four elected members of the newly constituted New South Wales Legislative Council.

In his lecture Windeyer draws extensively on the writings of Vattel and Blackstone, to hold that property in land was derived from one having laboured on it and hence that the Aborigines had no claim to it.[1] The argument in relation to their rights to the wild animals was similar: the animals belong neither to individuals nor societies until brought under actual domination. As to their customary laws: they were no more than 'lewd customs' which admitted atrocities, and in which settlers clearly had a right, indeed an obligation, to interfere.

All of this needs to be considered in the context of Windeyer's experiences in his legal practice, his interactions with Aborigines on his properties and his work in the Legislative Council.

In his legal practice Windeyer had appeared in two significant cases involving Aborigines: *R v. Murrell* in 1836 and the trials following the Myall Creek massacre in 1838. The first trial raised the question of whether in incidents between Aborigines, as distinct from those between Aborigines and settlers, English criminal law or native customary law should prevail. Justice Burton's decision, that English law prevailed, was based on two assumptions: that at the moment of colonisation the land was 'unappropriated by anyone' and therefore lawfully taken into possession of the Crown; and that the Aborigines had no laws of their own 'but only lewd practices and irrational superstitions contrary to Divine Law and consistent only with the grossest darkness'.[2] These were arguments that Windeyer was to use in his lecture.

R v. Murrell and the Myall Creek trials raised another question, that of the admissibility of the evidence of Aborigines before colonial courts. Many were aware of this problem: as it was thought that Aborigines did not believe in some form of existence after death, they could not take an oath. Although the majority of those charged in relation to the massacre were eventually found guilty, it was clear that justice would often not be done as long as the evidence of Aborigines was inadmissible. When, in 1844, a bill was introduced (albeit unsuccessfully) into the Legislative Council to admit unsworn testimony, Windeyer supported it: 'He could not see how', the *Sydney Morning Herald* reported, 'upon principles of justice, the Bill could be rejected, unless they came to the conclusion that the savage should be barred from all improvements'.[3]

In the Council it was on Windeyer's motion in 1845 that a Select Committee was appointed to consider the condition of the Aborigines, 'not', as he said, 'with the hope of effecting much good, but because they are so utterly friendless and helpless, that it was inhuman to pass them by in silence'.[4] The Committee, chaired by Windeyer, accumulated evidence for two straight years before ultimately disbanding after his health began to decline. It unfortunately made no recommendations to the Council.[5]

In all these matters regarding the Aborigines, besides being their 'friend', a lawyer, and, since 1838, a member of the Aborigines Protection Society, Windeyer was himself a landowner. A letter from

Maria, Windeyer's wife, to her sister in England, shows the interesting balance in the Windeyers' attitude to the Aborigines:

> We have always made a point of behaving kindly towards them, and the consequence is we are all great favourites with them [...] Richard has frequently taken them to the play [theatre] with which they are exceedingly delighted particularly with the dancing [...] held corrobe [sic] by invite at Tomago [...] local Blacks come and go [...]
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> They are incorrigibly idle, in the Country they will sometimes bring a little fish, but as to work they won't, the only thing they have learnt from the whites is to drink [... and] we never take any notice of any whom we know to be drunkards, but they are very cunning and try to deceive us. [However] they are very honest I never fear these coming into the house, I know they won't take a crust of bread unless it were given to them although suffering great hunger.[6]

On *Tomago* Windeyer spent vast sums draining swamps and experimenting with different crops – successfully with wine, not so with others. It meant Maria did not have a carriage or horse in town and his estate was insolvent when he died.

As an esteemed member of the New South Wales Legislative Council, Windeyer had a prominent voice which was heard in many debates, especially those on education. Even though it was subsequently rejected by the Governor, he promoted a broad credit scheme to ease the financial crisis of the early 1840s. And he sought to reform colonial law, particularly with respect to jury trials and libel.

Richard Windeyer was highly regarded as a man of vigour, ambition and honesty; a man independent and liberal in his thinking; someone ruthless to his enemies yet kind to family and friends; and as the *Atlas* remembered him after his death at just forty-one, an

'indefatigable friend of the aborigines'.[7] His work was only really just beginning.

NOTES

[1] Emer de Vattel, *The Law of Nations, or, Principles of the Law of Nature: Applied to the Conduct and Affairs of Nations and Sovereigns* (London: 1793); Sir William Blackstone, *Commentaries on the Laws of England in Four Books,* 18th edition (London: Sherwood Jones & Co, 1823).
[2] J. G. Legge (ed.), *Selection of Supreme Court Cases in New South Wales from 1825 to 1862*, Vol. 1 (Sydney: Government Printer, 1896), p. 72; *Sydney Morning Herald* (16 May 1836).
[3] *Sydney Morning Herald* (21 June 1844).
[4] *Sydney Morning Herald* (1 April 1846).
[5] NSW Legislative Council, *Votes & Proceedings* (1845), p. 40.
[6] Maria Windeyer to Elizabeth Camfield, 3 October 1842. Windeyer Family Papers, ML, MSS 186/7.
[7] *Atlas* (26 February 1848).