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HON. TREVOR MONIZ, JP, MP
MINISTER OF LEGAL AFFAIRS & ATTORNEY GENERAL



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400 years of Bermudian courts

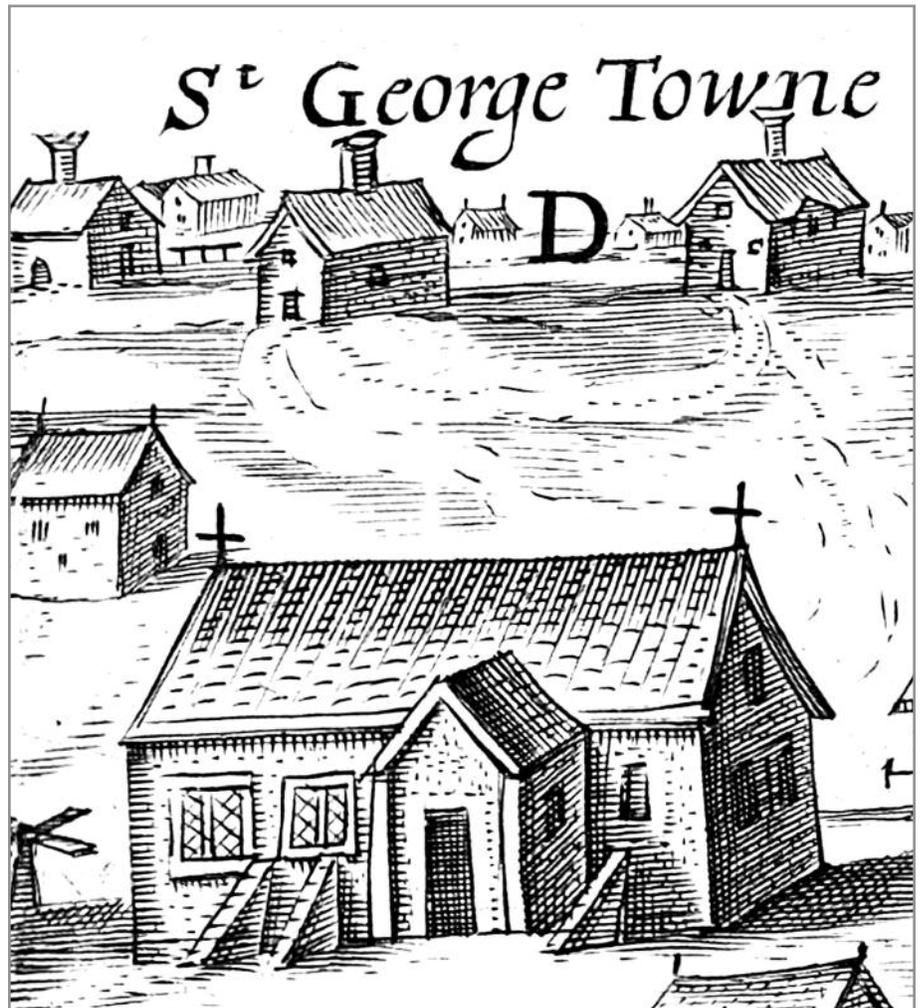
A sound legal foundation for an international investment domicile of choice

BY CHIEF JUSTICE IAN R. C. KAWALEY

BERMUDA'S Court of General Assize first sat on June 15, 1616, on the 401st anniversary of the signing of Magna Carta at Runnymede, England. Bermuda's courts have expanded and sat since then on a continuous basis.

In constitutional terms, Bermuda began its life as an appendage of Virginia. In 1612 the island was legally created (or constituted) by amendment to earlier Royal Charters granted by King James I to the Virginia Company.¹ The Company sold its rights in Bermuda for £2,000 to various London merchants, who returned the island to the Crown in return for the grant on June 29, 1615 of Letters Patent to "the Governor and Company of the City of London for the Plantacon of the Somer Islands." Company shareholders included Sir Edwin Sandys,² a barrister of the Middle Temple and an MP who was an early advocate of accused persons being represented by counsel.³

It is clear Sandys indirectly influenced the 1615 Charter through his recognised contribution to the 1609 Virginia Charter upon which the Somers Isles Charter was significantly based. Indeed, Sir



Bermuda's first church, St. Peter's in St. George's, hosted early legislative meetings



The State House in St. George's where early assizes were held

Edwin, from whom Sandys Tribe (now Parish) acquired its name, is not only credited with introducing his libertarian views into the Second Virginia Charter, a precedent for much of the “Bermuda” Company’s first constitution—he is also recognised as its principal author.⁴ Two elements of Bermuda’s first “constitution” are noteworthy:

1. All the King’s subjects who migrated to Bermuda and their children born there were granted “all libertyes franchises and immunities of free denizens and naturall subjectes within any of our dominions to all intents and purposes, as if they had been abiding and borne within this our Kingdome of England or in any other of our Dominions.”

2. The Company’s constitution conferred the power to create courts exercising the following jurisdiction:

a) “in cases civil and criminal, both maritime and others so always that the said statutes, ordinances and proceedings (as near as conveniently may be) be agreeable to the laws, statutes, government and policy of this our Realm of England.”

b) in the case of mutiny or rebellion, martial law as applicable in England, “by a Jury of twelve Men,” a feature absent from the Virginia Company Charters.

Bermuda not only has a strong claim to being the New World’s oldest uninterrupted modern legal system. Its courts were established under legal

instruments which from the outset firmly planted respect for the rule of law in the founding territory’s fundamental governing principles.

THE RULE OF LAW TAKES ROOT
Bermuda legally began as an English settlement whose non-English residents were regulated under a constitutional system which only formally recognised the liberties of English subjects, and only fully English men. For the first 100 years of the courts’ existence, persons of indeterminate legal status comprised all women, African slaves, Native Americans, Irish, Scottish and Welsh indentured servants (often prisoners captured in the wars which created the United Kingdom) and religious minorities.

The first jury trial took place on

June 15, 1616 at the first Assize, and jury trials have been conducted on a regular basis ever since. Nevertheless, even slaves were accorded the right to jury trial for serious offences, save when “emergency legislation” was passed in response to rebellions.

During the Somers Isles Company era, the jurisdiction enjoyed by English courts, other than the General Assize Court, was also exercised in Bermuda. The Governor sat as the Ecclesiastical Court, dealing with probate and divorce matters. The Governor, commissioned as a Vice-Admiral, and his Council sat as a Court of Admiralty to deal with shipping disputes. The first admiralty case was heard in 1671 and related to the wrecking of the vessel *Truelove*.⁵

Sir Allan Smith has noted that a commercial court sat in 1668: “There is one instance recorded in 1668 of the sitting of a Court of Piepoudre (spelled “Pipepowder” in the record) to deal with two commercial cases, the first an action on the case for damages against a ship and the other an action of account between two merchants.”⁶

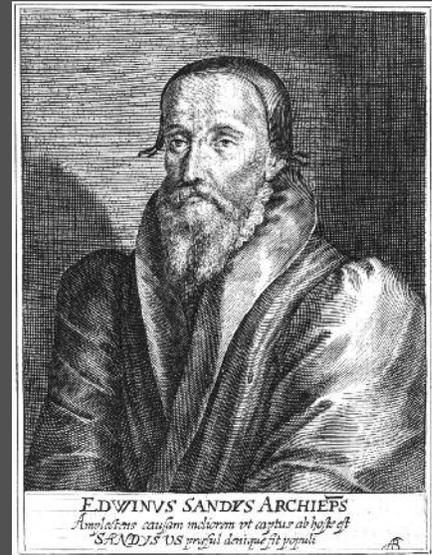
In 1684 the Somers Isles Company was dissolved in London and Bermuda became a Crown Colony. Bermuda’s constitution became grounded in Letters of Instruction to Governors and local legislation, with the Bermudian House of Assembly providing a legislative basis for the courts. Thereafter, rather than simply following English law and practice, Bermudian substantive and procedural law was applied within a court system and under umbrella principles which were strongly influenced by English law.

The Emancipation Acts of 1834 ended slavery, and expanded the range of persons who were, theoretically at least, equal before the law. The Supreme Court was created as a unified Superior Court in 1905. The Court of Appeal for Bermuda was created as an intermediate appellate court in 1964. Bermuda’s highest appellate court is the Judicial

LANDMARKS

From company island to Crown rule

Prominent London lawyer and MP Sir Edwin Sandys was one of the original shareholders in the Virginia Company, which settled Bermuda. Many of the “Adventurers,” as the shareholders were known, gave their names to local Tribes, or parishes, including Sandys. The company’s spinoff, the Somers Isles Company, ruled Bermuda for more than 70 years, but its monopoly system of governance eventually worked against the island’s development. In 1684 its charter was revoked and the Crown took over administration.

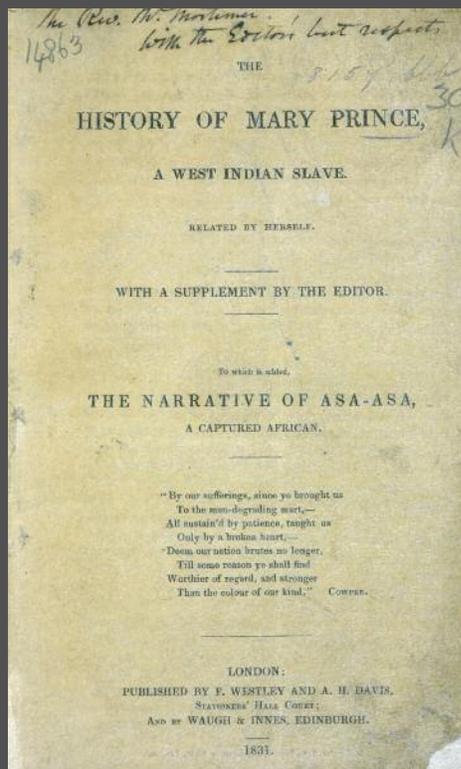


The History of Mary Prince

Mary Prince was a Bermudian slave born in Devonshire Parish, whose life became a flashpoint in the years leading to legal Emancipation. Aged 43, she told her story to the Anti-Slavery Society in Britain which published the account. It was a chilling account of broken families, physical abuse and

harsh work and punishment. Prince’s story became a highly successful tool in the Society’s campaign, which came to fruition two years later in 1833, when the UK House of Commons passed an Act for the Abolition of Slavery.

In Bermuda, the Attorney General laid the Act before the Assembly: it called for “promoting the industry of the manumitted slaves, and for compensating the persons hitherto entitled to the services of such slaves.” The Act was voted into Bermuda law, taking effect on August 1, 1834.



Title page of The History of Mary Prince, A West Indian Slave, published in 1831



The Sessions House and Front Street in the mid-1800s

Committee of the Privy Council in London, which is staffed by the judges of the UK Supreme Court (previously the House of Lords).

The Bermuda Constitution Order 1968 introduced for the first time full internal Cabinet-style self-government based on universal adult suffrage. A bill of Fundamental Rights and Freedoms is contained in Chapter 1 of the Constitution. The British-appointed Governor appoints all judges and is required to consult with the Premier only when appointing the Chief Justice. Judges of Bermuda's Supreme Court and Court of Appeal have security of tenure and can be removed during the term of their appointments only for serious misconduct. Bermuda's Supreme Court can today grant relief for breach of fundamental rights, including declaring that local legislation is void for inconsistency with the Constitution,

LANDMARKS

Fight for women's rights

A key legal battle was to win the vote for women, which was not secured until 1944. In Bermuda, the campaign was spearheaded by Gladys Morrell, who was inspired by British suffragettes. Morrell and other Bermuda activists frequently challenged local laws by, for instance, withholding parochial taxes—leading to property being ordered confiscated by Magistrates Court.

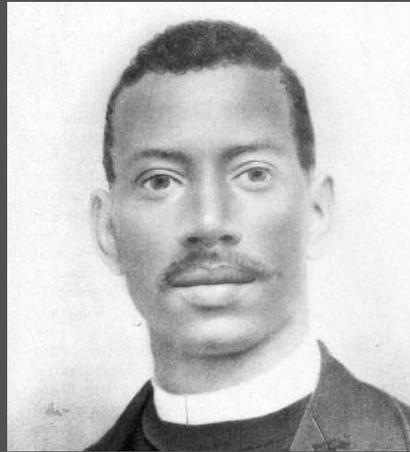
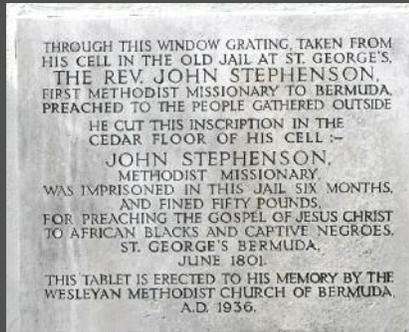
Morrell and her supporters with confiscated furniture



LANDMARKS

Clergy who spoke against injustice

Clergymen have often been involved in key legal cases in Bermuda. The Methodist Rev. John Stephenson fell foul of local authorities in 1801 when he preached to local blacks. Despite being defended by James Esten, later Chief Justice, he was jailed for six months and fined £50. In 1903, the American pastor and newspaper editor Charles Vinton Monk (pictured) was jailed and fined for criminal libel after speaking out against the treatment of Jamaican workers employed on extensions to the Royal Naval Dockyard.



and exercises a jurisdiction which is in this respect broader than the corresponding competence of the UK courts.

The 1981 Human Rights Act provides further protection of human rights and prohibits discrimination in relation to employment, property rights and services. The Act generally takes precedence over other legislation.

Bermuda's legal profession was first formally regulated under the Bermuda Bar Act 1974, under which various professional conduct rules have since been promulgated. The Act permits foreign leading counsel to be admitted for major cases, including commercial and trust disputes. Bermuda's Judiciary voluntarily adopted Guidelines for Judicial Conduct in 2006, and in 2014 adopted a Judicial Complaints Protocol to enable judicial complaints to be made for conduct falling short of conduct likely to be punished with removal under the Constitution. The rule of law is now well-rooted in Bermudian legal soil.

BERMUDIAN LAW IN SERVICE OF THE INTERNATIONAL BUSINESS COMMUNITY

It is apt that international business has been, since the 1990s, the central pillar of Bermuda's economy. Bermuda began its existence and was settled in the early 1600s as an asset beneficially owned by international investors based in England. By the 1700s, shipbuilding and maritime trade replaced the initial tobacco plantation.

Bermuda's increasingly pivotal role in Atlantic maritime trade from the turn of the 17th and 18th centuries created a need for the adjudication of international maritime disputes. Professor Michael Jarvis attributes the evolution of the courts in this period to a combination of increased self-government for Bermudians and the need for more modern courts due to the shift from plantation to maritime economy:

"As their shipping traffic and

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intercolonial commerce grew after the company's demise, Bermudians soon realised that they needed more specialised and responsive courts to deal with the volume and complexity of their new maritime transactions. Between 1687 and 1708, Bermudian legislators and the Crown established permanent courts of vice admiralty and exchequer, staffed them with appointed judges and assistant judges, and created the offices of Chief Justice and Attorney General. In 1691, the assembly created four new courts (King's Bench, Oyer and Terminer, Quarter and Chancery) to replace the general-purpose assize court that had been used throughout the company period. Under royal administration, Bermudians enjoyed not only a regularly convened assembly that crafted locally relevant laws (subject to royal approval) but also a new court system with local justices and jurors to enforce them. It took more than a decade for Bermudians to displace the English appointees who early monopolised the posts of sheriff, collector, provost marshal, treasurer and searcher, but once they did they gained considerable autonomy in local governance.⁷

The courts' initial record in the 1700s as neutral arbiter of disputes between local and international maritime interests admittedly may have been somewhat patchy. However when modern international business was born in the 20th century, international business investors were permitted to operate from a base in Bermuda on terms that prevented competition with local business interests. Against this background Bermuda's courts in the second half of the 20th century quickly developed a keen understanding that an efficient, independent and business-friendly approach when dealing with international commercial disputes of any nature would promote confidence in Bermuda as an investment domicile. In January 2006 a Commercial Court

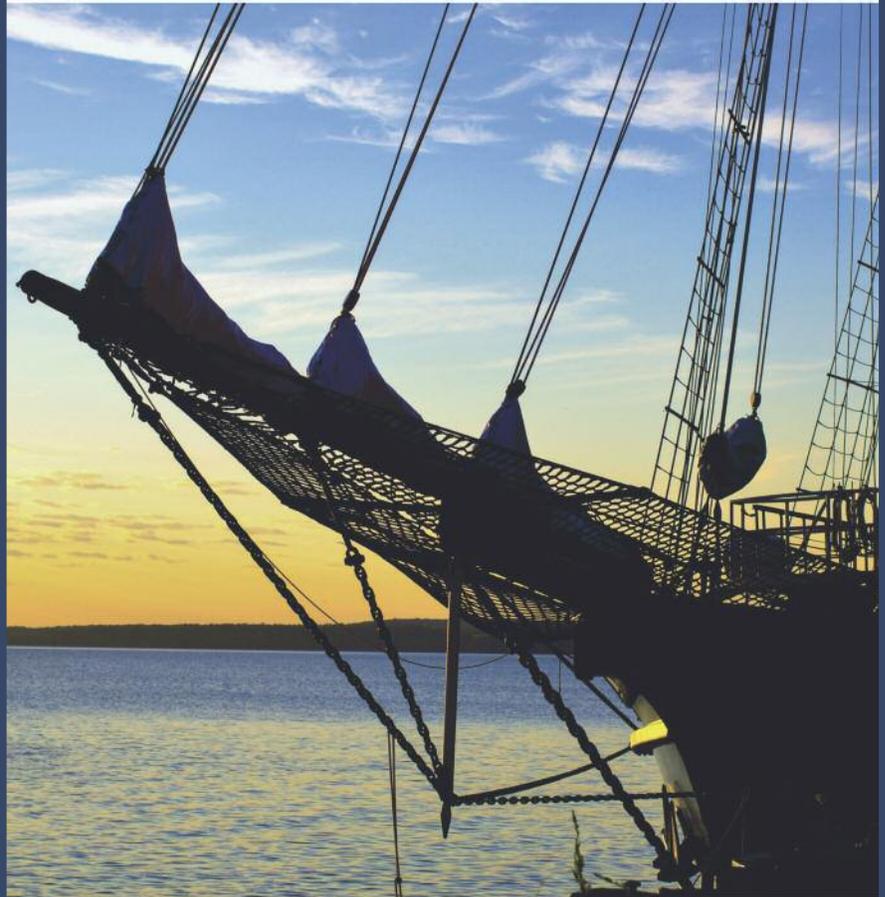
was established as a division of the Supreme Court of Bermuda, more than 300 years after the first *ad hoc* commercial court sat in 1668.

The main diet of the Commercial Court is international cases, including cases with a strong cross-border. Bermudian judges and lawyers have close professional links with their counterparts in both the "offshore" world and in major "onshore"

metropolitan centres. Modern Bermudian commercial law has been described as follows:

"The heart of offshore commercial law... focuses on the establishment of offshore investment vehicles to generate or preserve wealth. But this specialist legal field does very arguably have a soul as well; Bermudian offshore structures are formed in and regulated by a legal framework which

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aims to a) afford commercially acceptable means to resolve any incidental legal disputes which may arise, and b) ensure compliance with internationally-recognised standards of commercial morality.”⁸

CONCLUSION

As Bermuda’s courts celebrate their 400th anniversary, a snapshot legal history suggests two key themes. First, the courts have an uninterrupted history of operating under stable government in which the rule of law has always prevailed and in which international human-rights standards

are now creditably protected. Second, the courts, in partnership with the legal profession and Bermuda’s legislators, have developed substantial experience in serving Bermuda’s international business clientèle. It is submitted that if Bermuda’s courts are weighed in the scales by those considering choosing Bermuda as an investment domicile, they ought not fairly to be found wanting.

1 Rosemary Jones, *Bermuda Five Centuries* (Panatel VDS Ltd./Brimstone Media Ltd.: Bermuda, 2004), pp. 30–32.

2 Lefroy, *Memorials of the Discovery and Early Settlement of the Bermudas or Somers Islands 1516–1685, compiled from the Colonial Records and other original sources*, Vols. I–II, originally published in

1877, 1879 (Bermuda Historical Society/Bermuda National Trust: Bermuda, 1981), pp. 83–98.

3 https://en.wikipedia.org/wiki/Edwin_Sandys.

4 Samuel M. Bemiss, *The Three Charters of the Virginia Company of London With Seven Related Documents; 1606–1621* (Virginia 350th Anniversary Celebration Corporation: Virginia, 2011–EBook #36181): www.gutenberg.net.

5 Dr. Edward C. Harris, “Bermuda’s Silver Oar of the Admiralty Court,” *Supreme Court Annual Report 2012*, p. 10: www.judiciary.gov.bm.

6 “An Outline of the History of the Courts of Bermuda” (1960) *Bermuda Historical Quarterly* 17, pp. 97, 101.

7 *In the Eye of All Trade: Bermuda, Bermudians, and the Maritime Atlantic World* (University of North Carolina Press: Chapel Hill, 2010), p. 72.

8 Ian R. C. Kawaley (ed.), *Offshore Commercial Law in Bermuda* (Wildy, Simmonds & Hill: London, 2013), paragraph 1.69.

LANDMARKS

Silver Oar Court’s mace of authority

Bermuda’s Silver Oar, latterly the mace of authority of the Bermuda Supreme Court, is the oldest of its kind in the world for British Overseas Territories. It was made in London in 1697 and first used in the early 1700s as ceremonial mace of the Island Council, which later became the Legislative Council.

The Oar was used in at least one Prize Court of Vice Admiralty held in 1944 during the Second World War. Now kept at the National Museum of Bermuda, it is unveiled only for the opening of the Assize Court in January each year, where it precedes the Chief Justice in the ceremony.

Symbolically, the oar is thought not to represent a rower’s device, but rather a steering oar, which was the early form of the rudder. One scholar has noted: “It has been persuasively suggested that here is the gubernaculum (helm or rudder) of Roman ships, a fitting symbol of right governance.”



Bermuda’s Silver Oar is carried before the Chief Justice at the Assize Court opening



"This Court in which we sit is a temple of justice; and the Advocate at the Bar, as well as the Judge upon the Bench, are equally ministers in that temple. The object of all equally should be the attainment of justice."

CRAMPTON, J., R. v. O'Connell (1844) 7 Ir. L.R. 261, 312.



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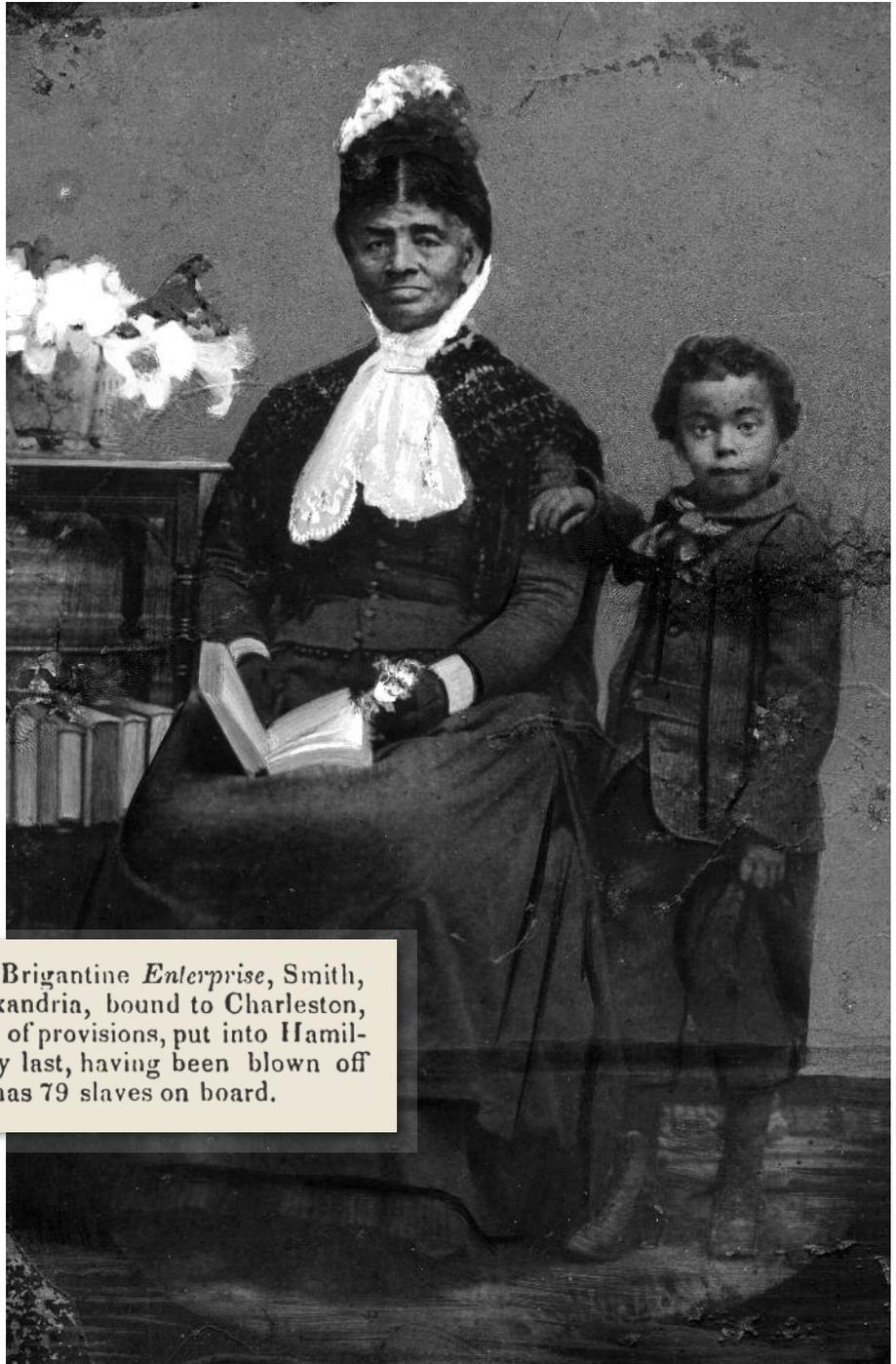
The Ferreira Family
Pamela, Kristen & David

The *Enterprise*: Bermuda's blow against US slavery

IT WAS Wednesday, February 11, 1835 when an American brigantine of 127 tons, the *Enterprise*, sailed into Hamilton Harbour. It had been sailing between Virginia and South Carolina but had been blown off course by a hurricane. In addition to other cargo, the ship carried 78 slaves: 41 females and 37 males. The slaves were almost all young and had been born or raised in America.

What followed is an inspiring moment in Bermuda legal history. Richard Tucker, a local businessman and community leader, took it upon himself to try to free these slaves now they were in British waters. He applied for *habeas corpus* against the captain of the ship, Elliot Smith, requiring him to show cause as to why these persons were detained on the *Enterprise*. Slavery had been abolished in the Caribbean colonies by the Slavery Abolition Act 1833 and Lord Mansfield, Chief Justice of England, had held in the case of *Somerset v Stewart* [1772] Eng R57, overturning previous decisions, that English common law did not recognise slavery. Tucker, in short, was on firm ground. The ship tried to leave but was prevented from doing so by local forces.

On February 18, the slaves were taken off the ship at Barr's Bay Park and were escorted by jubilant crowds to the Court House. There, at a hearing which began at 9 p.m., Chief Justice Thomas Butterfield informed each slave that they were free and asked them each in turn if they



The American Brigantine *Enterprise*, Smith, master, from Alexandria, bound to Charleston, out 21 days, short of provisions, put into Hamilton on Wednesday last, having been blown off the Coast.—She has 79 slaves on board.

Mary Warfield, who came to Bermuda as a child aboard the Enterprise

LANDMARKS

Keeping a watch

Bermuda once had as many as 18 watchhouses like this surviving example in Somerset—two per parish. The lockups were used to hold local troublemakers, drunks and felons before they could be taken before the courts to be dealt with. The Somerset watchhouse is thought to be the last remaining wholly intact.



would like to remain in Bermuda as free persons. All said “yes,” with the exception of Matilda Ridgely, who had five young children. She had been born a free person in America but had been kidnapped and sold into slavery. Ridgely had other children in the slave states and, rather than abandon them, she chose to return and in due course embarked on a ship to South Carolina. It is not known what happened to Ridgely, who disappeared from the record.

However, in the Court House in Hamilton, there were emotional scenes. Attorney General John Harvey Darrell organised an immediate whip-round for funds to help the newly liberated slaves. The Mayor of Hamilton, William Cox, offered up one of his warehouses as temporary accommodation. It was Tucker, however, through the local Young Men’s Friendly Lodge (a friendly society founded by Tucker dedicated to empowering the black community), who took responsibility for looking after Bermuda’s newest arrivals.

Angry Americans

The liberation of the *Enterprise* slaves led to local celebration but created some hostility with our American neighbour; there were angry press reports in US newspapers and journals; there were angry speeches on the floor of the US Senate. The matter lingered. A senator for South Carolina suggested in 1840 that if there were any repetitions, it would lead to war with Britain. Eventually the dispute about the *Enterprise* case, and the legality under international law of the freeing of the slaves, had to be resolved by international arbitration, but that is another story.

As far as Bermuda’s legal history is concerned, February 18, 1835 marks the day when Bermuda’s Chief Justice granted liberty to 78 American slaves and ruled that Bermuda law did not recognise the institution of slavery.

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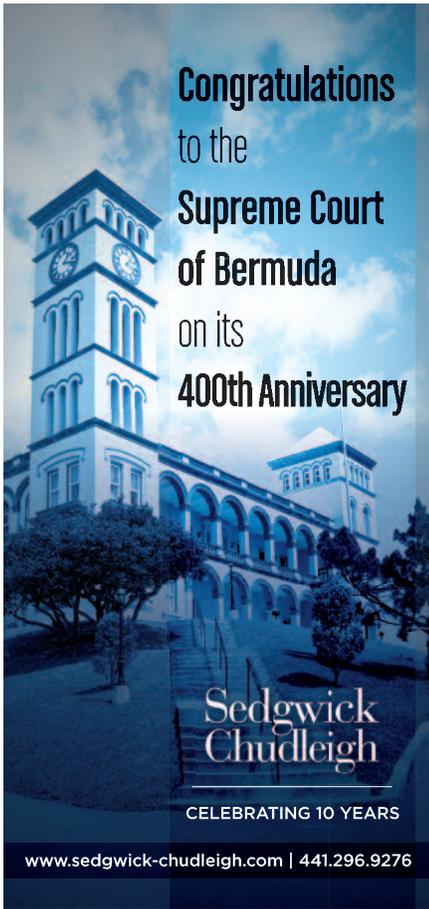
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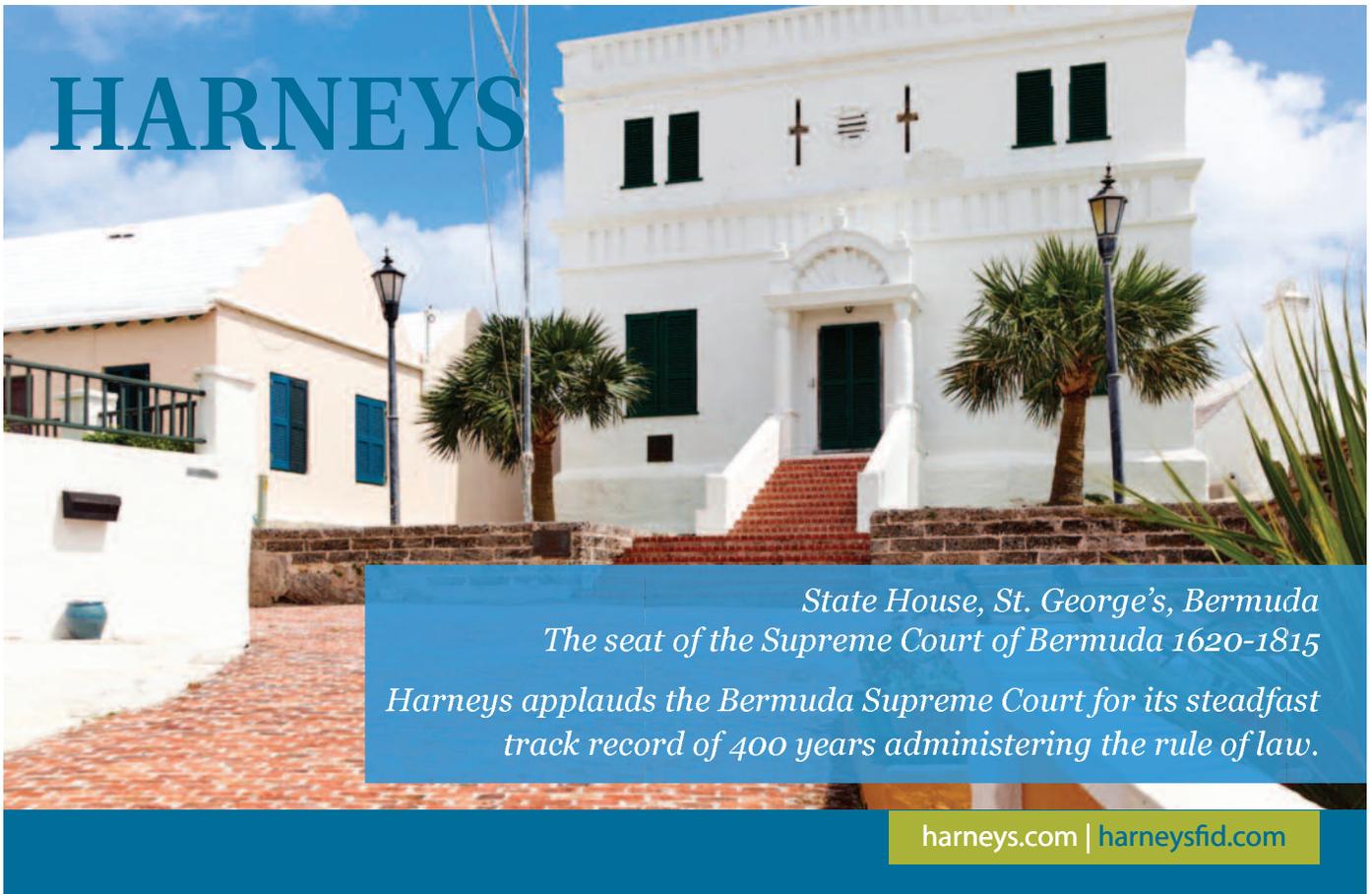

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