Book reviews

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AUTHORITY TO DECIDE, THE LAW OF JURISDICTION IN AUSTRALIA

Authority to Decide, The Law of Jurisdiction in Australia, by Mark Leeming, Federation Press, 2012, 316 pages + xxxv tables: ISBN 97818628790927. Hardcover $165.

We have been remiss in not reviewing this little book earlier. Its subject matter is technical. The author in his preface rightly says that the book is written for the working lawyer. However, he also says that it is best to be read as a whole. I found it difficult to read from cover to cover, but it is certainly a great source of material to consult whenever one has a problem in this area. The book deals with a problem that has been more and more significant particularly in administrative law over the past decade.

A court or tribunal which has authority to adjudicate on a question has authority to get the answer to the question wrong. A person aggrieved by that answer may or may not have a right to appeal against that answer depending on the legislation allowing appeals. In some areas, such as industrial courts and tribunals, often only very limited appeals are permitted. On the other hand, if the tribunal had no jurisdiction to make the decision the Supreme Court can review the case by one of the equivalents of the old prerogative writs of certiorari or prohibition.

In the leading case of *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 at 389, Dixon J spoke of the clear distinction … "between want of jurisdiction and the manner of its exercise". However, as the author points out, "that distinction is notoriously contestable" (p 47). Chapter 3 of the book fleshes out this thought and considers the effect of the recent High Court decisions in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 and *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

The book contains nine chapters as well as a brief appendix setting out the text of the relevant parts of the Australian *Constitution* and the *Judiciary Act 1903* (Cth). Chapter 1 deals with the meanings of the term "jurisdiction". Its prime meaning is "authority to decide" but it has a range of meanings which the chapter considers.

Three chapters deal with matters that need to be dealt with under Ch III of the Australian *Constitution* and the failure of the cross-vesting legislation insofar as it could not validly invest a Federal Court with purely State litigation.

This is a very learned tome and will be of great assistance to lawyers who need to venture into this technical area. Unfortunately in one sense, that may include all of us, as the problems of jurisdiction can affect even the apparently simplest piece of litigation.

Acting Justice Peter W Young

SIR CHARLES LILLEY, PREMIER 1868-1870 AND SECOND CHIEF JUSTICE 1879-1893 OF QUEENSLAND

Sir Charles Lilley, Premier 1868-1870 and Second Chief Justice 1879-1893 of Queensland, by Dr J M Bennett AM, Federation Press, 352 pages + i-xvii tables + index: ISBN 9781862879546. Hardcover $64.95.

This is Dr Bennett's 14th biography of Chief Justices of colonial Australia. It was, perhaps, the most difficult of those assignments. Few personal papers survive, and the author has had to breathe life into parliamentary papers, law reports and the often jaundiced opinions of contemporaries.

Charles Lilley (1827-1897), one of eight children, was born in a working class area of northern England. He was apprenticed to a local solicitor, W L Harle, who sent him, still in articles, to conduct a branch office in London. That unreasonable demand may explain a dissolute period alienating him from his family, and disrupting his legal education.

He reached Brisbane in August 1856. His former master, Harle, generously (not to say fictitiously) credited him with four years' service under articles; he completed the necessary five years with the Crown Solicitor, Robert Little. Meanwhile he edited the *Brisbane Courier*, advocating separation of the Moreton Bay District from New South Wales.

In 1860 he became a member of Queensland's first Parliament. In November 1861 he transferred from the solicitors' branch to the nascent Queensland Bar. Some four years later he was appointed Queen's Counsel, notwithstanding an uninhibited statement on the "low standard" of colonial judges and advocates.

Brisbane's legal and political worlds of the 1860s and 1870s were miniscule; there were, at most, 10 barristers in actual practice, and fewer than 50 solicitors in the colony. He and his protégé Griffith were under the tree when the fruit was falling.

But the tight professional and political circles were not always collegial. In 1888 the visiting Earl of Carnarvon, sometime British Colonial Secretary, found that "everything political [in Brisbane] seems to me to be very factious and personal … drinking seems to pervade all classes and degrees", Lilley included. The author describes Queensland politics of the 1870s as a "ferocious maelstrom". A drunken colleague, Pring, assaulted a fellow member in the House, was ejected, resigned and was promptly re-elected, and went on to a judicial career.

Lilley's political career was hamstrung by hostility of the "squatters' party" towards his liberal views. His proposals on female suffrage, republicanism, land redistribution, capital punishment, and the need for a local university in 1870 were less successful than legal consolidation, Torrens title, abolition of government school fees, and creation of a government shipping line to defeat monopolists. He prudently abandoned a scheme for compulsory military service.

In the early 1870s Lilley suffered a volley of personal attacks "founded on the widespread knowledge of [his] 'wild' years in London". A dubious private inquiry agent was engaged to dig up stories of financial malpractice in Harle's employ. Enemies put it about that "he had never abandoned his libidinous character and was notorious for concupiscence, marital infidelity, and many forms of lust". None of it prevented judicial appointment in 1874. Perhaps the scandalmongers quietly welcomed the departure of a feisty political rival. As Dr Bennett observes, modesty was "not one of Lilley's characteristics".

Lilley's tergiversations on "fusion" of the legal profession – a lively issue in the eastern colonies in his day – reveal tension between a curious mixture of working class sympathies and aristocratic airs. In 1871 he decried an "amalgamation" Bill as an attack on the "gentlemanly independence and honour" of the Bar, and impudent self-promotion by people (solicitors) who were really not lawyers. Griffith helpfully added that some of them "knew no more law than a blackfellow". Diplomatic deference to the "lower branch" was not, it seems, a barrister's necessity in those days.

Just one year later Lilley warmly supported the same Bill, declaring that it would lead to better legal education, and "a simple system of procedure". Griffith, he said, yearned to make the little colonial Bar as exclusive as England's.

But in 1882, after an ill-fated "fusion" Act became law, Lilley CJ haughtily forbade solicitor-advocates to appear as "apparition[s] in wig and gown … [It must] be distinctly understood … that they must appear in ordinary attire".

In 1884 the wind veered round again. He told a Victorian parliamentary inquiry: "I am in favour of what I regard as the true reform of the profession – that is, one legal profession, without an arbitrary division into barristers and solicitors, and one sufficient standard of education." Griffith, however, remained a bitter opponent of fusion, vowing to resist it "on every occasion, by every means in [my] power" – subject to making his old school and university companion Charles Stuart Mein, in 1885, the first of the very few solicitors appointed to the Supreme Court.

Lilley's liberalism did not extend to reciprocity of admission. Between 1885 and 1891 he rejected practitioners from New South Wales, Victoria, New Zealand and Tasmania. Dr Bennett observes that it was "fanciful, petulant and absurd" to maintain that a colony with only apprenticeship training had higher standards than those in Melbourne, Sydney, or Adelaide, with university law schools founded

in 1857, 1859 and 1883 respectively. Lilley was miffed that the New South Wales court had scant regard for Queensland judgments – a view still held by some distinguished practitioners lecturing at Sydney Law School in the 1950s. However, the Queensland Bar's closed shop survived until *Street v Queensland Bar Association* (1989) 168 CLR 461.

During Lilley's final decade on the court (1884-1893) there was a "loss of self-assurance and objectivity" as he "wrestled … with many demons" judicially, politically and privately. During an all-night carousal in the Queensland Club he made a fool of himself, and dishonoured his office, by conducting a mock trial and sentencing to death two members guilty of fisticuffs. Meanwhile he preached temperance to the lower orders. Increasingly, he indulged in "controversial extra-judicial pronouncements". In 1891 he laid the foundation stone of the Trades Hall, hailing it as "the Parliament of the working men of Queensland". In 1892 he sponsored an advertisement for a political candidate. In retirement, he courted a press interview on the sensational Dean Case, Sydney's fin de siecle pot-pourri of murder, perjury and conspiracy.

Then there was the problem of his son Edwyn, of counsel. Edwyn was frequently in his father's court, and there were persistent, if unjustified, rumours of favouritism. The profession made no formal protest, but in Brisbane's closeted legal world of the 1880s that would have been a most invidious task, even for senior counsel. In 1890 a non-lawyer sponsored a Justices Prevention Bill, explaining that "a certain barrister … is receiving eight-tenths of briefs" in the Supreme Court. Known to its friends as the "Justice's Sons Prevention Bill", it lapsed after three months' controversy.

In November 1891 it was Edwyn who persuaded his father to allow a late and radical amendment of his pleadings in the case which effectively ended Lilley's career: *Queensland Investment & Land Mortgage Co Ltd v Grimley* (1892) 4 QLJ Supp 1, where it was alleged that directors of a finance company (including Lilley's sworn political enemy, McIlwraith) made enormous, irrecoverable loans to the defendant.

The shambles of Grimley were due, in part, to Lilley's "too ready acceptance of Edwyn's insupportable method of conducting it". But the bizarre procedure of sitting with a jury while reserving the right to discharge it, and then continue the hearing as a judge-only trial, was all Lilley's own work. After inundating the jury with 140 questions, he decided the case was "beyond [their] grasp". Alone, he gave judgment for the plaintiff in a process described by Sir Harry Gibbs as "arbitrary and unjudicial". The discarded jury would have found for the defendants.

Extraordinarily, Windeyer J of New South Wales was appointed to chair the court of appeal. Lilley's decision was set aside, and in early 1893 he retired on medical grounds. After a disastrous attempt to re-enter politics, he died on 20 August 1897.

Dr Bennett urges us to look beyond *Grimley* to the years when Lilley, an "exceptional lawyer", was a courteous and co-operative chairman of his court. It is said that he improved local advocacy by demanding serious legal research in lieu of well-worn cliches from Blackstone or Coke. To modern counsel, deluged by another 120 years of printed and electronic law reports that may seem a modest advance indeed. But again we face the difficulty of assessing, realistically, big swimmers in small ponds a century and more ago.

Griffith, eyeing the position he would soon inherit, did not hasten to praise his predecessor. In a characteristically, "strong sense of vanity and superiority", he declared: "[T]he administration of justice in Queensland has fallen into contempt [and] … there [are] manifold objections to each of the other judges."

Dr Bennett has successfully, but not uncritically, freed Lilley from "the stain of the many personal and vicious attacks upon him by his political opponents". Despite a dearth of personal papers, the author has skillfully drawn upon new material to craft an engaging biography of a complex man who was so much more than a lawyer.

Regrettably a "celebration" of the 170th anniversary of Lilley's birth was superficial and grudging. In Chief Justice Macrossan's summary judgment, Lilley was "damned with faint praise, and roundly criticised for his 'flawed personality', 'strange lack of restraint and deficiency in judgment'

and 'notorious inability … to restrain an undue partiality towards his barrister son'". A brother judge described a "dubious legacy" of "events [that] dominated his final years … the Supreme Court must … have suffered quite considerably".

Fortunately that is not the last word. This learned and eminently readable work, vividly depicting Queensland's colonial lawyers and politics, is a fitting addition to Dr Bennett's lives and times of early Australian Chief Justices.

Dr John R S Forbes