" 'A one-man Selden Society', Bruce Kercher and his influence"

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Introduction

It was inevitable that when Bruce began playing the piano in retirement he would naturally gravitate towards George Gershwin. Like the American composer, Bruce has an energy level that could jolt any audience out of a state of lethargy. His infectious enthusiasm rivals any rhythmical Gershwin chord progression. In my view however, the one skill that blesses both composer and scholar, above all others, and embodies this rhapsodic vitality for work and life, is a unique ability to excite and provoke through the telling of the tale: both are master narrators of their subject matter.

In the spirit of indulging in the simple joy of telling the tale, what better way to celebrate the career of a master narrator than through a collection of personal narratives that go to the core of Bruce's academic investigations: law in the new colony of NSW did not simply descend from a sovereign above, but was the constant subject of contest between local custom and strict application of English law. There was not a single body of law, but multiple legal networks, interacting with one another. Bruce had an ability to delight his students and colleagues with this narrative of colonial NSW through the vehicle of the thousands of cases he has collected over the past twenty five years.

The accounts in this paper pay tribute to Bruce's substantial contribution as not only a redoubtable legal historian, but also his contribution as a teacher of Australian legal history and his intellectual generosity as a colleague. Scholar, mentor, and benevolent colleague - all the best tales turn on the number three.

Beyond Doctrine: The Macquarie experience and the tale of *McDonald v Levy*

As a law student at Macquarie University, my first interaction with Bruce came four years before meeting him in person and was shared with four hundred of my fellow first year law students. This initial encounter came in the form of a series of questions, posed in a first year course outline, that considered the 1833 case *McDonald v Levy*.[1] This nineteenth century Supreme Court case, which on a first reading appeared to be a quaint civil dispute between disgruntled colonists, was not only my first exchange with Bruce, but the first case I would read as a law student. This detail is significant in its own right.

Since settlement, interest rates in New South Wales had often been set at a much higher rate than English law would have ever allowed. The question for the Court in the *McDonald* case was whether the English usury statute could be applied in the colonies of New South Wales and Van Diemen's Land in order to place a cap on the excessively high loan rates.

[1] (1833) 1 Legge 39; see also *Decisions of the Superior Courts of NSW*, 1788-1899 (hereafter: www.law.mq.edu.au/scnsw/).

Bruce, who was a guest contributor for the week, submitted a number of terrifying introductory questions for a student with no legal training including "What is usury and what did English law do to try to discourage it?" and the obligatory "What was the outcome of the case? Who won and how did the court decide the point of law?" Terrifying, but traditional. After cutting one's way through the doctrinal forest , Bruce then challenged his students to explore more fertile ground:

> "The people of NSW had their own customary practice of lending money at very high interest rates. According to the minority judge why was this not a formal 'custom' which could have varied the common law?" ; "…How English was NSW law in 1833?" [and]; "What does the existence of Privy Council appeals say about the Englishness of Australian law? What does it say about the independence of Australia from Britain?".

It was within these questions that my legal education would begin in substance. Not with a question asking to find the *ratio* of a recent High Court constitutional decision, or a question that asked to apply the law to a hypothetical set of facts, but questions that invited the student to consider whether Australian law was English. I can't think of any other law schools in Australia, that would have provided a similar introduction to the law.

By 1833 the *Australian Courts Act*[2] had been in operation for five years and provided in s 24 that the laws of England were to be applied in the colony "so far as they can be applied". For the Anglophile Burton J, resolving the issue was simple: the question was

[2] 9 Geo. 4, c. 83 An act to provide for the administration of justice in New South Wales and Van Diemen's Land, and for the more effectual government thereof, and for other purposes relating thereto. (*The Australian Courts Act*) (1828).

whether the law "can" apply, and in his mind, it could. There was no local practice, such as the acceptance of high interest rates, that could undermine the centuries of wisdom embedded in the laws of England; no local custom, although common-place, could be elevated to such heights unless it had been in existence since time immemorial. The usury laws of England were clear.

In terms of a first year student merely trying to comprehend the law the Burton judgment came as immediate relief. Here was a clear and neatly articulated application of the law to a set of facts. However, Burton's brethren, Chief Justice Forbes and Dowling J, saw the case differently. The Chief Justice's primary concern in the *McDonald* case, as in many other reception cases, was to assure that the law was pragmatic and suitable to the conditions of the colony. The Chief Justice concluded that the English usury laws were merely local to England and, although not accepting that high interest rates were local customs, held that the usury laws had not been adopted in New South Wales.

It was evident from this first case that I would read as a student that the law was contested terrain, but also that the law did not exclusively exist in a contemporary vacuum. This tension would feature prominently throughout Bruce's work and would be continually revisited during my legal training at Macquarie. The historical contest would frame and explain the modern tension. Whether the subject was property law, torts, equity, criminal law or contracts the research inquiry would inevitably begin with the history. Through the thousands of cases he would collect between 1824 - 1863, Bruce would always come back to the same critical questions: was the court receiving the laws

of England in line with a set of strict doctrinal rules, or was the court developing jurisprudence "from below"? To what extent was the law being adapted and from whose perspective are we understanding the law? Without being aware of it at the time, it was these questions that would be instrumental in shaping the way that I would approach the study of the law.

The technical test of Burton in the *McDonald* case was deeply rooted in notions of positivism: strict adherence to precedent and neutrality where the law was centralised around a normative British legal Empire.[3] The contrasting view of Forbes was a broader pluralist one clarified in later cases (*R v Maloney)*:

As a new student to the law the ramifications of this second understanding of reception was immediately both daunting and thrilling. Daunting in the sense that I resigned myself to the fact that, in order to even begin to appreciate the complexities of the discipline, it was essential my reading and research would have to go well beyond legal doctrine; but thrilling because this is what Bruce was encouraging: a law that demanded consideration of historical, social, political, moral and economic issues beyond the doctrinal vacuum; a legal education that was genuinely interdisciplinary.

[3] Ibid, 182.

The final question on Bruce's list asked the student to look up the *Australian Courts Act* and the *McDonald* case. In an attempt to reconcile some of the tensions in the case, I soon found it necessary to call upon a broader range of readings beyond the *Legge Reports* and old English statute books. Before I knew it, I was surrounded by *Historical Records of Australia and the Royal Australian Historical Society Journal,* political treatise and other historical works about the nineteenth century English economy – not a modern casebook in sight ! And so it was to be for the next five years of law school. From my first interaction with Bruce, three years before meeting him in person, my experience was being shaped through a thrilling, and daunting, interdisciplinary lens which found it impossible to divorce history from any legal inquiry.

Tales from the beginning

I finally met Bruce in person at the end of my degree when he was contemplating a new frontier of his law report collection: 1788 – 1827, the earliest decisions of the settlement courts. By this time in my legal education, having relied on a training that would instinctively look for the history in any legal inquiry, I had used Bruce's online cases on a number of occasions. In particular, in the context of the study of remedies, an area where many historians may be unaware that Bruce has made a significant contribution to legal scholarship, the case records revealed fascinating accounts. Contractual damages, remedies for debt recovery, equitable remedies all detailed in our earliest supreme court records. By working through the cases, carefully transcribed and placed online, the

contest between adoption, adaptation or outright rejection of the laws of England continued to constantly emerge.

The new project covered the years of famine, of settler battles with indigenous people, of convict rebellions, of the beginnings of bushranging and the only military coup in Australian history. All of those events are well known to Australians, but it is less well known, as Bruce had examined in *Debt, Seduction*, *and Other Disasters* that this was also a time of rapid development in trade and civil disputes over debt. A commercial society quickly grew within the penal colony. Of equal importance, this was also the period when the law, albeit a highly contested notion of law, was entrenched in its central place in the colony.

As Bruce would previously entice with stories of usury laws and expectation damages, Bruce would begin our working relationship together with a new tale. Over one of our first, of many, expeditions to find good coffee, we drifted into a conversation about the rule of law when Bruce would tell me a story about the shooting of a humble pig. John Boston, a free settler, was at his Sydney home in October 1795 when he was told one of his stock – "a very fine sow, considerably advanced in Pig" had been shot. Boston rushed to the place where he was told the pig was shot and proclaimed "Who is the damned rascal that shot my sow?" The damned rascal – a highly offensive phrase in the late eighteenth century – was a Private in the NSW Corps, William Faithfull. The Private was advised by two of his superiors, which included Thomas Laycock, to avenge the insult to the corps by beating Boston. A fight ensued between Boston and Faithfull. Other

members of the Corps assembled with Boston making further claims including that he had been “very much hurt by a Parcel of Rascals” and stating “you are a pack of thieves all together”.

Boston sued Laycock and fellow members of the NSW Corps Neil Mackellar, private Faithfull and Eaddy, for trespass in assault and battery. The Court of Civil Jurisdiction awarded him damages of £1 each against Laycock and Faithfull. Faithfull appealed to Governor Hunter who dismissed the action.

The trial is one of the first in the colony to consider the legal status of military defendants, the civil appeal process, court structure and reform, felony attaint and went to the core of many of our inquiries into the rule of law. The trial asks: was New South Wales merely a prison, controlled by the military? Or was it a place of law, in which everyone, soldiers included, were subject to the same basic law? Behind these questions was the challenge posed to the military by the independent figure of John Boston. Boston was a free settler, one of the first in the colony. Governor Hunter’s statements about the rule of law deserve a wide readership. He delivered a number of statements which might be called judgments, the first of which dealt in the abstract with the application of civil law to every person in the colony. Boston successfully argued:

> When the Respondent instituted this Action, his object was to vindicate the Public Justice of the Colony, to impress the Conviction that the Laws were equal to all, and that no rank in life could by impunity justify their violation.

In the midst of what some have described as a period of rudimentary law, appeared a moment of heroic legal independence. It was a thrilling introduction to the material. What appeared to be a case about the demise of a poor sow, was one of the most significant matters to be tried in the courts in the first forty years of settlement. The case went once again to the core of the tension surrounding the reception issue that confronted me as a first year student in the *McDonald v Levy* decision.

Whether courts were adopting, adapting or outright rejecting English law were three critical themes that would continue to guide our selection process for the 1788 to 1827 project. We would find amongst these fascinating accounts that no simple line can be traced in the first 40 years of superior court decisions in the penal colony of New South Wales. There was no straight line from amateurism to professionalism,[4] from informal law to formal law,[5] from locally created law to the strict imposition of English law,[6] from a politically engaged to a neutral judiciary.[7] The notion of law was highly contested - it could only be appreciated by getting your hands dirty and examining the everyday operations of the court.

Future tales

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[4] See some of the early informal decision such as

[5] For the very informal see *R. v. Barsby* (1788) N.S.W. Sel. Cas. (Kercher) 1.for eg; for the very formal see *Marsden v. Howe* (1818) N.S.W. Sel. Cas. (Kercher) 599.

[6] For the very localised see *Palmer v. Jones* (1796) N.S.W. Sel. Cas. (Kercher); *Morris v. Lord* (1800) N.S.W. Sel. Cas. (Kercher) 245; *Howell v. Furber* for eg; for the strict application of English law see *R. v. McNaughton and Connor* (1813) N.S.W. Sel. Cas. (Kercher) 496.

[7] For the politically engaged see *R. v. Macarthur* (1808) N.S.W. Sel. Cas. (Kercher) 379; *R. v. Luttrell* (1810) N.S.W. Sel. Cas. (Kercher) 419; for a neutral judiciary see *Harris v. Kemp* (1799) N.S.W. Sel. Cas. (Kercher) 399.

As the conclusion of the 1788 project drew closer, one could not help but think that there was still many goals to achieve to ensure the substantial legacy that Bruce has left continues to be nurtured. To take just a couple of examples, no newspapers were published in the colony between 1788- 1802 so for the 1788 project we relied on the surviving documents of the State Records of NSW: the minutes of proceedings,[8] informations, depositions and related papers,[9] and a handful of surviving defence papers.[10] For the hundreds of cases we were able to transcribe, there remains thousands more that we were unfortunately never able to consider. Indeed, the most difficult challenge associated with the 1788 project was not deciding what to select, but deciding what to leave out. There is also a treasure trove of magistrate court records covering the first forty years of settlement. We included a few of these cases in the 1788 book to illustrate the richness of this material.

Not only is there the potential to expand the collection in New South Wales, but also the potential to see similar projects develop in both Australia and further abroad. Bruce would write in 2000 that in his "most ambitious fantasies" he would imagine a similar project in other jurisdictions:

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[8] Court of Criminal Jurisdiction, Minutes of Proceedings, February 1788 to October 1794, State Records N.S.W., 5/1147A - B; Court of Criminal Jurisdiction, Minutes of Proceedings, March 1798 to December 1800, State Records N.S.W., X905; Court of Criminal Jurisdiction, Minutes of Proceedings, February 1801 to December 1808, State Records N.S.W., 5/1149; Court of Criminal Jurisdiction, Minutes of Proceedings, February 1809 to November 1809, State Records N.S.W., 5/1150; Court of Criminal Jurisdiction, Minutes of Proceedings, March 1810 to August 1811, 5/1119-121; Court of Civil Jurisdiction Proceedings, 1788-1814, State Records N.S.W., 2/8147-50; Court of Civil Jurisdiction Proceedings, 1788-1814, State Records N.S.W., 5/1103-11.

[9] State Records N.S.W.: Court of Criminal Jurisdiction, Indictments, Informations and Related Papers, 1796-1815, 5/1146.

[10] Court of Criminal Jurisdiction, Miscellaneous Criminal Papers, State Records N.S.W., 5/1152.

> Only when we can gain easy access to the case law of New Zealand, Canada, Australia, South Africa, Ireland, Scotland, England and the United States can we really engage in a comparative study of the case law of the old Empire. This would require immense resources, of course, but it would have immense benefits. [11]

A substantial body of cases would be the basis for understanding the "pluralist history of judge made law in the Empire, one that would look inwards and across from one part of the periphery to another, rather than merely outwards from London." [12] I know that Bruce's work with Stefan Petrow in Tasmania ,[13] and the commencement of Shaunnagh Dorsett's major project in New Zealand, has given him immense satisfaction. It would be wonderful to see similar projects develop in other Australian and overseas jurisdictions.

But the seeds for Bruce's most immediate project were sown, once again, with new tales that would challenge the notion that law simply descended from Britain above. Stories about the legal status of emus under British law; stories about the laws in relation to convicts; and stories about some of the most significant Indigenous cases.

Although many cases from the 1828 - 1863 period were reported in the *Legge Reports*, many were not. Accordingly, our knowledge of legal practice and precedent in this very important period of self-government in the colonies is still undernourished. In collaboration with Lisa Ford, we hope to supplement the *Legge Reports* and the

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[11] Bruce Kercher, "Where the Future meets the past: Pre-1900 NSW Case Law on the Web" (2000) 2 *UTS Law Review* 132, 138.
[12] See Bruce Kercher, "Recovering and Reporting Australia's Early Colonial Case Law: the Macquarie Project" (2000) 18.3 *Law and History Review* 659.
[13] See *Decision of the Nineteenth Century Tasmanian Superior Courts:* http://www.law.mq. edu.au/sctas/ .

comprehensive *Dowling Reports*. [14] More enthralling tales for Bruce to continue to tell – but only this time, in retirement, when they don't conflict with George Gershwin!

I wanted to draw on my developing legal narrative, by telling some of the stories that have been handed down to me through the generosity and collegiality of a master narrator. The stories embody Bruce's commitment and enthusiasm for scholarly engagement. At the core of this narrative is an approach to legal scholarship that was taught to me in my first weeks of law school and reinforced through the richness of my indirect and direct interactions with Bruce; a contextualised, interdisciplinary approach that demands a curious spirit and exhaustive detail. Every turn in the narrative requires an inquiry into the contested nature of colonial law: an inquiry challenging the notion that all laws trickled down from above with only minor variations, an inquiry into complex patterns of formal and informal law, acceptance and resistance to imperial law. It was a legal training that demanded you made inquiries outside of the legal domain, which made studying law infinitely more complex but proportionately more rewarding.

As Bruce would continually reveal, there was conflict within the judiciary about the nature of English law – unitary or pluralist, appealing to broad notions of justice or adhering to strict principles. The inquiry would also encompass other views about legality: indigenous views, global views, and those of a colony primarily made up of convicts and settlers who, it is often assumed, passively received a law from above; but in substance, would commonly resist.

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[14] Tim Castle and Bruce Kercher (ed) *Dowling's Select Cases 1828 to 1844* (2005).