

## The Corruption of Benjamin Boothby

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### ABSTRACT

*The fifteen-year judicial career of Justice Boothby of the Supreme Court of South Australia all but annulled the colony's constitutional foundations. A contemporary declared that his honour was 'literally at war with every institution in the colony'.<sup>1</sup> Historians have studied the legal reasoning he deployed to strike down local legislation and legal administration and have analysed its consequences for colonial law, governance and enterprise. As a result, we know a great deal about what Boothby did and the effect he had. Less has been said about what Alex Castles called Boothby's 'personal moral justification'.<sup>2</sup> This paper concludes that Benjamin Boothby benefited from money received indirectly from a litigant before him.*

### Writing Boothby

The Boothby saga has been told well and often. Its modern historiography began with Ralph Hague's narrative-style 'Early history of the law in South Australia'. His chapter on Boothby, the largest in the *opus*, he finished typing around 1936. He expanded and revised it in 1961 and re-worked it a little more by 1992. The latter version has dominated most of the subsequent work on the subject though, unaccountably, it remains unpublished.<sup>3</sup>

Meanwhile the 'Boothby case' attracted a string of commentators. A paper by A. J. Hannan Q. C. set the ball rolling in 1957.<sup>4</sup> Castles prepared Boothby's 1969 *ADB* entry and, with Michael Harris in 1987, surveyed Boothby's legal and political impacts in their full colonial context.<sup>5</sup> As recently as

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<sup>1</sup> *Advertiser*, 11 March 1867, 2 (repeated at 'Supreme Confusion': *Chronicle*, 16 March 1867, 4).

<sup>2</sup> Alex. C. Castles, 'Boothby, Benjamin (1803–1868)', *Australian Dictionary of Biography*, Volume 3 (Carlton: Melbourne University Press, 1969), 194–66.

<sup>3</sup> Ralph Hague, 'Early history of the law in South Australia' (typescript) c. 1936: State Library of South Australia (SLSA) PRG 215/1; R. M. Hague, 'Mr Justice Boothby' (typescript), Adelaide, 1961, R. M. Hague, 'The judicial career of Benjamin Boothby' (typescript), Adelaide, 1992. The c. 1936 version, its footnotes missing (Hague cannibalised his 1936 typescript for his 1961 version), was published in 2005: ed. Bruce Greenhalgh ed., *Hague's History of the Law in South Australia, 1837–1867* (Adelaide: Barr Smith Press, University of Adelaide, 2005).

<sup>4</sup> A. J. Hannan, 'Mr Justice Boothby', *Proceedings of the Royal Geographical Society (S.A. Branch)*, Adelaide, 1957, Volume 58, 72–96.

<sup>5</sup> Castles, *ADB*, Volume 3; Alex C. Castles and Michael C. Harris, *Lawmakers and wayward Whigs: Government and law in South Australia 1836–1986* (Adelaide: Wakefield Press, 1987).

2006 John Williams revisited the constitutional crisis that Boothby provoked.<sup>6</sup> Each in his different way concluded that Boothby did a great deal of damage.

The judge has his modern supporters, too, as he did during his lifetime.<sup>7</sup> Two modern writers have concluded that Boothby was well-intentioned in his strict jurisprudence and roughly handled by his critics in both the nineteenth and twentieth centuries. In 1998 Elizabeth Olsson (an Adelaide legal practitioner), not disputing Boothby's inappropriateness for his office, described breaches of natural justice in the procedure adopted to remove him from it, condemning the proceedings as 'a "kangaroo court" of the worst order'.<sup>8</sup>

The subject's leading non-lawyer, Peter Howell, arguably dealt with the story's legal issues better than some of the lawyers. He stressed in 1965 and again in 1986 that the judge's sole critics were the colony's licentious, irresponsible newspapers and the spineless politicians they influenced. The judge was caught in the crossfire of 'the liberal-democratic philosophy', which preferred the popular will to make laws to the power of judges to declare them invalid, even though that power was endorsed by the English law officers and the colonial office. As a result, Howell argued, it was 'understandable that, in his long and acrimonious struggle with brutally unfair critics, he became both obdurate and hypertechical.'<sup>9</sup> Howell's arguments about the clash between judicial review of legislation and the supremacy of Parliaments are sound, and have had recent support.<sup>10</sup> They do not, however, exonerate Boothby from the charge of misbehaviour in office *after* the imperial remedial statute of 1865 nor, probably, the earlier one of 1863.

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<sup>6</sup> John M. Williams, 'Justice Boothby: a disaster that happened', in ed. George Winterton, *State Constitutional Landmarks* (Annandale, NSW: Federation Press, 2006), citing Hague's *History of Law* (2005) and relying on Hague, 'Judicial career', 1992.

<sup>7</sup> A local businessman who had known Boothby for more than thirty years thought him 'such a worthy man' for the job; that 'a more dauntless advocate for high and liberal principles never pleaded for them', 'a stern defender of truth and impartial justice', and 'a man of no ordinary capacity, coupled with an amiable disposition': J. B. Mather to ed., *Register*, 24 May 1853, 2; another thought him 'a venerable old man' (he was sixty-four) and noted his 'courage and consistency' (though it is possible this was meant satirically): Pasquin, 16 February 1867, 3bc; after the amoval, one John B. Hughes organised an address to be presented to his honour as 'a simple act of justice': *Register*, 16 August 1867, 4; the clergyman who buried him, Congregational minister Rev. C. Manthorpe, praised 'his courteous, gentlemanly manner, and his genial spirit': *Advertiser*, 24 June 1868, 2. Some of this was equivocal: his most favourable, if unusually guarded, obituary encouraged readers to remember what was 'favourable in his character and disposition' without stating what that might be: *Advertiser*, 22 Jun 1868, 2.

<sup>8</sup> Elizabeth Olsson, 'The Justice gone wrong or the Justice wronged? The trials of Mr Justice Boothby' (typescript), Australian Legal History Essay for LL.M., University of Adelaide, 1998, 34.

<sup>9</sup> Peter A. Howell, 'The Boothby Case' (typescript), Master of Arts thesis, University of Tasmania, 1965; 'His intellect and his experience and standing at the English bar rank him well above most barristers who were given colonial judgeships in the nineteenth century': P. A. Howell, 'Constitutional and Political Development, 1857–1890' in ed. Dean Jaensch, *Flinders History of South Australia: Political History* (Adelaide: Wakefield, 1986), 95, 141–42.

<sup>10</sup> See, for example, Alastair Davidson, *The Invisible State: The formation of the Australian State, 1788–1901*, (Cambridge: Cambridge University Press, 1991), 169–70.

In his day, Howell was unique in the field for studying his subject independently of Ralph Hague's pioneering work. Hague's narrative line and sources dominate the rest of Boothby's historiography. All but Howell relied heavily on his various typescripts, especially the 1961/1992 version of his Boothby text. More recently, in a fresh canvass of all the sources, old and new, John McLaren gave the judge his rich imperial context but also the best analysis to date of the entire saga. McLaren concluded that Boothby's condemnation was easily more justifiable than his congratulation.<sup>11</sup> McLaren's handling of the complexities is deft and eloquent and sufficient unto itself. Last words, however, rarely remain 'last' for long.

Even as John McLaren was publishing, Greg Taylor was delving deeply into Boothby's English career prior to his appointment to the South Australian bench.<sup>12</sup> Taylor documents how Boothby and his father lost the family's capital in corporate investments from around 1820 until their bankruptcies in 1837; the way the younger man shifted from Chartist Radical to arch Tory as the electoral winds favoured; how he went on to become a barrister, legal recorder and law book writer; and how at last he obtained the South Australian judicial seat—still not fully discharged from bankruptcy, his 'shonky investments' still not at an end, and worse. Taylor concluded by affirming the judgments of commentators from Hannan to Williams, that Boothby was 'the most unsuitable appointment to the Bench in South Australia's history, and lacked almost every quality necessary for the role.'<sup>13</sup>

### **A matter of motives**

Every writer on Boothby has wondered what drove the judge to the precipice. Yet as they described Boothby's devastating trail, his commentators found they had to call him a lot of things which all go to personality and its disorders: alienating, bad-tempered, dictatorial, disdainful, dogmatic, egotistical, hostile, humourless, ignorant, impatient, implacable, intolerant, misguided, obnoxious, partial, pompous, relentless, rude, tactless and uncompromising. Most recently, John McLaren has added to the list 'bizarre' and 'purposely obstructionist, even malevolent', dubbing his nature 'pig

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<sup>11</sup> John McLaren, 'Repugnancy in Australia after 1850: Shoot-out in Adelaide, 1854–68', in John McLaren, *Dewigged, bothered, & bewildered* (Toronto: The Osgoode Society and University of Toronto Press, 2011), 190–216.

<sup>12</sup> I am grateful to Dr Taylor for the opportunity to see a late draft of his article which will be published in August 2013 as Greg Taylor (La Trobe University), 'The early life of Mr Justice Boothby', *Adelaide Law Review* Volume 34 Part 1, 2013.

<sup>13</sup> Other, more specialised work is also in print: see, for example, Deryck Skinner (comp), *Mr Justice Boothby: his impact on the judicial system and the Parliament of South Australia* (also titled: 'A removal of Mr Justice Boothby in which the principal responsibility was taken by James Penn Boucaut'), Evandale, SA: The Author, 2011.

headed and unduly self-centred'.<sup>14</sup>

This broad church of perspectives agrees that Boothby was flawed, as a judge and as a man. On a more prosaic level, most mention his money problems and his embitterment. From the moment he landed, a string of events soured his mind, each new one adding insult to old injury, as he saw it. His full salary of £1,000 was not paid from the date of his appointment in London. The government in Adelaide refused, paying only half-salary until his local appointment. He was furious that the South Australian Constitution not only threatened to reduce his salary but denied him his expectation to sit in the Parliament it established. He felt belittled when he was denied the full Chief Justice's salary (£1,200) while acting for his colleague during twelve months' leave in 1856–57. His subsequent pursuit of the Chief Justice's mantle was as much for its higher salary as for the higher status with which to ward off a Full Court block to his canter through the statute book. And he had a large family to support: fifteen children would keep any man poor.

In other words, as Olsson admitted, he displayed 'greed and thwarted ambition', and wanted 'power and money',<sup>15</sup> between them some of the oldest impulses for human malefaction. Others have hinted—John McLaren noticed this most succinctly—that rheumatic gout and other health problems, not excluding mental illness, were likely in play.

McLaren took this a step forward, enlarging on Boothby's financial problems, based on emerging but (at the time of his writing) incomplete evidence supplied by the present author. To that development must be added Taylor's new and damning evidence that the judge not only arrived in Adelaide in dire financial straits but with two decades' experience in legal chicanery and financial double-dealing.<sup>16</sup> This paper supplies persuasive evidence of his debts and of their impact on his judicial conduct.

The weight of the evidence, until now, indicated financial difficulties, although their nature and extent were not clear. By 1863, however, ten years after he first sat, the judge had come to depend for his financial liquidity on the dividends earned by his son George on shares given to him by the directors of the Moonta Mines, the colony's latest and richest fountain of fortune. That was

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<sup>14</sup> They drew the line at plunging into psychobiography, that nebulous point 'where history and psychology meet': Bruce Mazlish, *James and John Stuart Mill: Father and son in the nineteenth century*, (London: Hutchinson, 1975), xi.

<sup>15</sup> Olsson, 3, 7. On the other hand, Olsson decided that, by ignoring 'the unequivocal directions of the Imperial Parliament contained in the Colonial Laws Validity Act he was not exercising his office correctly', yet also concluded that that fault 'coupled with his behaviour towards the profession, the Parliament and his brother Judges, especially if it was governed by personal aims of greed and power, does not amount to misbehaviour': Olsson, 34.

<sup>16</sup> McLaren, *Dewigged*, 214.

nobody's business but the family's until in 1864 the judge was asked to decide whether those shares were the directors' to give and those dividends theirs to pay.

### **The judicial career to 1863**

During his first two sitting years, Boothby proved eccentric and intemperate without exactly erring significantly in law.<sup>17</sup> If this was his and the colony's honeymoon, it was soon over. Despite reports from friends and other partisans that he was amiable and urbane, he was rude to bench and bar alike, and rough-handed attorneys, juries, women, Catholics and the Irish. Another year on, the first of several large-scale public protests was held.

Responsible government commenced a few months after that angry gathering. What the Constitution Act forbade him to join, the new bicameral Parliament, Boothby now set his head against. Its legislative capacity he tested against the general principle that a colonial Parliament could not pass legislation repugnant to the laws of England.<sup>18</sup> And he did so with destructive vigour, not to say relish, putting right the wrongs he perceived in the new order of things and, not incidentally, avenging the slights that had been done to him, as he saw them.

The judge started by striking down individual statutes, including the radical and popular Real Property Act 1858, and then the Constitution Act 1857 itself. Out went the Parliament and all its works.<sup>19</sup> In the process he negated the legal existence of the governor, the attorney-general, the Chief Justice and the Supreme Court in general. He left standing only his own patent from the Crown at Westminster.

To restore some balance to the previously two-man Supreme Court bench, a third judge was appointed in 1859. This, on its own, had little effect; in fact, it exacerbated the situation because the new man, Edward Gwynne, was just as inclined to concur with Boothby as to dissent from him. Moreover, the cabinet bypassed Boothby, the senior puisne judge, when it replaced Chief Justice Cooper with a local practitioner, Richard Hanson, in 1861. Boothby insulted both colleagues from the bench, insisting that, being former English attorneys, they were not true English barristers, and could not be judges. The colony's leaders remained dissatisfied and pressed ahead with Boothby's

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<sup>17</sup> McLaren, *Dewigged*, 196.

<sup>18</sup> On repugnancy, see McLaren, *Dewigged*, 189, 211–13.

<sup>19</sup> On the Constitution and the Real Property ('Torrens') Act (RPA), see McLaren, *Dewigged*, 196–207. Achieved by near demagogic clamour, Boothby selectively struck down the RPA's clauses whenever the opportunity arose, fuelling negative popular reaction.

dismissal. Two Parliamentary inquiries found against him, the first in 1861, the other in 1866.<sup>20</sup> After the first, the governor specially commissioned a ministry and summoned a session of Parliament with the express purpose of removing Boothby from office.

To this point, objections to Boothby's behaviour were essentially legal and political, even if they were expressed intemperately, even demagogically. An event in 1862, however, altered the complexion of things, and proved to be a turning point in *l'affaire* Boothby. Thus far, on the kindest reading, his honour could be said to have been rude but right. Boothby might have been exonerated as a procedural victim, lost within contemporary public culture, particularly the balancing of the relative roles of Parliament and the courts in an emerging constitutional democracy. From 1862 into 1863, not only did the political process dirty and darken, but the judge's son obtained forty shares in the famed 'Moonta Mines'.<sup>21</sup> Before long it became well known that Boothby's dire financial straits were in direct conflict with his judicial office. His honour's bad temper came to be seen in a whole new light.

All this was watched with ill-humour at Westminster. Boothby's conduct frustrated the colonial office and the Crown law officers, who gave only begrudging support to the colonial authorities. They rejected the South Australian Parliament's 1861 request for Boothby's recall because, they insisted, judges were entitled to test the validity of local legislation. Though widely condemned, this endorsement made Boothby seem invincible. He certainly thought he was. By 1863, however, public indignation in the colony had reached fever-pitch and the colony sought and obtained remedial legislation from the United Kingdom Parliament.<sup>22</sup>

### **The Moonta Mines Case, 1864–65**

Justice Boothby pressed on to the brink. Undeterred by the confirmatory imperial act he continued to cut a swathe through colonial legislative and executive instruments. One matter that came before him in early 1864 did so in the ordinary course of things and offered little or no scope for his usual legalism or obstructionism. This was the matter of *The Queen at the instance of Samuel Mills v.*

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<sup>20</sup> Even after the second, in 1866, when Boothby's doom was thought to be more certain, its achievement took another full year.

<sup>21</sup> The 'Moonta Mines' consisted of several separate companies with adjoining properties along the main lodes and almost the same line-up of key investors and directors—Moonta, Wallaroo and Matta; the others—the Duryea, New Cornwall and Kurilla mines—were either exhausted early or absorbed into the larger ones. The Moonta and Wallaroo companies amalgamated in late 1889: Anon., *The Wallaroo and Moonta Mines: their history, nature, and methods*, together with an account of the concentrating and smelting operations, Adelaide, 1914, 5.

<sup>22</sup> An Act to Confirm Acts of Colonial Legislatures (1863) 26 & 27 Vict., c. 84 for which see McLaren, *Dewigged*, 203–4.

*Walter Watson Hughes & Edward Stirling*.<sup>23</sup> This action, the so-called ‘Moonta Mines Case’, challenged the current ownership of what came to be vaunted as ‘the most valuable [copper] mine in the world’. It would pay its shareholders a million pounds in dividends in its first fifteen years, the first Australian mine to do so.<sup>24</sup> When the proceedings began, however, the Moonta Mines were barely two years old and had paid a bare £350,000.<sup>25</sup> At stake was its potential rather than its proof. Yet, even that early in its life, Moonta promised to make every investor a colonial Croesus.

After a long decade of doing justice ‘dogmatically and perseveringly’,<sup>26</sup> it fell to Justice Boothby to adjudicate in the Moonta matter. All of his substantive decisions favoured the current directors and affirmed their absolute right to control the mines and to distribute their rich profits. Moreover, for two more years his Moonta rulings had strong judicial support in Adelaide and at Westminster. Both the South Australian Supreme Court and the Privy Council backed his decisions.

The syndicates that pursued a prior claim to the mineral lands commenced by writ of *scire facias*.<sup>27</sup> The current directors countered that this was the wrong way to start. The Full Court divided, though the majority—including Boothby—agreed with the defence argument and quashed the writ.<sup>28</sup> The claimants appealed to the Privy Council. Nearly two years later, colonists learned that their lordships had confirmed the Full Court’s (and Boothby’s) reasoning.<sup>29</sup> The claimants had to start all over again.

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<sup>23</sup> The many epithets for this litigation attest to its celebrity: *Mills v. Hughes & Another, Regina v. Hughes (& Another)*, the ‘great Moonta trial’: *Chronicle*, 9 March 1867, 4, ‘the great Moonta [mines] litigation’ e.g. *Advertiser*, 29 June 1867, 2 and *Chronicle*, 30 March 1867, 4, and ‘the celebrated Moonta case’: *Chronicle*, 1 October 1864, 4.

<sup>24</sup> In all, over £2.2 million in dividends were paid in its first fifty-four years: Anon., *The Wallaroo and Moonta Mines*, 5.

<sup>25</sup> The Moonta writ alleged £100,000 had been paid though the *Advertiser*’s editor thought the figure nearer £350,000: *Chronicle*, 9 March 1867, 4.

<sup>26</sup> ‘The Supreme Court and the Parliament’: *Register*, 26 March 1864, 4.

<sup>27</sup> The claimants argued that the Moonta mineral lands had been devised to Hughes inappropriately, even though the leases had been issued pursuant to the South Australian Waste Lands Act (No. 5 of 21 Vict., 1857–58, the fifth statute passed by the colony’s new Parliament). The plaintiffs selected the writ of sc. fa. to annul or vacate that issue. It demanded that the party benefiting by the Crown’s inappropriate action should bring the documents, viz. the Crown leases, before the court and justify their issue. Among the grounds for the claim were that Hughes could only hold one lease at a time (and held a dozen) and that his claim to be the original discoverer was fraudulent. The writ, though called a ‘form of action’, was ‘in the nature of a bill in Chancery’ and treated as an equitable matter: ‘Scire Facias’, Matthew Bacon, *Abridgement of the Law 7th ed.*, (London: Cadell and others, 1832), Volume 8, 610, and see John H. Baker, *An introduction to English legal history 4th ed.*, (London: Butterworths, 2002), 145. See next note for the Full Court’s ruling against this choice.

<sup>28</sup> The information, headed ‘Regina on the prosecution of —’, the Full Court held to be bad (for not being in English), and ruled against exercising its own discretion to amend ‘Regina’ to ‘Queen’: digested as ‘*Regina v. Hughes*, Register Reports, May 21, 1864’ at A. Lovekin, *Digest of Cases, 1847–1884*, Adelaide, 1884 col 130 (that is, the Supreme Court report of the Full Court decisions made on 20 May and published at *Register*, 21 May 1864, 3).

<sup>29</sup> Full court decision digested as ‘*Regina v. Hughes*, 1 L. R. 143’ at A. Lovekin, *Digest of Cases, 1847–1884*, Adelaide, 1884 col 39; Privy Council report: *R. v. Hughes & Others*, (February 1866, hearing and judgment) at (1867) 1 South Australian Law Reports 161.

Meanwhile, another Full Court majority that included Boothby had set the claimants' case back again by ruling against the admission of the 'big gun' of Melbourne silk, Archibald Michie Q.C., to lead their efforts (though this victory was more psychological than strategic).<sup>30</sup>

### **The Moonta Mines Case, 1866–67**

The 'great Moonta trial' did not return to the Supreme Court with gusto for two years.<sup>31</sup> By the time it did, the colonial office had procured the Colonial Laws Validity Act 1865 to resolve the repugnancy question and put an end to the South Australian impasse.

Benjamin Boothby was not dissuaded. Ignoring the new Act and returning to 'the inexhaustible topics of repugnancy and invalidity' (as the weary press put it),<sup>32</sup> Boothby indulged in the conduct that led inexorably to his removal from office. On this, all commentators agree. What they were not aware of was that all of Boothby's actions from 1866 had some connection with the Moonta Mines litigation and supported the defence being mounted by the current directors. On several occasions Boothby's rulings in other, unrelated matters also favoured the current mine owners. In late 1866, for example, the judge returned to an argument he had not used for several years when he refused once more to acknowledge the authority of the attorney-general and quashed all information for major crimes which were brought before him in that officer's name.<sup>33</sup> Clearly, this stultified the colony's criminal jurisprudence in general. But Boothby's decision also impugned the Moonta Mines claimants, because the new action had been taken out by the attorney-general as 'a public cause'. No attorney; no cause—no cause; no contest for the current directors.

Boothby also renewed his old challenge to the appointment of the Chief Justice—an 'absolute illegality', he now called it. He also struck down the Equity Act of 1866 that constituted the office of primary judge.<sup>34</sup> These decisions purported to side-line the Full Court and the equity court, with the effect of making Boothby the only judge in the colony. They, too, had their impacts on the

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<sup>30</sup> An order for admission of Archibald Michie Q.C. was made on 21 November, in absentia though the candidate did not fulfill its terms by appearing to sign the roll and take the oaths: In re Michie (Supreme Court newspaper report at *Register*, 23 November 1863, 3). South Australia first appointed senior counsel within sixteen months of this event: see Graham Loughlin, 'Queen's Counsel in the South Australian legal profession', *Journal of the Historical of South Australian*, No 8, 1980, 53–67.

<sup>31</sup> Castles noted that the administration of justice entered a period of relative calm, 1863–66. That is explained as the period between the remedial statute of 1863 putting the brakes on Boothby and the Moonta Case returning to the lists in 1866: Castles, 'Boothby, Benjamin', *ADB*, Volume 3.

<sup>32</sup> 'The Supreme Court and the Parliament': *Register*, 26 March 1864, 4.

<sup>33</sup> *R. v. O'Donnell* (terms of order at Supreme Court report for Tuesday 22 May): *Advertiser*, 23 May 1866, 3, and referred to the Full Court the following Monday 28 May when lengthy discussions took place without resolving anything (Full Court report for Monday 28 May): *Register*, 29 May 1866, 3. Procedural rules made it impossible for the Full Court to intervene and the cases lapsed: Castles, 'Boothby, Benjamin', *ADB*, Volume 3.

<sup>34</sup> See *Wright v. Lindsay*: see, for example, *Register*, 22 December 1866, 4; 3 and 6 March 1867, 2; 24 June 1867, 2.



Moonta Case. No Full Court; no interference in his handling of the Moonta Case and no overruling Boothby on the Equity Act. No equity court; no chance for an injunction by the claimants to prevent the Moonta Mines' directors from paying dividends. No attorney-general; no-one to initiate such an injunction. Boothby thought these were the new realities. He was by now virtually alone in that view. These were still untested decisions, however. There was still a way to go.

Ignoring Boothby's rulings, in February 1867 the attorney-general prepared that injunction, and also moved to appoint receivers of the mining leases. He began by presenting to the Full Court his formal commission to entitle him to appear in the proceedings as required by the new Equity Act. His colleagues approved the attorney's standing. Boothby ignored them and reiterated that the act was null and void, and declared 'the legal effect' of the attorney's commission to be 'a waste of parchment'.<sup>35</sup>

Not daunted, the attorney took his application to the primary judge in equity who did not doubt the legality of his statute, his office or his capacity. Mr Attorney got his injunction. Similarly undaunted, the directors 'rather cleverly checkmated their opponents' by emptying their bank account and paying £16,000 in dividends before the injunction was served.<sup>36</sup>

The claimants then hit the directors with contempt of court proceedings and tried to call up the directors' bond of £32,000—double the amount they had dispersed as dividends. At the Full Court sitting in this matter, Boothby disrupted the hearing long enough for the current directors' counsel to win a six-month adjournment in order take a demurrer to the Privy Council.<sup>37</sup>

### **Amoval, 1867**

No-one was prepared to wait that long. Local circumstances had overtaken judicial niceties. The week before the injunction was granted (and thwarted), the colony's other great copper mine closed, raising the spectre of economic downturn.<sup>38</sup> In their turn, the Moonta Mines' financial backers became jittery. In the face of another injunction against the directors paying the June dividend, its bankers withdrew their support. In late May the Moonta Mines' closure was announced. Stoppage of production meant a halt to receipts within a short time. Five thousand workers would starve,

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<sup>35</sup> Supreme Court report, 26 February: *Register*, 27 February 1867, 3.

<sup>36</sup> 'The removal of Mr Justice Boothby, either by suspension or removal, now seems a matter of necessity': *Register*, 28 February 1867, 2.

<sup>37</sup> *Register*, 16 April 1867, 2–3. And see 'The Great Moonta Case': *Chronicle*, 9 March 1867, 4.

<sup>38</sup> 'The world-renowned Burra Mines, which have added four millions sterling to the exports of South Australia ...': *Advertiser*, 29 May 1867, 2.

trade and commerce would be paralysed, people said. The entire colony would plunge into depression.<sup>39</sup>

While the lawyers played their cat-and-mouse game of litigious one-upmanship—one side trying to bring the matter to a head, the other trying to stall—Parliament’s latest resolutions to remove Boothby came back from London with renewed instructions that the only way to remove him was to resort to Burke’s Act of 1782.<sup>40</sup> Something needed doing—quickly, decisively—and here was the way to do it.

In Boothby’s mind, the Supreme Court was now a one-man band. There was no Full Court to interfere and the equity side was his to command. The colony stood at the brink. All eyes were on the Supreme Court. What would the judges do next? If Boothby’s ruling on the Equity Act went to the full bench, the other two judges might overrule him and reinstate the act and all its consequences, including the Moonta injunction and the application to punish the directors. But would they? Previously, they might not be counted on to act together. But by early 1867 their collegial unity was matched by their unusual unanimity. Their combined forces could be counted on, but only if the case went on appeal.

It did not. Appeal was being talked about as the colony teetered on disaster although, in late May, the judges formally applied for Boothby’s removal under Burke’s Act. This shifted the forum from the Supreme Court to the Court of Appeals, a tribunal instituted by the Supreme Court Act 1837 and which, since 1844, consisted of the members of the executive council.<sup>41</sup> It also forestalled Boothby’s manoeuvrings. Now it mattered not whether the primary judge could sit in equity and that the Chief Justice and Justice Gwynne could overrule their brother in the Full Court.

This turn of events, too, resonated with the Moonta Case. The attorney-general whose official title was on the Moonta Mines claim, always opposed by Boothby, now drew up seven charges against Boothby. Counsel for the Moonta Mines claimants, always thwarted by him, prepared to prosecute

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<sup>39</sup> Called ‘a national calamity’: *Advertiser*, 22 May 1867, 2.

<sup>40</sup> 22 Geo III Cap. 75. This statute’s usual nickname of the ‘Colonial Leave of Absence Act’ aimed ‘to prevent the granting in future of any Patent Office to be exercised in any Colony’ by officials who did not intend to reside in the colony, remove ‘officers for neglect of duty’, give them leave, and replace them during the consequent vacancy. Clause II (of four in all) empowered governors to ‘remove’ officials who neglected their office ‘or [who] otherwise misbehave therein’. Reading this section’s very general terms in the context of the act’s stated purpose makes resort to it bizarre: see Howell, ‘Constitutional and Political Development, 1857–1890’, 141.

<sup>41</sup> Not including the Colonial Judge or attorney-general, the Court of Appeals lacked any member with legal training or experience: Castles and Harris, *Lawmakers and wayward Whigs*, 1987, 63.

him. Boothby had avenged his slights by his onslaught; now Adelaide was taking revenge on his honour.

Boothby continued to sit in the Moonta matter while the amoval proceedings unwound. A month after the mines closed, the Full Court mulled over the cause list. Its members politely wove around the realities. Boothby announced that he would call the Moonta Case on next week. The Chief Justice countered that it stood adjourned until the following week. The point was that in between fell the first sitting in Boothby's amoval proceedings. Boothby was trying to give himself one last chance. By the time he took it, it was too late.

On Monday the 24th of June the Court of Appeals began its inquiry into his misbehaviour. He attended on the arm of his son, Josiah, to hand in a protest against the proceedings.

Back in the Supreme Court, on Wednesday the 26th Boothby did indeed call on the Moonta matter. He struck out the application to penalise the directors for breaching the injunction and adjourned the matter. In so doing he spoke of the approaching climax, declaring in open court that 'I certainly sleep on a bed of roses ...'<sup>42</sup> Thus convinced, he strolled down King William Street to Government House to attend the third sitting day in the proceedings against him. A month later, on Saturday the 29th of July, the Court of Appeals found him guilty of official misconduct and solemnly amoved him from office.

No-one sought to re-open the Moonta injunction or to pursue the directors' attachment for its breach. Six weeks later the mines reopened. Dividends flowed again in September. At the same time he was diagnosed with the symptoms that would kill him—within nine months as it happened. Late in that span Boothby set in train a Privy Council appeal against his amoval. A matter of weeks later, in July 1868, he died. His resort to the judicial committee died with him.

### **Following the money**

As the dividends flowed, the Legislative Council was told that the judge had been 'relieved of his own debts' by his son's shareholding in the Moonta Mines. This is the first mention in the public record that the judge might have had more than the purity of the law on his mind. It was not,

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<sup>42</sup> Supreme Court report, 26 June: *Register*, 27 June 1867, 2.

however, the first time it had crossed anyone else's. If not exactly common knowledge, the judge's impecuniosity was known about in a limited circle.<sup>43</sup>

The speaker was the Honourable Thomas Elder, one of the colony's most influential men and a key player in the Moonta Mines from the start. His mercantile firm of Elder, Stirling & Co. were the lead financiers of the Moonta Mines. Elder himself was chairman of directors and co-equal largest shareholder, and the driving force behind the Mines' funding and development for thirty years. He was also George Boothby's boss and knew only too well how George had come by his shares. George had been a clerk in Elder's counting-house in 1860 when he tipped off Walter Hughes, the owner of the Moonta mineral lands, that the actual discoverer, a shepherd, was blabbing about his discovery of copper ore. Hughes used the tip to ensure he won the claim. Hughes and Elder then led the formation of the Moonta Mines Proprietary in 1861 and Hughes rewarded George with the gift of five of the first issue of 400 shares. No evidence indicates that this was other than a genuine thank-piece for a supporter's loyalty. Moreover, when the company reconstructed in 1862, George Boothby received forty shares, his due proportion of the 3,200 shares now on issue.<sup>44</sup> He sold ten of them almost immediately.

At that very moment the judge's bank<sup>45</sup> manager recorded that the quarterly dividend payment on George's remaining thirty shares earned just enough to cover the judge's interest bills. Thus the judge had indeed come to depend for his solvency on the son's dividend receipts. And six months later the claimants to the Moonta mining leases launched their litigation to take them away.

His honour's bankers knew more. They reported not only the judge's indebtedness by 1863 but his delinquency since at least 1853, confirming Greg Taylor's account of the judge's financial crises before reaching South Australia. Reflecting back over ten years, the London directors reminded the Adelaide board about Boothby's 'financial vagaries long before he left England', quipping that they had been 'sufficient to keep "his head *under* water"' ever since.<sup>46</sup> By 1859, then, Boothby's was

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<sup>43</sup> Legislative Council proceedings, 19 September: *Register*, 20 September 1867, 1–2; note that Howell considered Elder to be one of Boothby's consistent champions: Howell, 'Constitutional and Political Development, 1857–1890', 141.

<sup>44</sup> Share allotment list dated 27 July 1861: SAPP 51 of 1863; Deed of Settlement February 1862 and Amended Deed March 1863; the Hughes-Elder syndicate floated in 1863 a separate proprietary, the Matta Mining Company, and gave George Boothby shares in it and the role of secretary: *Register*, 8 June 1861, 1, *Advertiser*, 18 November 1863, 3.

<sup>45</sup> The South Australian Banking Company: see S. J. Butlin, *Bank of South Australia: a brief history of the Bank of South Australia as recorded in the history of the ANZ Bank* (Adelaide: S. J. Butlin, 1961); offprint of the South Australian chapter in S. J. Butlin, *Australia and New Zealand Bank: the Bank of Australasia and the Union Bank of Australia Limited, 1828–1951* (London: Longmans, 1961).

<sup>46</sup> Emphasis added; London Board to Adelaide Board, 24 October 1863: ANZ Banking Group Archives, Bank of South Australia (hereafter ANZBGA SA) – ANZBGA SA /19/19 f. 969.

already ‘a very old and troublesome debt’ and by 1862 the bank had begun pressing hard for its ‘permanent reduction’.<sup>47</sup> The London manager characterised as ‘shady & persistent’ the judge’s ‘determination ... over several years to “tinker” with these difficulties’ but never to resolve them. Early in 1863 the London board rejoiced in reports from their Adelaide manager that he had ‘never ceased to “dun” [the Judge] for a reduction’ of his staggering overdraft.<sup>48</sup> London directed their man in Adelaide to advise Boothby ‘to place his debts in train for adjustment’ and to deny him ‘further loans on private or personal acts’, indeed, to press ‘for an entire liquidation of the bank’s claims’.<sup>49</sup> Neither board admitted any responsibility for this state of affairs, nor did they acknowledge that, between the judge’s arrival in the colony and 1863, they had allowed him to borrow around £10,000 in twenty-odd transactions (including rollovers) at between eight and ten per cent per annum.

Thus, throughout the decade after Boothby’s arrival in South Australia, only the bank stood between the judge and insolvency. By late 1863 his bank believed that, between his overdraft and his salary, it was ‘scarcely possible ... that his accommodation of debt can ever be adjusted in his life time’. A few months later proceedings were issued against the Moonta Mines directors who had given George his shares. As dire as the judge’s financial straits were, the prospect of the loss of the Moonta dividend must (to him) have seemed direr still.

### **House of Boothbys**

The judge’s indebtedness to the Bank of South Australia was one thing. Triple mortgages on his house were another. Cross-referencing his bank’s archives with a land title search reveals that Boothby’s insolvency was more than nominal.

As his private overdraft at the bank rose steadily, Benjamin Boothby made at least four attempts to acquire a major house property for his wife and their large family.<sup>50</sup> Two of these efforts ended up in the Supreme Court. On both occasions his colleague on the bench, Justice Charles Cooper, ruled against him.

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<sup>47</sup> SA/4/11 SA board minutes, 11 March 1859; SA/4/13 SA board minutes, 10 February 1862.

<sup>48</sup> SA/8/8 f105 No. 1153 dated 24 January 1863 (acknowledged 24 March 1863).

<sup>49</sup> London Board to Adelaide Board, 24 October 1863: ANZBGA SA/19/19 f. 969.

<sup>50</sup> Hague’s ‘Early history’ c. 1936 confused the properties and the chronology of events, though Hague partly corrected himself in his revisions in 1961 and 1992, though the corrections did not of course reach Ch 5 Pt 1 of the version published in 2004.

The judge's first step on arriving in Adelaide was to rent a house at Walkerville, apparently without incident. Looking about, a few months later the judge expected to lease 'Marybank', a modest country house six miles east of town, with 560 acres stretching deep into the foothills.<sup>51</sup> Recently widowed Mary Fox attempted to lease the estate and a wrangle arose with several interested parties over rent, duration and other terms. Boothby came late to the table and made a string of offers to take a lease but the widow Fox rejected each one. Meanwhile the testator's estate went into receivership by the Supreme Court. Still the widow declined to proceed, so in early 1854 Boothby chose to petition for the master to intervene and pressure the executrix to act. Justice Cooper decided that, although Boothby had been treated unfairly, 'the proper remedy is an action for specific performance' and discharged his petition.<sup>52</sup> To the 'indignity of hearing the petition dismissed by his colleague ... with the criticism that the wrong form of procedure had been adopted', Boothby had to endure Cooper's judgement 'that in any event the affidavits in support were so carelessly drawn that they failed to disclose any cause for relief.'<sup>53</sup>

Soon afterwards, another property slipped out of his honour's hands. Boothby leased 'Urrbrae', a 'Mansion House' and 134 acres lying about four miles south of the Supreme Court House, for five years from April 1854 starting at £300 a year. Three months later he surrendered the lease to Edward Stirling, an influential entrepreneur who became Thomas Elder's mercantile partner in 1856, a director of the judge's bank in 1859 and, from 1861, another leading financier, director and shareholder of the Moonta enterprise.<sup>54</sup>

Next, Boothby set his sights on 'The Glen' estate of 34 acres on Glen Osmond Road with a 'capital mansion house and other buildings'. He obtained the residue of the lease from the tenant, a retired Indian judge, J. S. Boldero, for £1,500.<sup>55</sup> When the lease expired in 1858 his honour exercised his right of purchase. This, however, found him back in the equity court. To the further expense was added more humiliation. When *Boothby v. Cleve* came on in equity in June 1859, Charles Cooper, now Chief Justice, ordered the owner to give up the property to Boothby and insisted that the parties adjourn to reach a negotiated settlement. Justice Boothby got the place by negotiation in the end, at an expensive £3,500. How his honour financed these transactions is not clear. All that is

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<sup>51</sup> Elizabeth Warburton, *From the River to the Hills: Campbelltown, 150 years* (Campbelltown: City of Campbelltown, 1986, 222–24).

<sup>52</sup> See *Fox v. Fox: Register*, 31 January 1854, 3; *Observer*, 4 February 1854, 7.

<sup>53</sup> Hague, 'Boothby', 1992, 4; Castles 'Boothby, Benjamin', *ADB*, Volume 3.

<sup>54</sup> See 'Elder, Thomas', *ADB*, Volume 4, 1972 and 'Stirling, Edward Charles', *ADB*, Volume 6, 1976.

<sup>55</sup> Assignment Boldero to Boothby General Registry Office Book 328 Memorial 72 (GRO 328/72) registered 13 July 1854.

known is that between leasing The Glen in 1854, and purchasing it in late 1859, in 1855 he borrowed £1000 at eight per cent from George Young on a promissory note for two years.

Once he had a clear title on The Glen, however, he mortgaged the estate to the Savings Bank, raising £2,000 at ten per cent. A week later he borrowed another £2,000 from two different sources, both secured as real property mortgages. One was an advance from solicitors' trust funds, also at ten per cent. The other was a rollover of George Young's debt from 1855 and which he managed to have ranked as a second mortgage.

Thus, first, second and third mortgages on his 34-acre house property formed the centerpiece of his financial web. His personal bank manager was aware of one of those debts, though he may not have known its extent or of the others.<sup>56</sup> Effectively, the judge had borrowed £3,000 at ten per cent and £1,000 at eight per cent, with quarterly payments of £95.

Nearly three years later George sold ten of his forty Moonta shares to four men.<sup>57</sup> Six went to two of his father's creditors. One of them was George Young, attorney of the owner of the Moonta lands and also a director of the allied Wallaroo Mines. The shares were reputedly worth around £1,000 each. Nothing on the archival record indicates that any of the proceeds of these sales benefited the judge. No lump sum payment to the bank nor any reduction of his real property mortgagees is on record. In fact, none of the real property securities was fully discharged in the judge's lifetime; nor does the bank report a significant receipt against his overdraft. We know only that from late 1863, the bank was less troubled by the judge's indebtedness and, by late 1864, his honour still pressing them, was even disposed to make a small further concession.<sup>58</sup>

Matching the low points of his mounting indebtedness to the high points of the Moonta Mines Case, however, raised the spectre that he was also corrupt.<sup>59</sup>

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<sup>56</sup> London Board to Adelaide Board, 24 October 1863: ANZBGA SA/19/19 f. 969.

<sup>57</sup> Minutes, 1 June 1862, Board of the Moonta Mines Proprietary: SLSA BRG 40/3/1. He had sold a further three by 1867: Registrar of Companies' evidence: *Register*, 16 August 1867, 4cd.

<sup>58</sup> It is possible that some of this money was used to discharge the last of the judge's English debts, still at fever-pitch in 1856 [sic]: see Taylor, 'The early life of Mr Justice Boothby' (end of Part 3), citing S. A. Parliamentary debates reported at *Advertiser*, 27 June 1866, 3 and 4 July 1866, 2, where reference was made to English reports ten years previously about the outlawry of one 'Benjamin Boothby': *Morning Chronicle*, 22 February 1856, 8 and 21 March 1856, 8.

<sup>59</sup> Full credit is due to Ms Patricia Sumerling MA who found out about the South Australian Banking Company's archives in Melbourne and noted the numerous Boothby references in them. Her master's dissertation in 2001 on Walter Hughes, the leaseholder of the Moonta mineral lands, necessarily studied the development of the Moonta Mines and concluded that the syndicate that formed to exploit the mines had committed fraud: Patricia J. Sumerling, 'Walter Watson Hughes and the Moonta and Wallaroo Mines', MA Thesis, Flinders University of SA, 2005.

## **Who knew?**

All this was an open secret in Adelaide and London. The judge's bank manager knew that Boothby's annual interest bill due to the bank alone had more-or-less overtaken his total salary. The Adelaide manager told the local and London bank boards and the judge's five mortgagees also knew. All were kingpins in the colony's corporate and financial life and all were Moonta directors and shareholders, as well as its financiers. Some were more than one of these. Five of this group were also members of Parliament, one in cabinet.

Beyond that inner group, the total number 'in the know' could have topped a hundred. In the small Adelaide community, that amounted to everyone who was anyone. The total membership of the Parliament was fifty-four and the board members of the colony's top ten corporations amounted to thirty-odd more, nearly half of them in Parliament. Behind-the-scenes consultations and talk on change must have drawn others in. Then there were the sixteen individual Moonta litigants and their eight lawyers, their law partners and innumerable clerks. By the time the judge was removed, his financial condition was surely well known.

This was confirmed by even the judge's best defender, one J. B. Hughes. Six weeks after the removal, he published extracts from the evidence presented to the Court of Appeals, designed to show how the judge had been set up for his fall. His selection included Master Hinde's deposition, as Registrar of Companies, that George Boothby held seventeen [sic] shares, and the testimony of leading lawyers Rupert Ingleby and William Wearing that they knew that George had enjoyed shares from the outset. Wearing in particular stated that this was a matter of 'public repute' and that Thomas Elder and his circle and George Boothby are 'always associated in my mind with the proprietorship of the mine'.<sup>60</sup>

The point is that, for several years, the movers and shakers in Adelaide's corporate, financial and political life can have been in little doubt about the judge's conflict of interest raised by the extent of his debts and the source of his extra-judicial income stream.

## **Conflict of interest**

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<sup>60</sup> Letter to editor: *Register*, 16 August 1867, 4cd.



Chief among these business leaders was the immensely influential Thomas Elder. That explains why, when Elder told the Legislative Council that an issue of conflict of interest surrounded Boothby, everyone listened—though many knew already.

Elder bruted it about under the pretext of refuting accusations that he and the judge, who lived a stone's throw from each other, were on intimate terms and exchanged social calls. He was also keen to deny that George Boothby, his employee, had received the gift of shares from Elder out of 'family friendship', but for helping Hughes, the original owner of the mineral lands, to register his claim.<sup>61</sup> Elder also wanted it understood that the judge was relieved of his debts as much by the sale of George's shares as from the dividends alone (although that contradicts the judge's bank's better knowledge of the subject). Either way, having characterised the accusations so self-servingly, Elder set about a solemn and sweeping denial of their implications. The judge and Elder were never in each others' houses. Elder was in England when the shares were allotted by another director 'for some service rendered' by George (even though the allotment was, of course, by the board as a whole). Thus Elder denied being the conduit for the circumstances that might have given rise to that conflict of interest. He could not do that, however, without admitting that he knew about those circumstances, the judge's debts, and George's role in servicing them. Indeed, the donors of the shares were complicit in the conflict because their gift either commenced or completed it.<sup>62</sup>

Despite this clear statement that the facts had long been widely known, Boothby was not pursued for conflict of interest as a matter of law. Why not? Part of the answer is that the precedents were limited in quantity and quality.

Montague's Case in Van Diemen's Land in 1847 and Cottenham's Case in England in 1853 appear to cover Boothby's situation though, in the time-honoured fashion of the common law, both might be distinguished from it. Boothby might be forgiven for knowing nothing about the Hobart decision, even if it was well known in Downing Street where the evolving Boothby story was being watched and managed. Justice Algernon Montagu of the Supreme Court of Van Diemen's Land had for several years shielded himself from his considerable creditors by pleading his judicial status to lead litigants before him on a merry dance. In 1847 (supported by a fellow judge) he declared a

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<sup>61</sup> For that madcap episode, see McLaren, *Dewigged*, 198–99 and Sumerling, 'Walter Watson Hughes', 35–38.

<sup>62</sup> George emerged unscathed, financially and socially. He went on to head up a London-based insurance company for twenty-five years, sat on boards and committees with an exclusive coterie of leading lights, and voted in 1890 to consolidate the Moonta Mine Company with the Matta and Wallaroo concerns. When Elder died in 1897 worth well over £815,000 he thought well enough of George Boothby to leave him £7,000, one of his largest personal bequests (nearly double the gift to Elder's in-laws, though two-thirds of his own brothers' bequests). He died prior to Elder, however: obit. G. Boothby: *Advertiser*, 3 July 1893, 3, obit. T. Elder: *Register*, 28 June 1897, 6.

taxing act to be unconstitutional and was removed by the Executive Council under Burke's Act 1782.<sup>63</sup> On the other hand, Boothby must have known about Cottenham's crisis as it had been the subject of protracted litigation and voluminous press reportage that culminated the year before Boothby left the bar and England for South Australia and the bench.

Lord Chancellor Cottenham had sat on a case involving a canal company in which he owned a substantial block of shares. The House of Lords, after consulting all the superior court judges, reversed his decisions.<sup>64</sup> Their lordships held that, though there was no suggestion that the chancellor had in fact been influenced by his shareholding in the company, no case should be decided by a judge with a financial interest in the outcome. Regarded as authority for the proposition that judges must not *appear* to be biased, Boothby was arguably caught by it.

The Cottenham appeal flowed from the aggrieved party discovering that the chancellor held canal company shares. Their lordships seemed to require that people knew about the judge's interest. Sufficient people had 'discovered' Boothby's indebtedness and his dependence on George's dividends, raising similar issues about the public nature of the potential conflict of interest. The nature of the relevant interest was not spelled out by 1867. That was left to later decisions to speak of 'a pecuniary interest in what is at stake' and set the test at the *possibility* of bias rather than its *probability* (my emphasis) and, later still, of 'a *direct* pecuniary interest' (my emphasis).<sup>65</sup>

Cottenham owned the shares in person while Boothby did not. The payment of the dividend was not for his own use, but to his son; that the son used them to pay his father's debts might be characterised as no more than an act of filial charity. If the judge had an interest, it was private, not public. Yet the Moonta Case would decide whether the men who issued the shares would get to keep paying the dividends, and non-payment might have rendered his honour formally insolvent.

Conflict of interest, in any event, was of little avail. None of Boothby's crucial Moonta rulings were reached alone; all enjoyed another judge's assent. Others were readily explicable. His only act that was distinctly colourable was the specious reasoning behind the release of the directors from

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<sup>63</sup> 'Perils of the colonial judiciary: English legal culture' at McLaren, *Dewigged*, 160–70.

<sup>64</sup> Gareth H. Jones, 'Charles Christopher Pepys, first earl of Cottenham (1781–1851)', *Oxford Dictionary of National Biography, Volume 43*, 638–40; *Dimes v. Grand Junction Canal Co* (1852) 3 HL Cas 759; (1852) EngR 789; (1852) 3 HLC 759; (1852) 10 ER 301. Not only his substantive decision was impugned, also attacked was his committal of the appellant (a seriously disgruntled solicitor) for refusing to abide by an injunction issued in an earlier action.

<sup>65</sup> See Frank Sharman, 'Rural Copyholders and Industrial Shareholders – *Dimes v. Grand Junction Canal Co.*', *Journal of Legal History* 10, May 1989, 71–89.

contempt proceedings. And that decision was his last ruling before his removal. It was never tested by an appellate tribunal.

The nice question is whether Boothby knew exactly what he was doing and calculated that any conflict of interest was covered by the arm's length between himself and the mines. If the father-son financial arrangement was private, and the dividends neither paid nor received in the father's capacity as a judge, surely the Boothby case must fall outside the Cottenham rule? Can it have been wrong for the judge to accept George's gift or loan to meet his interest payments?

What is more, George was not the only actor in his *pater's* financial affairs. The judge also used sons William and Benjamin Junior as guarantors in a few of his borrowings. Did intermingling their own liabilities and the judge's numerous debts make George any more than a mere filial donor or lender of the Moonta dividends? Did not George's lack of distance from the judge's financial affairs invoke Cottenham's case? This may not have been understood by their contemporaries. The 'Boothby Brothers' had come in for criticism within the year of arriving in the colony and controversy followed some of their careers. The judge's bank manager was almost as scathing about the sons as the father when it came to financial delinquency.<sup>66</sup>

The subject of judicial bias arose again very publicly in 1865, and concerned another British chancellor, Lord Westbury. Its very different circumstances were resolved politically: in the face of public outcry over 'selling' public offices, his lordship resigned the woolsack. The timing had a South Australian dimension, however: Westbury had presided over the passage of the Colonial Laws Validity Act and he left office the week the Act left Colonial Office for Adelaide.

No-one seems to have noticed, but there was a political aspect to Boothby's downfall. His conflict of interest might not be punishable by law, as Cottenham's and Montagu's had been, but, like Westbury's, it could be corrected by the political power wielded by the colony's financial masters. And the implication survived in the court of public opinion that the gift of Moonta shares had purchased George's loyalty in 1861 and that, by extension, once the Moonta Case commenced in 1864 the judge's subsequent support was expected to form part of the bargain.

### **Was Benjamin Boothby corrupt?**

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<sup>66</sup> London Board to Adelaide Board, 24 October 1863: ANZBGA SA/19/19 f. 969.

Until 1861, when George received the shares, and possibly as late as 1866 when Justice Boothby began his final onslaught, the judge's bad behaviour *could*, in charity, be put down to mental anguish arising from the pressure of his financial problems, especially the mortifying fear of their exposure. His bank's London manager understood the need for discretion, having 'no wish to feed the love of public scandal by reducing a Judge to extremities, or placing him in any humiliating position.'<sup>67</sup>

Such tenderness seems wasted in light of Justice Boothby's long-time relations with the bench, the governor, the Parliament and the attorney-general. Instead of shoring up their support, he persisted in souring relations with Westminster and Downing Street, and Adelaide's Government House, Parliament, cabinet and Supreme Court. Every step dug himself deeper into a hole of his own making. Once he started, he trapped himself into having to go on. A case of pig-headed to the point of manic.

However, after George received the shares, the evidence of the judge's progression from indebtedness to insolvency, and the godsend of dividend payments from the Moonta Mines, adds a whole new dimension to the Boothby story—that of financial self-interest. His desperate dependence on the Moonta dividends can explain why he kept going so doggedly. His interest had to be paid. The mines must keep paying. This state of affairs might also explain why he persisted in his obstinacy even after the Colonial Laws Validity Act directed him to stop because, by 1865, his dependence was total.

Should he, like modern judges would, have excused himself from sitting, or at least declared his interest in the Moonta Mines litigation?<sup>68</sup> And if so, and he did not, does that mean he was 'corrupt'? In Boothby's case, 'corrupt' as a verb operated in both its active and passive voices: he corrupted the colony and its culture and was in turn corrupted by his own nature and circumstances. These states of being merge in the Moonta Mines case.

The handful of men on the Moonta board who condoned the gift of shares to George, Thomas Elder among them, all knew about the judge's indebtedness. Did the gift to the son put the father in their joint and several pockets? Adelaide's corporate sector knew all about political conflict of interest.

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<sup>67</sup> London manager to Adelaide manager, 24 October 1863: ANZBGA SA/19/19 f. 969.

<sup>68</sup> Connections between judges and litigants were inevitable in a small community. In *R. v. Smith* (1876), the judge who joined the Cooper bench to counteract Boothby remarked in passing that in a small colony with a small bench, lawyers could not abandon practising in courts presided over by their relatives: see Peter Moore, 'Unjustly Condemned', paper presented at the ANZLHS conference, Brisbane, 2011.

Reinforced by what they understood of Cottenham's case, they may well have thought that judicial conflict of interest was similar to better understood politico-commercial conflict.

Compare the political case of George Waterhouse MLC who was a partner in the firm of the mines' financiers, Elder, Stirling & Co. Waterhouse was also a director of the judge's bank and the colony's chief secretary by 1861 when he received ten Moonta shares.<sup>69</sup> Just weeks after the gift, he proposed and chaired the first Parliamentary push to remove Boothby. A few more weeks along he formed a ministry expressly to pursue that goal. This push was not connected to the judge's second-hand interest in Moonta dividends. This was the Parliamentary response to the populist outcry against the judge's generally obnoxious behaviour rather than the concise issue of judicial conflict of interest. At the same time, the political charge of conflict of interest over holding copper mining shares and pressing the mines' interests in the Legislative Council saw Waterhouse hauled over the Parliamentary coals in 1863. That charge against Waterhouse—that his shareholding put the premier in the board's pocket—was well made. Explicit claims that he had been bribed were not proven, yet the tumult tipped him out of Parliamentary office. (The corporate sector was less delicate. Waterhouse retained his seats on the boards of the judge's bank, Elder, Stirling & Co., and the Moonta Mines.<sup>70</sup>)

Affront that the judge was guilty of conflict of interest formed no part of the colony's continuing response to his judicial conduct. On the contrary, the current directors probably did not relish Boothby's support. Supporting their defence against the Moonta claimants was all very well during 1864–66 as his legal ploys and judicial conduct destabilised the colony, but mining operations could hardly proceed efficiently. In August 1865, the directors shored up their mineral claims with indefeasibility of title by bringing their mineral properties under the Real Property Act 1861 once it was protected by the Colonial Laws Validity Act that arrived a few weeks previously—only to find his honour continuing to undermine it through 1866–67.<sup>71</sup>

Before the Moonta Case, Boothby's tendentious legalisms, his unsociable rudeness, his errant borrowings alike proved to be unpunishable. During that litigation, he did not make an actively corrupt ruling. But this was nothing compared to the fatal flaw. As it snaked its course over four

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<sup>69</sup> In the year between Boothby's amoval and death, a satirist wrote that George Waterhouse had favoured the Moonta Mines directors because he had 'received his ten thousand', adding in the same vein that 'Judge Boothby's son had four thousand worth': see Sumerling, chapter 8.

<sup>70</sup> Waterhouse remained the judge's most implacable Parliamentary enemy. At the height of his political power he joined the local board of the judge's bank and in 1865 joined the London board. On the Moonta Mines board by then, too, just before he sailed away he was named as one of five trustees of the Moonta Mines' mineral lands. See 'Waterhouse, George Marsden', *ADB* Volume 6, 1976.

<sup>71</sup> *Register*, 2 August 1865, 1.

years, however, Boothby had to be punished, not for the legalisms or rudeness or delinquency, but because he put at risk the very survival of the Moonta Mines and thus the colony itself.

To continue to benefit from the dividends—indeed, to need them most desperately—while ruling against the challenge to the people who paid them might be beyond the pale. But no-one could accuse him openly of conflict of interest because everyone was in on it to varying degrees.<sup>72</sup> Boothby was removed from office by a mildly judicial species of legal proceedings in which the whole truth need never be mentioned.

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<sup>72</sup> J. P. Boucaut, one of two attorneys-general on the court record in the Moonta Case, was said to have had £10,000 worth of shares. W. A. Wearing Q. C. gave evidence against Boothby, assuring his credibility by deposing that he held no Moonta shares, while failing to mention that the Hughes–Elder syndicate had given him shares and a seat on the board of the related Matta Company: see J. B. Hughes’ defence of Boothby with extracts from evidence given at the amoval proceedings at *Register*, 16 August 1867, 4. Wearing replaced Boothby on the bench; Boucaut followed the man who replaced Wearing.