

## **Legal and Literary Pursuits**

*(This is an edited version of a talk given by The Hon Nicholas Hasluck AM, QC at the Australian Academy of Law dinner held at the Sandalford Winery in Perth on Sunday 22 January 2017)*

When I was invited to say a few words at the Academy of Law dinner in Perth I had to explain that, being in retirement, I could say nothing useful about current legal issues. It was then put to me that being known to some extent as a writer perhaps I could say something about law and literature. This suggestion brought with it some vivid memories and a sense of caution.

Many years ago I represented one of the parties involved in a case that turned on the wording of a contract for the sale of a small business. During one of the adjournments at trial, counsel for the real estate agent I will call 'Smith' must have told his client that he was about to be cross-examined by Hasluck, a published writer. This was of interest to Smith, for he himself had just burst into print with a manual of practical tips for real estate agents, complete with ready reckoner tables for the fixing of percentage based commissions.

We are all familiar with the witness who seeks to disarm the cross-examiner with a winning smile and a display of charm. Thus, when the moment came for the compiler of the ready reckoner tables to face the cross-examiner - a published writer who had spent much of his adult life wrestling with the mysteries of narrative and style - Smith, with the aplomb of a poetaster at a literary soiree, prefaced his reply to my first question as follows: 'Well, Mr Hasluck, as one creative writer to another, I would say this ...'.

The word 'creative' in the context of a real estate agent's ready reckoner commission tables should probably have encouraged me to cross-examine with fervour, but in fact I was discombobulated by his reply. I was reminded then, and was reminded again when invited to speak at this dinner, that in the legal world a so-called 'writer' is usually viewed with impatience at best; disbelief at worst.

In my own career I soon discovered that if a chap works five days a week at the law and spends his weekends yachting, gardening or playing golf, he is thought to be treating the law with the respect it deserves. On the other hand, if a fellow works five days a week at the law and then goes home and writes books about truth and justice, it not only seems 'odd' but somehow, frankly, rather ..... 'frivolous'. As if the chap in question is a dilettante without any proper regard for the priorities of his profession.

Fortunately, I have now reached an age where one has ceased to worry about censure of that kind. The fact is that I have always thought of literature as a way of understanding viewpoints other than one's own, and thus of use to practitioners at every level of the legal system, from lowly articulated clerk to a top judge.

I pause here to say in passing that, as we all know from apocryphal gossip in the bar common room, there are two ways of becoming a 'top judge'. One way is to study hard for an honours degree at law school, join a good firm or set of chambers and win some big cases, be appointed to the bench and write some fine judgements over many years. The other way is to become a minor magistrate and be caught in a brothel. Thus securing the inevitable headline: 'Top judge in A List Brothel Horror.'

So now, having thrown caution to the winds, let me say a few words about the joinder of legal and literary pursuits. I will do so by turning to the career of A.B.Piddington, well-known in the annals of Australian law as a barrister who was appointed to the High Court in 1913 but resigned before taking a seat on the bench. Was this a hasty retreat in the face of valid criticism or was it the act of a principled jurist? Contrarian or virtuous counsellor? A closer look at Piddington's career will cast light upon these and other issues of interest to observers of professional life, including writers in search of a good story such as myself.

Albert Bathurst Piddington was born at Bathurst in New South Wales in 1862. The son of an Anglican minister, he won a scholarship to Sydney Grammar School and was admitted to the Bar in 1890. He became an independent Liberal MP for Tamworth in 1895 but lost his seat three years later. He returned to the law as an advocate on behalf of trade unions in the New South Wales Arbitration Court. His wife, Marion O'Reilly, was the sister of poet and politician Dowell O'Reilly, and the aunt of novelist Eleanor Dark. Family connections of this kind seem to have kept alive Piddington's own literary pursuits.

In 1913 the Labor Attorney General in the federal government, W.M. (Billy) Hughes was looking around for two new appointments to the High Court. He sounded out Piddington for one of the positions and in the course of doing so indiscreetly sent a cable to this effect. 'Confidential and important to know your views Commonwealth versus State Rights. Very Urgent.' Unwisely, Piddington replied as follows: 'In sympathy with supremacy of Commonwealth powers.'

Piddington was offered a place on the High Court but soon after his acceptance he found that his exchanges with Hughes had become public

knowledge. He was criticised by the press and reproved by the Victorian and New South Wales Bar Associations. Stung by the criticism, Piddington felt that he had compromised himself and promptly resigned without taking a seat on the Bench. He was then appointed to the new Inter-State Commission and some years later became Labor Premier Jack Lang's first Industrial Commissioner for New South Wales. In that role he was able to introduce a form of child endowment and resist cuts in the basic wage. When Lang was dismissed by the state Governor in 1932 for repudiating overseas debts, Piddington resigned in protest.

Two years later, as an elderly barrister nearing the end of his career, Piddington was engaged to represent the radical Czech journalist Egon Erwin Kisch in what was to become known as 'the Kisch case' – a controversy concerning the immigration system and the workings of the White Australia Policy 'dictation test'.

Born and educated in Prague, Kisch's early writings portrayed the underworld in his native city as a consequence of which he was known as 'the rampaging reporter'. Fluent in many languages, he moved with artists and intellectuals on the left throughout the 1920s. His credentials as an opponent of Fascism were established when he and other writers were imprisoned by the Nazis after the Reichstag fire in Berlin. Towards the end of 1934 the Australian Branch of the Congress Against War and Fascism invited him to address an anti-war rally to be held in Melbourne on Armistice Day.

Kisch was prevented from landing at Fremantle by a ministerial declaration made under the *Immigration Act* 1901 (Cth) concerning undesirable persons. When the ship reached Port Melbourne Kisch jumped ashore: a dramatic leap to the quay below that earned the

rampaging reporter some additional notoriety (and a broken leg) but left the ban against landing in place. He was seized, hustled back on board, and forced to travel onwards.

As Kisch's newly-appointed counsel Piddington was introduced to his injured client on board the P & O liner *Strathaird* when the ship reached Sydney. The elderly barrister sought relief immediately by way of a writ of *habeas corpus*. Having held that the ban was invalid, because it was based on questionable information from overseas, Justice Evatt of the High Court made an order for Kisch's release from the *Strathaird*. Leg in plaster, borne aloft in a chair carried by stewards, the rampaging reporter was bundled off the ship and dumped on the wharf at Circular Quay.

That wasn't the end of the matter. Kisch was taken to the Central Police Station. Immigrants had to show they could speak a European language. So, in response to dictation by Constable Mackay, Kisch was told to write out a passage of not less than 50 words in Scottish Gaelic, one of the few languages not known to him.

Inevitably, Kisch failed the test and was thereupon charged with being a prohibited immigrant. He was released on bail and removed to hospital for his broken leg to be reset in plaster. Piddington spoke forcefully in court next morning and managed to secure an adjournment so that Kisch could prepare his defence. While Piddington worked on the defence, Kisch slipped off to address an Anti-War rally on the Domain. He was there, waving his crutches in the air, when the fiery anti-conscription campaigner, the Reverend Arthur Rivett, fell dead at the end of a speech denouncing the conservative government.

When the 'dictation case' was brought back to the Magistrate, Piddington submitted that Scottish Gaelic was not a European language within the meaning of the Immigration Act, but to no avail. The Magistrate convicted Kisch and sentenced him to six months imprisonment. The indefatigable Piddington promptly gave notice of appeal and obtained Kisch's release on restricted bail. The Kafkaesque quality of the dispute had now moved to a new but equally bizarre level: Kisch was no longer free to leave the country that was still trying to keep him out!

The High Court then held that Scottish Gaelic wasn't a European language with the result that Kisch's conviction had to be set aside. A majority of the Court found that the Gaelic language wasn't recognised as the ordinary means of communication among the inhabitants of a European community. It was simply 'an ancient form of speech spoken by a remnant of people inhabiting a remote portion of the British Isles'.

Piddington's victory meant that Kisch was left free to address more anti-war rallies. In the meantime letters and articles written by indignant Scottish patriots now resident in Australia had appeared in the *Sydney Morning Herald*, highly critical of the High Court's reasoning. These included a lengthy piece by a correspondent writing under the *nom de plume* Columbinus. Having set the scene with various sarcastic jibes about the judiciary, Columbinus accused the High Court of making themselves 'dictators of all language and above linguistic facts.'

While this was taking place updated information from Great Britain led to the Attorney General, Robert Menzies, making a revised declaration of undesirability. Kisch was said to have been banned from entering England 'on account of his known subversive activities', and

thus justifiably banned in Australia . When the new charge was brought before the Court of Petty Sessions the tenacious Piddington pointed to a lack of clarity in the wording. He argued also that his opponent, the Attorney General of New South Wales, should relinquish his brief from the Commonwealth because he was the employer of the magistrate hearing the matter. During the course of these angry exchanges, Piddington, exhausted by the struggle, collapsed in court.

Kisch was convicted again, although the exact nature of the ‘subversive activities’ the subject of the charge remains unclear to this day. Undaunted, Piddington promptly lodged a fresh notice of appeal, and Kisch remained out on bail.

The ongoing controversy had by now spawned various collateral rulings, some of which were referable to the High Court’s supposed denigration of Scottish culture. Justice Evatt dismissed a case for contempt against the editor of the *Sydney Morning Herald* for having published the Columbinus letter (which had in fact been written by the Chancellor of Sydney University, Mungo McCallum). But the editor of the *Sun* was not so fortunate. He was fined for asserting that the law which was intended to keep Australia white was in a state of suspended animation owing to the ingenuity of ‘five bewigged heads’ who had managed to discover a flaw in the Immigration Act ‘to the horror of everybody except the Little Brothers of the Soviet and kindred intelligentsia.’

In the end, after four months of controversy and constant litigation, the government felt obliged to compromise. In February 1935 the Commonwealth agreed to settle the matter by withdrawing the charges against Kisch, paying his costs, returning his passport, and allowing him

to return to Europe. The rampaging reporter left Australia voluntarily in March 1935.

For Piddington, Kisch's departure marked the end of his career as a prominent public figure. His last appearance before the High Court was as a plaintiff. In 1938 while crossing Philip Street in Sydney he was knocked down by a motorcycle and seriously injured. He was unsuccessful in the litigation but the case brought into play an important evidentiary rule as to whether the answers given by a witness to questions put to him in cross-examination concerning collateral facts must be treated as final. The elderly barrister died in 1945, at the age of 82.

So what are we to make of it all? Piddington's career reflected a constant concern for the less fortunate members of society, a principled opposition to injustice and a fearless approach to expressing his opinion. His views may have been contentious, and possibly wrong on some occasions, but a legal system without advocates of such a kind would be a poorer place.

It seems that the lessons to be drawn from his career were absorbed by his son, Ralph Piddington. The younger Piddington trained as an anthropologist at Sydney University under Professor Elkin and in due course faced up to certain issues confronting anthropologists in the field in the 'between-wars' era. After researching the living conditions of Aboriginal people near Broome in the 1930s, Ralph Piddington condemned their working arrangements on cattle stations as slavery and denounced the Kimberley region as 'a plague spot of European oppression.' He was promptly disowned by the establishment.

In the aftermath of the controversy, while Elkin and others were documenting cultural practices in the Kimberley, including the stark differences between Wandjina and Bradshaw rock art, Ralph Piddington



had to pursue his career overseas. He returned some years later in the war years to work with Elkin, Stanner, Strehlow and other well-known anthropologists at the Australian School of Pacific Administration in Sydney. In the post-war era he went on to become a Professor of Anthropology in New Zealand.

I began by foreshadowing my intention to say a few words about law and literature. Piddington's career suited my theme, I suggested, because of its interest to observers of professional life and writers in search of a story. With those thoughts in mind let me close by suggesting also that works of fiction can be used to explore controversial events at a deeper level. Stories blending fact and fiction can be shaped to reveal the mood of an era, to dwell upon the dilemmas facing those involved, and to cast light upon the motivation of the principal characters.

I drew upon the Piddington careers in writing *Our Man K*, a novel based on the Kisch case, and in writing *Dismissal*, a blend of fact and fiction glancing at Sir John Kerr's links to the School of Pacific Administration and a head of state's power to sack an elected government. I drew upon them again, more recently, in writing *The Bradshaw Case*, a story about a disputed native title claim near Broome.

In these works of fiction I have sought to cast light not only upon the workings of the legal system but also upon the nature of persuasion, the need for integrity and, above all, upon the importance of independent thought and fearless speech: qualities visible in Piddington's career, and in that of his son.

For example, in my novel *The Bradshaw Case* lawyers involved in the native title claim demand that an elderly anthropologist abandon an opinion he has held for many years, namely, that an unusual form of rock art in the Kimberley (known as Bradshaw art) was created not by local

Aboriginal artists but many thousands of years earlier by visitants from the Indonesian archipelago.

The anthropologist refuses to comply with their demand. In doing so, he recalls the words of the contrarian Henry Thoreau: *'If a man does not keep pace with his companions, perhaps it is because he hears a different drummer. Let him step to the music he hears, however measured or far away.'*

I have little doubt that A.B.Piddington and other contrarians would defend the speaker's right to hold such a view. To paraphrase the poet Cowper, freedom of thought has many charms to show that slaves to fashion never know. It is the key to freedom generally.

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