BOOK REVIEW

HAGUE’S HISTORY OF THE LAW IN SOUTH AUSTRALIA 1837-1867

R M HAGUE, THE UNIVERSITY OF ADELAIDE BARR SMITH PRESS, 2005

It is rare, at least in recent times, that a work of great significance is first published many decades after it was written. Hague’s magnum opus had to wait nearly 70 years before it was made available to a wide readership. If the book had been written in the last few decades of the 19th century, Adelaide’s book publishers would gladly have added this legal account of the early development of the colony to the many general eye-witness accounts which were published at that time. After all, in those days politics and the law were practised and subjected to criticism with a depth of interest and a passion which seem largely to have disappeared. Had Hague’s pioneering work been produced in an academic environment similar to that of today, it would have been greeted as a valuable contribution to the now-recognised discipline of Australian legal history. Its author would have been strenuously encouraged to publish it. However, in 1936 the Faculty of Law of the University of Adelaide, advised by jurists of high standing, denied Hague the recognition which he deserved. The reasons, now considered spurious, were that the work was too historical in its orientation, and that it lacked the narrow legal analysis then considered to be of the essence of academically acceptable legal writing. Helen Whitington informs us that the denial of the Bonython Prize to Hague for this work came as a tremendous shock to him and overshadowed the rest of his life, for he had been used to academic success, and was self-effacing by nature.

Hague’s interest in legal history did not wane and he published a number of studies of limited scope but made no further attempt to gain any form of recognition for his magnum opus. He simply deposited a typed copy in the Public Library of South Australia (8411), and resisted numerous attempts by prominent Adelaide lawyers to have it published or to submit it for an academic degree (842). Although Hague was denied the pleasure of seeing his work in print, he gained much recognition for other aspects of his life and work, particularly for having edited The South

1 References appearing in brackets in the text and the footnotes are to page numbers in Hague’s book. The full story of this sad episode is told by Helen Whitington (839-44).
Australian State Reports and the Law Society Judgment Scheme for a period of forty years (881).

It was after Hague’s death in 1997 that the John Bray Law Chapter of the University of Adelaide Alumni Association, led by its former Chairman, Mr Justice Tom Gray, provided the major impetus for the posthumous publication of the work. Active support for this initiative was very extensive, as is shown by the list of nearly 90 institutions and persons who contributed financially or otherwise to the project. The editors have sensibly published the text as Hague wrote it, with some shortcomings which the author would have eliminated had he arranged to have it published during his lifetime.

The work as published includes two components which have greatly enhanced its attractiveness. They are not from the pen of Ralph Hague. One is the biography of the author by Helen Whitington (811-79). This is of special interest because it traces the unusual genesis of Hague’s work, which is such an essential element in the development of Australian legal history as a discipline that it has, in itself, become part of that history. Further, there are many illustrations with explanatory text, collected from nearly 30 contributors, which we owe to Bruce Greenhalgh, the Librarian of the Supreme Court Library. There are portraits which help bring to life the numerous personalities who shaped the early legal history of South Australia, as well as pictures of buildings, landscapes and street scenes. Greenhalgh’s labour of love has supplemented Hague’s numerous quotes from contemporary sources, which also create a sense of closeness to the historical events. In addition, and perhaps more importantly, these quotes give the reader access to much primary material.

Most of the book deals with the judicial and legal establishment. The remainder of the work, Hague’s accounts of the historical background (1-49), the Aborigines (751-77) and the Torrens system (779-96) are no less important, though short by comparison.

Hague considers that the Foundation Act (4 and 5 Wm IV c 95) was so poorly constructed that it ‘threatened to ruin the colony at its outset’ (1). It divided executive authority between the Governor and the Resident Commissioner. The first incumbents, Captain John Hindmarsh and James Hurtle Fisher, were incompatible personalities. A ‘reign of squabble’ and an ‘administrative pandemonium’ were the hallmarks of the first two years (36). The risks inherent in the creation of two centres of power at the same level of government had fully materialised. Early

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2 The long title of the Act is ‘An Act to empower his Majesty to erect South Australia into a British Province or Provinces and to provide for the Colonization and Government thereof’.

3 Sir John Jeffcott, the first South Australian Supreme Court Judge, is reported as having remarked (39): ‘Fisher was a wily attorney, . . . who, by dint of . . . splitting hairs upon every insignificant point, wishes to put the Governor, who is a bluff, straightforward, but not very prudent sailor, into a false position.’
victims of the resulting quarrels were Fisher’s three Acts for the orderly registration of land titles. Though greatly inferior to the Torrens system, which emerged 20 year later, these Acts might have prevented some of the chaos in land dealings which contributed to the fall in land values and the economic crisis which occurred during 1841 and 1842 (537).

Hague’s chapter 11, ‘The Aborigines and the Law’, also conveys lessons for coping with our present political and legal problems. Revulsion from the slave trade had helped to awaken concern for the welfare of native peoples in early 19th century Britain. Hague reports that the ‘Saints in the House of Commons’ (751), as the colonists sarcastically called them, were anxious to avoid native dispossession and persuaded the Colonial Office to ensure that settlers occupied only a small district not already occupied by aborigines. An unrealistic compromise scheme, which took into account such concerns, was never carried into effect, but it may now be seen as an early precursor of the native title movement of the last few decades.

In recent years there has been much interest, overseas as well as in Australia, in the origins of the Torrens system. Hague’s treatment of this subject retains its significance, for he deals with the very early part of the story. This includes the request made to James Hurtle Fisher by the Colonisation Commissioners in the mid-1830s to draw up an efficient registration code (779), and also the suggestion made as early as 1839 by W A Poulden, an Adelaide solicitor, that land transactions should be void unless registered, thus anticipating one of the central features of the Torrens system (781).

With the exception of the three chapters just discussed, Hague has looked at the first 30 years of South Australia through the prism of the judicial and legal establishment. Accordingly, he has devoted separate chapters to early Supreme Court judges (Jeffcott, Jickling, Cooper and Boothby), the various courts, the Law Officers of the Crown and the Legal Profession (51-750). The work concludes with a short chapter concerning the gaol, a melancholy appendix to the legal establishment (798-810). The chapters on the four judges are not concerned solely with these judicial figures. There are accounts of the leading cases of the period and of the practitioners who appeared in the Supreme Court. Due note is taken of the reactions of the local press. Hague has very painstakingly presented the reader with the whole of the legal world of the time. Even figures like William Giles, who were

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5 One of the most thorough investigations of the origins of the system was recently published in Germany: A K Esposito, *Die Entstehung des australischen Grundstücksregisterrechts (Torrens-system) – eine Rezeption des Hamburger Partikularrechts?!* [The Development of the Australian Law Relating to the Registration of Real Estate (Torrens System) – a Transplant of the Law of Hamburg?!] (2005).
marginal in a legal sense, are mentioned. He was the successor to David McLaren as Chief Manager of the South Australian Company and was appointed as the Resident Magistrate on Kangaroo Island in 1838 (687). Hague has devoted more than 50 pages of his magnum opus and two separate publications to Sir John Jeffcott. It must have been Jeffcott’s adventurous life and his early death by drowning which excited Hague’s interest. Sir John sat in the Supreme Court only twice and spent less than three months in the colony, so his impact on the legal development of the colony was negligible.

Henry Jickling was an English chancery barrister and one of the first legal practitioners admitted to practice in the colony (727). After the departure of Sir John Jeffcott for Van Diemen’s Land in November 1837, Jickling was appointed as temporary judge and retained that position until March 1839 when Sir Charles Cooper arrived, having been appointed Jeffcott J’s successor. Even though Jickling was a Dickensian figure of fun and was often treated disrespectfully by those who appeared before him, he was active in the colony for much longer than Jeffcott and, even if only for this reason, made a bigger impact upon the law. After the arrival of Sir Charles Cooper, Jickling reverted to the role of barrister. He played a leading role in the foundation of the Law Society of South Australia and served as Master of the Supreme Court from 1850 to 1861. Hague was sufficiently intrigued by him to follow up his chapter on Jickling (107-51) with a separate study. Some of Jickling’s ideas were ahead of his time, even though he lacked the force of personality to have them accepted. He expressed the view from the Bench that the law of England relating to the arrest of debtors had not been received in South Australia, but changed his mind when the Governor intervened (536). Jickling argued before Cooper J, albeit unsuccessfully, that the native ‘code of morality’ deserved some respect before English law was blindly applied to natives on criminal charges, thus foreshadowing some of our present concerns about aboriginal law and customs.

Sir Charles Cooper occupied the Bench for almost 23 years (March 1839 - November 1861). Hague gives him due credit for having restored the dignity of the office which ‘had been somewhat tarnished by the appointment of a bankrupt duellist and the interim administration of an amiable but inefficient eccentric’ (152). However, when Benjamin Boothby was appointed to be the second judge, Sir

6 Giles is a central figure in Jane Isabella Watts’s account of the fortunes of the Giles family in the first few years of South Australia – Jane Isabella Watts, Family Life in South Australia fifty-three Years ago Dating from October, 1837 (1978).
7 There are two separate early publications by Hague on Jeffcott: Sir John Jeffcott: Judge of the Supreme Court (1936) and Sir John Jeffcott: Portrait of a Colonial Judge (1963).
8 R M Hague, Henry Jickling, Judge of the Supreme Court of South Australia from November 1837 to March 1839 (1993)
9 Ibid 71.
Charles had to cope with eccentricities of a different order and failed to do so effectively. He was no match for the force and aggressiveness of Boothby J's personality. These difficulties almost certainly contributed to his occasional bouts of ill health and his eventual resignation in 1861. Hague's judgment of Cooper J is that he was 'sound enough', but 'timid, conservative and crotchety' and that he had 'no exceptional grasp of legal principles, no subtlety of thought or of expression, no vigour in decision' (152). His delays in coming to his decisions became proverbial in early South Australia.

When Dr George John Crawford was appointed as the second Supreme Court judge in 1850, the colony seemed at last to have a judge with intelligence, energy and firmness and, most importantly, with 'natural inclinations towards law reform' (180). His early death after only two years in his judicial office was tragic in itself; but South Australia's misfortune was greatly magnified when Benjamin Boothby was appointed in England to succeed Crawford J. In view of his great importance to the evolution of Australian constitutional law, it is not surprising that Hague's chapter on Boothby takes up about 40 per cent of the material concerned with the judicial and legal establishment. The chapter on the Court of Appeals (605-69) is concerned in part with Boothby's attempts to destroy that controversial tribunal, which was used by litigants and by the Government as a check on the disruptive activities of the Supreme Court.

Hague has also provided accounts of the backgrounds and achievements of Edward Castres Gwynne, appointed as the third Supreme Court Judge in 1859 (248), and of Richard Davies Hanson, who was appointed as Chief Justice in 1861, upon the retirement of Sir Charles Cooper (322). However, neither judge was given a chapter of his own – they were accommodated under the 'Boothby' heading.

As Hague explains, Boothby's private life was beyond reproach, and, even as a judge, he had some admirable and redeeming characteristics. Unfortunately, he

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11 Hague's History only devotes a little more than two pages to the judge (179-181), but Hague later published a separate book on him, in which he described him as 'enthusiastic and progressive' – Hague, above n 10, 19.
14 'In private life he could be, when he wished, a courteous, urbane, and charming gentleman, and he was an irreproachable husband and father.' (219).
15 '. . . his character contained elements of great moral power. . . . he had high ideals of the duty of the judge to the state; he had the courage to be outspoken in his opinions, and to hold fast to them regardless of criticism or abuse.' (219).
failed to put these fine qualities to constructive use. He managed to generate, almost
single-handedly, a long-lasting, disastrous legal crisis. Instead of supporting
colonial legislation, Boothby was untiring in finding reasons why most of that
legislation was null and void. Unlike Crawford J, Benjamin Boothby did not favour
colonial law reform, for he showed little ‘hospitality to new ideas’ (219). His
judicial pronouncements were thus often destructive, but they were also carefully
and deeply thought out. How could a single judge, sometimes assisted by one of his
fellow judges, throw the colonial legal system into such a calamitous crisis of legal
uncertainty? Part of the answer no doubt lies in Boothby’s personality.

No reader of Hague’s work will fail to be fascinated by this judicial figure. Boothby
was dogmatic in his opinions, stubborn in his adherence to his conclusions and
convictions, impervious to public or professional criticism or pressure, and immune
to self-doubt. That his actions might make enemies of powerful political figures
like Robert R Torrens he viewed with indifference. Contemporaries must have
winced at his exaggerated sense of self-importance, and his judicial colleagues
were embarrassed by many arrogant remarks he made in an apparently deliberate
attempt to offend them.

16 A Committee of Inquiry set up by the South Australian Parliament in 1861 stated: ‘. . . His Honour regards as invalid the whole administration of justice in criminal
matters . . . ; the whole of the customs laws of the Colony; all Acts establishing
courts which have been passed since 1842; the Real Property Acts; all Electoral
Acts since 1851; and, especially, the Constitution Act; and, consequent upon these
last, as being at least doubtful, all Acts of whatever character passed by the
51.

17 Concerning the extent and significance of early South Australian law reform, see G
Taylor, A Great and Glorious Reformation: Six Early South Australian Legal

18 ‘Doubt as to his own omniscience was never one of Mr Justice Boothby’s
weaknesses.’ – Hague, above n 12, 162.

19 In a debate in the House of Assembly, Francis Dutton suggested that it was Torrens
who had dragooned parliamentarians to support the motion for the removal of the
judge (312): ‘Mr Torrens was all along an active fomenter of the opposition to the
judge.’

20 He saw himself as responsible for protecting the integrity of the sovereign and as
partaking of her dignity. In Harrald v Carruthers, heard on 4 August 1865,
Boothby is reported as having stated (413): ‘. . . her Majesty in legal estimation [is]
present in all Her Courts, and . . . any contempt of the Judges would be contempt to
Herself.’

21 In 1867 the Chief Justice, Sir Richard Hanson, told the Governor, Sir Dominick
Daly, and his Executive Council: ‘[His Honour, Mr Justice Boothby, has made
remarks as to the status of the Bar here and also] as to the state of legal knowledge
in the Colony possessed by attorneys and Judges – and in fact everyone but
Mr Justice Boothby, implying that no one in the Colony knows even the ABC of
the profession except himself. These are things to which I have referred as
rendering the administration of justice, and keeping the mind in an unbiased and
The *South Australian Register* described Boothby’s conduct as ‘judicial tyranny’ (240), a judgment which Hague ultimately, though perhaps reluctantly, came to share.22 Tyrants act arbitrarily; they have no need for guidance provided by a set of principles, for their only loyalty is to themselves. Boothby was no tyrant in this sense, for one can hardly deny that he was motivated by a fierce sense of loyalty and fidelity to the law – not to the slowly developing colonial law, which he seems to have viewed with contempt, but to the superior wisdom embodied in the law of England. Many historical, psychological and sociological and, of course, legal aspects of the Boothby phenomenon deserve close study.

Although Benjamin Boothby was a man of great intelligence, his legal education, judging by today’s standards, had been short, shallow and inadequate. As Hague observes, his legal knowledge and understanding were ‘neither as deep as a well nor as wide as a church door’.23 It was not the law of England in all its historically derived complexity, but the legalistically hardened version of it24 which he absorbed during his apprenticeship and practice from 1838-1852. Had his jurisprudence been enriched by a study of legal history, some of the excesses of which he became guilty might have been avoided. Hague’s treatise will help Australian lawyers to understand the historical background, without which a complete understanding of Australian law cannot be achieved.

The book is of great value to legal researchers. It does not deal with the great political themes of the period,25 but with the important legal events which have shaped the constitutional history, not only of South Australia, but of Australia as a whole. It is a veritable goldmine of information, for it contains a great deal of material not otherwise accessible. It sheds light on the fascinating relationship between the jurisprudence which Boothby practised in his colonial court and the state of English law during the first half of the 19th century.

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22 . . . [Boothby had] an overweening confidence in his own powers of reasoning and a proportionate contempt for the views of those who chanced to differ from him, [and] he was also as stubborn as the most perverse of mules. . . . He was a man of masterful will – a born tyrant; and his determination to have his own way was not often weakened by any consideration for the feelings of others.’ – above n 12, 6. In his book on Way C J, Hannan characterized Boothby in similar terms: ‘He was combative and aggressive to a high degree, lacking in tact, and possessed of an extraordinary stubbornness and intransigence that led him to persist in wrong opinions long after they had become untenable.’ – Hannan, above n 16, 49.

23 Hague, above n 12, 3.

24 ‘[Boothby] had matured his character and settled his convictions in the stereotyped forms and stagnant atmosphere of the British judiciary.’ – H T Burgess (ed), *The Cyclopaedia of South Australia (Illustrated)* (1907) Vol 1 242.

To students of English literature, the task of identifying the innumerable literary allusions which Hague, one of Australia’s great bibliophiles, has employed in the book, would represent an enormous challenge.

To the historically interested lawyer, this legal treatise contains much which will stimulate interest in the extensive, more general literature, particularly the informative contemporary accounts of the early development of the colony.

One feels no hesitation in thoroughly recommending this important work to Australian law schools and the legal profession.

H K Lücke
Professor Emeritus and Visiting Research Professor,
School of Law, University of Adelaide

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26 Hague left his personal library of some 30,000 books to the Barr Smith Library.
27 Of these, the following are particularly recommended: James C Hawker, Early Experiences in South Australia (2nd series, 1899); H Hussey, More than Half a Century of Colonial Life and Christian Experience with Notes of Travel, Lectures, Publications etc (1897); T Horton James, Six Months in South Australia; with some Account of Port Philip and Portland Bay in Australia Felix (1838); R Harrison, Colonial Sketches or Five Years in South Australia with Hints to Capitalists and Emigrants (1862); The Emigrant’s Friend, or Authentic Guide to South Australia, including Sydney; Port Philip, or Australia Felix; Western Australia, or Swan River Colony; New South Wales, Van Dieman’s Land; and New Zealand (1848); E M Yelland (ed), Colonists, Copper and Corn in the Colony of South Australia 1850–51 (1970) (A collection of accounts of travels through South Australia by ‘Old Colonist’, which were published in The South Australian Register in 1850 and 1851); Jane Isabella Watts, Family Life in South Australia fifty-three Years Ago Dating from October, 1837 (1978); Jane Isabella Watts, Memories of Early Days in South Australia (1882). Some early works contain comments on legal matters; for example, in F Sinnett, An Account of the Colony of South Australia, Prepared for Distribution at the International Exhibition of 1862 (1862) at 14, the author explained that South Australia had a population no larger than that of many English parishes, but that the colonial government owed it to that small community to ensure that a complete legal system was available to serve the legal needs of the colonists.