The 1987 Clem Lack Oration

A Nineteenth Century Cause Celebre:
Queensland Investment and
Land Mortgage Company Ltd.
v. Grimley

by Sir Harry Gibbs

Presented at a meeting of the Society
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During the course of the nineteenth century, five men dominated the political scene in Queensland. They were Sir Robert Herbert, Sir Charles Lilley, Sir Arthur Palmer, Sir Thomas McIlwraith and Sir Samuel Griffith. In the last decade of that century four of those men (Sir Robert Herbert having long since returned to England) were involved, directly or indirectly, in litigation which must have shaken the foundations of Queensland society, and which remains of contemporary relevance as a cautionary reminder of the dangers of departing from standards of judicial propriety. The story has something of the character of a Shakespearean tragedy, in that a man who almost achieved greatness was led, by the flaws in his own character, to actions which brought his career to an ignominious end.

The Queensland Investment and Land Mortgage Company Ltd. was an English company which lent moneys on the security of lands

The Right Hon. Sir Harry Gibbs retired as Chief Justice of the High Court of Australia in February 1987.
in Queensland. From 1882 until 1888, its Brisbane directors were Sir Arthur Palmer, Sir Thomas McIlwraith, Mr E. R. Drury and the Honourable F. H. Hart. By 1888, in the difficult economic conditions which then prevailed in the colony, the company had become concerned about the value of its securities. By that time, Queensland was drifting towards a depression, which was to have its worst effects in the early 1890s. The colony was having difficulty in meeting its heavy debts and the pastoral industry on which it substantially depended had been badly affected by droughts. In consequence, pastoral lands decreased in value. The company sent out an inspector from London, and as a result of his investigations, on 26th November 1888 issued a number of writs. One defendant was Mr Samuel Grimley who was registered as the proprietor of lands on the Darling Downs which he had mortgaged to the company to secure advances made to him from the company’s funds. He had defaulted and the company had taken possession of the lands, but now sued him for over £60,000 on the covenants in the mortgages. The other defendants were the four Brisbane directors of the company. They were sued for damages for negligence and malfeasance as local directors, or as agents for the company, in making the advances to Mr Grimley on insufficient security.

All the defendants (except perhaps Mr Grimley) were leading members of Queensland society.

Sir Arthur Palmer was a successful pastoralist who had been Premier of the colony from May 1870 to January 1874. From 1874 to 1878 he was the Leader of the Opposition. When Sir Thomas McIlwraith became Premier in 1879, Sir Arthur became Colonial Secretary and Secretary for Public Instruction but in 1881 he became President of the Legislative Council. He held that position at the time the proceedings were commenced. Also, at that time, he was Administrator of the colony, having been sworn in on 9th October 1888 after the sudden death of Governor Musgrave. Later he was to become the first Lieutenant-Governor of Queensland. It was rumoured, rightly or wrongly, that he had commenced his career as a bullock driver and his extensive vocabulary lent some force to this supposition. He was described as “a strange admixture of bluffness, tenderness and almost coarseness” and a man “inclined to bully”, although “with all his inelegance and rough mannerisms he had a very tender heart”. It has been said that he was “in many ways a rough diamond but a highly respected representative of the older order of squatters”.

Sir Thomas McIlwraith had been a grazier and had become a capitalist and investor. He had been Premier of the colony from 1879 to 1883 when his government was defeated by Sir Samuel Griffith. He then became Leader of the Opposition but in 1888 had again
become Premier. He resigned on 30th November 1888 on the grounds of ill health, but by the time the proceedings in the actions commenced by the company had come on for trial, he was again in the Ministry. He had, in 1890 joined in a coalition, thought remarkable at the time, with his former political opponent, Sir Samuel Griffith, and was then Colonial Treasurer. Sir Thomas was not a man to be taken lightly. Sir William McGregor rather unkindly described him as ‘an able bully with a face like a dugong and a temper like a buffalo’.

Alfred Deakin, who was by no means inclined to be over-charitable in his estimates of his acquaintances, gave what may have been a fairer picture. He described Sir Thomas as ‘a man of action, capable and resolute’, and ‘a man of business, stout, florid, choleric, curt and Cromwellian’, and referred to his ‘dominating personality, force of character and warmth of temperament’. He was on the conservative side of politics, supported by business interests but also by the squatters.

Mr E. R. Drury had since 1872 been the general manager of the Queensland National Bank — a bank whose fortunes he had vigorously sought to advance. In 1879 Sir Thomas McIlwraith’s government had given the Bank a monopoly of the business of the colony, which it still enjoyed in 1888. Mr Drury was President of the Australian Association of Bankers and the Consul for Belgium,
and at times acted as Commander of the Queensland Defence Force. Mr F. H. Hart was a well known businessman and a member of the Legislative Council.

The company’s case, as outlined in its original statement of claim, was that the advances to Mr Grimley were made by the four Brisbane directors on securities which were of insufficient value when the advances were made, that the directors did not exercise reasonable care in making them, and indeed that the directors had acted dishonestly in doing so.

TRIAL BEFORE LILLEY

On 5th November 1891 the actions came on for trial in the Supreme Court before Sir Charles Lilley, then Chief Justice of Queensland. Sir Charles Lilley had taken a very active part in Queensland politics and had been Premier from 1868 to 1870 when he had been defeated by Sir Arthur Palmer. He was regarded as radical in his views, and in politics consistently and vigorously strove for reform, particularly of education, and of the laws relating to elections, land holdings and labour. He was most successful in the field of education and the work that he did laid the foundations of the system of education in Queensland, although the fruits of his efforts were not fully gathered until after his retirement from politics. The Act which established the system of free and secular primary education for which he was largely responsible was not passed until after he had gone on the Bench, and the University which he wished to see established did not come into being until a good many years after his death. In other respects his attempts at reform met with little success. One view is that he was ahead of his time and that his ideas, which had become acceptable 40 years later, were too advanced for the time when he was in Parliament. His influence in politics was diminished by his impulsive nature and by his tendency, once he had made up his mind, to act precipitately and without consulting his colleagues. Further, although he was described as having “a genial, friendly, lovable nature which appealed to most men”, he was inclined to be arrogant and domineering. At the Bar he had been a brilliant advocate. He was appointed to the Bench in 1874 and became Chief Justice in 1879. His contemporaries regarded him as a good lawyer and a sound judge — even a distinguished one.

However, he could never forget politics, and as time went on he began more and more to regret his absence from the political arena. He claimed that although a judge he retained his rights as a citizen and was accordingly free to express his political opinions, notwithstanding that he was a member of the Bench. He found a precedent for this unfortunate attitude in the views and actions of an earlier judge, Lutwyche J. He increasingly supported socialist and
republican views, and appeared to cultivate the newly formed Labour party.

There were two reasons why Sir Charles Lilley should not have sat to hear these actions. The first was that he was closely acquainted with Sir Arthur Palmer and Sir Thomas McIlwraith, and had been a vigorous political opponent of both of them. As I have mentioned, Palmer became Premier by defeating Lilley's government. When in Opposition, Lilley was exceptionally active in mounting a course of systematic obstruction to the work of Palmer's government. Lilley and McIlwraith had also been opponents in the House, and after 1882 Lilley had become a bitter opponent of McIlwraith's policies. It was unkindly said that some of that bitterness was due to the fact that in that year Sir Thomas had been awarded a higher Order of Knighthood than that which Sir Charles had obtained, but whatever the reason for the antipathy which obviously existed between them, its very existence provided a reason why Sir Charles should have declined to sit. In the circumstances members of the public might have thought, however wrongly, that Sir Charles might be biased against the defendants, and where there are grounds for a suspicion of that kind a judge ought not to sit.

The second reason which should have led Sir Charles to arrange for the case to be taken by another judge was that his son Edwyn had been briefed as counsel for the company. Ever since I have been a member of the Bar, and long before, it has been accepted in Queensland that a judge should not sit to hear a case in which his son appears for one of the parties, except, perhaps, in unlikely circumstances of absolute necessity, such as where no other judge is available and no other counsel can be briefed. To put Sir Charles' actions in the proper perspective, it should be said that the ethical rule that a son should not appear before a judge who is his father may not have been firmly established at that time; indeed it appears that the first published ruling on the subject was issued by the English Bar Council in 1895 and even then it was said that there was no objection to a barrister practising in a court where his father was one of several judges and it was impossible to know beforehand which judge would try the case. Possibly Sir Charles appreciated that it would be better if someone other than his son led for the company because at some stage, rather remarkably, he tried to persuade Sir Samuel Griffith to take a brief for the company, but Sir Samuel refused, understandably, because by that time Sir Thomas McIlwraith was a senior member of his cabinet. Most of the leading members of the small Bar of those days had been briefed for the defendants — Mr Feez appeared for Grimley, and Messrs Byrnes (Solicitor-General), Power, Shand and Bannatyne appeared for the other defendants, and it may have been difficult for the company
to obtain other leading counsel. However, it should have been easy enough to arrange for another judge to hear the case. The frequent and successful appearances of Edwyn Lilley before his father had already become a public scandal. A large proportion of the cases in which Edwyn appeared were heard by Sir Charles and he enjoyed such success that solicitors went to extravagant lengths to ensure that when they had briefed Edwyn the case would be set down before his father. In those days cases were set down for hearing before a particular judge and a judicious observation of the progress of events in the Supreme Court Registry made it possible to set down a matter before the judge of one’s choice. It began to be thought that Sir Charles favoured parties whom Edwyn represented; it was said that he decided “by the light of the son”, and “The Brisbane Courier” reminded its readers of the biblical injunction, “Consider the lillies of the field, how they grow”. In 1890 a bill had been introduced in the Legislative Assembly to prevent sons from appearing before their fathers, but leading members of the legal profession (including Sir Samuel Griffith) had opposed the bill as unnecessary and it was not passed. Subsequently, in 1892, the Assembly did resolve that no judge should sit alone or in Chambers in a matter in which his son was counsel. About that time Edwyn was persuaded by Sir Samuel Griffith to agree that he would no longer appear before his father, but it was too late.
The company had given notice of trial of the actions before a judge alone, but the defendants requested a jury and the Chief Justice ordered that the actions be tried by a special jury of four, but added, in his order, that he reserved leave to himself to discharge the jury and try the action without a jury if, at the trial, he should see fit to do so. During the course of the trial the Chief Justice communicated a similar reservation privately to counsel — itself an unusual course to take.

Once the trial had begun, Edwyn Lilley led his evidence and on 11th December 1891 closed his case. The defendants opened and led their evidence and closed their case on 23rd March 1892. Edwyn Lilley then commenced to call evidence in reply, but the evidence was objected to as irrelevant. It had by this time become apparent that the case was going badly for the company and that the charge of malfeasance against the directors would probably fail, and Edwyn Lilley was now attempting to make out a new and different case for the company. After the evidence was objected to, he sought leave to amend his pleadings to enable him to present this new case. It was then the thirty-seventh day of the trial. The new case which he sought to make was not that the securities were intrinsically of insufficient value, but that they were entirely worthless because the mortgaged lands had been illegally obtained, and that Grimley had no title to them. The lands over which Grimley had given the mortgages as security had originally formed part of the Jimbour holding of Sir Joshua Peter Bell, and they had been acquired by various selectors as conditional selections under the *Crown Lands Alienation Act*.

It was claimed that the selectors had acted as dummies, either for the estate of Joshua Peter Bell, or Bell Bros., so that the lands might continue to be used in conjunction with the Jimbour holding, or for Grimley himself, as agent for the Bells. The advances made to Grimley enabled him to purchase the lands from the selectors, and the company claimed that he was making the purchase not for himself but in the interest of the Bells. The conditional selections had been perfected by Crown grants. It was claimed by the company that to obtain the lands in this way was to commit a breach of the *Crown Lands Alienation Act* and that the consequence was that the grants in fee by the Crown were invalid. The defendants objected to the amendments but they were allowed. Edwyn Lilley then proceeded to call the evidence which was directed to his new case.

Eventually the jury retired. The judge left 143 questions for them to answer. They deliberated for three days and finally, on 21st May 1892, they returned their verdict. There were a few questions on which they were unable to reach agreement but the answers which they gave were entirely in favour of the defendants.
JUDGMENT AND RETRIAL

After hearing argument the Chief Justice gave his reasons for judgment on 16th August 1892. He said that he could not accept the jury’s findings, that he could not give judgment on findings which he could not accept, and that he would substitute his own findings for those of the jury. This course, he said, would make it unnecessary to hold a new trial. He claimed that he was acting in pursuance of the reservation which he had purported to make when he ordered the trial by jury and again during the trial. On critical issues his answers were the opposite of those which had been given by the jury. For example, to the question whether the directors were guilty of gross negligence in making advances, the jury answered No, but the judge answered Yes. The questions which the jury had not answered were answered by the judge, and those answers also were in favour of the company. For instance, the jury could not agree on whether the selectors had been dummies; the judge found that they were. He found that the company had made out the new case raised by the amended pleadings, and gave judgment for the company.

Not surprisingly, the defendants appealed. It was, however, found impossible to constitute a Full Court comprised of Queensland judges. There were then four puisne judges in the State — Harding, Real, Pope Cooper and Chubb JJ. Harding and Real JJ., who were stationed in Brisbane, indicated that it was impossible for them to sit, no doubt because of their association with the Chief Justice. It was therefore necessary to obtain the services of a third judge to sit with Pope Cooper and Chubb JJ. The Premier, Sir Samuel Griffith, acted very promptly. He procured the consent of Sir William Windeyer, a judge of the Supreme Court of New South Wales, to act as a judge of the Supreme Court of Queensland for the purpose of hearing the appeal and obtained the agreement of the Government and Chief Justice of New South Wales to that course. Sir William Windeyer was qualified to be appointed to the Supreme Court of Queensland, and had practised on circuit in Brisbane before separation. However, it was doubtful whether the law permitted the appointment of an acting judge in the exceptional circumstances, and Sir Samuel introduced into the Parliament, and secured the passage of, a bill to enable an acting judge to be appointed. The bill was introduced into the Legislative Council by the Solicitor-General, T. J. Byrnes, who was, as I have said, one of the counsel in the case. He described the appointment of a judge from New South Wales to sit in the Queensland court as “one of the first steps towards practical federation”. When Sir Samuel wrote to tell Sir William that the bill had passed through the Assembly, he added, “I think it is better that you should not stay at the Club”. He meant the Queensland Club, of which the defendants, or at least some of them, were members. On 14th September 1892, less than a month after
Sir Charles Lilley had given his judgment, Sir William Windeyer was appointed an acting judge and on the next day the Full Court commenced the hearing of the appeal.

On 12th October 1892 the Full Court gave judgment unanimously allowing the appeal. They held that the Chief Justice had no power to reserve the decision of facts for himself when he had ordered the trial by jury and no power to set aside the jury’s findings. They concurred with the findings of the jury that the defendants had not been negligent. In relation to the questions as to which the jury had failed to agree, they said that on the evidence the jury would have found for the defendants had they been told that it was their duty to do so in considering those issues, since the onus of proving them lay on the company. They further held that the amendments should not have been allowed, because they were not bona fide and did not refer to a matter which the parties originally came into court to determine. They rejected the company’s legal arguments based upon the alleged breach of the *Crown Lands Alienation Act*. Once the Crown grants had been made to the selectors it was to be assumed that if there had been any irregularity in obtaining them (in other words, if there had been any dummying) the Crown had waived the irregularity. Grimley had title to the lands and there was nothing in the law that invalidated the mortgages.

When this judgment was given the Brisbane press strongly attacked Sir Charles Lilley for his conduct of the case. Sir Thomas McIlwraith contended that the Chief Justice had acted with improper partiality and began to mobilize his forces in Parliament to effect the removal of the Chief Justice from the Bench, by a resolution of both Houses of the Parliament. It is most unlikely that Sir Charles did act with any conscious bias. However, his old antagonism towards Palmer and McIlwraith may have made him more disposed to believe the worst of them, and his readiness to accept his son’s arguments caused him to be led astray. He had put himself in a position in which no judge should allow himself to be placed. If the view that he did not act with conscious bias is correct, his imprudence was hardly grave enough to constitute misconduct warranting removal, but Sir Thomas McIlwraith sought revenge for what he regarded as a deliberate wrong, and Sir Thomas was a formidable man. Sir Charles bowed to the storm and on 24th October 1892 — less than a fortnight after the Full Court’s judgment — announced his intention to retire. He retired in February of the following year. Rather unwisely, he decided to re-enter politics, and in an election held in April 1893, he stood for Parliament against Sir Thomas McIlwraith, in association with Mr Thomas Glassey, who had in 1888 won a seat in the Queensland Parliament, the first endorsed Labour candidate to do so. However on this occasion both Lilley and Glassey were unsuccessful. Although
no one doubts that a judge while on the Bench should avoid any entanglement with politics, there is not such a clear tradition that a judge, after retirement, may not enter political life; Dr Evatt later did so after his retirement from the High Court. The danger of such a course is that it may be said that the judge had never freed himself from politics, and this was said of Sir Charles Lilley.

The obvious successor to Sir Charles Lilley as Chief Justice was Sir Samuel Griffith and Sir Samuel was appointed to that position on 13th March 1893. It is no doubt idle to speculate about what might possibly have eventuated if history had taken a different course and the position of Chief Justice had not then been vacant. When Sir Charles retired he was 65 and there was then no retiring age for judges in Queensland. He might have continued in office until his death in 1897. Had Sir Samuel not been appointed Chief Justice of Queensland in 1893 one can never know whether, when the time came to appoint a Chief Justice of the High Court of Australia in 1903, he would have been chosen. The conspicuous distinction with which he had filled the office of Chief Justice of Queensland had revealed his eminent suitability for the post of Chief Justice of Australia. When the High Court was established, it was his force of intellect and character and his legal ability which did much to enable the High Court to become quickly and firmly accepted and respected throughout Australia, notwithstanding that it was met initially with some suspicion and resentment. The fact that the early retirement of Sir Charles Lilley may have played some part in making it possible for Sir Samuel Griffith to become Chief Justice of the High Court is some consolation for the sorry turn of events. In this respect the rather sad story may be thought to have had a happy ending.

REFERENCES
1. The proceedings are reported at 4 Q.L.J. 224 and 4 Q.L.J. Supp. 1.
7. Since writing this, I have learned that there were other reasons. Real had apparently been briefed in the case while at the bar.

OTHER SOURCES