SIR CHARLES LILLEY AND THE GRIMLEY AFFAIR

JUDICIAL BIAS IN COLONIAL QUEENSLAND?

INTRODUCTION

On Wednesday 2 July 1890, the Member for Toombul (and supporter of pastoralist and politician Sir Thomas McIlwraith), Michael Gannon, introduced the Justices Prevention Bill into Queensland's Legislative Assembly. Modelling a New York law, the Bill intended to prevent a barrister, solicitor, or legal practitioner from appearing before a judge or a justice of the peace to whom he was related 'by blood of father, son, or brother'.[1] The Bill lapsed but not before 'extensive and heated debate' revealed its personal nature.[2] Its target was the 'three Smiths',[3] 'Smith and Sons',[4] 'the Trinity',[5] or 'the Father, Son, and Holy Ghost',[6] referring to Sir Charles Lilley (1827–97), the second Chief Justice of Queensland (1879–93), and two of his sons, barrister Edwyn Mitford (1859–1911) and solicitor Charles Bertram (1860–1918).[7] Edwyn's continued successes before his father had encouraged gossip.[8] During parliamentary debate on the Bill, statistics were presented showing the frequency with which Edwyn appeared before the Chief Justice compared to other judges and barristers over the previous year.[9] Rife was the idea that litigants would have a 'better chance of success' before the Chief Justice if only they engaged the Lilley brothers.

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1 'Local and General News', *Warwick Examiner and Times* (2 July 1890) 2 <http://nla.gov.au/nla.news-article82208690>.
2 B H McPherson, *Supreme Court of Queensland* (Butterworths, 1989) 193; Queensland, *Parliamentary Debates*, Legislative Assembly, 18 September 1890, 566 (Albert Callan).
3 Queensland, *Parliamentary Debates*, Legislative Assembly, 3 July 1890, 126 (Michael Gannon).
4 Queensland, *Parliamentary Debates*, Legislative Assembly, 2 October 1890, 747 (David Dalrymple).
5 Queensland, *Parliamentary Debates*, Legislative Assembly, 18 September 1890, 569 (James Morgan).
6 Ibid.
7 Queensland, *Parliamentary Debates*, Legislative Assembly, 2 July 1890, 89 (Arthur Morgan); Queensland, *Parliamentary Debates*, Legislative Assembly, 3 July 1890, 124, 126 (Michael Gannon). The statistics were presented in a tabled paper entitled 'Proceedings before the Supreme Court in Brisbane – Return to Address'.
8 McPherson (n 2) 180.
9 Queensland, *Parliamentary Debates*, Legislative Assembly, 2 October 1890, 746 (George Agnew). See also McPherson (n 2) 194.

The concerns resurfaced in 1891/2 during the 57-day civil trial of *Queensland Investment and Land Mortgage Co Ltd v Grimley* in the Supreme Court.[10] The case attracted significant press comment in Queensland and elsewhere: four of the five defendants were 'individuals of high standing'[11] dominating political life in colonial Queensland. These four leading defendants were McIlwraith, former Premier; Sir Arthur Palmer, President of the Legislative Council, former Premier and McIlwraith's brother-in-law; Frederic Hart, a member of the Legislative Council; and Edward Drury, manager of the government-backed Queensland National Bank. The trial judge, Sir Charles Lilley, was politically opposed to McIlwraith and Palmer.[12]

In this paper, I will be examining how the behaviour of Lilley CJ during the trial, and his personal and political relationships with the parties and counsel, raised questions of judicial bias. His behaviour was — as the late Bruce McPherson put it — 'scarcely calculated to inspire confidence'.[13] The unusual circumstances of the case, described by Sir Harry Gibbs as a nineteenth century *cause célèbre*,[14] prompted much-needed reforms to the structure of Queensland's Supreme Court. I next give an account of the colonial legal profession and the Supreme Court's composition — followed by a broad-brush of colonial land policy, the litigation in *Grimley's Case*, and its broader implications.

THE COLONIAL LEGAL PROFESSION

Late-19th century almanacs reveal the close-knit nature of the legal and political establishment in colonial Queensland. In 1891, Queensland boasted a population of 393,718 souls.[15] The colonial legal profession was unsurprisingly small, making it more probable than not for a barrister to appear before a relative on the Bench.[16] Five judges occupied the Supreme Court Bench, increased from four by the *Supreme Court Act 1889*.[17] Two judges were 'Northern Judges' sitting in the northern Supreme Court in Townsville.[18] They were Cooper and Chubb JJ. The remaining Judges — Lilley CJ, Harding J and Real J — sat in Brisbane. Before his appointment to the Supreme

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[10] *Queensland Investment and Land Mortgage Co Ltd v Grimley* (1892) 4 QLJ 224.
[11] *Pugh's Almanac and Queensland Directory for 1893* (Gordon & Gotch, 1893) 75.
[12] J M Bennett, *Sir Charles Lilley: Premier and Chief Justice of Queensland* (Federation Press, 2014) 257.
[13] McPherson (n 2) 180.
[14] See Sir Harry Gibbs, 'A Nineteenth Century Cause Celebre: *Queensland Investment Company Ltd v Grimley*' (1987) 13(3) *The Royal Historical Society of Queensland Journal* 74.
[15] *Pugh's Almanac and Queensland Directory for 1892* (Gordon & Gotch, 1892) 56 ('*Pugh's Almanac for 1892*').
[16] See generally McPherson (n 2) 233; W R Johnston, *A Study of the Relationship between the Law, The State and the Community in Colonial Queensland* (MA Thesis, University of Queensland, 1966).
[17] *Supreme Court Act 1889* (Qld) s 7.
[18] Before the 1889 Act, the northern Supreme Court was in Bowen.

Court in 1874, Sir Charles served in Queensland Parliament for 14 years including periods as Attorney-General (1865–9) and Premier (1868–70).

Barristers were better represented compared to judges. *Pugh's Almanac and Queensland Directory* (1892) records 81 barristers on the roll, many of whom were absent from Queensland.[19] Yet, as the Almanac's Trade and Professional Directory shows, far fewer barristers practised at the private Bar — 35 in Brisbane and five in Townsville.[20] Eleven barristers, 10 of whom practised in Brisbane, were briefed by the parties in *Grimley's Case*. One was Edwyn Lilley; another, Patrick Real, was elevated to the Supreme Court bench.

The Full Court heard appeals from the decisions of Supreme Court judges. Under the *Supreme Court Act 1874*, the Full Court would ideally comprise three judges but, where one could not attend, two judges would be allowed.[21] However, as McPherson notes, it was common practice, especially after 1885, for the Full Court to comprise only two judges.[22] Northern Judges were precluded from sitting in the southern division of the Supreme Court and on the Full Court (*Mr Justice Sheppard's Claim*). The judge who gave the decision appealed from could sit on the Full Court.[23]

QUEENSLAND INVESTMENT AND LAND MORTGAGE COMPANY LTD V GRIMLEY (1892)

The Queensland Investment and Land Mortgage Company Ltd was incorporated in London in 1878 to raise money on the security of lands in Queensland. Between 1882 and 1888, McIlwraith, Palmer, Hart and Drury acted as local directors because they knew the value of colonial land.[24] The company was established at a time when Queensland's outlook seemed 'glittering and safe'[25] but, by 1888, the colony's prosperity was no longer assured. Drought conditions prevailed in the 1880s, resulting in a depressed economy and shrinking company dividends.

At the company's annual general meeting in London in July 1888, shareholders criticised the manner business was transacted out of the Brisbane office.[26] The general sentiment was that the

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[19] *Pugh's Almanac for 1892* (n 15) 179.
[20] Ibid 19, 180.
[21] McPherson (n 2) 201.
[22] Ibid.
[23] Ibid. 182.
[24] McIlwraith and Palmer were brothers-in-law.
[25] D B Waterson, 'Pastoral Capitalism and the Politician Thomas McIlwraith and the Two Land Companies, 1877-1900' (1986) 12(6) *The Royal Historical Society of Queensland Journal* 401, 402.
[26] 'Queensland Investment and Land Mortgage Company', *Colonies and India* (London, 18 July 1888) 24; 'Queensland Investment and Land Mortgage Company', *British Australasian* (London, 18 July 1888) 13;

local directors had 'too much control'.[27] The chairman, Mr Marten, reassured the shareholders that the board was not to 'lend more than 50 per cent on their own independent valuations of any property.'[28] On receipt of these reports in early September, the four Brisbane directors cabled London tendering their resignations.[29] The company, now starting to question 'the value of its securities', despatched its general manager to investigate the true state of the company's colonial affairs.[30] Following investigations, the company issued seven writs against various defendants on 26 November 1888, claiming a total of £250,000.[31] The first writ was against Samuel Grimley and the local directors. Grimley obtained advances from the local directors on the security of now-repossessed lands on the Darling Downs. The plaintiff company claimed around £63,000 for advances made to Grimley with interest.

The remaining four defendants were sued for negligence and malfeasance for advancing money on insufficient security. Leading counsel of the day were briefed: Sir Samuel Griffith, Edwyn Lilley, Alfred Pain, and John Woolcock for the plaintiff; Arthur Feez and Arthur Rutledge for Grimley; and Solicitor-General Thomas Byrnes, Virgil Power, William Shand and James Bannatyne for the remaining defendants. In his biography on Sir Charles Lilley, J M Bennett speculates that Lilley may have 'tried to persuade Griffith to take Edwyn Lilley's place, to spare Edwyn from the unpleasantness that seemed certain to occur, and which did occur, in the course of the trial.'[32] At any rate, Griffith withdrew to form the so-called 'Griffilwraith' coalition with political foe, McIlwraith. Pain, tubercular, relinquished his brief.[33]

A DETOUR: FROM RUNS TO CLOSER SETTLEMENT

The lands selected by Grimley comprised 3,144 acres of land in the Bunya Mountains and 15,827 acres of Crown land formerly part of Jimbour Station owned by the Bell family. Samuel Grimley was intimately connected to the Bell family: once Jimbour storekeeper, formerly secretary of the

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'Commercial', *Morning Bulletin* (Rockhampton, 29 August 1888) 4; 'Impending Lawsuits', *The Brisbane Courier* (27 November 1888) 5; 'Financial Troubles in Brisbane', *Maryborough Chronicle, Wide Bay and Burnett Advertiser* (30 November 1888) 2; 'Big Law Cases', *The Telegraph* (Brisbane, 31 October 1891) 4.

[27] 'Queensland Investment and Land Mortgage Company', *Colonies and India* (London, 18 July 1888) 24; 'Queensland Investment and Land Mortgage Company', *British Australasian* (London, 18 July 1888) 13.

[28] 'Queensland Investment and Land Mortgage Company', *Colonies and India* (London, 18 July 1888) 24; 'Queensland Investment and Land Mortgage Company', *British Australasian* (London, 18 July 1888) 13.

[29] 'Commercial', *Morning Bulletin* (Rockhampton, 29 August 1888) 4; 'Impending Lawsuits', *The Brisbane Courier* (27 November 1888) 5; *Maryborough Chronicle, Wide Bay and Burnett Advertiser* (30 November 1888) 2; 'Big Law Cases' (n 26) 4.

[30] Gibbs (n 14) 75. See 'Impending Lawsuits', *The Brisbane Courier* (27 November 1888) 5.

[31] 'Big Law Cases' (n 26) 4.

[32] Bennett (n 12) 258.

[33] Pain died of tuberculosis on 29 February 1892. See 'Today, March 1', *Brisbane Courier* (1 March 1892) 4.

Darling Downs and Western Land Company, and accountant for Bell and Sons. Before his death in 1881, Sir Joshua Peter Bell established the Darling Downs and Western Land Company to separate ownership of the stately Jimbour House from the Station and to merge the pastoral holdings of the Bell family, long-time Darling Downs squatters, with those of Sir Thomas McIlwraith and his business partner, Smyth.

Squatters were among those who agitated for Queensland's separation from New South Wales achieved in 1859.[34] The colony's new constitution defended existing pastoralist interests, yet the squattocracy's dominance would gradually subside following liberal land reforms. In short, these reforms halved pastoral leaseholds to enable closer settlement.[35] Squatters used various stratagems, such as dummying, to regain control of land resumed by the Crown for selectors. Dummying referred the common practice of selecting land, fulfilling the Crown's conditions of purchase, and then transferring the land back to the squatter for nominal consideration.[36] Allegations of dummying were advanced at a late stage in the Grimley trial.

THE TRIAL

After three years of adjectival proceedings, the defendants sought a civil trial before a judge and a special jury of twelve in September 1891. The plaintiff company sought trial by judge alone. A trial with a four-man jury was ordered. In making this order in chambers, Sir Charles reserved 'leave to [himself] to discharge such jury, and to try the said actions, or either of them, without a jury, if at such trial [he] should see fit so to do'.[37] While the plaintiff could select the judge before whom their case would be tried, that did not in any event matter: Lilley was the only judge who could try the action and hear any appeal. His two brother judges in Brisbane stood down. Harding J's second wife was the sister-in-law of one of the defendants, Drury, and a shareholder in QILM.[38] Real J, meanwhile, had been briefed by the plaintiff and advised on the case before his elevation to the bench.[39] The two Northern Judges were ineligible from sitting in the southern division.

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[34] Jan Walker, *Jondaryan Station: The Relationship between Pastoral Capital and Pastoral Labour, 1840–1890* (University of Queensland Press, 1988) 11 n 22.
[35] *Crown Lands Alienation Act 1868* (Qld). G P Taylor, 'Political Attitudes and Land Policy in Queensland, 1868–1894' (1968) 37(3) *Pacific Historical Review* 247, 251; Walker (n 34) 114.
[36] *Encyclopaedic Australian Legal Dictionary* (online at 9 November 2021) 'dummying'.
[37] *Queensland Investment and Land Mortgage Co Ltd v Grimley* (1892) 4 QLJ 224, 225.
[38] See generally B H McPherson, *Supreme Court of Queensland* (Butterworths, 1989); 'The Queensland Cause Celebre', *Colonies and India* (London, 15 October 1892) 22.
[39] 'Big Law Cases', *The Telegraph* (Brisbane, 31 October 1891) 4; B H McPherson, *Supreme Court of Queensland* (Butterworths, 1989) 180. Barbara Jane Grahame, the sister of Isabella Smellie Harding (née Grahame), was married to Edward Robert Drury at St John's Church, Brisbane on 19 August 1869.

The local press offered a blow-by-blow account of the trial, which commenced on 5 November 1891. At the trial's opening, Grimley offered to submit to judgment for the principal sum with seven per cent interest. The plaintiff company refused, claiming nine per cent. On the trial's fifth day, the Chief Justice advised counsel for the plaintiff company and the defendants, excluding Grimley, that 'he intended to act on his reservation and try the case himself.'[40] The Solicitor-General objected and so the trial resumed. On the thirty-seventh day of trial, Edwyn was granted leave to amend the statement of claim to present 'an entirely new case'.[41] As McPherson points out, this was 'in defiance of accepted legal practice'.[42] The new case asserted that securities were not only insufficient but worthless. Specifically, Grimley was not the *bona fide* conditional purchaser of land under Queensland's *Crown Lands Alienation Act 1876* but a dummy purchaser for the estate of Sir Joshua Peter Bell or the firm of Bell and Sons.[43] A chamber application to strike out the amendments 'as embarrassing, irrelevant, and tending to prejudice and delay the fair trial of the action' was dismissed with costs against the defendants — except Grimley.[44] The defendants demurred to the amended statement of claim; the Chief Justice ordered that it stand over until motion for judgment.

A lengthy adjournment allowed the defendants to amend their pleadings, the trial resuming on 9 May. On 19 May, the Chief Justice summed up and submitted a staggering 143 questions to the jury. The jury returned two days later with their verdict. While not answering every question — nor agreeing on some — what answers they provided favoured the four leading defendants in three respects. First, the local directors had exercised proper care in their dealings. Secondly, the advances were given on good and sufficient security. Thirdly, all material information about the transactions had been supplied to the London Board and the London directors had acquiesced to the local defendants' actions. They also found that Grimley had agreed to pay seven — *not* nine

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[40] *Queensland Mortgage and Investment Company v Grimley* (1892) 4 QLJ (Supp) 1, 2.
[41] *Queensland Mortgage and Investment Company v Grimley* (1892) 4 QLJ (Supp) 1, 3; 'Judicial Affairs—Important Mortgage Cases—Queensland Investment and Land Mortgage Company against Grimley and Others', *The Queenslander* (Brisbane, 26 March 1892) 620; 'Judicial Affairs—Important Mortgage Cases—Queensland Investment and Land Mortgage Company against Grimley and Others', *The Queenslander* (Brisbane, 2 April 1892), 668.
[42] B H McPherson, *Supreme Court of Queensland* (Butterworths, 1989) 180.
[43] *Queensland Mortgage and Investment Company v Grimley* (1892) 4 QLJ (Supp) 1, 3.
[44] *Queensland Investment and Land Mortgage Co Ltd v Grimley* (1892) 4 QLJ 224, 234; 'In Chambers—The Queensland Investment and Land Mortgage Company's Cases—The Action against S Grimley and Others', *Brisbane Courier* (5 April 1892) 7.

— per cent interest. All questions concerning dummying were marked 'not agreed to'.[45] The Chief Justice discharged the jury because, he subsequently asserted, they could not agree.[46]

The Chief Justice adjourned the hearing of the cause and motion for judgment, reserving to himself the right to try the case. At a further hearing in July, motions for judgment were presented. The Chief Justice heard the defendants' arguments on the demurrers and reiterated his entitlement to try the case. On 16 August, the courtroom overflowed 'with the principal business men of the city and many legislators, barristers, solicitors, and clergymen' ready to hear judgment.[47]

Lilley started his judgment by overruling the defendants' demurrers. He thought the amended statement of claim raised good legal issues under the *Crown Lands Alienation Act 1876*. Judgment was awarded to the plaintiff company 'on the greater part, almost the whole, of the case'.[48] Grimley was liable for the principal sum with interest at seven per cent while the remaining defendants were also liable. Lilley outlined his entitlement to go behind the jury's findings 'where the jury have failed to find the vital issues, on which… the final judgment in the action depends, and more especially were [sic] there is no reasonable expectation of better results from a trial before another jury.'[49] He concluded that:

> *the lands were illegally obtained, that the defendants knew they were so gotten, that they committed breaches of duty in taking them as securities and in advancing the plaintiff company's money on them, that the defendants were reckless and careless, and did not act solely with a view of the interests of the plaintiff company.*[50]

The defendants appealed. Only the local directors' two grounds of appeal are relevant for present purposes. The first ground was that the Chief Justice should not have allowed the late amendments. The second ground was that, in making the jury order, the Chief Justice could not 'reserve to himself leave to discharge the jury and to try the action himself without a jury, if at such trial he thought fit to do so.'[51] Fortunately, Sir Samuel Griffith had the foresight to introduce legislation in the event of an appeal. Coming into force in April 1892, the *Supreme Court Act 1892* obviated the twin problems of the Chief Justice sitting on the appeal from his own decision —

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[45] 'Great Mortgage Cases', *The Telegraph* (Brisbane, 22 July 1892) 2.
[46] *Queensland Mortgage and Investment Company v Grimley* (1892) 4 QLJ (Supp) 1, 9.
[47] 'Judicial Affairs—Supreme Court—The Queensland Land Mortgage Company's Cases—Tuesday, August 16', *The Queenslander* (Brisbane, 20 August 1892) 350.
[48] *Queensland Mortgage and Investment Company v Grimley* (1892) 4 QLJ (Supp) 1, 8.
[49] Ibid 9.
[50] Ibid 14.
[51] Ibid 8.

still a possibility — and constituting an appeal court of three judges. Lilley, affronted by these amendments, indicated his intention to resign in April 1893.

IMPLICATIONS: LAW REFORM AND THE APPEAL

The 1892 statute resolved these problems. First, a judge was now precluded from sitting upon an appeal from his own judgment.[52] Secondly, three judges were to sit on Full Court appeals.[53] Thirdly, Northern Judges were competent to 'exercise, in any part of Queensland, all the jurisdiction, powers, and authorities of a judge of the court, including authority to sit as a member of the full court'.[54] Thirdly, contested chamber applications — originally conducted behind closed doors — were to be adjourned into open court.[55] Fourthly, the Executive Council could appoint a District Court Judge 'or any person qualified to be a Judge of the [Supreme] Court' to act as judge.[56] With this provision, Griffith intended to borrow a judge from New South Wales. In August, Sir William Charles Windeyer of the Supreme Court of New South Wales accepted Griffith's invitation to sit on the specially constituted Full Court. Another statute, *Supreme Court Act 1892 (No 2)*,[57] comprising two sections, was passed, confirming that '[a]ny Judge of the Supreme Court of any of the Australian Colonies may be appointed to act as a Judge of the Supreme Court of Queensland… and any such Judge shall… be deemed to be a person qualified to be a Judge of the Court'. The statute received assent on 13 September. Edwyn — perhaps unwisely — retained his brief.

On 15 September, the appeal was heard before Windeyer, Cooper, and Chubb JJ. On 12 October, Windeyer took two hours to deliver the Full Court's judgment. The judgment set aside Lilley's judgment, restored the jury's findings, and found for the defendants other than Grimley. The Full Court criticised Lilley for 'setting aside the findings of the jury, trying the case himself, and giving judgment upon a set of findings of which counsel was entirely ignorant.'[58] They thought that '[n]either considerations of time nor of expense' could justify Lilley doing as he did.[59] In fact, they could not imagine a better case 'for determination by a jury of business men' for it 'involved no such subtlety of reasoning or complexity of facts as made it more desirable that it should be

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[52] *Supreme Court Act 1892* (Qld) s 4.
[53] Ibid ss 5–7.
[54] Ibid s 8.
[55] Ibid s 15.
[56] Ibid s 12.
[57] 56 Vic No 10.
[58] *Queensland Investment and Land Mortgage Company Ltd v Grimley* (1892) 4 QLJ (Supp) 1, 4–5.
[59] Ibid 5.

considered by a lawyer with a legally trained mind rather than by laymen of intelligence.'[60] Who better to judge 'the value of securities fluctuating from time to time under the influence of droughts and periods of commercial depression' than a jury constituted by businessmen?[61] The jury had in fact 'answered the questions with singular correctness, and displayed an amount of discrimination and acumen rarely exhibited by the best of juries, but which was to be expected from a jury of businessmen'.[62]

POSTSCRIPT: WHAT BECAME OF LILLEY CJ?

On 24 October, Lilley sent a formal letter of resignation to Griffith, the Chief Secretary, with effect from 13 February 1893. He requested an immediate leave of absence on account of ill-health – going on an extended holiday with his wife to New Zealand. On one level, Lilley's resignation was an inevitability following the Full Court's reversal of his judgment and press criticism.[63] On the other, he had not enjoyed the best of health for some time and always intended to retire in April 1893.[64] The story that McIlwraith forced Lilley to resign by threatening to expose youthful indiscretions is unlikely.[65] In retirement, Lilley attempted to re-enter Parliament. He died in 1897.

[60] Ibid.
[61] Ibid.
[62] Ibid.
[63] McPherson (n 2) 190.
[64] Ibid; Bennett (n 12) 263.
[65] Bennett (n 12) 264, 265–8.