# BOOK REVIEWS

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## *DEBT, SEDUCTION AND OTHER DISASTERS: THE BIRTH OF CIVIL LAW IN CONVICT NEW SOUTH WALES*

**Bruce Kercher**

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BRUCE Kercher's *Debt Seduction and Other Disasters*[1] is a thoughtful and scholarly work which steers a clear path between two evils that have manifested themselves in the writing of Australian legal history. The first evil might be labelled as "strict legalism", though "boring legalism" is, on occasion, a more appropriate label. Histories tainted by this vice are histories of legal doctrine and public institutions which have failed to move beyond the discourse of the

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1 Kercher, *Debt, Seduction and Other Disasters: The Birth of Civil Law in Convict New South Wales* (Federation Press, Sydney 1996).

law. In Marxist terms, these might be described as histories of the legal superstructure of political society which ignore not only its material base but the political context within which public institutions function. The genre was declared dead a long time ago,[2] but unfortunately it persists.

The second evil is that which is produced when lawyers dabble in social theory. The social sciences have their own methods, canonical learning and conventions which legal academics disrespect when they explore the historical horizon of their own discipline while "catching-up" on a bit of social theory. That which emerges from this process is the worst of all possible worlds: an historical narrative which has little regard for the archive and which is driven by grand theories long since superseded in the disciplines from which the theories were imported. This product satisfies neither the more traditionally minded legal historian nor the social theorist.

*Debt, Seduction and Other Disasters* steers a sensible middle course. It appears on the heels of the author's more thematically oriented overview of Australian legal history.[3] It is not a theoretical work, nor is it a summary of the archive. Rather, it is an attempt to tell the story of early colonial society from the perspective of a system which manages conflict - the system of civil litigation - while reflecting on the essential components of the system.

The work has as its subject the Court of Civil Jurisdiction, Australia's first civil court, established by the First Charter of Justice (1787)[4] and abolished by the Second Charter of Justice (1814),[5] the instrument which established the Supreme Court of New South Wales. Although some picture of this institution has been gained through larger surveys of Australian legal history,[6] or shorter biographically-oriented studies of the

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2 For example Momigliano, *Studies in Historiography* (Harper and Row, New York 1966) pp239-256.

3 Kercher, *An Unruly Child: A History of Law in Australia* (Allen and Unwin, Sydney 1995).

4 *Letters Patent: Warrant for the Charter of Justice*, 2 April 1787.

5 *Letter Patent to Establish Courts of Civil Judicatures in New South Wales*, 4 February 1814.

6 For example Castles, *An Australian Legal History* (Law Book Company, Sydney 1982) Ch6, especially pp90-112; Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge University Press, Melbourne 1991) Ch4; Windeyer, "A Birthright and Inheritance: The Establishment of the Rule of Law in Australia" 1 *Tas ULR* 635 at 641-650, 658-667; Else-Mitchell, "The Foundation of New South Wales and the Inheritance of the Common Law" (1963) 49 *Journal of the Royal Australian Historical Society* 1 at 5-11.

early participants,[7] this is the first full length study of the Court's life and times. John Nagle's recent *Collins, the Courts and the Colony*[8] restricts itself to the period of the first Judge-Advocate's incumbency (1788 to 1796) and is conducted as something of a judicial biography through a chronologically ordered account of cases decided by Collins.

The main sources for the research are the records of the Court of Civil Jurisdiction, which are now located in the New South Wales Archives Office. Some five hundred decisions of the Court appear in the book's Table of Cases. For the most, these are judgments which have not been reported, but which have been recorded in the minutes of the Court's proceedings. According to Kercher,

> there are about a million handwritten words of this court's proceedings, but they are minutes rather than recorded judgments. ... In most cases they merely record the evidence followed by a bald statement of the court's decision.[9]

The minutes are the most important primary record for the estimated 6017 cases heard and decided by the Court between 1788 and 1814, a figure which excludes the actions commenced in the Court but settled or discontinued.[10]

To establish a picture of the Court's jurisprudence from judicial minutes presents formidable logistical and hermeneutical difficulties. Kercher has confronted this labour with the skills of an accomplished archivist reasoning through the inductive historical method,[11] a method with a

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7 For example Currey, *The Brothers Bent: Judge-Advocate Ellis Bent and Judge Jeffrey Hart Bent* (Sydney University Press, Sydney 1968); Bennett, "The Status and Authority of the Deputy Judge-Advocates of New South Wales" (1956-58) 2 *Syd LR* 501; Bennett, "Richard Atkins - An Amateur Judge Jeffreys" (1966) 52 *Journal of the Royal Australian Historical Society* 261; Benjamin, "Ellis Bent - Australia's First Lawyer" (1952) 38 *Journal of the Royal Australian Historical Society* 57. See also Evatt, *Rum Rebellion: A Study of the Overthrow of Governor Bligh by John Macarthur and the New South Wales Corps* (Angus and Robertson, Sydney 1938).

8 Nagle, *Collins, The Courts and The Colony: Law and Society in Colonial New South Wales 1788-1796* (University of NSW Press, Sydney 1996).

9 Kercher, *Debt, Seduction and Other Disasters* pvi.

10 At pp92-93.

11 See generally: Collingwood, *The Idea of History* (Oxford University Press, Oxford 1948) pp249-282; Elton, *The Practice of History* (Sydney University

venerable history in the English legal tradition.[12] The jurisprudence and practice of the Court has largely been inferred from the arguments of counsel and the outcomes of the recorded cases. This narrative is further supported by a consideration of an extensive range of contemporary primary sources such as the records of the Court of Appeal, the minutes of magistrates' courts proceedings, press reports from the *Sydney Gazette,* the correspondence of contemporary private and public figures[13] and the sporadic historiographical writing on the period. The documentation of sources is impressive but not obstructive to the reader. The author and Federation Press have employed a page layout which aggregates numerous citations into a few footnotes on every page - an excellent editorial balance between scholarly integrity and reader comfort.

In this history, the Judges-Advocate of the Civil Court occupy centre-stage, as both historical subject matter and historical source. This opens up interesting possibilities for readers and practitioners of historical writing with a taste for the postmodern analysis of historical authorship and textuality. For what is at stake is the representation of a society through accounts of conflict, narrated by texts as diverse as the judicial scribblings left by "a sensitive, if drunken, romantic" gentleman (writings described by other commentators as "the mere ravings, almost of a lunatic"[14]) to the extensive and meticulous archive of Judge-Advocate Ellis Bent. To what extent do these judicial texts structure the discourse in which the early legal system is represented? What would the history of the Court of Civil Jurisdiction be like if it had been told by debtors? The Governors-General? Wealthy settlers? Or the silent majority of Aboriginal people living just beyond the reach of the legal system? To what extent are the contours and the exercise of judicial power tempered by the text? [15]

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Press, Sydney 1967) Ch2; McCullogh, *Justifying Historical Descriptions* (Cambridge University Press, Cambridge 1984) Ch1-5.

12 For example Maitland's reconstruction of the law regarding seisin from the Year Books: Maitland, "The Seisin of Chattels", "The Mystery of Seisin" and "The Beatitude of Seisin" reprinted in Fisher (ed), *The Collected Papers of FW Maitland* (Williams, Hearn, Buffalo 1981) Vol 1 pp329-57, 358-84, 407-57.

13 Kercher, *Debt, Seduction and Other Disasters* pvi.

14 Bennett, "Richard Atkins - An Amateur Judge Jeffreys" (1966) 52 *Journal of the Royal Australian Historical Society* 261 at 263-264, cited by Kercher, *Debt, Seduction and Other Disasters* p35.

15 For an example of the exploration of a contemporaneous subject matter which exploits these possibilities, see one of the icons of the vibrant Australian cultural studies school: Dening, *Mr Bligh's Bad Language: Passion, Power, and Theatre on the Bounty* (Cambridge University Press, Cambridge 1992).

Although a postmodernist analysis is not to be found in this work, devotees of this school may well find inspiration for future work within its pages. Kercher's approach is more conventional, but no less sensitive to the influence of the individual Judges-Advocate upon the jurisprudence and standing of the court. The strength of this work lies in its mastery of the archive and its ability to use the stories behind the litigation participants to provide glimpses of the conditions of colonial life.

The first two chapters establish an account of the socio-political locus and the personalities of the Judges-Advocate: David Collins (the marine officer), Richard Atkins (the aforementioned romantic drunk), Richard Dore (the "practical" Judge Advocate) and Ellis Bent (the young "barrister of eminence"). The reader is armed with an account of the political force field within which the judiciary operated, and a description of individual judicial and administrative "styles" which is then fleshed out in later chapters through the examination of discrete bodies of substantive law and particular decision-making contexts. These might briefly be described as: legal status and capacity of persons (Chapter 3); the use of litigation as a dispute resolution mechanism (Chapter 4); tort law - aptly titled "Pigs, Storms and Fires" (Chapter 5); land law and the legal problems surrounding the early currency and exchange system (Chapter 6); contract law (Chapter 7); and creditor and bankruptcy law (Chapter 8). The final chapter comprises a brief discussion of the evolution and adaptation of the jurisprudence of civil law in the early colonial legal system. A great deal of effort has gone into stripping the case law of unnecessary legal technicality. This makes for a readable volume. Nevertheless, one suspects that there are limits to the average reader's interest in the various facets of civil litigation history, limits best attributed to the nature of the subject matter than the author's skill.

In the early chapters, much attention is paid, and rightly so, to the ambiguous position of judges in a political system which did not observe a separation of powers or the principle of responsible government. The early governors possessed extensive executive powers which often manifested themselves in ordinances with the character of de facto legislation.[16] The Judges-Advocate of the Civil Court were appointed by the governor and had no security of tenure. Appeals from the Court could be heard by the governor alone. The obvious structural tension between Court and governor was heightened by the use of civil litigation as a means for the review of executive action. Very quickly the Court became

16 See Castles, *An Australian Legal History* Ch3; Finn, *Law and Government in Colonial Australia* (Oxford University Press, Melbourne 1987) Ch3.

a forum for the display of the political and financial power of dominant individuals within the colony.

This basic picture of the colony's early court system is familiar to most readers of Australian legal history. Indeed HV Evatt's *Rum Rebellion* (1938) placed the litigation between Macarthur and Bligh's officers at the centre of the coup d'état. Kercher finally provides a more fine-grained picture of this early struggle, allowing the tableau to emerge from the retelling of numerous instances of conflict between Court and governor. Thus, apart from the well-known instances of overt political clashes, we are told more subtle stories, such as the means by which judicial interpretation subverted successive governors' orders seeking to regulate the practice of discounting promissory notes and the informal assignment of land.[17] The picture that emerges from this study is hardly a portrait of a breed of judicial lions pitted against a vice-regal throne; nor is it a story of political lackeys. Sometimes, this idiosyncratic body of men was motivated by an ideological commitment to the "rule of law", and acted as an independent force within the colonial polity. At other times, the Judges-Advocate simply bowed to various power coalitions. Kercher's attention to the biography, particularly the personal finances and class consciousness of the Judges-Advocate, is particularly enlightening in this regard.

The fourth chapter presents very interesting statistical evidence on the use of litigation as a means of dispute resolution in this early society. Litigation explosions are noted in the years 1800-1 and 1806, and upon the restoration of the governor in 1810. A vast number of these claims were debt actions, their rapid expansion reflecting the evolving contours of commercial life and the increasing complexity of small enterprise finance in the early colony. Tort claims for personal assault and defamation were also numerous and often possessed a distinctly political character. The analysis of many of these actions reveals struggles between military and civilians over military honour and prestige and the demarcation of social class between settlers, traders and convicts through defences of personal honour or the honour of daughters seduced and abandoned.[18] An interesting aside which emerges from this study is the important role of the early print media in the construction of commercial reputation. The *Sydney Gazette* carried notices of defects of title or legal authority, warned

17 Kercher, *Debt, Seduction and Other Disasters* Ch6.

18 Readers attracted by the promise of the word "seduction" on the book's cover ought be warned that debt and disaster feature more prominently within.

creditors of notorious debtors and served as the vehicle for the correction of defamatory statements.

The breakdown of cases and the identification of litigants reinforces the understanding that the indigenous inhabitants of this country were placed beyond the bounds of civil litigation; not even an Aboriginal defendant is to be found. Kercher tackles the issue of legal status well. Apart from the commonplace issues surrounding the status of convicts, the doctrine of attainder and the astounding decision in *Kable v Sinclair*,[19] the work contains a very perceptive treatment of the ambiguous legal status of women in the early colony. Constructed almost entirely from primary source material, the author manages to convey the flexibility with which the Court approached the legal disability of married women and the practical disability of de facto female spouses. In both commercial and property matters the Court was willing to depart from English practice by granting de facto procedural rights to technically disabled litigants. Much is learnt about the role of female traders in the early colony through the legal nature of the business associations they adopted with or without their partners. The treatment of legal status is rounded off by the presentation of a series of curious practices regarding the legal status of soldiers and sailors (drunken or otherwise).[20]

The theme of variance in "judicial styles" plays an important part in this work and is convincingly argued by reference to a number of jurisdictions. The analysis of the judicial management of debt enforcement procedures is a particularly good illustration.[21] Inheriting a harsh English regime which provided for the arrest and imprisonment of debtors, Judges Collins and Atkins leaned towards settlements and assignments and the recognition of a wide variety of "currencies" whereby debts could be satisfied or postponed. Judge Dore retained the strong discretion of the Court, but leaned towards the interests of creditors, jailing 109 people in a three month session while giving extra time to only three judgment debtors. Bent returned the Court to the English position which returned much of the practical enforcement power back to the plaintiff creditor. Similar divergences between the Judges-Advocate are noted in the enforcement of contracts. The analysis of contract cases aims to trace the

19 (Unreported, Court of Civil Jurisdiction, 1788). This was the first civil action brought in the colony: two attainted convicts - a couple - were permitted to sue and were successful in claiming damages for the loss of goods on board the ships which transported them to their place of imprisonment.

20 Kercher, *Debt, Seduction and Other Disasters* pp81-90

21 At p195.

influence and rivalry between paternalist notions and the ideology of laissez-faire with its inherent bias towards contractually stronger parties. The brief but fascinating account of alternative currency and market speculation provides the beginning of a history of the legal regulation of forms and exchange and derivatives. It also debunks the popular myth that the entire colony passed around bottles of rum.[22]

In light of the material presented on contract and exchange mechanisms, a number of research directions suggest themselves. Firstly, Kercher suggests a very promising line of inquiry based on the theoretical writing on "relational contracts".[23] This is put forward as a framework for explaining the "paternalist" model of engagement in some of the contract decisions. But this line of analysis might help explain much more. It might shed light on the creativity with which the colonists arrived at novel forms of currency as a means of keeping bargains afoot. It might also provide an analytical framework for examining the manner in which early trading networks addressed the problem of enterprise finance, how traders employed or refrained from use of the law to manage commercial favours and how social and commercial relationships intertwined. Much of this already comes across in Kercher's work. But there is a strong need to further contextualise the history of commercial law in this period within the economic history literature addressing the background of enterprise and capital formation in early colonial societies.

The underlying theoretical purpose of *Debt, Seduction and Other Disasters* is to show that for a significant period of the Court's life, the Judges-Advocate took notice of the commercial customs and social conditions which obtained in the early colony. The Court displayed considerable autonomy in creating its own rules and remedies, movements which often contradicted the law and practice of English courts. While English law was undoubtedly the most important source of law within the colony, it was a source which was significantly mediated and interpreted through local conditions. This period of relative autonomy came to an end with the arrival of the last Judge-Advocate, Ellis Bent, who moved the jurisprudence of the Court closer towards the law of England. This

22 At pp131-146, 151-156, 171-177.

23 Reference is made to the work of Macneil, "Relational Contract: What We Do and Do not Know" [1985] *Wisconsin LR* 483 and Macaulay, "An Empirical View of Contract" [1985] *Wisconsin LR* 465. The debate has now moved into the mainstream of contract law theory. See, for example: Eisenberg, "Relational Contracts" in Beatson & Friedmann (eds), *Good Faith and Fault in Contract Law* (Clarendon, Oxford 1995).

narrative of the origin of our legal system describes itself as a "pluralist" view of Australian law, and is contrasted with the view that English legal doctrine "trickled-down" to a passive colonial audience.[24]

The construction of a home-grown genealogy of Australian law is now central to the way in which Australian legal historical writing defines itself. This is motivated by the desire to expel incompatible English encrustations from the body of Australian law,[25] but also a desire to understand the way in which "frontier" legal systems evolve. The second objective is somewhat underdeveloped in this work, at least at the theoretical level. At certain points within the book, reference is made to American studies on colonial law and comparisons are drawn between the New South Wales experience and the manner in which English common law was received and adapted within the jurisdictions of the North American colonies. The final chapter, which commences the task of reflection on these larger questions of adaptation and evolution of the colonial legal system, is, in the reviewer's opinion, interesting but incomplete. To be sure, the litigation record of the Court reveals a socio-economic complexity that may not admit of an overarching theory of the evolution of the colonial legal system. But the immense breadth of archival material traversed in this study left the reviewer seeking more explanations than those proffered.

*Debt, Seduction and Other Disasters* makes an important contribution to Australian legal history. Its influence will be felt quietly, as it opens up new ways of looking at our past and as it, in turn, becomes a sourcebook for new histories.

An interesting way of testing this influence will be to see whether more patrician accounts of Australian legal history can continue to obscure the creativity of early legal institutions and the role of judicial decision-making (however ill-informed) within them. There is a well known riddle relating to the manner in which the Court of Civil Jurisdiction purported to grant equitable remedies in the absence of a grant of a jurisdiction in

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24 Kercher, *Debt, Seduction and Other Disasters* pp9-10, Ch9.

25 See for example Finn, *Law and Government in Colonial Australia* pvii:

> With Australian law at long last coming of age, the need is there to look anew - if not for the first time - at our own past, at our own institutions, at the nature and workings of our own governmental system. If this is not done lawyers will embark again upon a process of myth-making having so recently come to the realization that English law does not necessarily yield solutions to our concerns.

equity under the First Charter of Justice.[26] Kercher's work demonstrates that the "frontier" court simply got on with the job of judging by offering functionally equivalent remedies - a semi-conscious "fusion" of two streams of jurisprudence before the "fusion fallacy" ever emerged as an issue in the administration of justice. Perhaps this is proof that legal systems have always developed "pragmatically rather than dogmatically".[27] This leads one to wonder whether we might hope to see mention of the practice of the Court of Civil Jurisdiction in paragraph 123 of the next edition of Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies*.

26 See for example Castles, *An Australian Legal History* p92; Meagher, Gummow & Lehane, *Equity: Doctrines and Remedies* (Butterworths, Sydney, 3rd ed 1992) para123.

27 Tilbury, *Civil Remedies: Vol 1 Principles of Civil Remedies* (Butterworths, Sydney 1990) para1019, commenting on the "fusion fallacy".