

Bullfry ponders Brexit

By Lee Aitken

Bullfry thought back fondly to his bibulous days among the 'dreaming spires' – sadly now, he was, indeed, 'an Oxford scholar poor, grown tired of knocking at preferment's door'. (His 'Varsity stint had been cut short, due to the Principal's complaint about the loudhailer). Still, he had at least met there the mother of most of his children. She embodied the continuing social and class divisions which seemed to have provoked the Brexit, since she retained the dialectical ability to move seamlessly between a received BBC pronunciation, and broad Scouse.

And at least Brexit promised a possible return to normality in jurisprudence in Anglo-Australian jurisprudence which had been drifting further apart like the continents, for decades.

More than a century ago, Stanley Buckmaster KC had argued a case before the Privy Council indirectly on appeal from the High Court. A key question was the application of the ancient maxim: *causa proxima, non remota, spectatur*. In the High Court *causa* had been replaced by *fons*. With sad Latinity, Sir Samuel Griffith somehow omitted to change gender, from the feminine (*causa*) to the masculine (*fons*), to make the respective adjectives agree.

This solecism prompted a facetious question in the Privy Council during argument: 'How is it that *fons* has lost its gender on its journey to the Antipodes?' to which Buckmaster KC replied, 'In the same way as the common law has lost its meaning!'

Perhaps the rupture which occurred in 1963 after Parker would now be repaired. For a while, following *Piro v Foster*, there had been a forelock-tugging approach to

the decisions of the English courts – but all that had changed once it was perceived that merely because a case had been decided in England was no voucher of its correctness.

There are large differences forensically between the mother country and the Commonwealth. Bullfry remembered attending in his youth a hearing in the House of Lords where Lord Keith of Kinkel professed never to have heard of *Salmond on Torts* (but the author of that work was, of course, only a New Zealander!)

And Bullfry, watching the Assange extradition hearing in London via video link, had noted a number of important differences between our own High Court and the UK Supreme Court.

The latter seems very genteel indeed. The 'Lords' all sit in lounge suits (or a party frock for Lady Hale) in a sort of horse-shoe arrangement. The newest recruits are not now, under the Blairite dispensation, 'Lords' at all since they no longer have a right to an immediate barony. But all receive some sort of courtesy title, similar to their Scottish counterparts in the Outer House – Lord Maxwell of the Ilk; Lord Braxfield ('you'll be nane the waur o' a hingin'!').

Assange's leading counsel, on opening, was heard without interruption at all from the bench for about 10 minutes, meandering along and reading from a prepared booklet on the lectern in front of her. What a contrast with our own tribunal. It is usually all that an advocate can do to get out his name, rank and serial number before the Assyrians descend like the wolf on the fold.

The important point at issue there was the scope of the 'European arrest

warrant'. Under the regime which existed before Brexit any low level continental functionary could designate himself as a 'judicial authority' and have you quickly hauled out of bed in Birmingham to answer some allegation in Vaduz. Presumably, that sort of thing will no longer happen so easily.

And a purist might hope for a return to some commonality with respect to the rules of Equity and other aspects of received doctrine. In October 2010 Bullfry had attended a lecture by Lord Neuberger of Abbotsbury delivered in Hong Kong and entitled 'Has Equity had its day?'

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Within five minutes of opening, and after a deferential reference to the strength of Equity in the Antipodes, his Lordship divagated (for the next three quarters of an hour) to elucidate the mysteries of the European Convention on Human Rights, and the reach of the European Court of Justice. It seemed to a bemused Bullfry that the old Equity doctrines had been overreached, at least temporarily, by

a supranational statutory jurisprudence which relied on large and ill-defined judge-made norms.

So, Brexit might mean a return to a more autochthonous jurisprudence. And it might also be possible to look again to *Snell on Equity* (34th ed) as an authority.

Bullfry always rejoiced in his British passport, obtained via a direct descent from the coppersmith's labourer of Gorbals Cross. Thank goodness that man had had the sense to leave the Lowlands forever – without his foresight and boldness Bullfry would no doubt have been standing in the mild rain, uneducated and unemployed, waiting for his favourite bar to open.

Brexit voting had exposed the very large social and class divisions which still obtained in the Old Dart.

It was still true there, in a caste ridden society, that one could be socially stratified as soon as one spoke. Bullfry recalled his visit to chambers in the Inner Temple while working for Hong Kong solicitors many years ago at the height of an English summer.

All the junior counsel were dressed for the weather (which is to say most of them were in three piece suits and spats). Bullfry, ready for al fresco, was more relaxed in his dress. Those to whom he was introduced looked askance at his deshabelle (perhaps he was driving a minicab), until the magic words: 'Large firm in Hong Kong' were said by his host – whereupon, shamelessly, Bullfry was inundated with business cards claiming expertise in every form of litigation, and forensic endeavour.

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For happily, in Australia, the diphthongs are the same for the minicab driver as they are for counsel. And, indeed, there is no impediment to moving, via the BAB, from the former occupation to the latter.

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