Albert Bathurst Piddington

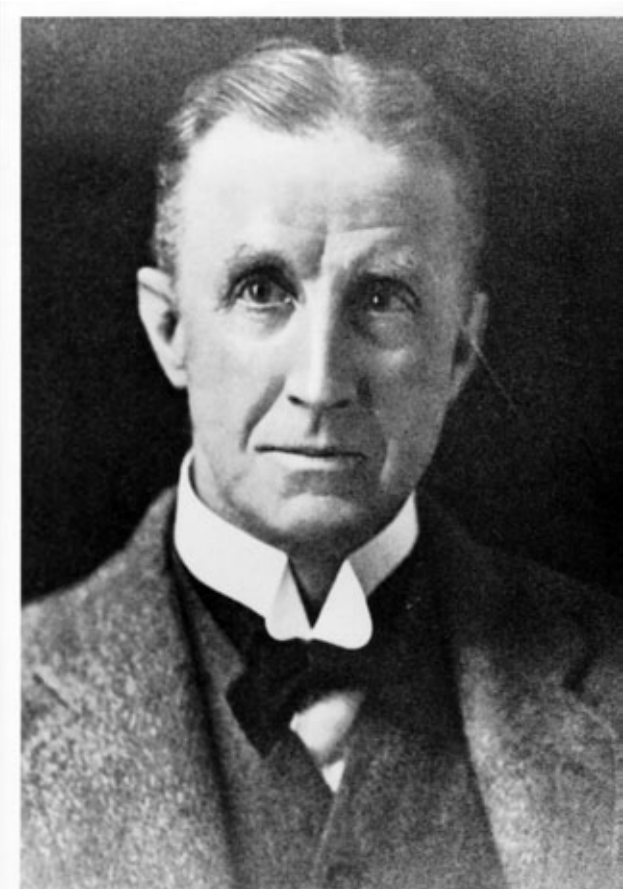
By David Ash

Cyclone

a. gen. A name introduced in 1848 by H. Piddington, as a general term for all storms or atmospheric disturbances in which the wind has a circular or whirling course. [1]

Albert Bathurst Piddington was to write fondly of H 'Storms' Piddington, his father's uncle. As well he might, for his own life was a cyclone of fine proportion. A client would write in his own memoirs:[2]

> Mr. A. B. Piddington KC could be a sketch by Dickens, a grey-haired old gentleman, thin as a rake, but inside him there burns a volcano, which will soon erupt and spit fire for four months. He will cause the Judges a lot of trouble, although he was one himself not long ago. He resigned his position on the bench of the High Court, and also his position of Arbitration Court Judge, with their high salaries and high honours, the first because of a personal view regarding a point of duty, the second as a protest against an anti-democratic measure of the Governor. He is respected for his fidelity to his convictions, as an art historian, as a Shakespearean scholar, and as a linguist. In the course of the trial he will learn yet another new language, or rather, a very old one, in spite of his seventy-three years.



The young Piddington

'There may be an age of innocence. I never found it.'[3] So Piddington opens the chapter of his published reflections touching on his childhood.[4] His father was English-born, a Wesleyan who became an Anglican, ending his career as an archdeacon in Tamworth. Religion in Piddington's early life was practised with a pungent dose of Victorian chastisement. 'My father was passionately fond of us all, but if it was the Lord's will that he should be chastened by having an imp of a son, it was also the Lord's command that he should correct him. At school the cane, at home the horsewhip, was the curriculum.'[5]

Piddington was born on 9 September 1862,[6] at the place which gave him his second name. This was thirteen and eleven years after the two Sydney members of the first court – Barton and O'Connor – and a year before Piddington's replacement Rich, who would sit until 1950. His education was that of a nomad; his first school was Cleveland Street Infants, in Sydney, then Newcastle Public School, and then Goulburn Public, which he left without knowing his declensions, something he justified by the fact that Latin was only taught once a week and on the same day as the cattle sales.[7]

There was a scholarship to Newington, then the former home of the Blaxland family on the banks of the Parramatta River. Piddington found himself in a Latin class with much older students, men, in fact, who were themselves teaching before they could afford to study for the ministry. Having started so late, they made mistakes; the headmaster being unable to cane twenty-one or twenty-two year olds, caned Piddington in their stead.[8] Piddington later ran away but was recovered after his father telegraphed 'Inform the police, search the river; if absconded, punish severely', which in later years came back to Piddington as 'If alive, flog; if dead, bury!'[9]

The child and the school abided each other for a term. Providence intervened in the form of J F Castle, who had run Calder House, a proprietary school in Redfern which included among its alumni the Sly brothers, Jack Want, Sir William Cullen and Sir Kelso King. Castle had lately purchased Cavan, a property some 15 miles out of Yass, where he continued classes. Piddington's truancies at the cattleyards proved not in vain. He responded vigorously, and went on to success first at Albert Bythesea Weigall's Sydney Grammar and then at Sydney University. He graduated in 1883 aged 21 with first class honours and the university medal in classics.

Piddington later recalled that his first public dinner was a banquet given to Charles Badham on his seventieth birthday in the vestibule of the Town Hall.[10] The toast being given by W B Dalley – Australia's first Privy Councillor and thrice-refuser of the chief justiceship – 'the wines came on in orthodox order and profusion'.[11] Only four saw the end, among them Piddington and Edmund Barton. Barton was elected to the chair and they toasted all officials of the university

to the yeoman. Somehow Piddington was able to walk home to St Paul's College, where he had been student and was to become vice warden. He was also a member of the first staff of Sydney High, established in Castlereagh Street:[12]

> The building chosen as the site of the new schools was a two-storeyed building on land now occupied by David Jones, surrounded by a high wall. It had been commissioned in 1820 by Governor Macquarie and designed by Francis Greenway and in the meantime it had been St James Church of England Primary School. The boys entered from Castlereagh Street and occupied the ground floor, the girls entered from Elizabeth Street and occupied the first floor.

In 1929 and to mark the opening of the new school building a year earlier, Mr AM Eedy, the school's first pupil, donated MLC shares to provide annual prizes for English and the 100 yards championship. The former was named for Piddington as an expression of the affectionate regard in which he was held by Eedy. The AB Piddington Prize for English (advanced) is still given out to a year 12 student.[13]

In 1887, Piddington took a year's leave of absence in Europe, visiting Badham's old college and Cobet of Leyden. He would write that 'In the pure serene of Greek scholarship [Badham] and Cobet of Leyden shone as the great Twin Brethren, the Castor and Pollux of their section of the sky'.[14] Piddington's biographer adds that he found time to get to Bonn 'where instead of seeking to make an impression as an academic he enthusiastically joined university students in noisy revelry'.[15]

Piddington at the bar

Back in Sydney, Piddington kept up his teaching; he lectured evening students from 1889 to 1894 and was an examiner in the Junior Public Examination. Meanwhile, in 1889, he served as associate to Sir William Windeyer. An associateship with a highly regarded judge must have been quite a prize for anyone considering a barrister's life. However, it seems to have jarred with this highly strung young man. In Piddington's 1929 reminiscences, neither of his two references to Windeyer is warm:[16]

> [In the first of two chapters on Badham] Dalley's pursuit of pleasure was angrily spoken of by the late Judge Windeyer, but fits of religious contrition alternated to keep his nature from any lasting contamination of the soul…

> [In his chapter on Sir Samuel Griffith] Sir Frederick Darley was no longer at his best, though he gave of his best. A sound common lawyer, he was never a jurist, and his judgments, careful and conscientious, evince no width of intellect. Windeyer was gone, before whom every man felt he had to do his best to make headway in the judge's esteem, and Sir Frederick at times showed signs of fatigue.

Darley himself was more sympathetic to Windeyer, saying that he was 'singularly able, conscientious, zealous and hardworking … in some respects he was much misunderstood, for those who knew him best know what a tender heart he had and what a depth of sympathy he possessed for all those in distress and misery'.[17] Sir Henry Parkes, not known for being a killjoy unless there was a vote in it, might equally have been writing of Windeyer's grandson when he observed 'My friend Windeyer was a young man of high spirit, bold and decisive in the common incidents of life, with a strong capacity for public affairs. He would have made as good a soldier as he has made a sound Judge'.[18] I have not found how the associateship came about, although Piddington the scholar would have been familiar with Windeyer the educationalist; at the time, the latter was between his vice-chancellorship and chancellorship of the university. Whatever, the relationship appears to have got no further than oil and water.

To Piddington's rooms. Denman Chambers, like Wentworth Court, was constructed on land owned by the businessman and District Court judge Joshua Frey Josephson. His father reached the colony in 1818, having been sentenced to fourteen years for having forged £1 notes in his possession. Josephson himself was a music teacher, a Sydney mayor, a solicitor, a member of the founding committee of St Paul's College, and a founder of a number of businesses, before being called to the bar in 1859.[19]

It was at Denman Chambers – or 182 Phillip Street – that Piddington had his rooms. He later wrote that it was 'a hive of industry, but also a club of friends', with reflections along the following vein: [20]

> Among Walter [Edmunds]'s visitors was a well-known remittance man, an English barrister, Cornewall Lewis. He was the son of that Chancellor of the Exchequer who was noted for his epigrams – among them the famous 'Life would be tolerable but for its pleasures.' His son imitated the gift, and worked his good things off when he was seeking accommodation in chambers. Thus when Mr Blank, a member of Parliament at the time, at last drew the line and would not be bled any more, Cornewall Lewis waited at the street door and said: 'Poor Blank! not quite a lawyer, not quite a statesman, not quite a gentleman' – an epigram he shouted out about an eminent judge when he took his seat for the first time on the High Court Bench in Sydney.

The difficulty with Piddington's account is that, as I understand, the Chancellor of the Exchequer of that name had no children of his marriage, and his three stepchildren seemed to have been eminently respectable. Which makes me wonder about the last part.

Piddington the politician

Piddington made two attempts in 12 months to enter the Legislative Council. In 1894, he stood against Premier Sir George Dibbs in Tamworth, representing free trade liberals. He chose also to identify with the labour movement, although he firmly rejected the disruption caused by strikes and the violence employed by

trade unionists; in his own words, 'He had chosen to consecrate himself to a great cause… that cause which took its shape in the labor [sic] movement of the present century… a cause for which a man might willingly lay down anything and not stop short of life'.[21] (Even if we allow for 'an age of perorations', Christopher Brennan was on the money when he referred to his friend as 'the singer of hyperbole'.[22])

Dibbs would lose the premiership to George Reid, but took Tamworth with 612 votes. Piddington polled 492 and another labour leaning candidate 277, leading the Tamworth Observer to remark that 'the workers have themselves to blame for permitting their ranks to be so broken up as to allow the Fat Man's representative to sail in'.[23]

It was not, however, all tears in the Piddington family. His brother William Henry Burgess Piddington was elected as the member for Uralla-Walcha. WHB would hold the seat until his death at the age of 44, in 1900. Like Dibbs and no few others, he changed allegiances, moving from Independent Free Trade to Free Trade to Protectionist in his six years.[24]

A year later, Reid went to the people, and the situation had changed. Piddington took 621 votes, and Dibbs, the only other candidate, 559. Piddington was now member for Tamworth. However, it was not free trade but federation which was the issue on which Piddington would leave his mark. (His brother supported and Piddington opposed the 1898 Constitution Bill, WHB being 'will have bill' and AB being 'anti-bill'.[25]) Piddington's major opposition to federation was the role to be given to the Senate. He distrusted the power to be afforded it, and distrusted its power base in the states as undemocratic:[26]

> A paper on 'Federation and Responsible Government', read before the Australasian Association for the Advancement of Science on 11 January 1898, was published under the title *Popular Government and Federation*, together with an article on 'The Senate and the Civil War in America'… [Piddington] wrote of two chambers 'each commissioned to voice the assent of a different master'. The Senate would certainly use the powers it was granted unless the Commonwealth Act operated 'as a repeal of human nature'. That for Piddington no bicameral system of representative government was logical, only a referendum of the people, not the proposed 'dual referendum' of States and people, would prevent executive government from becoming 'a prize to be wrestled for between the bodies of equal statutory powers'.

Piddington contributed his bit to the colony getting less than the required 80,000 yes votes, with Tamworth's voters coming out firmly against the Bill. His heightened profile led to an invitation from – and an enduring association with – H B Higgins, a prominent anti-Biller.[27] However, this did not help him in the following election. He was deeply disappointed, but his biographer suggests, 'It was not a matter of Piddington's losing touch with his constituency. He had never listened to their concerns. He had wanted them to listen to him… a comment applied to Cobden and Bright applied equally to him: 'To their very great ability can be added their inexperience in politics, the fact that they were unpractised in compromise'.'[28]

Industrial arbitration

With the eclipse of Piddington's political career and the carriage of federation came a set of briefs in a new area of law which was ultimately to form the frame of Piddington's professional and philosophical outlook for the rest of his life, the world of compulsory industrial arbitration.

This was a furious area of debate in the 1890s. Reid's attempt to introduce a bill in 1895 failed to get a second reading in the upper chamber, with RE O'Connor 'reflecting the almost unanimous view that going a step beyond the voluntary principle was 'to walk over the edge of the precipice'. He genuinely feared that the intrusion of state power into the personal relationship between masters and men would rapidly destroy the basis of free society as liberals saw it.'[29] (Just as Piddington would leave behind an older view of liberalism, so too O'Connor; it was he and not Higgins who, less than a decade later, would sit as the first president of the Commonwealth Court of Conciliation and Arbitration.)

An Industrial Arbitration Act made it onto the books in 1901 (temporarily, as provision was made for it to expire in 1908) and Supreme Court judge HE Cohen was its first president. The early years were fertile ones for lawyers, not only because of the subject matter but because of its newness; just as jurisdictional battles kept industrial law on the battlegrounds at the beginning of the 21st century, so too the 20th. One example is *Clancy v Butchers' Shop Employees Union & ors,* a matter which made its way to the High Court.[30] There had been a dispute between the butchers and their employees which had resulted in an award under the Act. Clause 4 provided that shops were to close at 5.00pm on Mondays, Tuesdays, Thursdays and Fridays, 1.00pm on Wednesdays, and 9.00pm on Saturdays. Mr Clancy was alleged to have kept his shop open to 9.30pm one Saturday, and found himself the subject of a summons taken out by the union and others, for Mr Clancy to show cause before the Arbitration Court as to why he should not pay a penalty of £5 for his breach of the award.

Mr Clancy's brief came up with the argument that the matter with which clause 4 purported to deal – closing times – was not an industrial matter within section 2 of the Act, with the result that the Court of Arbitration – whose jurisdiction was so limited – had no power. A full court of the Supreme Court disagreed, by majority, but the High Court did not. Sir Samuel Griffith found that there was nothing in the legislation 'to interfere with the employer during his own spare time; but after the relationship of employer and employee [spelled in the reports employé] has ended the employer is free to do as he pleases.' The chief justice continued that the employer 'retains his common law right to dispose of his own time as he thinks fit without reference to anyone else, and the

Arbitration Court has no power under the Act to interfere with the exercise of this right.'[31] Barton and O'Connor JJ agreed. In the case, Piddington and WA Holman appeared for – and both addressed – the union and its secretary.

After the Act died its timetabled death, and the court with it, a new bill – the Industrial Disputes Bill – made its way through both houses. This made provision for wages boards, chaired by judges or other persons 'of good standing and fair mind'. There were not enough judges, and the upshot for current purposes was that Piddington was appointed to chair ten boards from 1909 to 1911.[32] Piddington got invaluable experience, and grew in favour with both Labour and Capital. Or more accurately, he became a person acceptable to both.

A royal commissioner

So it was that Piddington was on call when the first NSW Labor government was elected in 1910 with W A Holman as attorney general. And called on he soon was, no less than as a royal commissioner. In 1911, he was appointed to inquire into and report on three matters, an alleged shortage of labour; the effects of the hours and conditions of employment of women and juveniles in factories and shops; and the cause of the decline in apprenticeship and the practicality of using technical college and trade classes as substitutes.[33]

Piddington's work revealed a concern – shared by many of the time – that a reduced birthrate and the health dangers for factory girls would produce 'race suicide' at a time when our neighbours' populations were increasing rapidly.[34] He also had a moral objection to women in factories:[35]

> He was shocked at the 'open and unconcealed employment of young unmarried girls in and about the preparation of preventives of conception' and how they 'applied joking names' to them. He regarded this as 'a disregard for decency' apart from his objections in the national interest to 'the apparently wholesale dissemination of the means of race suicide'. He endorsed the urgent recommendations of doctors to separate the workplaces of males and females. In his view, if boys and girls should be separated at school it was 'simply to court disaster' to let them work together. He went as far as recommending that female employees should enter and leave the premises at least a quarter of an hour before males.

Whatever Piddington's naivety, he still had his rhetoric. When he sought more skilled labour, he was able to answer union fears thus:[36]

> … the flow of human energy and skill poured into the veins of the body industrial will not only vitalise it highly for its present duties, but create in all its parts so strong a pulse and so sound a growth that before long a new necessity will arise for a fresh infusion of skilled as well as other immigrants.

Spanish sketches

In 1912, Piddington attended a Congress of the Universities of the Empire in London. (He had been elected unopposed to the University of Sydney Senate in 1910.) He and his wife also attended in London an International Eugenics Congress. He found time to visit Spain, and his observations are recalled in *Spanish Sketches.* The sketches first appeared in the *Sydney Morning Herald* in 1913, and then in book form in 1916.[37] It is an elegant little travelogue, covering places and painters in descriptive but not – for Piddington, at least – too imposing a style.

In Spain, Piddington met with Prime Minister Jose Canalejas, who was interested in Piddington's views on and experiences with compulsory arbitration:

> He does not, however, propose compulsory arbitration (which he had a day or two before denounced in the Cortes as 'hateful to liberty and to Liberals' abomination de la liber tad y del Liberalismo) but a voluntary tribunal, with representatives for each side, and a representative of the State, as being a third but neutral party. This last ingredient, logical as it is, the Socialists oppose out of utter, and, I am convinced, sincere, distrust of the neutrality of the Government. And on the main question, the taking away of the right to strike el derecho de huelga the Conservatives, led by Maura, are at one with the Socialists. There are evidently, then, troublous days ahead for Canalejas; but he is a brave, resourceful, and alert man.

The last sentence is poignant: the interview took place in Madrid on 25 October 1912; it was written up by Piddington in London on 10 November; Canalejas was assassinated while walking in the Puerta del Sol a couple of days later.

There is a visit to Seville, in particular to the Biblioteca Columbina, where 'the layman finds his greatest interest centered in the narrow compass of books on which Columbus pored long and pondered deeply, and which are annotated in his own hand'.[38] We have seen that Piddington – like many of his class – had something of a naivety about poverty. But – and this comes through time and time again in his writing – he would be the last to hold that a merely bookish approach was ever warranted. If Piddington wanted for experience himself, he was someone who recognised its value as a teacher. His defence of Columbus is a good example:[39]

> Amidst much detraction which in the last half-century has succeeded to the lay canonization of Columbus in earlier days, nothing has been more futile and misplaced than the relish with which some writers have proved that Columbus was not, as used to be said, a learned or a scientific man, and did not make his discovery as the result of a sound theory, nor even seek to find India, as he afterwards said he had meant to do and had done. These books of Columbus, of which I speak, would prove all these things except perhaps the last, and yet are they worth proving? It is one of the snares of learning that it often feeds the nerve of that vanity in men which thrills at contact with the faults of others, and that it sometimes produces (to quote a notable phrase of Badham's) ' the flatus of self-

> sufficiency rather than the afflatus of inspiration '. Columbus made geography if he did not know geography, and though he was not an inventive theorist, he was an inventor, and therefore, by the unappealable judgement of history, he rightly enjoys the exclusive and perpetual patent of his discovery. Others had pondered but not sailed; others still had sailed but not pondered. Columbus both pondered and sailed, and seems to have been the only man of his time who at once absorbed (and this at times with a felicitous credulity) the opinions of all who had speculated or even dreamt about the New World, and at the same time absorbed them always and only as the nutriment of a fixed practical resolve.

The High Court

On the way home from Europe, Piddington received an offer from Billy Hughes to sit on the High Court. The court's own site provides the framework of the appointment:[40]

> In November 1912 Justice O'Connor died in office. At the same time, the workload of the High Court had grown to the extent that it was stretching the capacity of five Justices, so Parliament agreed to again increase the Bench by two. In February 1913 Frank Gavan Duffy was appointed to replace Justice O'Connor, and the following month Charles Powers and Albert Bathurst Piddington were appointed to increase the High Court Bench to seven Justices.

Gavan Duffy's appointment was warmly welcomed by the legal profession but there was considerable disquiet about the appointment of Justices Powers and Piddington. Criticism centred around their abilities as lawyers: the bars of New South Wales and Victoria even went so far as to withhold the customary congratulations on their appointment.

Piddington's biographer permits himself more latitude:[41]

> Piddington was not appointed because he was the best judicial material available in the Commonwealth. This was the first opportunity that a Labor government had to appoint a High Court judge likely to be more sympathetic to Labor viewpoints. Piddington was not a member of the Labor party and was not even a King's Counsel, but he was the most appropriate pro-Labor barrister known to Hughes.

I am not sure what is meant by 'the first opportunity'. In fact, Labor's first opportunity for an appointment had already been exercised, Hughes appointing Frank Gavan Duffy in place of Richard O'Connor. Perhaps, as one of Henry Bourne Higgins's biographers suggests, 'there was a slight sense of the court's token Catholic being replaced by another'.[42]

Piddington's appointment is said to have come from an exchange of cables between Hughes and Piddington, with Dowell O'Reilly the intermediary. Graham Fricke summarises it thus:[43]

> In 1913 radical senior lawyers were rather thin on the ground. Hughes was attracted to the notion of appointing Piddington, who during the federal convention debates had shown the same individualism as Higgins, and who was by no means a run-of-the-mill ambitious conservative barrister.
>
> But before offering the appointment to Piddington, Hughes wanted to ascertain his views on constitutional issues. Unfortunately, Piddington's absence overseas made it difficult to make discreet inquiries, so Hughes took the unorthodox step of writing to Piddington's brother-in-law, Dowell O'Reilly [Marion's brother] (the poet, Labor parliamentarian and son of Canon O'Reilly). Hughes pointed out that before appointing Piddington he wanted to be satisfied that the proposed appointee was not a rabid States'-right champion. An assurance that Piddington 'looks favourably upon the national side of things' would be 'quite sufficient'. He suggested that if O'Reilly did not know Piddington's views, he should cable Piddington and ask him what they were. O'Reilly duly cabled Piddington:
>
> > Confidential. Most important know your views Commonwealth versus State Rights. Very urgent.
>
> The cable was sent to intercept Piddington, who had left England by ship, at Port Said. On 2 February 1913, Piddington cabled O'Reilly:
>
> > In sympathy with supremacy of Commonwealth powers.
>
> O'Reilly transmitted the reply to Hughes, who went ahead with the proposal. His offer reached Piddington at Colombo in mid-February. According to a newspaper account given by Piddington almost ten years later, he had in the meantime become uneasy about the propriety of having expressed his political views in response to O'Reilly's cable. He claimed – in the 1922 newspaper report – to have replied to Hughes's offer:
>
> > Unofficial. If with complete independence validity questions shall accept. Do not hesitate to withdraw offer if you wish, wire again Frederick der Grosse and I will reply officially, grateful anyhow.
>
> Hughes announced the appointment.

More on the 1922 situation later. Meanwhile, the *Bulletin* was scathing:[44]

> Piddington was, till W.M. Hughes discovered him last week, a more or less obscure junior, with a modest, in fact, insignificant practice… [The] men who were fitted for this big job stand out like beacons. The names which occur most readily are Patrick McMahon Glynn, B.R. Wise, Josiah Symon and Irvine the Iceberg.

For the magazine, 'he is one of the last whom a colleague would select as the possessor of a judicial mind. He possesses no sense of legal proportion. His intellect is, forensically speaking, of the perverse and pedantic order. He was a 'coach' for years, and the mark of the schoolmaster is still on him in plain figures. His experience of public affairs… has been meagre, to put it mildly.'[45]

The *Bulletin*'s remarks were published on 20 February 1913. On 10 March, the New South Wales Bar met – in a 'large and representative' mood – and resolved:[46]

> (1) That in order to maintain the prestige of the High Court, as the principal Appellate Court of the Commonwealth, and to secure public confidence in its decisions it is essential that positions on that bench should be offered only to men pre-eminent in the profession.
>
> (2) That this Meeting of the Bar of New South Wales regrets that this course was not adopted with respect to the two most recent appointments to the Bench of the High Court.
>
> (3) That a copy of these resolutions be forwarded to the Prime Minister of the Commonwealth.
>
> (4) That a copy of the first two resolutions be forwarded to the Attorney-General and the Solicitor-General of this State, with the request that congratulations should not be offered to either of the justices in question on behalf of the Bar of this State.

Despite consultations with Sir William Cullen, chief justice of New South Wales, and Sir Edmund Barton (whom he had as a friend), Piddington chose to resign and did so on 24 March. Arguably, this was 'a hurried escape [from the wrath of the legal profession] rather than being a matter of conscience',[47] although Fricke points out that Piddington was already suffering grief at the news of a half-brother's death.[48] Barton later wrote to Marion Piddington, regretting a resignation which some might describe as quixotic, but which he saw as 'conduct worthy of a high mind'.[49]

Can we glean some insight into Piddington's frame of mind and to his subsequent attitude to the court, from his inclusion of Sir Julian Salomons as a chapter in his 1929 memoirs? Salomons had been appointed as chief justice in 1886, but:[50]

> … a meeting of the Bar convened in the Attorney-General's chambers on 19th November 1886. The Attorney-General because of political interests could not be present and M. H. Stephen, Q.C., as senior member of the Bar took the Chair. It was unanimously resolved that a letter be written to Salomons asking him to withdraw his resignation and the letter was sent over the signatures of sixty barristers. At a separate meeting Sydney's solicitors came to a similar decision. Salomons, however, could not be induced to change his mind. [He later did.]

In fact, Piddington, in a laudatory sketch, makes no mention of that trying experience. However, in the context of one well-put criticism of Salomons as a constitutional advocate, he gives a summary of the bench which suggests no lingering rancour. He is writing in 1929:[51]

> When he [Salomons] came out of his retirement to argue the question of interference of State laws with Commonwealth instrumentalities, he protested to the High Court that 'no lawyer would ever support' the proposition he was opposing. Griffith said somewhat sternly: 'You are forgetting that the Judges of this Court have already so held.' Salomons replied, 'I did not say no *Judge* would say so, I said no *lawyer* would say so.' That Bench could afford to ignore the affront, for every member of it possessed in a high degree the special sense for constitutional questions – a sense not to be won by technical studies alone, but compounded of an historical knowledge of man as a political animal, of expedients to adjust claims at war with one another, and of that feeling for the principles of human government which make it a requirement of the constitutional lawyer that he should be a servant of freedom slowly broadening down from precedent to precedent.
>
> This was the one aptitude that was missing when Salomons, who was prone to surround a constitutional right with the same atmosphere as a commercial contract, was arguing a point of constitutional law.

Back on track

Piddington's collapse was soon trounced by confidence. Premier Holman immediately appointed Piddington silk, 'a kind of consolation prize',[52] and followed it up a few days later, in April, with a second royal commission, a process which sealed for him a lifelong commitment to a system of industrial peace governed by judicial arbitration, a commitment which would not always sit easily with another lifelong commitment, to the liberty of the individual.

Piddington's report came down in the same year, 1913, and he presumably expected to become a judge of the reformed Arbitration Court whose creation he had urged. However and extraordinarily, he was to be offered a fresh opportunity to sit on another of the nation's highest bodies, the Inter-State Commission. In 1913, everyone – well, almost everyone except some High Court judges – thought that this was a position of great potential and that it was time for the potential to be realised. Labor had been ousted and Joseph Cook's Liberal Party was in power, and Cook appointed Piddington as its chief commissioner. Just as Piddington had been acceptable to Labor and Hughes, so he was acceptable to the Liberal Party and to Cook, who had known Piddington when they were both MLAs.

This body, its august place in the constitutional firmament, and its ultimate and permanent eclipse, is the subject of another article in this issue of *Bar News*. Piddington excludes any discussion of the commission in his memoirs, but records a trip with Sir Nicholas Lockyer, one of his two co-commissioners, with typically fervent irrelevance:[53]

> … I was travelling to Melbourne by the *Marmora* and was introduced to the captain by his namesake and relation, Sir Nicholas Lockyer.
>
> Captain Lockyer at once said 'Are you a relative of 'Storms' Piddington?' and when I said 'Yes,' he went on, 'Well, there's a

> coincidence! The other day I was talking to Hunt the Commonwealth meteorologist and asked him 'Why don't you people give us something useful? Nowadays, when a sailor man strikes trouble, he's only got two things to help him – his own bally sense and Piddington's *Law of the Storms*.'

Another royal commission

By the end of 1919, the war to end all wars had ended and the workers were battling out the peace on the streets of Europe's cities, and Australian men – working men as well as the tragically incapacitated – were returning home. A price Billy Hughes had paid in that year's federal election was the promise of another royal commission to inquire into the cost of living and to devise a mechanism to adjust automatically the basic wage. (A post-conscription Hughes, it will be recalled, yet with Capital's suspicion that he remained Labour's man.) And who should emerge as the unanimous choice by the commission's capital and labour representatives for chair, but the subject of this essay?

Travelling alongside and sometimes indistinguishable from the development of arbitration in the industrial fabric of Australian life has been the *Harvester* judgment, a decision in which Henry Higgins – wearing his cap of president of the Commonwealth Industrial Court – attempted to lay down a basic wage, which had to be enough to support the wage earner 'in reasonable and frugal comfort', an expression which had appeared in Cardinal Manning's translation of Pope Leo XIII's encyclical *Rerum Novarum*.[54] The decision had been made in 1907, a time of twelve years but what must have seemed a distance of twelve light years. The new royal commission was born 'in the context of aggressive trade union dissatisfaction with wage levels, recognition by industrial tribunals of the need to overhaul the Harvester wage base, and fears of the spread of Bolshevik revolution to Australia.'[55]

Attempts had been made to get the information via statistical analysis, by Higgins himself and by, for example, the distinguished NSW arbitration judge, CG Heydon. There was also George Handley Knibbs – later Sir George – who had been appointed as first Commonwealth statistician in 1906. In 1910–1911 he undertook an inquiry into the cost of living. But after distributing 1500 booklets for housewives to keep records of a year's budgeting, he got back only 212 usable returns. A second effort in November 1913 saw 392 returned from 7,000 distributed.[56] (Knibbs, like Marion Piddington, was absorbed by eugenics, involved internationally and later embracing what he called the 'new Malthusianism'. At a personal level, his biographer records that he talked quickly and quietly in a high-pitched voice about his extraordinarily wide interests; one interviewer observed that 'an hour's conversation with him is a paralysing revelation'.[57])

Piddington was even less successful than Knibbs, getting 400 budgets returned from 9,000 requests, for a four-week survey.[58] However, he and his commissioners reached out to the community in no uncertain terms. There were 115 public sittings in all capital cities and Newcastle, with 796 witnesses and 580 exhibits.[59] (One of the owners and managers of CSR, Edward William Knox, desired 'a uniform absence of [government] interference in industrial matters' and refused in 1920 to give information to the commission;[60] in 1919, his younger brother Adrian had been sworn in as Sir Samuel Griffith's successor.)

To be accurate, it was not a basic wage but the different exercise of determining the cost of living which the commission focussed on. It was, Piddington would argue, then the task of government to make the political decisions and the task of the Commonwealth Arbitration Court to implement them.[61] Nevertheless, when the employers' representatives realised that the effect of acting upon the findings would raise a basic wage level from around £4 to £5 16s that they submitted a minority report.[62] Nor were the unionists happy; according to them, Piddington had failed to take account of old age and invalid pensioner dependants and of over-14s earning less than the living wage or still at school, and moreover he had allegedly understated the total value of production by over one hundred million pounds.[63]

An independently Labor man

The royal commission had three particular effects on Piddington's career.

First, the affirmation of his belief in and fervour for child endowment as an essential tool of social justice. In 1921, Piddington published a tract called *The Next Step: A Family Basic Income*.[64] On the first page, he says:

> It is the purpose of these pages to show that this minimal duty is not and cannot be adequately enforced under the existing Australian system which applies the sanctions of law only to a prescribed wage (the 'living wage' or 'basic wage') that is uniform for all employees. To ensure the adequate observance of that duty two things are necessary:
>
> 1. the continuance of the existing system with a different domestic unit for the living wage;
>
> 2. a law for the endowment of children out of a tax upon employers according to the number of their employees, such endowment to be paid to mothers.

Later in the text, under the subheading 'Position of Mothers and Children', we find Piddington in typical form:

> A work with a striking title was published in America a few years ago by the famous Judge Lindsay, 'Horses' Position of Rights for Women.' Its theme was the Mothers and right of women to 'the normal needs of a human being living in a civilised community,' just as a horse has rights of 'fair and reasonable treatment' in Mr. Justice Higgins' words already quoted. I allude to it now only to submit, by analogy, that in this question of a living wage the children also of the workers

> have rights as individual citizens, not as mere inclusive appendages in a compromise. From the moment of their birth they have a right to expect that the nation will so order its economic structure that they can live. 'All men are created equally entitled to life,' says the Declaration of Independence. It is a fond fashion of Homer to describe the family as 'wordless children,' which reminds us that their claim to life at the hands of the community cannot be voiced by themselves. Yet that wordless claim is as convincing as was the clutch of the foundling infant's hand on Squire Western's finger in Fielding's Tom Jones. What is wanted in Australia is not rhetoric bedecked with baby-ribbon upon 'The Day of the Child,' nor benevolent asylums, nor the kindly provision of creches or baby clinics, or children's playgrounds, or occasional treats – admirable as such charities are – but a strict and evenhanded canon of plain justice which will recognise that the children of those engaged in industry have a right to maintenance from industry, and that the mother who rears children for the future of industry and of the State has a right to receive the only wage she ever asks enough to enable her as society's trustee for nurture and education to discharge the duties of her trust.
>
> Upon what principle of social justice, to say nothing of social wisdom, are we to perpetuate a system like the present which, in the name of family support, penalises parenthood while simultaneously offering money-prizes to the childless?

As part of this nation's economic history, the royal commission and its results can be found elsewhere. In particular, feminist analyses of the 'living wage' developments and its biases and flaws have been made in more recent times.[65] For Piddington's part, there is no doubt that he held views that would be regarded as paternalistic, not only in relation to gender but to class. That said, he had supported Kate Dwyer's attempts to improve the educational opportunities of women, when they were both members of the University of Sydney Senate.[66] (There, Dwyer had campaigned for a chair of domestic science. She had earlier assisted Piddington, in his 1911 royal commission.[67])

The idea – or perhaps ideal – of 'woman' is an important part of Piddington's brand of liberalism, something both deeply influenced by and at times inexplicably paternalistic in the light of, his marriage to Marion. It will be recalled that they had both attended the International Eugenics Conference in London, where, his biographer records, 'he met, and was impressed by, the Russian anarchist Prince Pyotr Kropotkin, who stressed the improvement of a national stock through the removal of social defects rather than through sterilisation of the unfit.'[68] In this context, one observes that the opening paragraph of his 1921 tract reads 'This pamphlet is published in the belief that both employers and employed in Australia, whatever their pre-conceived opinions, are willing to examine fairly any proposal which is put forward in the spirit of that mutual aid which Kropotkin has shown is the paramount biological law of nature and of society.'

The second effect of the commission was the entrenchment among Capital of the view that Piddington was now irretrievably Labour. He did not help his case by suggesting in that same preface that his hope for a family basic income was confirmed by the NSW State Conference of the ALP putting a motion with respect to it on its agenda. Piddington's tragedy was that he was irretrievably independent, something which made him impervious to the realities of politics.

Which helps us understand a little more the flavour of the third effect of the commission on him, a marked decline in his relationship with Hughes. Hughes would never be trusted by Capital – rightly so, supporters of Bruce would argue – but would never be forgiven by Labour. In 1920, Piddington had given Hughes something he might have wanted but couldn't afford, and Hughes's solution was not uncharacteristic:[69]

> Hughes extricated himself from his promise to implement the Commission's findings by claiming that it had depended on the Commonwealth's being granted extended powers on industrial matters in the referendum held with the elections. He said that with the defeat of the referendum he was restricted to legislating for Commonwealth public servants, and he did introduce a system of child endowment to public servants, although only 5s. a week, not Piddington's recommended 12s. Piddington later rejected Hughes' claim that government action depended on a successful referendum. He insisted that he had at first declined to accept the Royal Commission because the inquiry might prove futile if the Constitutional amendment was rejected. He had informed Hughes during the campaign, after accepting the chairmanship, that he would not continue in the position if the promise were conditional but was given the assurance by Hughes that it was not. Piddington's opinion of the integrity of Hughes continued to worsen in 1920.

Hughes, the High Court and hindsight

These three things – Piddington's unwavering adoption of child endowment, his move – or perceived move – away from Capital, and his attitude to Hughes, coalesced in a decision to go to the federal legislature. In his first attempt – a by-election in the seat of Parramatta caused by Joseph Cook's appointment as high commissioner to London – he attracted less than 20 per cent of the vote and lost his deposit.[70] The second – at the general election of 1922 – was pure Piddington. Hughes's seat of Bendigo was threatened, so the Nationalists parachuted him in to North Sydney. Where better for Piddington to continue his campaign for child endowment? The ALP helpfully came to the party, withdrawing its candidate.

The campaign was hard-fought, and has the peculiar interest for us, because the High Court debacle of a decade before formed a colourful part. Piddington's biographer again:[71]

> In the last days of the campaign R. A. Parkhill, Nationalist campaign director and organiser of the gift of £25,000 to Hughes as thanks for wartime leadership, with a reputation for a style of campaigning

that was 'robust to the brink of unscrupulousness', circulated a pamphlet accusing Piddington of having resigned from the High Court because he could not face the hostility and criticism of the Bars of the eastern States. This not only ensured that the issue of child endowment would not make a last-minute emergence but also further poisoned relations between Hughes and Piddington. With amazing naivety after all that had been said, Piddington telegraphed Hughes complaining of Parkhill's slanderous attack and requesting him to acknowledge publicly that the cause of his resignation was Piddington's belief that he had compromised himself by indicating to Hughes a preference for the 'supremacy of Commonwealth powers'. Naturally Hughes refused this act of political charity. After Piddington released the 1913 interchange of cables between him and Dowell O'Reilly, who had acted as intermediary in the High Court offer, Hughes bitterly attacked Piddington. He accused him of having 'resigned from his great office like a panic-stricken office-boy', of having asked 'on very many occasions… to appoint him as a justice of the High Court' and of being the most eager man 'for office and its emoluments' that he ever knew.

Though Piddington, supported by extensive documentation, came out of the exchange better than Hughes, who produced none of the letters and documents he claimed to have, Piddington's reputation was damaged by it. A letter from O'Reilly to the *Sydney Morning Herald* rejecting Piddington's reason for resigning from the High Court as a gross twisting and misstatement of the facts and a 'thoroughly Piddingtonian' invention, hurt, especially in view of his brother-in-law's support for him in 1913 as one '(who has never pulled a gossamer, much less a string – nor had one pulled for him)… [compared with] all those lesser men, many of whom have doubtless been hauling on a hundred cables'. O'Reilly's bitterness towards Piddington continued a serious family estrangement begun in 1917. He had been a womaniser before the death of his wife, Eleanor, in 1914. When he persuaded his English cousin, Marie, to come to Australia in 1917 and marry him, Marion attempted to warn Marie of the risks of such a marriage and was met with a predictably dismissive response from the couple. But Marion must have had a eugenic concern as well: such consanguinity was unacceptable. Months before the 1922 election O'Reilly displayed his continuing contempt, especially for his brother-in-law. Prompted by Piddington's resignation as president of the University Public Questions Society in protest against its allowing theosophist Annie Besant to lecture, O'Reilly exhorted a correspondent to 'Be good – eschew Leadbeater's pernicious doctrines and never masturbate except when Piddington invites you to fill his syringe in the great cause of Via Nuova!'

The disturbed relationship between O'Reilly and the Piddingtons has received a fresh focus by the publication this year of a thesis by Helen O'Reilly. The thesis draws on their correspondence to suggest that the novelist Eleanor Dark – O'Reilly's daughter by his first marriage – based her early fiction on (unresolved) accusations that her father had sexually abused his first wife, who had died in Callan Park Hospital. I have not read the thesis, although it was discussed by Susan Wyndham in an article in the *Herald* earlier this year.[72] The article records that O'Reilly threatened to expose Marion's 1917 complaints to the federal government. Presumably to embarrass Piddington. And O'Reilly had counteraccusations of Piddington's peccadilloes as well. In any event, O'Reilly would die in 1923 and Marie – although a staunch supporter of his memory – would herself die at the Gap some years later.

As to North Sydney, Hughes won 16,475 votes to Piddington's 11,812. But both ultimately lost from the election. Stanley Melbourne Bruce took over from Hughes soon after, and with the Nationalists in power in the Commonwealth and in New South Wales, Piddington's chance for office was non-existent.

The Lang years

Although Piddington continued as a barrister – appearing a number of times in the High Court[73] – his main profile until 1925 was as a correspondent with *Smith's Weekly*. In that year, J T Lang was elected premier. Eighty years on, the name will mean little to many, although some will have an idea that he was involved with the cutting of the ribbon when the Sydney Harbour Bridge was opened. It is difficult for us to recall the increasing division in society, the fissures that the Great War had opened and time had not healed.

As in all industrial(ising) countries, Australia's industrial relations was both a cause and a symptom of these tensions. There were particular features, too, the constitutional difficulty – and Nationalist indifference – of federal industrial hegemony, and the short but complex history of industrial arbitration. By 1925, unions had come around to opposing judicial arbitration and to supporting a return to the old wage boards. For them, the delays in litigation and the bias of the judges themselves was too much. And it was with this as part of his platform that Lang took office with a narrow majority.

The legislation passed and there it was, the office of the first industrial commissioner. And while Lang did not know Piddington – they did not meet until December 1926 – the unions were only for Piddington. There was also 'lively but lightweight' support from a young Clive Evatt, editor of the Sydney University magazine *Hermes* and called to the bar in 1926; for him, Piddington was a spokesman for a younger generation because of his role in the University Senate 'in an uphill fight against reaction and purblind conservatism'.[74]

The Nationalists and the employers were aghast. And it was not as though two years on *Smith's Weekly* had kept Piddington out of their thoughts. The current leader of the opposition, Thomas Bavin, had regularly suffered under his pen. When Bavin as attorney had ordered a police raid of the Seamen's Union, his language was condemned by Piddington as a 'neurotic brainstorm, generated by the crowning disaster to a hectic and inglorious career as chief

law adviser to the Crown' and the government effort generally as 'a protracted crucifixion of British liberty'.[75]

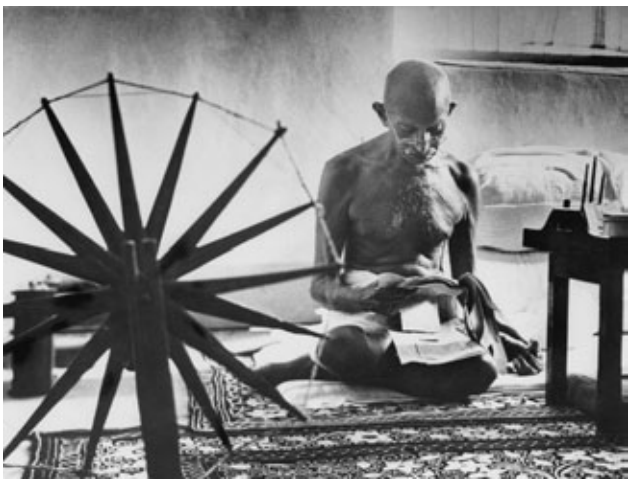
Again, this essay is not the forum to discuss the wider history. It will surprise no reader to learn that by 1927 employers through the *Sydney Morning Herald* were accusing the commission of being 'a creature of a stop-gap Ministry which [was] bound over hand and foot to the Reds of the Trades Hall'; that Piddington wanted a royal commission into the accusations because a libel action would have meant months of delay; that Lang warned him against exposing himself to cross-examination; and that eventually Lang reluctantly agreed.[76] Ruthless in his examination of Piddington was S E Lamb KC for the *Herald*, who would later represent de Groot.

In terms of his honesty and ability, Piddington was exonerated by the commission, although a majority criticised his interpretation and application of the relevant legislation. It did not much matter, as the Nationalists came to power in NSW the same year, with Bavin as premier. 'With low commodity prices and increasing difficulty in financing the debt from overseas borrowing, New South Wales was the first to feel the pinch of a declining national economy. Bavin's remedy was to reduce wages and the standard of living. But first he had to reduce Piddington.'[77]

Bavin achieved this by nominally increasing Piddington's status, to that of president of a judicial bench, but by making him one of three members of the new commission, with KW Street KC and ME Cantor KC alongside him. The legislation giving rise to the scheme of a full bench was referred to privately in the Commonwealth Arbitration Court as 'the Piddington Suppression Act'.[78] The turbulence in the commission over the following years was part of the wider political and social scene. There was Bavin's replacement by Lang in October 1930. There was Lang's suspension of interest payments to overseas bondholders and the formation of the New Guard in February 1931. In September 1931, Street was elevated to the Supreme Court, an elevation which, in the absence of an immediate replacement, effected an hiatus in the constitutionality of the commission. The headnote to a report of an application by Goldsborough Mort to the full Supreme Court – in which Lamb KC appeared for the employer – tells the story:[79]

> On 29th September, 1931, the Industrial Commission, which was at that date fully constituted, referred to the Deputy Commissioner, E. C. Magrath, Esq., the matter of an application for the variation of an award. On 30th September, 1931, one of the members of the Industrial Commission resigned and no further appointment was made to fill the vacancy thereby occasioned. The Deputy Commissioner nevertheless proceeded to hear the matter.

What would have been a minor bureaucratic oversight appears to have effected the commission's end.[80] In any event, on 13 May 1932, NSW Governor Sir Philip Game dismissed Lang, and this prompted Piddington's resignation six days later and a few weeks short of a judicial pension.[81] Piddington produced a pamphlet, a yellowed copy of which is before me, headed 'The King and the People and The Severing of Their Unity'. How far the electors in the ensuing 'Pseudo-Election', as Piddington termed it, took his comments on board is not known. The quote from Milton on the inside of the front cover opens 'Thus much I should perhaps have said, though I was sure I should have spoken only to trees and stones…'[82]



Mahatma Gandhi next to his spinning wheel. Photo: Margaret Bourke-White / Time Life Pictures / Getty Images

Piddington and Gandhi

In the midst of his own professional turmoil, Piddington found time to experience the serenity of a visit to Gandhi in his ashram in January 1929, an event covered as a chapter in his 1929 memoirs and published separately in 1930, *Bapu Gandhi*.[83] (Bapu is a Hindi word for father.) He records the reverent attitude to the cow, observing that they strolled about the streets with more than the assurance of the dairy cows in Blackheath in earlier days. The basis for this observation is revealed in an anecdote about the late A H Simpson CJ in Eq. He was in his gardening clothes and asking the local sergeant why he hadn't impounded some straying cattle which had damaged his flowers. The sergeant took pity on the untidy and unkempt person before him, laying a hand on his shoulder and explaining gently 'My good man! If you knew as much about the law as I do, you'd know that we can't impound in Blackheath, because it isn't a municipality.'[84]

The visit itself highlights Piddington's worldliness – one can hardly see many of his class acknowledging, still less visiting one of the exploders of the colonial world – alongside his naïve singlemindedness. Gandhi himself appears to have appreciated the nicety of being called upon as the leader of hundreds of millions for whom the rule of law was a chimera, to listen to a doubtless dense description of the jurisprudence surrounding the supplementation in New South Wales of a living wage with child endowment. As Piddington himself records, Gandhi politely listened, then asked

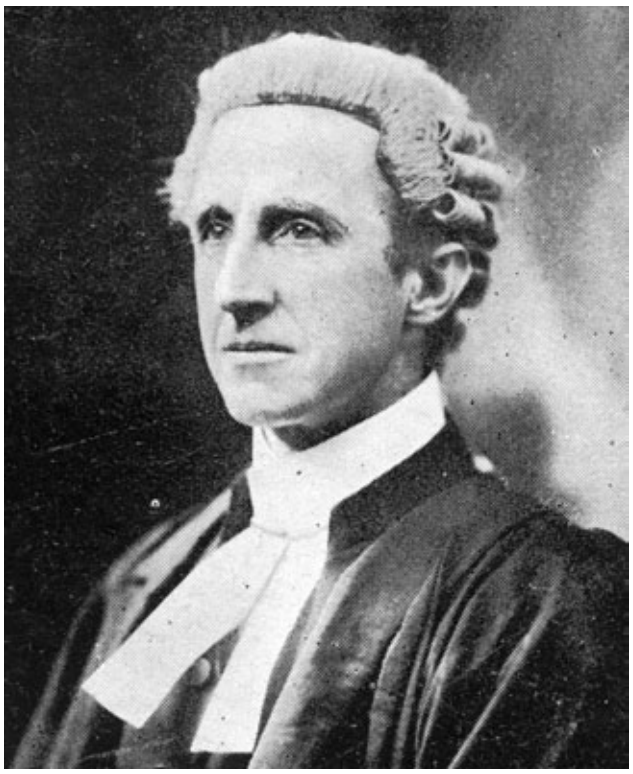


Photo: State Library of New South Wales

'And you have come all the way from Calcutta to tell me all this interesting news about the methods of your country?'[85]

In fairness to Gandhi's courtesy and to Piddington's persistence, by the end of their second meeting, Gandhi was able to say 'I am greatly struck by the way the wage question is dealt with in Australia, and especially with that separate provision for children of which you spoke. I approve of it thoroughly, and we must see what we can do, bearing in mind the figures you have given me about the local requirements in money.'[86]

The Privy Council

Piddington's resignation upon Lang's sacking stalled Piddington's career of public service but did not end what he understood to be his duty of serving the public. In *Piddington v The Attorney-General*[87] he sought an interim injunction to restrain the government from giving effect to its Legislative Council reforms. He was unsuccessful. It seems that he removed himself as a plaintiff in order to press the substantive claim as counsel, but this did not stop the defendants succeeding on a demurrer.[88]

Piddington's team pressed an appeal to the Privy Council. The report is cold enough, but the exchanges – reported in the *Herald*[89] – were at freezing point. Lord Russell of Killowen said 'I have listened to you for five minutes and I have not followed anything that you have said'. The senior law lord, Lord Tomlin, said 'As interesting as these considerations are, they do not concern our minds in the slightest. We are concerned with the meaning of an Act.' (Given that Edmund Barton was a twice unsuccessful litigant in the Privy Council, it is a curious footnote that the Australian component of the government team – the English leader being Greene KC – comprised Maughan KC and Wilfred Barton, respectively Barton's son-in-law and son.)

Heard about the same time was *Abigail v Lapin*.[90] In this, Maughan KC and Barton appeared for the appellant and Piddington KC for the respondents. Lord Wright's opinion is interesting for its tenor. The High Court had split 3-2; Lord Wright said that it was 'difficult fairly to summarize these carefully reasoned judgments…'; he refers to the conclusion of 'the late learned Chief Justice, Sir Adrian Knox, long a distinguished member of the Judicial Committee'; and he sees a 'conflict of eminent judicial opinion', before bringing the Committee down on the side of the dissenters Gavan Duffy and Starke JJ.

An advocate in the High Court

Over the summer of 1934 and 1935, Piddington had the opportunity to act against the dark forces in a far different cause. The Kisch affair has been recorded by Kisch himself and, among others, by author and judge Nicholas Hasluck. Egon Kisch's own assessment of Piddington opens this article. It is sufficient for current purposes to summarise the three ventures to the High Court, all reported in volume 52 of the *Commonwealth Law Reports* and in each of which Piddington appeared for Kisch.[91]

In *The King v Carter*; *ex parte Kisch*[92], Captain Carter as captain of the SS *Strathaird* prevented his passenger from landing at any port of the Commonwealth, as he believed Kisch to be a prohibited immigrant within the meaning of the Immigration Act. Among the issues was whether there was a sufficient basis for the requisite ministerial declaration by which Kisch would have acquired that status, and Evatt J pressed the Commonwealth into bringing in an affidavit from the relevant minister. Piddington pounced, seeking leave to cross-examine. The judge, doubtless with a mild glint, records:[93]

> I was loath to inconvenience the Minister, but he is not entitled to any immunity from bona fide cross-examination. I therefore indicated that I could not resist the application to cross-examine, although I made it quite clear that I reserved my opinion as to whether any question asked would be admissible or allowed. Counsel for the Commonwealth then asked leave to withdraw the affidavit, and, the two parties agreeing, I allowed such withdrawal.

Hasluck records:[94]

> I digress briefly to say that the elderly Piddington did not necessarily impress all of those associated with the case. In Peter Crockett's biography of Justice Evatt the author draws on various sources in

> support of a contention that Evatt was concerned about the way in which the case was being argued on behalf of Kisch. Neglecting his judicial obligation of impartiality, Evatt called Piddington's junior counsel to his chambers to explain that a different line of argument would be more persuasive. [The junior was Parsonage, not G L Farrer, who appears to have been his regular and who had gone with him to the Privy Council.]

Having failed to get to 'prohibited immigrant' by means of a ministerial declaration, the government tried a different route, the dictation test. Section 3(a) of the Act prohibited as an immigrant any person who failed to write out as dictated a passage of 50 words 'in an European language'. Kisch, a Czechoslovak, failed a test in Scottish Gaelic and was convicted of the appropriate offence. This time, in the form of *The King v Wilson & anor; ex parte Kisch*,[95] the matter came on before five judges. Rich, Dixon, Evatt and McTiernan JJ found that Scottish Gaelic was not a language, it not being a standard form of speech. Starke J offered a typically spirited dissent.

Over the next couple of months, the *Herald* published some staunch criticism in its letters pages. The chancellor of the University of Sydney Sir Mungo MacCallum weighed in under the name Columbinus, asking 'Is it possible that their Honours have adopted the old Highland tradition that it was the language of paradise, the vanished sanctum that, according to Dante, has been transferred to the southern hemisphere'.[96] Before anyone knew what was happening, Piddington's client was pressing an application that the *Herald* be punished for contempt, in that various articles and letters either were calculated to derail Mr Kisch's next visit to the Court of Petty Sessions or were themselves so serious attack on the High Court that the paper and its editor should be punished. This case – *The King v Fletcher & anor; ex parte Kisch*[97] – also came on before Evatt J. Evatt described his old lecturer as follows:[98]

> The next matter to which reference is required is an article published under the pen name of 'Columbinus' on December 27th. The writer strained to affect a scholar's detachment from all the merely legal questions involved in the case, but it seems not improbable that an element of malice lurks behind the facade of heavy sarcasm and hackneyed story. But the Court is constrained to give the respondents the benefit of every reasonable doubt upon all questions of fact which are involved, and it is unable to infer with sufficient certainty that a more damaging imputation upon the Judges than ignorance of the facts as to Scottish Gaelic was attributed to this article by the newspaper readers. This contributor also accepted payment for his article. Although his identity was disclosed to the Court, the parties agreed that it was unnecessary that it should be revealed in proceedings to which he is not a party.

An apology was read out prior to judgment and Evatt J did find that the paper and three contributors went beyond the limits of fair criticism and although no punishment was meted out, the respondents were deprived of their costs. While I confess I read that portion of the judgment set out immediately above as a malice directed to MacCallum, Dixon J was in no such mind:[99]

> My dear Evatt,
>
> …. It appears to me that the course you took is calculated to enhance the Court's reputation in a substantial degree. The exposure of the editor's methods, the contrition expressed through Curtis which is the peccavi of the sinner as much as the recantation of the craven, the consideration shown to Mungo MacCallum in withholding the name of Columbinus, the obvious justice of the observations on that scribe's contribution, the tone of detachment which the judgment has and the entire absence of any spirit of retaliation, all this does more to strengthen the authority of the Court as an instrument of justice than the imposition of any deterrent punishment, which might perhaps operate to suppress the publication of criticism in the future but would promote a real hostility to the Court….

It is easy to have some suspicion of Piddington's role in Kisch's application, as the *Herald* and he had a rancorous history. No-one seemed too concerned at the irony of Mr Kisch alleging contempt in an effort to prosecute his own right to free movement and speech.

Piddington's practice was a lively one. At times, it was not so much a case of leaving any stone unturned, but of overturning stones which were best left to lie. In 1937, he appeared for the plaintiff; Evatt J opened his judgment 'The plaintiff's claim is a curious one.'[100] Later in the same year, Rich J observed of Piddington's client that 'In this case the appellant brings a suit of a very unusual kind.'[101] Piddington had no hesitation in asserting constitutional invalidities,[102] in one case succeeding with Dixon J but not his Honour's brethren.[103]

A personal injury matter

In the autumn of 1938, a quarter of a century after Albert Bathurst Piddington had resigned from the High Court of Australia, he was knocked down by a motorcycle at the intersection of Martin Place and Phillip Street. In the ensuing trial, his witness said in cross-examination that he had seen the accident while taking a message for a Major Jarvie to a bank. The bank manager was called by the defendant, and said that there had not been any operation on Major Jarvie's account for that day. The jury returned a verdict for the defendant. The full court of the Supreme Court dismissed an appeal (with, it must be noted, a dissent from by-now Mr Justice Bavin), and Piddington pressed on to the High Court. For him were Windeyer KC and McKillop, with them Evatt KC. Dovey KC and WB Simpson were for the respondent.

A majority – Dixon, Evatt and McTiernan JJ – found that the evidence of the bank manager was inadmissible and ordered a new trial. Latham CJ and Starke J disagreed, Starke J adding that 'Friendship and sympathy for an old and distinguished member of the legal

profession should not sway the judgment of the court'.[104] In fairness to the majority, the closeness of the vote reflects the difficulty of the point, the grey world where credit and relevance mingle and collide. The last word is with the legislature, in the current section 106(2)(d) of the Commonwealth and state Evidence Acts. That provides that the credibility rule does not to apply to evidence that tends to prove that a witness is or was unable to be aware of matters to which his or her evidence relates. 'Section 106(d) has significance, because it represents an attempt, probably successful, to reverse such decisions as *Piddington v Bennett & Wood Pty Ltd* (1940) 63 CLR 533 to the effect that evidence rebutting a denial of absence by a witness is inadmissible.'[105]

The end

Piddington died in Sydney on 5 June 1945 and Marion five years later. Professor Geoffrey Sawer has said that Piddington was 'an able and civilized man who would have made a much better judge than Gavan Duffy'.[106] However, one is left to wonder at Piddington's brittleness. His difficulty was not a want of integrity but an inability to wield it as a sword as well as a shield. Too often he took the robust and often unfounded criticism which is part and parcel of public life as a personal attack. Too often he failed to appreciate that what he perceived as an expression of independence was seen by friend and foe alike as the exercise of an erratic mind. It is hardly surprising that he has been described as quixotic, and whatever his shortfalls there is a vividness in the image of him furiously tilting at windmills, an imperfect advocate for an ideal. Claude McKay, owner with Joynton Smith and RC Packer of *Smith's Weekly*[107] and friend of Evatt, once wrote:[108]

> I saw a lot of Bert when he decided to stand for the State Parliament as a Labor candidate, a brand of politics the big interests detested and were quick to make known to his disadvantage professionally. Briefs which came readily to the young barrister on account of his brilliance ceased abruptly and Bert was cut to the quick. He couldn't understand the vengeful attitude of the money-bags. But there it was. A. B. Piddington, I remember, told me of a somewhat similar instance, that of a remarkably able young lawyer who rose like a rocket at the Bar. One night in the Union Club he let himself go on the wrongs of the workers and, quoting Rousseau, saw them 'gnawing at the bloody skull of capitalism'. In capital's citadel that marked him as dangerous and sealed his professional ruin.
>
> In the humanities there was an affinity between Bert and Piddington. They both had a wide streak of altruism in a world where the one-eyed man is king. Anyway with both of them it proved a handicap to personal advancement.

Piddington's biographer leaves the last word to his son Ralph, a social anthropologist who fought his own battle with the establishment. In 1950, Ralph dedicated the first volume of *An Introduction to Social Anthropology* to the memory of his father, 'in a translation of a Pacific island dirge to a 'maru', a public official':[109]

> Broken is the shelter
> Of my father
> Lost to sight
> You were the true maru, generous to the common folk.

Endnotes

1. The OED says in full '1848 H. PIDDINGTON *Sailor's Horn-bk. 8 Winds.* Class II. (Hurricane Storms..Whirlwinds..African Tornado..Water Spouts..Samiel, Simoom), I suggest..that we might, for all this last class of circular or highly curved winds, adopt the term 'Cyclone' from the Greek κνκλωζ (which signifies amongst other things the coil of a snake) as..expressing sufficiently the tendency to circular motion in these meteors.'
2. Egon Kisch, Australian Landfall, passage quoted in Nicholas Hasluck, *The Legal Labyrinth – The Kisch Case and Other Reflections on Law and Literature*, 2003, Freshwater Bay Press, p.25.
3. AB Piddington, *Worshipful Masters*, 1929, Angus & Robertson, p.142.
4. Ibid.
5. Ibid., pp.143 to 144.
6. However, the Parliament of New South Wales site gives New Year's Day 1862 as the date: http://www.parliament.nsw.gov.au/prod/parlment/members.nsf/1fb6ebed995667c2ca256ea100825164/9c74b65d0ffd781bca256e4e001d3e05!OpenDocument, accessed 11/09/09.
7. AB Piddington, *Worshipful Masters*, p.146.
8. Ibid., p.147.
9. Ibid.
10. Ibid., p.1.
11. Ibid., p.6.
12. *The History of Sydney Girls High School* (www.sghs.nsw.edu.au/History/index.html, accessed 8/09/09).
13. I am grateful for the assistance of Ms Louise Graul, SBHS Archives.
14. AB Piddington, *Worshipful Masters*, p.119.
15. Morris Graham, *AB Piddington*: *The Last Radical Liberal*, 1995, UNSW Press, p.4.
16. AB Piddington, *Worshipful Masters*, p.229.
17. Sir Frederick Darley, quoted in Windeyer, Sir William Charles (1834 – 1897), *Australian Dictionary of Biography – Online edition* (www.adb.online.anu.edu.au/biogs/A060452b.htm, accessed 8/09/09).
18. Sir Henry Parkes, *Fifty Years in the Making of Australian History*, quoted in Windeyer, Sir William Charles (1834–1897), *Australian Dictionary of Biography – Online edition* (www.adb.online.anu.edu.au/biogs/A060452b.htm, accessed 8/09/09).
19. Josephson, Joshua Frey (1815–1892), *Australian Dictionary of Biography – Online edition* (http://www.adb.online.anu.edu.au/biogs/A040558b.htm, accessed 8/09/09).
20. AB Piddington, *Worshipful Masters,* pp.40 to 41.
21. Morris Graham, *AB Piddington*: *The Last Radical Liberal*, p.8.
22. Ibid., p.8 and p.11.
23. Ibid., p.12.
24. en.wikipedia.org/wiki/Electoral_district_of_Uralla-Walcha, accessed 11/09/09.
25. Morris Graham, *AB Piddington*: *The Last Radical Liberal*, p.19.
26. Ibid., p.21.
27. Graham, pp.21 to 22; Nettie Palmer, *Henry Bourne Higgins – A*

Memoir, 1931, Harrap, p.181; John Rickard, *H. B. Higgins – The Rebel as Judge*, 1984, Allen & Unwin, p.102.
28. Morris Graham, *AB Piddington*: *The Last Radical Liberal*, pp.24 to 25.
29. Ibid., p.32.
30. 1 CLR 181.
31. 1 CLR 181 at 203.
32. Morris Graham, *AB Piddington*: *The Last Radical Liberal*, p.39.
33. Ibid., p.43.
34. Ibid., p.44.
35. Ibid., p.47.
36. Ibid., p.45.
37. AB Piddington KC, *Spanish Sketches*, 1916, Oxford University Press.
38. *Spanish Sketches*, p.110.
39. Ibid., pp.110 to 111.
40. www.hcourt.gov.au/about_02.html (accessed 19/09/2009).
41. Graham, p.52.
42. John Rickard, *H. B. Higgins – The Rebel as a Judge*, 1987, George Allen & Unwin, p.273.
43. Graham Fricke, *Judges of the High Court*, 1986, Hutchinson, p.80.
44. Quoted by Fricke, p.81.
45. Quoted by Graham, p.52.
46. HAR Snelling in Bennett (ed), p.150 to 151.
47. Graham, p.53.
48. Fricke, p.81.
49. Graham, p.53.
50. J M Bennett, in Bennett (ed), p.99.
51. *Worshipful Masters*, p.203. See also p.233 to 234.
52. Graham, p.53.
53. Worshipful Masters, p.67 to 68.
54. Rickard, p.173.
55. Graham, p.82.
56. Graham, p.80 to 81.
57. Knibbs, Sir George Handley (1858 – 1929), www.adb.online.anu.edu.au/biogs/A090623b.htm (accessed 21/09/09).
58. Graham, p.82 to 83.
59. Graham, p.83.
60. Knox, Edward William (1847 – 1933), www.adb.online.anu.edu.au/biogs/A090629b.htm (accessed 16/09/09).
61. Graham, p.86.
62. Ibid., p.85.
63. Ibid., p.89.
64. A B Piddington KC, *The Next Step: A Family Basic Income*, 1921, Macmillan & Co; online edition @ www.archive.org/details/nextstepfamilyba00piddrich.
65. Graham, p.81 to 82.
66. Ibid., p.82.
67. Dwyer, Catherine Winifred (Kate) (1861 – 1949), www.adb.online.anu.edu.au/biogs/A080412b.htm (accessed 22/09/2009).
68. Graham, p.51.
69. Ibid., p.88.
70. Ibid., p.94 to 95.
71. Ibid., p.97 to 98.
72. Susan Wyndham, 'Abuse as a muse', *Sydney Morning Herald*, 6-7 June 2009.
73. See *Spain v Union Steamship Company of New Zealand Ltd* (1923) 33 CLR 555; *Pickard v John Heine & Son Ltd* (1924) 35 CLR 1; *Hillman v Commonwealth* (1924) 35 CLR 260; *Burwood Cinema Ltd v Australian Theatrical & Amusement Employees' Association* (1925) 35 CLR 528; *New South Wales v Cth* (1926) 38 CLR 74.
74. Graham, p.126.
75. Ibid., p.115.
76. Ibid., p.144 to 145.
77. Ibid., p.150.
78. Ibid., p.154.
79. *Ex parte Goldsborough Mort & Co Ltd; re Magrath & ors* (1931) 32 SR(NSW) 338.
80. Graham, p.172.
81. Fricke, p.83.
82. Although there is no reference to the source, it is an apt one, Milton's short work, *A Ready and Easy Way to establish a Free Commonwealth*.
83. A B Piddington, *Bapu Gandhi*, 1930, Williams & Norgate.
84. *Bapu Gandhi*, p.14.
85. Ibid., p.47.
86. Ibid., p.48 to 49.
87. *Piddington v The Attorney-General* (1933) 33 SR(NSW) 317.
88. *Doyle v The Attorney-General* (1933) 33 SR(NSW) 484.
89. Graham, p.186.
90. [1934] AC 491.
91. There is also *R v Dunbabin* (1935) 53 CLR 434, Piddington's successful prosecution of *The Sun* newspaper for contemptuous commentary on two pieces of High Court litigation, one being Kisch's.
92. 52 CLR 221.
93. 52 CLR 228.
94. Hasluck, p.29 to 30.
95. 52 CLR 234.
96. Hasluck, p.37.
97. 52 CLR 248; see also *R v Dunbabin* (1935) 53 CLR 434.
98. 52 CLR, 255.
99. Kylie Tennant, *Evatt: Politics & Justice*, 1981, Angus & Robertson, p.91.
100. *McDonald v Victoria* (1937) 58 CLR 146.
101. *Brunker v Perpetual Trustee Co Ltd* (1937) 59 CLR 140.
102. See eg *Werrin v Commonwealth* (1938) 59 CLR 150.
103. *R v Brislan; ex parte Williams* (1935) 54 CLR 262.
104. 52 CLR, 550.
105. J D Heydon, *A Guide to the Evidence Acts 1995* (NSW) and (Cth), 2nd ed, 1997, Butterworths, [3.450].
106. G Sawer, *Australian Federalism in the Courts*, 1967, MUP, page 65, quoted in Fricke, p.82.
107. McKay, Claude Eric Fergusson (1878 – 1972), www.adb.online.anu.edu.au/biogs/A150273b.htm (accessed 19/10/2009).
108. Claude McKay, a letter to Tennant, quoted in Tennant, p.43.
109. Graham, p.194.