

What Albert did and what Albert did next: Albert Bathurst Piddington – the High Court judge who never sat

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Introduction

- 1 Outside the Senior Common Room you may have noticed that there hang three photographs of the three former students from this College to end up on the High Court of Australia. Most of you will know or recognise the photo of Dyson Heydon, or at the very least, know of him. His was (and remains) a prodigious and prolific career, as a scholar, teacher, advocate, judge and Royal Commissioner. His most recent book, *Heydon on Contract*, which I will have the honour of launching this coming Thursday, runs to some 1,200 pages and is a work of quite extraordinary erudition.
- 2 In the second of the photographs you will see Sir Dudley Williams who not only had the distinction of serving on the High Court for almost 20 years but was a war hero, having been awarded the Military Cross for bravery for his service in the Royal Field Artillery during the First World War. He was also twice mentioned in dispatches.
- 3 It is the third of the High Court judges whose photograph hangs outside the Senior Common Room, however, that I want to speak to you about tonight. His name was Albert Bathurst Piddington (Bathurst after the place of his birth), and he holds the dubious honour of being the only judge appointed to the High Court who never in fact sat. That explains why none of his judgments come to mind. He was, however, a rather extraordinary figure who lived a very full and fascinating life. I think you would have liked him. You certainly would

* Justice Bell gratefully acknowledges the enormous assistance of Mr James Monaghan, Researcher to the Court of Appeal, in the preparation of this paper.

have found him interesting. My address is entitled 'What Albert did and what Albert did next'.

4 I first encountered Piddington over 30 years ago about 15 metres from where I am now speaking as the occupant of Room 7 in West Blackett. In 1987, in that room, I wrote an honours thesis in economic history on the subject of the Inter-State Commission, a curious body provided for by s 101 of the *Constitution* but which enjoyed only a very brief existence between 1913-1920.¹ It had a brief and largely ineffective second life between 1984 and 1990.² Piddington was its first President. About 100 years before I encountered him in that context, Piddington may well have occupied the very same room in which I first encountered him as a student of this College.

5 I make this point at the outset because you, as law students in this College, are part of a proud tradition which has produced many fine lawyers and public figures. In giving this address tonight, I express my hope that you will continue that tradition. I also express my hope that, like Piddington, you will become far more than lawyers and be engaged in public life and affairs through the course of your careers. As we shall see, he lived through dynamic years of change, including the foundation of the Commonwealth of Australia as a sovereign nation. He also, it would seem, enjoyed life to the full, and was forever intellectually curious and engaged. Those characteristics, I rather suspect, may have been fashioned or at least bloomed in this very same place where you are all lucky enough to be students.

Early life and university days

6 Born to a clergyman in Bathurst on 9 September 1862,³ Piddington moved around a great deal as a child. His schooling began not far away at Cleveland Street Infants, followed by a short time at Newcastle Public School, a stint at

¹ Andrew Bell SC, 'The missing constitutional cog: the omission of the Inter-State Commission' (Summer 2009-10) *Bar News* 59; see also Andrew Bell SC, 'The Elusive Promise of the Inter-State Commission' in James Stellios (ed), *Encounters with Constitutional Interpretation and Legal Education: Essays in Honour of Michael Coper* (Federation Press, 2018) 34.

² See Michael Coper, 'The Second Coming of the Fourth Arm: The Role and Functions of the Inter-State Commission' (1989) 63 *ALJ* 731.

³ Graham Fricke, *Judges of the High Court* (Century Hutchinson, 1986) 77.

Goulburn Public School, and a brief appearance at Newington College. According to his memoir, when he arrived at Newington, he was placed in the highest form in everything except Latin: a truant disposition in Goulburn had seen him attending more to the cattle sales than his conjugations. He therefore found himself in a beginners' Latin class with older divinity students. On his own account, 'the tyrannical old Headmaster, unable to cane men of twenty-one or twenty-two, used to come down from his dais and cane me.'⁴ Understandably incensed, the young Piddington ran away for three days. His father in Goulburn telegraphed the President of the College, the Rev Joseph Horner Fletcher, saying 'Inform the police, search the river; if absconded, punish severely.'⁵

- 7 Once located (and duly flogged), Piddington was, as they say, 'withdrawn' from Newington at the end of the quarter.⁶ He was sent to live on a station near Yass run by a Mr J F Castle. There, he encountered a less brutal pedagogical style, and spent five months on the land, growing in his love of learning.⁷ He would later write that:⁸

'I owe Mr Castle a great debt for taking, out of pure kindness towards the family, a young incorrigible as the guest not of his house and table only but of his rich mind and warm heart. But for him I should probably have never entered the Elysian fields, as they proved to be under [Professor Charles] Badham's later guidance, of foreign literature, and he made bearable a sentence of banishment from all schoolmates which first made me realize that school was not a place to run away from.'

- 8 From Yass, Piddington won a scholarship to Sydney Grammar School at age 14. After a few years there, he came to the University of Sydney and to St Paul's College.
- 9 When he arrived here in 1880, St Paul's was a much smaller place: in his first year, he was one of just seven undergraduates at the College, then under the

⁴ Albert Bathurst Piddington, *Worshipful Masters* (Angus & Robertson, 1929) 146-7.

⁵ *Ibid*, 147.

⁶ *Ibid*, 148.

⁷ *Ibid*, 150-9.

⁸ *Ibid*, 158-9.

wardenship of the Rev William Hey Sharp.⁹ In 1882, Piddington, Philip Street, and Andrew Macansh were all students at St Paul's. In his history of the College, *Hearts and Minds*, Alan Atkinson writes that in November of that year, Piddington and Macansh organised a petition complaining about food at breakfast and demanding the Steward's dismissal. Professor Atkinson then takes up the narrative:¹⁰

'Then, late at night ... all three were together in their nightshirts in Macansh's room..., singing to the combined melody of fire-irons, fender, concertina and French horn. 'The Warden', said Piddington, 'came in and ordered us to our rooms. Macansh invited us to stay as his guests. The Warden insisted. Macansh objected on grounds of jurisdiction under the by-laws'. ... 'Your only power in a student's room, Macansh informed [Warden] Sharp, 'is to order the removal of objectionable pictures from the walls. These gentlemen are not objectionable pictures, and what's more, they're not on the walls'.'

- 10 Professor Atkinson records that Council dealt with this rebellion by tightening up the rules about suspension and expulsion. Plus ça change, plus c'est la même chose! Of the three reprobates, one, Piddington, was to be appointed to the High Court; a second, Philip Street, was to become the 8th Chief Justice of New South Wales.
- 11 Later at the Bar, perhaps inspired by Macansh, Piddington would run a similarly ambitious argument regarding jurisdiction, trying to persuade the Supreme Court of New South Wales that the Court of Arbitration – established under the *Industrial Arbitration Act 1901* (NSW) – was not subject to the Supreme Court's supervisory jurisdiction. In response to Piddington's argument, Acting Chief Justice Stephens rather pointedly remarked: 'My only wonder is that anyone could be found to argue that this Court has been deprived of its most salutary jurisdiction to intervene in cases of this kind.'¹¹ Piddington's argument was, as Sir Humphrey Appleby might have said, 'courageous'.

⁹ *The Sydney University Calendar* (1880-1881), 104-105 <<http://calendararchive.usyd.edu.au/Calendar/1880/1880-1.pdf>>.

¹⁰ Alan Atkinson, *Hearts and Minds: St Paul's College, Sydney University, 1815-2016* (UNSW Press, 2017) 150-1.

¹¹ *Hotel, Club, Restaurant and Caterers' Employees' Union v The Caterers' and Restaurant Keepers' Association* (1903) 2 *Industrial Arbitration Reports* 196, 197.

- 12 At University, Piddington's scholarly gifts bloomed. He excelled in the matriculation exam, and won scholarships and prizes each year.¹² At the end of 1883, he completed his BA with First Class Honours and the University Medal for Classics. He was outgoing and gregarious. As a 20 year old, he attended a 22 course dinner for 150 guests – including judges and politicians – at Sydney Town Hall to mark the 70th birthday of Professor Badham, renowned Professor of Classics at Sydney University. Piddington was amongst the last four to leave, in the company of the 33 year old Edmund Barton. Piddington recorded that he 'ate every course, and afterwards walked home to St Paul's College, treading (but treading firmly) on air all the way.'¹³
- 13 Upon graduation, he stayed on at the College as Assistant Classical Lecturer¹⁴ and Vice-Warden.¹⁵ He also took up a post as a member of the first staff of Sydney High School – now Sydney Boys High School but then located in Castlereagh St – where his intellectual gifts and passion for teaching attracted the admiration of students and staff alike.¹⁶
- 14 In 1887, he took a leave of absence to travel to Europe on a grand tour, visiting Professor Badham's old Oxford college, Wadham (hence, and inevitably, 'Badham of Wadham').¹⁷ He also travelled to Leiden in Holland to call on one of Badham's academic colleagues, the ancient Greek scholar, CG Cobet and thence to Bonn in Germany where, apparently, 'instead of seeking to make an impression as an academic he enthusiastically joined university

¹² In the matriculation exam, he received first class honours in Classics and Mathematics, and was 'Distinguished' in Natural Science. In 1880, he was awarded the Hunter Baille Bursary No 2 and University Scholarship for General Proficiency (in Arts). In 1881, he was awarded the Lithgow Scholarship (for proficiency in classics) and a Prize Book in Classics. In 1882, he was awarded the Cooper Scholarship No 1 (for classical literature). And in 1883, together with the medal, he was awarded the University Prize for the BA Examination (Classics). See *The Sydney University Calendar* for the years: 1880-1, 1881-2, 1882-3, 1883-4, and 1884.

¹³ Piddington, *Worshipful Masters*, 6. See also Robert Lehane, *William Bede Dalley: Silver-tongued pride of old Sydney* (Ginninderra Press, 2007) 257-8.

¹⁴ *The Sydney University Calendar* (1883-4), 145
<<http://calendararchive.usyd.edu.au/Calendar/1883/1883-4.pdf>>.

¹⁵ *The Sydney University Calendar* (1884), 154
<<http://calendararchive.usyd.edu.au/Calendar/1884/1884.pdf>>.

¹⁶ Morris Graham, *A. B. Piddington: the last radical liberal* (UNSW Press, 1995) 3.

¹⁷ Piddington, *Worshipful Masters*, 12-14.

students in noisy revelry.¹⁸ A theme may be detected. Let us call it bonhomie!

- 15 Upon his return, he continued to teach, lecturing evening students in English. And while he never abandoned his love of letters – indeed, on his death, Sir Robert Garran would write that literature was his first love – Piddington pivoted at this point, turning from academic pursuits towards the public square.¹⁹ Taking up law, in 1889 he served as Sir William Windeyer's Associate at the Supreme Court of New South Wales, and on 17 September, 1890, aged 28, was called to the Bar.²⁰

Law and politics at the turn of the century: federation and arbitration

- 16 During his first few years at the Bar in Denman Chambers, then located at 182 Phillip Street, he continued to be involved in academic life, lecturing at the University, producing an annotated edition of extracts from Milton's *Paradise Lost*,²¹ and serving as an examiner for the Junior Public Examination.²² In 1894, at age 31, he felt a pull to political life, and ran for office in the Legislative Assembly in the electorate of Tamworth, having been invited by the Freetrade Association of Tamworth to be its candidate. He lost the 1894 election to a former Premier, Sir George Dibbs, but in the general election the following year, then aged 32, Piddington ran again and secured the seat.²³ Upon election, according to one historian, he declared that:²⁴

'He would support with his best efforts all fair and just requests, but as he was more than just the local member, 'one representative of a people and of a colony', he would have to consider the interests of the whole colony. He

¹⁸ Graham, *A. B. Piddington*, 4.

¹⁹ Sir Robert Randolph Garran, 'A. B. Piddington, M.A., K.C.' (1945) 19(3) *ALJ* 68, 69.

²⁰ Michael Roe, 'Piddington, Albert Bathurst (1862-1945)' in *Australian Dictionary of Biography* (MUP, 1988).

²¹ Early in his career at the Bar, Piddington was the plaintiff in proceedings in the Supreme Court – though he did not represent himself. He sought an injunction prohibiting publication of a book by George Thornton which he alleged infringed his copyright in relation to his edition of the Milton selections. The Chief Judge in Equity, Justice Owen, dismissed Piddington's motion for an injunction, holding that the two books substantially differed. The reason the two collections contained the same extracts from *Paradise Lost* is that those extracts were set texts for University examinations; Piddington had in fact set them. See *Piddington v Philip and Another* (1893) 14 LR (NSW) Eq 159.

²² Graham, *A. B. Piddington*, 4.

²³ L F Crisp, *Federation Fathers* (MUP, 1990) 129; Graham, *A.B. Piddington*, 12.

²⁴ Graham, *A. B. Piddington*, 12.

would recommend deserving persons regardless of their politics. People now 'demanded sincerity, straightness and earnestness' from their politicians."

- 17 Piddington came to politics at a time when the question of federation was being hotly debated. He was supportive of federation, and eager to work for the establishment of a strong, flexible national government, founded on majoritarian democracy.²⁵ He did not consider, however, that the draft Commonwealth Constitution bills that came out of the 1897-98 Convention and the 1899 Premiers' Conference would establish a national government of this character, and so was vocal in his criticism of them, both in and out of Parliament,²⁶ – so much so that his opponents 'interpreted his initials [A. B.] as "Anti-Bill," and christened his brother, W. H. B. Piddington, "Will Have Bill."²⁷

- 18 Piddington's core complaint about the draft bills was that they contained a fundamental incompatibility, trying to hold together the British system of responsible government with a US-style bicameral national legislature. On his view, the incompatibility arose out of the fact that in the British system, the government is ultimately responsible to the lower house, being the house that represents the interest of the people. Where there is a second chamber in other Westminster systems, it 'does not possess an insuperable veto ... [and represents] the *same interest* [as the first chamber] – that of the nation at large.'²⁸ In US-style federalism, however, the Senate represents a different interest to that of the House of Representatives – namely, that of the states. Piddington feared that the Convention bills, in failing to clearly specify the chamber to which the government was responsible, and in giving the Senate power to refuse supply, were making the mistake 'of giving [our] solar system two suns'.²⁹

- 19 He campaigned strenuously against the draft bills, and even after he lost his seat in the 1898 general elections, he campaigned in the press and in public

²⁵ Crisp, *Federation Fathers*, 130.

²⁶ *Ibid.*

²⁷ Garran, 'A. B. Piddington', 69.

²⁸ NSW Parliamentary Debates, vol 87, 27 May 1897, quoted in Crisp, *Federation Fathers*, 132.

²⁹ Albert Bathurst Piddington, *Popular Government and Federation* (Angus & Robertson, 1898) 10-12.

addresses. In June 1899, speaking in Tamworth against the bill that had emerged from the Premiers' Conference earlier that year, he said:³⁰

'I shall oppose the Bill, because a year's reflection has only made me *more* convinced that this is a measure which makes majority rule forever impossible for Australia. It denies to Australians the birthright of all men of British birth – the power of the purse. It puts heavy and needless burdens of taxation on the shoulders of those least able to bear them. It carries within it the germs of financial chaos and bitter heart-burnings between State and State in the demoralising scramble for the Federal surplus. It breathes the very spirit of provincialism and sets up a mockery of true nationhood. It makes responsible government impossible because it gives the Government two masters – the House *and* the Senate. As the final stroke of injustice to all Australians yet born and yet to be born, it denies to us the fundamental privilege of all free people, the right by majority vote to amend our Constitution according to our needs whenever, like every other human instrument, its faults become visible in the onward march of time.'

- 20 Piddington's rhetoric gives you a sense both of his intellect and of the depth of his concern: he thought the draft bills did the people of Australia a serious disservice, giving the interests of abstract governmental entities, the States, priority over the interests of ordinary people. One can also see that he was a nationalist.
- 21 By royal proclamation, the *Commonwealth of Australia Constitution Act 1900* commenced on 1 January 1901, and the Commonwealth was established. It is unlikely that Piddington was satisfied with the form that the *Constitution* took. But he had lost that argument and turned to other things.
- 22 Another statute, given assent at the close of 1901,³¹ would set the course of much of Piddington's professional life for the next few decades. The *Industrial Arbitration Act 1901* (NSW) opened a new field of legal work for practitioners like Piddington. The Act provided for the registration and incorporation of employer unions and employee unions, and it created a new court – the Court of Arbitration. The Act was intended to encourage collective bargaining, and

³⁰ *Tamworth Observer*, 17 June 1899, quoted in Crisp, *Federation Fathers*, 136.

³¹ New South Wales, *Parliamentary Debates*, Legislative Assembly, Tuesday 10 December 1901, 4070.

where such bargaining failed, the Court could hear and determine industrial disputes.³²

- 23 The new system was beset with various problems, largely on account of employers who 'frustrated the system by encouraging the registration of bogus unions, refusing to register their own associations and using legal representation to slow down procedures and increase [employee] union costs.'³³ The employers also pursued appeals to the Supreme Court and the newly formed High Court on points concerning the Court of Arbitration's jurisdiction.³⁴ Those appeals had the effect of undermining the finality of the Court of Arbitration's decisions, subjecting them to the supervisory jurisdiction of the superior courts.
- 24 Piddington was not a partisan in these disputes between labour and capital. While it's true that he acted for employee unions far more regularly than he did for employer unions,³⁵ he was, at least initially, primarily a barrister taking advantage of the opening of a new legal market. The difficulties that the new industrial system faced were unfortunate for workers, but produced work for lawyers.
- 25 The *Industrial Arbitration Act 1901* (NSW) contained a sunset clause, and when it lapsed, the *Industrial Disputes Act 1908* (NSW) took its place. That Act and its successors were beset by plenty of difficulties³⁶ – but for Piddington, the 1908 Act created opportunities to chair wage boards.³⁷ In that capacity, Piddington became a respected, but largely non-partisan, player in industrial law matters. His early involvement in that sphere would see him come to play significant roles in what we would now call industrial relations, as well as in shaping welfare policy. In 1911, by now 49 years of age, the Labor

³² *Industrial Arbitration Act 1901* s 16. Graham, *A. B. Piddington*, 34.

³³ Greg Patmore, *Australian Labour History* (Longman Cheshire, 1991) 110.

³⁴ See, eg: *Hotel, Club, Restaurant and Caterers' Employees' Union v The Caterers' and Restaurant Keepers' Association* (1903) 2 *Industrial Arbitration Reports* 196; *In re Clancy* (1903) 3 *Industrial Arbitration Reports* 6 (Supreme Court); *In re Clancy* (1904) 3 *Industrial Arbitration Reports* 206 (High Court).

³⁵ Graham, *A. B. Piddington*, 35.

³⁶ See, eg, Patmore, *Australian Labour History*, 111-113.

³⁷ David Ash, 'Albert Bathurst Piddington' (Summer 2009-10) *Bar News* 45, 48.

government in NSW appointed him Royal Commissioner, tasking him with inquiring into whether there was a labour shortage at the time, the working conditions of women and children, and the cause of a decline in apprenticeships.³⁸ This was the first of many commissions he would receive.

The High Court: appointment and resignation

26 By 1912, though not appointed silk, Piddington had appeared in the High Court 26 times,³⁹ on 18 occasions unled or leading.⁴⁰ These suits spanned diverse areas of law including constitutional and administrative cases,

³⁸ Roe, 'Piddington, Albert Bathurst (1862-1945)'; Graham, *A. B. Piddington*, 43.

³⁹ *Clancy v Butchers' Shop Employees Union* (1904) 1 CLR 181; [1904] HCA 9; *Borough of Tamworth v Sanders* (1904) 2 CLR 214; [1904] HCA 41; *Crowley v Glissan (No 2)* (1905) 2 CLR 744; [1905] HCA 31; *Miller v McKeon* (1905) 3 CLR 50; [1905] HCA 33; *Tindal v Calman* (1905) 3 CLR 150; [1905] HCA 39; *Sweeney v Fitzhardinge* (1906) 4 CLR 716; [1906] HCA 73; *Greville v Williams* (1906) 4 CLR 694; [1906] HCA 97; *Goldsborough, Mort and Company, Limited v Larcombe* (1907) 5 CLR 263; [1907] HCA 58; *Hazleton v Potter* (1907) 5 CLR 445; [1907] HCA 63; *O'Keefe v Williams* (1907) 5 CLR 217; [1907] HCA 64; *Mitchell v Scales* (1907) 5 CLR 405; [1907] HCA 66; *Merchant Service Guild of Australasia v Archibald Currie & Co Pty Ltd* (1908) 5 CLR 737; [1908] HCA 89; *Doodeward v Spence* (1908) 6 CLR 406; [1908] HCA 45; *Williams v Macharg* (1908) 7 CLR 213; [1908] HCA 56; *Sobye v Levy* (1909) 9 CLR 496; [1909] HCA 70; *Knowles v The Council of the Municipality of Newcastle* (1909) 9 CLR 534; [1909] HCA 72; *Australian Agricultural Co v Municipality of Newcastle* (1910) 10 CLR 391; [1910] HCA 17; *Mason v The Commonwealth* (1910) 10 CLR 655; [1910] HCA 22; *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co* (1910) 11 CLR 1; [1910] HCA 33; *Wingadee Shire Council v Willis* (1910) 11 CLR 123; [1910] HCA 35; *O'Keefe, O'Keefe, O'Keefe and McKenna v Williams* (1910) 11 CLR 171; [1910] HCA 40; *Osborne v The Commonwealth* (1911) 12 CLR 321; [1911] HCA 19; *De Britt v Carr* (1911) 13 CLR 114; [1911] HCA 32; *Union Bank of Australia Ltd v Rudder* (1911) 13 CLR 152; [1911] HCA 39; *Colon Peaks Mining Co (NL) v Wollondilly Shire Council* (1911) 13 CLR 438; [1911] HCA 70; *Sendall v Federal Commissioner of Land Tax* (1911) 12 CLR 653; [1911] HCA 75.

⁴⁰ *Clancy v Butchers' Shop Employees Union* (1904) 1 CLR 181; [1904] HCA 9 (Piddington for the respondent); *Miller v McKeon* (1905) 3 CLR 50; [1905] HCA 33 (Piddington, J Young with him, for the respondent); *Tindal v Calman* (1905) 3 CLR 150; [1905] HCA 39 (Piddington for the respondent); *Greville v Williams* (1906) 4 CLR 694; [1906] HCA 97 (Piddington, Hammond with him, for the appellant); *Goldsborough, Mort and Company, Limited v Larcombe* (1907) 5 CLR 263; [1907] HCA 58 (Piddington, Waddell with him, for the respondent); *O'Keefe v Williams* (1907) 5 CLR 217; [1907] HCA 64 (Piddington, HM Stephen with him, for the respondent); *Mitchell v Scales* (1907) 5 CLR 405; [1907] HCA 66 (Piddington for the appellant); *Doodeward v Spence* (1908) 6 CLR 406; [1908] HCA 45 (Piddington for the respondent); *Williams v Macharg* (1908) 7 CLR 213; [1908] HCA 56 (Piddington for the appellant); *Sobye v Levy* (1909) 9 CLR 496; [1909] HCA 70 (Piddington for the applicant); *Knowles v The Council of the Municipality of Newcastle* (1909) 9 CLR 534; [1909] HCA 72 (Piddington for the respondent); *Australian Agricultural Co v Municipality of Newcastle* (1910) 10 CLR 391; [1910] HCA 17 (Piddington, Blackett with him, for the respondent); *Mason v The Commonwealth* (1910) 10 CLR 655; [1910] HCA 22 (Piddington, Wise KC and Ferguson with him, for the defendant); *Wingadee Shire Council v Willis* (1910) 11 CLR 123; [1910] HCA 35 (Piddington and Pike for the appellants); *O'Keefe, O'Keefe, O'Keefe and McKenna v Williams* (1910) 11 CLR 171; [1910] HCA 40 (Piddington and HM Stephen for the respondent); *De Britt v Carr* (1911) 13 CLR 114; [1911] HCA 32 (Piddington and Coffey for the respondent); *Union Bank of Australia Ltd v Rudder* (1911) 13 CLR 152; [1911] HCA 39 (Piddington and Thomson for the respondent); *Sendall v Federal Commissioner of Land Tax* (1911) 12 CLR 653; [1911] HCA 75 (Piddington and JA Browne for the respondent).

statutory interpretation cases concerning the rights of public servants, cases about Crown Lands, tort and contract matters, and some criminal law too.

- 27 In late 1912, Billy Hughes – then the Attorney-General in the Fisher Labor government – had the opportunity to fill three seats on the High Court. The first vacancy was a result of the death of Justice O’Connor; the other two were products of the *Judiciary Act 1912* (Cth), which expanded the number of puisne justices of the High Court from four to six, and created the bench of seven justices (including the Chief Justice) that we still have today.
- 28 The early constitutional jurisprudence of the Court, shaped in large part by the original three justices – and especially the first Chief Justice, Sir Samuel Griffith, a former Premier of Queensland – had favoured the preservation of the pre-federation powers of the states over the expansion of Commonwealth power. On this point, it is important to remember that it was not until 1920 that the Court, in the *Engineers’ Case*,⁴¹ would take a profoundly textualist turn in constitutional interpretation, eschewing reliance on the reserved powers doctrine.
- 29 Hughes did not share the states-rights sympathies of the original three justices. Accordingly, given the opportunity, he was keen to appoint someone who might favour Commonwealth power over that of the States. He appointed Frank Gavan Duffy KC from the Victorian Bar – a safe choice from the perspective of the profession,⁴² and a conservative one constitutionally: in the *Engineers’ Case*, Gavan Duffy J would be alone in dissent.⁴³ Hughes also appointed Charles Powers, the Commonwealth Crown Solicitor. Though formally admitted as a barrister and solicitor in Queensland, Powers had

⁴¹ *Amalgamated Society of Engineers v Adelaide Steamship Company Limited and Others* (1920) 28 CLR 129. The extent to which Griffith CJ, Barton and O’Connor JJ had developed the Court’s early jurisprudence on the relationship between Commonwealth and State power as a bloc was evident in the majority judgment in the *Engineers’ Case*, where Knox CJ, Isaacs, Rich and Starke JJ (Isaacs J delivering the judgment) said at 150: ‘Though [the doctrine of “implied prohibition” has been] subsequently reaffirmed by three members of this Court, it has often been rejected by two other members of the Court, and has never been unreservedly accepted and applied.’ It seems clear that the ‘three members’ are the original three, while the ‘two other members’ are Isaacs and Higgins JJ, the fourth and fifth justices appointed to the High Court.

⁴² Geoffrey Sawer, *Australian Federalism in the Courts* (MUP, 1967) 65; Fricke, *Judges of the High Court*, 78.

⁴³ Fricke, *Judges of the High Court*, 66.

primarily practised as a solicitor, and had never appeared before the High Court as an advocate.⁴⁴ On that account, his appointment was poorly received by the press, and perhaps more importantly, by the Sydney and Melbourne Bars.⁴⁵

- 30 For his third choice, Hughes was considering Piddington, having admired the individualism that he had displayed in the debates leading up to the passage of the *Commonwealth Constitution*. It is also likely that Hughes looked favourably on Piddington's enthusiasm in the 1890s for a strong and flexible national government.⁴⁶ He wanted to be sure, however, as to what Piddington's views were on the balance of power between the Commonwealth and the States. At the time that Hughes was considering his appointment, Piddington was in Europe. Among other things, he had been attending the International Eugenics Congress with his wife Marion.⁴⁷ Because of his absence, Hughes approached Piddington's brother-in-law, Dowell O'Reilly, seeking to discern Piddington's views on Commonwealth power. O'Reilly did not know, but cabled Piddington on 2 February 1913, writing:⁴⁸

'Confidential most important know your views commonwealth versus state rights very urgent "O'Reilly"'

- 31 Piddington received the message on his way back from Europe, and replied saying:⁴⁹

'In sympathy with supremacy of Commonwealth powers.'

- 32 This was duly communicated to Hughes who, satisfied with the response, informally offered Piddington a seat on the bench. Somewhat concerned

⁴⁴ Ibid, 70-2.

⁴⁵ Ibid, 80; Brian Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (University of Queensland Press, 1987) 93.

⁴⁶ Crisp, *Federation Fathers*, 130.

⁴⁷ Roe, 'Piddington, Albert Bathurst (1862-1945)'.

⁴⁸ National Library of Australia, MS 1095/12.

⁴⁹ National Library of Australia, MS 1095/13.

about the propriety of his earlier telegram, Piddington wired Hughes from Colombo on 14 February, saying:⁵⁰

‘If with complete independence [on] validity questions shall accept Do not hesitate to withdraw offer if you wish, wire again Freidrich der Grosse [the ship he was on] and I will reply officially grateful anyhow Piddington’

- 33 Hughes was happy with this conditional acceptance, and told the public that Piddington was to take up a seat on the bench. On 17 February, in response to Piddington’s concerns about independence, Hughes wrote to Piddington saying, ‘There are no conditions – except that you keep alive as long as you possibly can: Even this need not be put in writing.’⁵¹ In due course, the Governor-General issued a commission,⁵² and preparations commenced for Piddington’s swearing-in.
- 34 Piddington received many letters congratulating him on his appointment from friends, other judges and lawyers, and from former students. One such student, a solicitor called Ernest Henry Tebbutt, founded a law firm that still exists today. He wrote to Piddington, ‘as an old High School boy, one who sat under you, and enjoyed and profited from your fine tuition.’⁵³
- 35 Unfortunately, not everyone received Powers’ and Piddington’s appointments so warmly. The Sydney and Melbourne Bars both resolved not to offer the customary congratulations to the new appointees.⁵⁴ The opposition to Piddington’s appointment was not primarily political: the public did not know of his ill-advised telegram recording his Commonwealth sympathies. Rather, the objection was simply that Piddington lacked experience and standing in the profession, and that others would be better suited to high judicial office. *The Argus*, a Melbourne-based paper, summed up the feelings of the profession, saying:⁵⁵

⁵⁰ National Library of Australia, MS 1095/18, 1095/20.

⁵¹ National Library of Australia, MS 1095/29.

⁵² Commonwealth of Australia Gazette, 8 March 1913, 541.

⁵³ National Library of Australia, MS 1095/82.

⁵⁴ Fricke, *Judges of the High Court*, 81.

⁵⁵ *The Argus*, Thursday 13 March, 1913, 12.

'Mr Piddington has been sufficiently long in practice in New South Wales to justify his being elevated to the bench of the District Court (not to speak of the State Supreme Court), provided that his knowledge and ability had equipped him with the requisite qualifications. His name has never been mentioned in connection with any considerable legal post in his own State. His status in the profession is, to put it mildly, only moderate; yet he has been called to a Bench which will decide appeals from State judges who are, in knowledge of law, immeasurably his superiors. Not only so, but he is to hear arguments upon constitutional problems by lawyers beside whose attainments his own shrink into absurd insignificance. It is little wonder that such men feel not only dismayed and indignant, but affronted by the choice...'

36 *The Bulletin* was even more forthright:⁵⁶

'Piddington was, till W.M. Hughes discovered him last week, a more or less obscure junior, with a modest, in fact, insignificant practice. Setting aside the K.C.'s, it would be easy to name half a dozen men at the N.S. Wales Bar, and many at the Bar in other States, who are immeasurably his superiors. His personal character is, of course, unimpeachable. On the other hand 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.'

37 Though the Governor-General had issued his commission, Piddington had not yet been sworn-in. Faced with this criticism, and after taking advice from Sir William Cullen, the Chief Justice of NSW, and his friend Sir Edmund Barton, Piddington resigned his commission on 24 March 1913.⁵⁷ A Sydney paper, *The Sun*, noted that the New South Wales Bar Council was 'elated' at the 'capitulation of Mr Piddington on the eve of his swearing-in'.⁵⁸

38 Hughes was deeply disappointed by Piddington's choice, and turned on him, later describing Piddington as having 'resigned from his great office like a panic-stricken boy'.⁵⁹ Geoffrey Sawer reads Piddington's response in similar terms, judging that he 'was terrified into immediate resignation by the screams

⁵⁶ *The Bulletin*, 20 February, 1913, 8.

⁵⁷ Fricke, *Judges of the High Court* 81-2; Geoffrey Sawer, *Australian Federal Politics and Law 1901-1929* (MUP, 1956) 105-6. Piddington is not the only Australian judge to have resigned without being sworn in. Keith Mason records that Julian Salomons was appointed Chief Justice of New South Wales on 12 November 1886, and resigned just 16 days later on 27 November without being sworn-in: Keith Mason, *Lawyers Then and Now: An Australian Legal Miscellany* (Federation Press, 2012) 84-5.

⁵⁸ *The Sun (Sydney)*, 'Mr Piddington's Withdrawal' Tuesday 25 March 1913; National Library of Australia, MS 1095/137.

⁵⁹ Quoted in Fricke, *Judges of the High Court*, 82.

of rage which his appointment elicited from the reactionary Melbourne and Sydney bars.⁶⁰

- 39 That reading of things may be right – the criticism of Piddington’s appointment was, after all, bitterly expressed, and it would be natural enough to feel somewhat intimidated as a result. But we should also recall that Piddington was a man of high principle – and from the debates over Federation, known to be. A few months after his resignation, he was appointed King’s Counsel. When he announced his appointment before the High Court, according to the *Sydney Morning Herald*,⁶¹ Barton ACJ

‘depart[ed] so far from the practice of the Court as to say that the Court welcomes your accession to the rank of King’s Counsel with more feeling from the fact that you were recently one of its members, and resigned your commission as a Justice in this Court under circumstances which nobody who knows you can doubt evinced motives of the highest honour and most delicate feeling.’

- 40 Whatever motivated his resignation, Piddington has the peculiar distinction of being the only High Court judge never to have sat on a case in that jurisdiction (although a decision he made as President of the Inter-State Commission was appealed to the High Court in 1915).⁶² Though he gave up the high office of a justice of the High Court, Piddington went on to do much more in his long life, including 22 further appearances in the High Court in the years spanning 1923-1938.⁶³

⁶⁰ Sawyer, *Australian Federalism in the Courts*, 65. Note, however, that in his earlier and slightly longer treatment of the same episode, Sawyer presents a more nuanced view, writing: ‘It seems probable that Piddington’s resignation was induced not only by his scruples concerning the exchange of cables, but also by the hostile reception from the legal profession in Melbourne and Sydney.’ Sawyer, *Australian Federal Politics and Law*, 106.

⁶¹ *Sydney Morning Herald*, 10 May 1913, 19. Egon Kisch would later write in his memoir, *Australian Landfall*, that Piddington had resigned his position ‘because of a personal view regarding a point of duty’: Kisch, *Australian Landfall* (Macmillan, 1969) 64.

⁶² *New South Wales v The Commonwealth* (1915) 20 CLR 54 (*The Wheat Case*).

⁶³ *Spain v Union Steamship Company of New Zealand Limited* (1923) 32 CLR 138; [1923] HCA 21 (Piddington KC, Collins with him, for the appellant); *Russell v Wilson* (1923) 33 CLR 538; [1923] HCA 60 (Piddington KC, Delohery with him, for the appellant); *Spain v Union Steamship Company of New Zealand* (1923) 33 CLR 555; [1923] HCA 65 (Piddington KC, Collins with him, for the appellant); *Pickard v John Heine & Son Ltd* (1924) 35 CLR 1; [1924] HCA 38 (Piddington KC, Sherwood with him, for the appellant); *Hillman v The Commonwealth* (1924) 35 CLR 260; [1924] HCA 62 (Piddington KC and Collins for the appellant); *Burwood Cinema Ltd v Australian Theatrical and Amusement Employees’ Association* (1925) 35 CLR 528; [1925] HCA 7 (Piddington KC, Cantor with him, for the

What Albert did next

41 In April 1913, the NSW government appointed Piddington Royal Commissioner again, instructing him to inquire into the administration of the *Industrial Arbitration Act 1912* (NSW), an Act that had substantially failed to address problems with the *Industrial Disputes Act* of 1908. Not long after, in August of 1913, the federal government, then led by Sir Joseph Cook, appointed him the Chief Commissioner of the Inter-State Commission. Irony abounded in the sense that it was widely thought that Billy Hughes himself personally aspired to this appointment.⁶⁴ That a man of Hughes' ambition held such aspirations is an indication of the Commission's perceived status at the time and great potential for the exercise of power.

42 The Inter-State Commission is a body that you have probably never heard of. It is in fact provided for in s 101 of the *Constitution* in mandatory language:

'There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder.'

43 During the course of the Convention debates, it was contemplated as a body equal in importance to the High Court. It was, in effect, to be an economic

respondent); *Jumna Khan v Bankers & Traders Insurance Co Ltd* (1925) 37 CLR 451; [1925] HCA 48 (Piddington KC, Newell and KA Ferguson with him, for the appellant); *Clyde Engineering Company Limited v Cowburn* (1926) 37 CLR 466; [1926] HCA 6 (Piddington KC, Cantor with him, for the respondents); *New South Wales v The Commonwealth* (1926) 38 CLR 74; [1926] HCA 23 (Piddington KC and Browne KC, McKell with them, for the plaintiffs); *Williams v Commissioner for Road Transport and Tramways (NSW)* (1933) 50 CLR 528; [1933] HCA 33 (Piddington KC, Herron and Curlewis with him, for the appellant); *R v Carter; Ex parte Kisch* (1934) 52 CLR 221; [1934] HCA 50 (Piddington KC, Parsonage with him, for the applicant); *R v Wilson; Ex parte Kisch* (1934) 52 CLR 234; [1934] HCA 63 (Piddington KC for the applicant); *R v Fletcher* (1935) 52 CLR 248; [1935] HCA 1 (Piddington KC, Farrer with him, for the applicant); *MacDonald v The King* (1935) 52 CLR 739; [1935] HCA 18 (Piddington KC, Farrer with him, for the applicant); *R v Dunbabin* (1935) 53 CLR 434; [1935] HCA 34 (Piddington KC, Farrer with him, for the applicant); *R v Brislan* (1935) 54 CLR 262; [1935] HCA 78 (Piddington KC, Evatt and Farrer with him, for the applicant); *The Seamen's Union of Australasia v The Commonwealth Steamship Owners' Association & Ors* (1936) 54 CLR 626; [1936] HCA 8 (Piddington KC, De Baun with him, for the applicant); *Mercer v Commissioner for Road Transport and Tramways (NSW)* (1936) 56 CLR 580; [1936] HCA 71 (Piddington KC, RM Kidston with him, for the appellant); *R v Paterson; Ex parte Purves* [1937] Argus Law Reports 144 (Piddington KC, Farrer with him, for the applicant); *McDonald v Victoria* (1937) 47 CLR 274; [1937] HCA 60 (Piddington KC and Farrer for the plaintiff); *Brunker v Perpetual Trustee Company (Limited)* (1937) 59 CLR 140; [1937] HCA 76 (Piddington KC, McKillop with him, for the appellant); *Werrin v Commonwealth* (1938) 59 CLR 150; [1938] HCA 3 (Piddington KC, O'Sullivan and Farrer with him, for the plaintiff).

⁶⁴ Graham, A. B. *Piddington*, 63.

High Court whose principal focus would be on inter-state trade and commerce, it being recalled that the great controversy that the founding fathers needed to grapple with was the diametrically opposed views in various colonies surrounding free trade and protectionism. The disputes which still exist today between the States as to water rights were precisely the kind of disputes that the Inter-State Commission was designed to resolve.⁶⁵

- 44 So also, s 92 of the *Constitution* – a section the interpretation of which bedevilled the High Court in over 140 cases up until its 1988 decision in *Cole v Whitfield* (1988) 165 CLR 360; [1988] HCA 18 – was meant to be administered by the Inter-State Commission (as opposed to the High Court), which was authorised to ‘adjudicate’ upon disputes arising in inter-state trade or commerce.⁶⁶
- 45 Piddington’s appointment as the inaugural President or Chair of the Interstate Commission, unlike his earlier appointment to the High Court, was not apparently the subject of similar criticism.⁶⁷ As a man who had taken an enormous interest in politics, the birth of the nation, the federal system and matters that we would today describe as economics, it was a very significant appointment. This time, however, it was not Piddington’s appointment personally which caused a difficulty but the very creation of the Inter-State Commission itself, notwithstanding that it is, as I have said, provided for in the *Constitution*.
- 46 In a landmark decision in 1915, in which the High Court split 4:2 on the relevant point, and which smacks of institutional rivalry, a majority of the Court effectively held that the Inter-State Commission, as it had been established

⁶⁵ Andrew Bell SC, ‘The missing constitutional cog: the omission of the Inter-State Commission’ (Summer 2009-10) *Bar News* 59, 59-60. See also Stephen Gageler, ‘Chapter IV: The Inter-State Commission and the Regulation of Trade and Commerce under the Australian Constitution’ (2017) 28 *PLR* 205, 208-9.

⁶⁶ Bell, ‘The missing constitutional cog’, 60; Andrew Bell, ‘Inter-State Commission’, in Tony Blackshield, Michael Coper, and George Williams (eds), *The Oxford Companion to the High Court of Australia* (OUP, 2001) 353, 354.

⁶⁷ Morris Graham, ‘Piddington, Albert Bathurst’, in Tony Blackshield, Michael Coper, and George Williams (eds), *The Oxford Companion to the High Court of Australia* (OUP, 2001) 533, 534.

was a ‘toothless tiger’.⁶⁸ Part V of the *Inter-State Commission Act 1912* (Cth) had purported to confer judicial powers on the Commission – so that it could exercise its constitutional role of ‘adjudication’. A majority of the High Court, jealous of its own jurisdiction,⁶⁹ held that the whole of Pt V was invalid on the ground that it attempted to confer federal judicial power on a body that was not a Ch III court.⁷⁰ There was a powerful dissent by Sir Edmund Barton which many consider to be one of his finest judgments.⁷¹

47 Although the Commission was to do important work on the tariff,⁷² the High Court’s decision, combined with the onset of the First World War, meant that the Inter-State Commission limped on into constitutional and historical obscurity and, when the seven year terms of its first three Commissioners expired, there were no replacements and the Inter-State Commission passed into a constitutional graveyard.

48 Just as he emerged, however, from the disappointments which no doubt surrounded his appointment to and then resignation from the High Court, Piddington emerged from the demise of the Interstate Commission. In March 1919, though his commission as Chairman of the Inter-State Commission was still on foot, Piddington was appointed a Royal Commissioner again, this time charged with inquiring into the sugar industry. It was a sign of the decline of the Inter-State Commission that the inquiry was conducted as a Royal Commission, not under the auspices of the constitutional body.⁷³

49 In December 1919, Piddington was given yet another commission by the Commonwealth, this time charged with leading a Royal Commission on the cost of living. In the *Harvester* decision of 1907, Justice Higgins, the President of the Commonwealth Conciliation and Arbitration Court, had decided that 7 shillings per day was a ‘fair and reasonable’ wage for an unskilled worker,

⁶⁸ *New South Wales v Commonwealth* (1915) 20 CLR 54 (*The Wheat Case*).

⁶⁹ Bell, ‘The missing constitutional cog’, 69.

⁷⁰ *The Wheat Case*, 65 (Griffith CJ), 95 (Isaacs J), 107 (Powers J), 110 (Rich J); 75, 77 (Barton J, dissenting), 104 (Gavan Duffy J, dissenting).

⁷¹ Oscar Roos, ‘Justice Barton and the Demise of the Inter-State Commission in the *Wheat Case* (1915)’, in Andrew Lynch (ed), *Great Australian Dissents* (CUP, 2016) 20.

⁷² Bell, ‘Inter-State Commission’, 353.

⁷³ Bell, ‘The missing constitutional cog’, 69.

sufficient to cover 'the normal needs of the average employee, regarded as a human being living in a civilised community'.⁷⁴ A wage defined in these terms came to be known as a 'basic wage'. The report penned by Piddington and his fellow commissioners pointed out, however, that:⁷⁵

'...while the Harvester Case laid down the doctrine that a basic wage should be at least adequate to cover the cost of living according to reasonable standards, the decision in the case was given without that cost of living having been ascertained by evidence except to a partial extent.'

- 50 With the resources of a Royal Commission – and without the constraints of the litigious setting in which Higgins J formulated the *Harvester* standard – Piddington and his colleagues gathered data on the four key components of a living wage: rent, clothing, food, and 'miscellaneous items', a capacious category that included everything from life insurance to school expenses. The Commission determined a concrete standard for each of these four categories of expenses, and so developed a more realistic basis for determining the cost of living than the *Harvester* standard had provided.⁷⁶ The Report effectively recommended that the basic wage should correspond to the actual cost of living, as calculated by the Commission. Implementing that recommendation, however, would be very costly for employers, and the Report was more or less or dead in the water on publication.⁷⁷
- 51 The Report had been drafted by Piddington,⁷⁸ and some persistent themes in his social thought are seeded through it. One that would come to have particular prominence was his advocacy of child endowment – that is, financial assistance from the state to help meet the costs of raising children.⁷⁹ Piddington mentioned this cause in an appendix to the 1920 Report,⁸⁰ and developed his thoughts more fully in a tract he published the following year, titled *The Next Step: A Family Basic Income*.⁸¹ An admirable concern for the

⁷⁴ *Ex Parte H V McKay (the Harvester case)* (1907) 2 CAR 1, 3.

⁷⁵ Commonwealth, Royal Commission on the Basic Wage, *Report* (1920) 9.

⁷⁶ *Ibid*, 57.

⁷⁷ Graham, *A. B. Piddington*, 86, 88-9.

⁷⁸ Commonwealth, Royal Commission on the Basic Wage, *Report* (1920) 63.

⁷⁹ Graham, *A. B. Piddington*, 87.

⁸⁰ Commonwealth, Royal Commission on the Basic Wage, *Report* (1920) 90.

⁸¹ Ash, 'Albert Bathurst Piddington', 51.

welfare of children clearly stood behind his support for child endowment. But his support for the cause also had a dark side to it.

- 52 Together with his wife, Marion, Piddington had a keen interest in eugenics, the so-called science of improving the human species by selective breeding and, in particular, the “breeding out” of perceived undesirable characteristics. Piddington and his wife were both very much concerned about ‘race suicide’ and ‘race decay’ – that is, about the enfeeblement of White Australia as a result of factors like women and children working in damaging factory conditions and young men dying in the Great War. Marion’s advocacy was concerned with heredity; Albert, on the other hand, was more focused on the ways that material and institutional conditions – ‘an adequate living wage, healthy housing standards and a sound education’ – might contribute to improvement in both quantity and quality of the population.⁸² His support of eugenic ideologies did not, of course, irredeemably taint child endowment as a policy. Women’s rights activists at the time lobbied for the adoption of child endowment as government policy, together with equal pay and motherhood endowment.⁸³ But like so many figures in Australia’s history, there’s no escaping the fact that Piddington, for all his virtues, also had what we now see clearly as vices.
- 53 After chairing the 1920 Royal Commission, Piddington attempted to return to politics. In 1922, he contested the seat of North Sydney. His opponent was none other than the Prime Minister, Billy Hughes. It was a bitterly fought campaign, with the skeletons of 1913 exhumed in the papers, and mudslinging on both sides. Hughes won the seat, though did not last long as Prime Minister.⁸⁴
- 54 In 1926, the Labor Premier of NSW, Jack Lang, appointed Piddington to lead a newly formed body, the Industrial Commission which, in essence, still exists today. The Commission was part of a new system of industrial conciliation in

⁸² Graham, *A. B. Piddington*, 93.

⁸³ Marilyn Lake, ‘The Independence of Women and the Brotherhood of Man: Debates in the Labour Movement over Equal Pay and Motherhood Endowment in the 1920s’ (1992) 63 *Labour History* 1, 4.

⁸⁴ Graham, *A. B. Piddington*, 95-99.

which industry-specific conciliation committees, comprised of representatives of employers and employees and a chair appointed by the Minister had primary responsibility for resolving industrial disputes. The committees could make binding orders or awards. The role of the Commission was to resolve disputes referred to it by committees or by the Minister, and to deal with bigger-picture questions, like determining the standard of living and fixing the basic wage accordingly.⁸⁵ Piddington was appointed to lead this powerful body amidst controversy: he was, by this time, perceived by employers as a radical. And it did not take long for his radicalism to come through in his decisions. Initially, his decisions only grated employers; but when he began to use his position to implement his then-idiosyncratic views on child endowment – in a manner that resulted in a lower basic wage than many expected, and one that was substantially lower than what employees on Commonwealth awards received – he managed to alienate both labour and capital.⁸⁶

- 55 In January of 1929, Piddington found time to visit Gandhi at Satyagraha Ashram, in the state of Gujarat in India.⁸⁷ In his memoir, *Worshipful Masters*, Piddington devoted a chapter to his recollections of Gandhi, calling him – in the style of his followers at the ashram – Bapu Gandhi, that is, Father Gandhi.⁸⁸ Piddington wrote admiringly of Gandhi, and was sympathetic to his core political aspiration – Indian Home Rule. In Gandhi, Piddington found someone who shared his conviction that political and social questions could not be divorced from questions of individual character. He describes Gandhi's insistence that Home Rule must 'begin in the personal life of the individuals of the nation'. This was not a quietist prescription of gradualism, but rather, was a critical insight, recognising that governing requires virtues that need to be cultivated if government is to truly serve the people.
- 56 While at the ashram, Piddington told Gandhi about child endowment policies in NSW. At the end of their conversation, Gandhi asked, 'And you have come all the way from Calcutta to tell me all this interesting news about the methods

⁸⁵ Ibid, 123-4.

⁸⁶ Ibid, 124-134.

⁸⁷ Ash, 'Albert Bathurst Piddington', 54; Piddington, *Worshipful Masters*, 160-1.

⁸⁸ Piddington, *Worshipful Masters*, 170.

of your country?’ Piddington described this, perhaps optimistically, as a ‘courteous observation’; one wonders if the truth was that he had chewed Gandhi’s ear off.⁸⁹ Whatever the case, Gandhi later said that he was ‘greatly struck’ by what Piddington had told him. And Piddington was clearly affected by his meeting with the man he described as the *parens patriae* of India.⁹⁰

57 From the serenity of the ashram, Piddington was thrown back into the political tumble that was NSW under the Lang government. In 1932, when the Governor, Sir Philip Game dismissed Lang, Piddington resigned from his position at the Industrial Commission, just weeks shy of the date at which he would have qualified for a pension.⁹¹ He believed strongly that Game had acted unconstitutionally in dismissing Lang. A tract he wrote on the constitutional crisis, together with his personal correspondence with the Governor, was published under the title *The King and the People and the Severing of their Unity*. The title gets to the heart of the complaint: he thought that Game’s dismissal of Lang’s government – which had a majority in both houses – ‘destroyed Responsible Government and was, in nature, a severing of the constitutional nexus between the Crown of England and the Parliament of New South Wales.’⁹² His resignation from the Industrial Commission signalled the end of his long string of high-profile legal offices. But yet again, other adventures lay ahead.

58 In 1934, Piddington was in his early 70s. Egon Erwin Kisch, a Czechoslovakian communist journalist and activist, was invited to Australia to speak at an event called the Congress Against War and Fascism. Accepting the invitation, he set sail from Europe aboard the SS Strathaird. The Lyons government did not welcome Kisch’s visit, and sought to deny him entry to Australia by various means. Kisch’s local supporters sought legal assistance,⁹³ and Piddington was briefed by Christian Jollie Smith, a left-wing

⁸⁹ *Ibid*, 192-3.

⁹⁰ *Ibid*, 199.

⁹¹ Garran, ‘A. B. Piddington’, 69.

⁹² Albert Bathurst Piddington, *The King and the People and the Severing of their Unity* (R. T Kelly Ltd, 1932) 15.

⁹³ Kisch, *Australian Landfall*, 64.

lawyer who was the second woman to be admitted to practise as a solicitor in New South Wales.⁹⁴

- 59 Famously, Kisch was administered the dictation test in Scottish Gaelic, and, refusing to take what he described, rightly, as a ‘stupid and unfair test’,⁹⁵ was arrested. Piddington took the case to the High Court, where he argued that Scottish Gaelic was not a ‘European language’ within the meaning of s 3(a) of the *Immigration Restriction Act 1901* (Cth) – rather, it was a dialect. Consequently, the dictation test had been unlawfully administered. The High Court accepted this argument,⁹⁶ much to the chagrin of some, including Sir Mungo MacCallum, the rather conservative Scot who was Chancellor of the University of Sydney at the time. MacCallum wrote to the *Sydney Morning Herald* under the nom-de-plume ‘Columbinus’, protesting that:⁹⁷

‘Some of us may have supposed the Immigration Act was meant to provide a test whereby, even if in a quibbling and pettifogging way, undesirable aliens might be excluded, and that an alien forbidden to land in England might be considered undesirable here. Now we know better. It behoves us to bow down before the court’s confident pronouncement: ‘We are dictators over all language and above linguistic facts.’

- 60 In his memoir of his time in Australia, Kisch gives a memorable description of Piddington, writing:⁹⁸

‘Mr A. B. Piddington, K.C., could be a sketch by Dickens, a grey-haired old gentleman, thin as a rake, but inside him there burns a volcano, which soon will 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, and as a sociologist, as an art-historian, as a Shakespearean scholar, and as a linguist.’

Piddington the polymath, he might have been called.

⁹⁴ Joy Damousi, ‘Jollie Smith, Christian (1885-1963)’, in *Australian Dictionary of Biography* (MUP, 1988, 11th ed) <<http://adb.anu.edu.au/biography/jollie-smith-christian-8465>>.

⁹⁵ Kisch, *Australian Landfall*, 73.

⁹⁶ *The King v Wilson & Anor; Ex parte Kisch* (1934) 52 CLR 234.

⁹⁷ Quoted in the Hon Keith Mason QC, ‘The saga of Egon Kisch and the White Australia Policy’ (Summer 2014) *Bar News* 64, 67.

⁹⁸ Kisch, *Australian Landfall*, 64.

- 61 Having been a judge of the High Court, albeit briefly, and an advocate before the Court, towards the end of his life, Piddington also found himself an aggrieved party in that Court.⁹⁹ On 11 April 1938, by now 75 years of age, Piddington was knocked over in Phillip Street by a motorcycle and side-car driven by a servant of Bennett and Wood Proprietary Limited. He commenced negligence proceedings in the Supreme Court of New South Wales, claiming damages in the sum of £15,000. The jury returned a verdict for the defendant. Piddington applied to the Full Court for a new trial on the basis that inadmissible evidence had gone before the jury. The Full Court refused that application. Piddington appealed to the High Court, where, by a narrow majority, he succeeded in obtaining orders for a new trial. Bennett and Wood unsuccessfully sought leave to appeal to the Privy Council.¹⁰⁰
- 62 Whether the retrial went ahead is difficult to say: the only record of it that my research has turned up is a notice in the *Sydney Morning Herald* on Tuesday 15 October 1940, stating that the matter of Piddington v Bennett and Wood Pty Ltd was to be heard by the Prothonotary at 9:30am ‘for writ of commission’ – that is, the matter was to come before the Prothonotary for a procedural hearing to determine whether the Court should order the examination of witnesses on oath, whether they be in or out of the jurisdiction.¹⁰¹
- 63 On 5 June 1945, at the age of 82, Piddington died in Sydney. A headline in the *Sydney Morning Herald* the following day read ‘Noted Jurist Dead’, and described him as ‘for many years ... prominent in the political and judicial life of New South Wales.’¹⁰² He was buried at St Thomas’ Cemetery in Crows

⁹⁹ *Piddington v Bennett and Wood Pty Ltd* (1940) 63 CLR 533.

¹⁰⁰ *Sydney Morning Herald*, ‘Privy Council: Applications for Leave to Appeal’, Wednesday 1 May 1940.

¹⁰¹ The power to issue such commissions was located in section 4(1)(b) of the *Witnesses Examination Act 1900* (NSW). *Sydney Morning Herald*, ‘State Jurisdiction: Supreme Court Causes List’, Tuesday 15 October 1940.

¹⁰² *Sydney Morning Herald*, ‘Noted Jurist Dead’, Wednesday 6 June 1945.

Nest, and was survived by his wife Marion, who died five years later, and their only child, Ralph, a social anthropologist.¹⁰³

Conclusion

64 At the beginning of Piddington's book *Worshipful Masters* – a series of recollections of various important figures in his life – a note to the reader invites us 'to meet in surroundings of hospitality certain notable exemplars, some of mirth, some of learning, but all of human friendliness and service in their day'.¹⁰⁴ You might agree that tonight, in similar surroundings, we've met just such a figure.

¹⁰³ Ash, 'Albert Bathurst Piddington', 57.

¹⁰⁴ Piddington, *Worshipful Masters*, 'To the Reader'.