BOOK REVIEW

Justice According to Law; a Festschrift for the Honourable Mr Justice B. H. McPherson CBE
Supreme Court of Queensland Library, Brisbane, 2006
pp i-xxii, 1-792
A RAHEMTULA

The *Macquarie* and the *Australian Oxford* dictionaries differ in their definitions of 'festschrift': in the *Macquarie*, it is a collection of papers written to honour a 'colleague'; the *Australian Oxford* would, however, restrict 'colleague' to a 'scholar'. Whatever the 'true' meaning of the term in Standard Australian English, it is clear that Bruce McPherson qualifies for a festschrift both as a colleague and as a scholar. 'Reminiscences', the first group of essays in this volume, is testimony to the high regard in which the Queensland legal profession holds McPherson as a colleague, and the distinguished contributors to these essays from across Australia confirm that his standing in this respect is a national one. The 'Select Bibliography', which appears in an appendix to the volume, attests to McPherson's prodigious scholarship, even though, curiously, it fails to list the books he has authored.[1]

In his preface to these essays, Aladin Rahemtula identifies this volume as only the fifth festschrift offered to a member of the Australian judiciary, and the first to a Queensland judge.[2] The small Australian market for legal publications no doubt accounts to some extent for the scarcity of such works. But there are, in any event, comparatively few judicial festschrifts[3] in the common law world, which is perhaps surprising given the cult of judges in common law systems (as opposed to civilian systems of law, in which judges tend to be anonymous).[4] This may point to intrinsic difficulties in justifying the production of judicial festschrifts in a limited market. Two suggest themselves. First, the work of a judge, particularly in a superior court of general jurisdiction, necessarily spans many areas of law. Unlike a festschrift produced to honour the life's work of a scholar, there will generally be no obvious focus or theme for the volume. The result is likely to be a collection of essays widely spread across disparate areas of the law, especially those on which the judgments of the judge in question have had an impact. In short, the volume may simply be too thinly spread to tempt prospective purchasers. Secondly, the essayists are overwhelmingly likely to be fellow judges and practising lawyers whose contributions primarily

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1 A Rahemtula, *Justice According to Law; a Festschrift for the Honorable Mr Justice B H McPherson CBE* (2006) Appendix B (hereafter, *Festschrift McPherson*).

2 *Festschrift McPherson* xv.

3 The *Macquarie* and *Australian Oxford* dictionaries both allow an anglicised plural.

4 See, for eg, K Zweigert and H Kötz, *Introduction to Comparative Law* (3rd ed, 1998) 125-6.

reflect professional concerns or current controversies in the law, potentially restricting the book's attraction to a small group of similarly situated lawyers. Moreover, the writing is likely to be directed at legal practitioners, eschewing theoretical debates (however described) at the cutting edge of legal scholarship or thought. Professional journals, it could be argued, are a sufficient outlet for such writing.

At first glance, this festschrift conforms to this genre. It consists of disparate essays, written mostly by judges or practitioners, that provide an analysis of current issues and concerns to legal practitioners across a range of legal topics that (with the exception of 'Reminiscences' mentioned above) are grouped alphabetically, producing a snapshot of the legal system that tends almost to resemble the old abridgements of the law. Even if the festschrift were to be regarded solely as representative of the postulated genre, it would demonstrate the value and importance of collecting such essays in a single volume. As is to be expected of a judicial festschrift, the essays are of the highest quality and of great interest given the position and standing of those who have been asked to contribute. And, it is surely only the opportunity to honour a colleague that motivates their busy authors to produce these essays. Without that opportunity, much of what has been written in this volume would likely not have been written at all.

At one time, it could, perhaps comfortably be assumed that academic writing would have picked up most of the issues covered in these essays. But doctrinal analysis flourishes in an era of legal positivism that emphasises the black letter of the law as a self-contained discipline. That era has passed. In a post-realist and post-modern world legal scholars are not content simply to write about what the law is or (within its own terms) should be. They want to know how law contributes to, fits in with, and operates within, philosophical, political, economic and social systems and structures. Indeed, even one major strand of current legal thought within the positivist tradition, namely, that concerned with issues of taxonomy and classification, can be presented at a level that, while it may sometimes be of importance in the highest courts, is hardly of everyday interest to the practitioner.[5] In the United States, the gulf between the academy and the legal profession has widened to the extent that the discourse of academic lawyers often bears little relation to what is happening in the courts or in the legal profession.[6] This has not occurred to the same extent in Australia where, it is to be hoped, the academy will continue to accommodate all forms of scholarship about law, including that predominantly represented in this volume. However, to the extent to which doctrinal research is not, in practice, the focus of legal

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[5] For criticism of the approach, see, for eg, G Samuel, 'English Private Law: Old and New Thinking in the Taxonomy Debate' (2004) 24 *Oxford Journal of Legal Studies* 335. And note Justice Finn's warning that 'the strict legal taxonomist is the almost invariable herald to the legal taxidermist': P Finn, 'The Fringes of the Law: Public or Private Functions' in *Festschrift McPherson* 560, 561.

[6] See, generally, D Rhode, 'Legal Scholarship' (2002) 115 *Harv L Rev* 1327.

scholarship in the academy, the production of volumes such as this becomes all the more important.

A characteristic of the postulated genre is that the essays will pay particular regard to the impact of the judicial work of the judge they honour. While many of the contributions range more broadly than this,[7] the collection does contain a number of powerful essays that focus on important judgments of McPherson J or McPherson JA in receivership,[8] contract,[9] equity,[10] property[11] and criminal law[12] – and even one important argument made by McPherson as counsel.[13] Concentration on the judgments of a highly regarded judge can, of course, serve purposes other than doctrinal instruction in a particular area of law. It can, for example, also provide evidence of what amounts to good judicial writing.

Judge Alan Wilson's sums up why McPherson's writing can be so described: 'first, because it frequently contains simple, but precise and profound, explanations of the law and legal principles; and, secondly, because it does so in a way which goes beyond the strict confines of the law and accepted legal styles, and embraces all that is good in the English language'.[14] I would underline this with two particular points. First, as to style, Justice McPherson's judgments use quotation sparely – unlike, it must be said, many modern judgments whose unnecessarily lengthy and discursive nature is attributable to the judge's failure to summarise the essence of what has gone before by resorting to the 'cut and paste' function in word processing software. Secondly, as to substance, the simplicity and profundity of his Honour's judgments seem to come from a deep understanding of underlying principles of Western legal systems generally,

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7 For example, P Finn, 'The Fringes of the Law: Public or Private Functions' in *Festschrift McPherson* 560 (dealing with an important aspect of the public/private distinction in law); D Heydon, 'Similar Fact Evidence: The Provenance of and Justification for Modern Admissibility Tests' in *Festschrift McPherson* 240 (on possible tests for the admissibility of similar fact evidence); D McGill, 'Some Intersections of Law and Religion' in *Festschrift McPherson* 604 (analysing the situations in which the legal position of churches is important).

8 R Lindwall, 'Receivers – Squeezing the Lemon Dry' in *Festschrift McPherson* 54.

9 P Keane, 'The Termination of Contracts for the Sale of Land upon the Failure of a Condition Subsequent' in *Festschrift McPherson* 106.

10 J McKenna, 'Remedies in Estoppel' in *Festschrift McPherson* 167; P McMurdo, 'Misdirected Monies and Changes of Position on the Faith of their Receipt' in *Festschrift McPherson* 209 (which must now be read subject to the decision of the High Court in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22).

11 D Robin, 'McPherson on Property' in *Festschrift McPherson* 520.

12 R O'Regan, 'Complicity and Differential Verdicts for Unlawful Homicide' in *Festschrift McPherson* 130.

13 That in *Raysun Pty Ltd v Taylor* [1971] Qd R 172, 174-5 (*Festschrift McPherson* 111-12).

14 A Wilson, 'Deconstructing McPherson JA' in *Festschrift McPherson* 411, 429.

and of the common law in particular. My favourite McPherson judgment, that in *Carrier v Bonham*,[15] is an illustration. The case concerned the liability in tort of a person of unsound mind. The conclusion that unsoundness of mind does not diminish liability either in negligence or under *Wilkinson v Downton*[16] was founded on a profound analysis of the basis of liability under either potential cause of action. That analysis distinguished the seemingly more appealing position in Roman law that persons of unsound mind are not legally liable for their wrongs,[17] a position favoured by the weight of academic opinion.

Can an analysis of the judge's judicial (and other) utterances tell us more about what makes a good judge? Probably not. Judge Alan Wilson points to the limited results that could flow from 'deconstructing' McPherson to discover his ethnic, cultural and philosophical core.[18] We learn that McPherson regards himself as a positivist,[19] while others regard him as a black letter lawyer,[20] an 'exemplar of the judicial virtues of impartiality, objectivity and restraint'.[21] No black letter lawyer is, however, isolated from the fundamental principles (whether described as 'liberal' or not) that inform, or (more strongly) are part of, the law itself, such as principles of fairness or equality. McPherson's extra-judicial support of such principles is movingly contained in his public letter to the then President of South Africa for an explanation of the policy underlying the legislation of the apartheid-State that prohibited marriage between whites and non-whites, whose cruelty he had personally witnessed.[22] A study of McPherson's judgments may reveal the extent to which his attachment to such principles infiltrated his decisions. But such a study would be based on *a priori* assumptions about the content of the principles, and, where (as would usually be the case) they are not expressly acknowledged, would be neutral as to whether the judge had used them consciously or unconsciously. So, notwithstanding the title of Justice Stanley Jones's essay ('A Judicial Hero'), it seems that we cannot determine if, in his judicial role, McPherson was the

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15 [2002] 1 Qd R 474.

16 [1897] 2 QB 57, where the liability formula incorporated the 'weasel word' 'calculated' obscuring the relationship of such liability to that in negligence. In many respects, Mc Pherson JA's analysis of the law here foreshadows that of Lord Hoffman in *Wainwright v Home Office* [2004] 2 AC 406.

17 For McPherson J's use of foreign law, see Robert Gotterson, 'The Tax-gatherer as the Evidence-gatherer: May Statutory Investigative Powers be Used for Pending State Tax Appeals?' in *Festschrift McPherson* 639, 644. For his contribution to foreign systems of law, see G Williams, 'McPherson JA in the Solomon Islands' in *Festschrift McPherson* 631.

18 Alan Wilson, 'Deconstructing McPherson JA' in *Festschrift McPherson* 411, 413-14.

19 *Festschrift McPherson* 46 (Williams JA).

20 *Festschrift McPherson* 14 (Justice Stanley Jones), 557 (Judge David Robin).

21 *Festschrift McPherson* 355 (Senator George Brandis).

22 *Festschrift McPherson* Appendix G. See also S Jones, 'A Judicial Hero' in *Festschrift McPherson* 14.

embodiment of Hercules, Dworkin's hero judge, who always reaches the right decision by, among other matters, consideration, and 'correct' application, of all potentially applicable principles.[23] Alas, Hercules must remain a fable. Fortunately, not every positivist has to believe that every case has a right answer.

So far I have drawn attention to the strengths of this book as falling within a particular genre. The book cannot, however, be assessed simply within this frame of reference because, as pointed out in the first paragraph of this review, McPherson is not only a judge. He is also a scholar and has played a pivotal role in the development of law reform in Queensland. This adds two further dimensions to the book. Reflecting McPherson's scholarly interest in legal history, outlined in part by Dr John Forbes,[24] the volume contains important essays expressly devoted to legal historical themes in areas as diverse as constitutional law,[25] land law[26] and bankruptcy.[27] A number of essays devoted to an analysis of current law also have significant historical content.[28] Associate Professor Peter McDermott's essay is the point of departure for considering McPherson's contribution to law reform in Queensland,[29] a theme picked up in a number of other essays.[30] McDermott's essay is a valuable addition to the existing literature on law

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23 Consider, for e.g., how Hercules would decide *Brown v Board of Education*, 349 US 294 (1955): see R Dworkin, *Law's Empire* (1986) 379-99.

24 J Forbes, 'No Mere Mechanic: The Historian' in *Festschrift McPherson* 507.

25 W Sofronoff, 'Deakin, Isaacs and the Supremacy of the Commonwealth' in *Festschrift McPherson* 82 (arguing that the *Engineers'* case ((1920) 28 CLR 129) is the planned and inevitable consequence of the structure of the Constitution, Deakin's securing of the passage through Parliament of the *Judiciary Act 1903* (Cth), and Deakin's appointment of Isaacs to the High Court); D Beanland, 'The Hemmant Petition' in *Festschrift McPherson* 468 (outlining the skirmishes between Griffith and McIlwraith over the latter's alleged maladministration of office); C Lohe, 'The Origins of Section 57 of the Criminal Code of Queensland' in *Festschrift McPherson* 583 (dealing with the scope of criminal liability for giving false answers before Parliament).

26 E Campbell, 'Reservations and Exceptions in Crown Land Grants in Colonial New South Wales' in *Festschrift McPherson* 487 (surveying the balance between present and likely future needs reflected in the reservation and exception clauses of crown land grants in colonial New South Wales).

27 P Sayer, 'Agony and Ecstasy: The Progress of Bankruptcy Reform in 1860s England and its Reception in Queensland' in *Festschrift McPherson* 262 (tracing the legislative history of the subject using archival material).

28 Especially P Finn, 'The Fringes of the Law: Public or Private Functions' in *Festschrift McPherson* 560; A Greenwood, 'Render therefore unto Caesar things which are Caesar's: The Ownership of Copyright in Judgments Published in Writing or Ex Tempore' in *Festschrift McPherson* 302.

29 P McDermott, 'Mr Justice McPherson – His Contribution to Law Reform in Queensland' in *Festschrift McPherson* 432.

30 Especially D Robin, 'McPherson on Property' in *Festschrift McPherson* 520 (detailing McPherson's contribution to the overhaul of property law contained in the *Property Law Act 1974* (Qld)). See also I Callinan, 'B H McPherson: Personal Recollections' in *Festschrift McPherson* 2, 8

reform, confirming the role that individual effort has played in effecting law reform in Australia,[31] in McPherson's case in the context of a highly productive law reform commission, inadequately staffed, financed on a shoestring, yet subject to constant criticism for not being more productive! The more things change … !

To leave the best until last, I draw attention to two other particular strengths of this book. The first is the essays that appear under the heading 'The Judiciary',[32] which, appropriately in a book that honours the work of a judge, provide much food for thought. Bruce McPherson became a judge of the Supreme Court of Queensland in January 1982 and retired as a judge of the Queensland Court of Appeal in September 2006. In that period of almost a quarter of a century, a number of changes impacted on the role, or perceived role, of judges in Australia and in most liberal democratic societies. One change was the unparalleled attacks that were made on the judiciary by government and in the media. The tradition of judicial silence on matters of public controversy (embodied in the so-called 'Kilmuir Rules') would prevent a response to such attacks. In his thoughtful analysis, Senator Brandis argues that the basis of the Kilmuir Rules, which have never been formally adopted in Australia, is sound, and that judges should restrict comments on changes to the law to their direct consequences or effects (if any) on the administration of justice, as opposed to comments on the political desirability of the law in question. A corollary, Brandis argues, is the revival of the traditional role of the Attorney-General as defender of the courts. While not denying the utility of the Attorney performing such a role, Chief Justice de Jersey regards it as irresponsible for judges now to fail to respond to destructive or unfounded criticism or significant misleading commentary. Underlying both essays is the nagging question with which Justice Dowsett leaves us: does the community, upon whom the legitimacy of the judiciary depends, really value an independent, impartial, fair and competent judicial decision when decisions of this sort are not part of the everyday life experience of its members?

There are, of course, other changes that have impacted on the judicial role during Justice McPherson's tenure on the bench. These are the subject of a magisterial overview by Justice Susan Keifel.[33] Her comprehensive survey of the current Australian legal scene, which includes reference to the current debate about judicial activism versus judicial restraint to which so many sitting judges have felt compelled to contribute, joins two other superb

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[31] See especially J Bennett, 'Historical Trends in Australian Law Reform' (1970) 9 *University of Western Australia Law Review* 211.

[32] G Brandis, 'The Kilmuir Rules: A Parliamentary Perspective' in *Festschrift McPherson* 332; P de Jersey, 'The Kilmuir Rules: A Judicial Perspective' in *Festschrift McPherson* 357; J Dowsett, 'Judicial Qualities and Corruptive Good Customs' in *Festschrift McPherson* 367.

[33] S Kiefel, 'The Judiciary and Change: 1982 to 2006' in *Festschrift McPherson* 386.

essays of an overview nature. These are the essays by Professor Lee[34] and Judge David Robin, [35] which explain (subsuming centuries of legal development) why, respectively, the law of trusts and the law of property exist in their current form. Professor Lee additionally identifies issues that still require resolution in trustee law, while Judge Robin's essay also contains an analysis of judicial commentary on important aspects of real property legislation in Australia. These three essays should be read by all who are interested in the Australian legal system as it exists today. In addition, Justice Keifel's essay should be compulsory reading for any general introductory course to the Australian legal system, while Professor Lee's and Judge Robin's essays should be accorded similar status in the subjects to which they relate.

I did not set out in this review to comment on the substance of the essays in this collection. As I have attempted to show, they cover a wide spectrum of the law, probably putting such comment beyond the competence of any one reviewer, certainly this one. Nevertheless, I do hope that the review conveys the immense enjoyment, and instruction, that a reading of these essays gave me, and should give any Australian lawyer. I hope too that the review demonstrates the importance of a volume such as the present, and that its publication will prompt the production of further judicial festschrifts in Australia, perhaps by the mainstream legal publishers. Meanwhile, the Supreme Court of Queensland Library is to be congratulated for publishing this volume, as well as for its other publishing endeavours.

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[34] W Lee, 'The Trusts Act 1973 – Reforms Accomplished and Problems Remaining to be Resolved' in *Festschrift McPherson* 144.

[35] D Robin, 'McPherson on Property' in *Festschrift McPherson* 520.