CHAPTER 4

Law as Politics: Chinese Litigants in Australian Colonial Courts

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Abstract

The recent historiography of the Chinese in Australia has emphasised their vigorous formation of a local identity and community even in the face of recurrent and expanding threats of exclusion from colonial life. In their ready embrace of legal remedies to redress what they saw as discrimination or other harms, the Chinese were exemplar colonial settlers who looked to the law to protect them. In colonial appeal courts Chinese litigants challenged migration controls, contested convictions under opium restriction and gambling laws, sought equitable outcomes in property inheritance and challenged exclusionary regulation under the Factory Acts. In contrast to another kind of history of the Chinese in Australian law, as defendants in criminal prosecution, this chapter draws attention to the Chinese engagement in legal remedies as an assertion of their entitlement to recognition and fair play.

Keywords

Chinese immigrants – Australia – law courts – litigation

The recent historiography of the Chinese in Australia has emphasised their vigorous formation of a local identity and community even in the face of threats of exclusion from colonial life (Khoo & Noonan 2011; Ngai 2011; Fitzgerald 2007; Jones 2004). A striking example of this resilience can be located in the records of colonial courts hearing legal cases involving Chinese litigants, not only as defendants but as plaintiffs and appellants. In their ready embrace of legal remedies to redress what they saw as discrimination or other harms, the Chinese litigants were exemplar colonial settlers who looked to the law to protect them. In this chapter, I address this history by examining the fortune as well as the fate of Chinese litigants in Australian colonial courtrooms, examining cases that escalated to appeal courts.
A United States study of similar phenomena in American law in the late 19th century took as its theme the “Chinese contribution to American law” (McClain & McClain 1991). A further American study accented this theme, tracing the influence of determined Chinese litigation on subsequent congressional policy that shaped modern American immigration law and administration (Salyer 1995). In that case, as in Australian colonies and in Canada (McLaren 1991), a great deal of the foundation of modern immigration law was formulated in response to Chinese-initiated litigation. While some of the leading Australian cases are well known, they have generally been subordinated in the history of Australian immigration law to the study of the racialising discourses of the time in the politics of White Australia (Lake & Reynolds 2008; Willard 1967; Yarwood 1964). This litigious activity deserves greater scrutiny for illustrating the strength of the Chinese community networks that initiated and supported such litigation in the period before Federation, for its ‘contribution’ to the history of Australian law and for its illumination of the political dimension of litigation, of a politics conducted through the law courts. Importantly, the range of cases reaches beyond the immigration field, with Chinese litigants challenging opium restriction laws, seeking equitable outcomes in property inheritance and contesting exclusionary regulation under the Factory Acts. In contrast then to another kind of history of the Chinese in Australian law, as defendants in criminal prosecution, this chapter draws attention to the Chinese engagement in legal remedies as an assertion of their entitlement to recognition and fair play in the countries of their diaspora.

Litigants and Defendants

As immigrants (short- and long-term) and as settlers, Chinese were participants in the shaping of the colonial societies of Australasia. Their sense of themselves as settlers was forged in the angry politics of exclusion. Against the repeated attempts of colonial states to restrict their passage into the colonies, the Chinese worked in conventional political styles as well as informal ‘work around’ modes to secure their rights of entry and residence. The conventional political styles were most obvious in the two largest Australasian colonies, Victoria and New South Wales (n.s.w.), with leading and successful Chinese entrepreneurs lobbying political leaders directly on behalf of their individual and collective interests. In assessing the importance of litigation as politics, it will also be helpful to locate this phenomenon against the broader experience of Chinese interaction with the law. Australian scholarly treatments of this interaction have highlighted the vulnerability of Chinese immigrants and