

# The Forbes Flyer

The newsletter of the Francis Forbes Society for Australian Legal History

Spring 2011

## History reports itself

I remember very clearly my Year 11 history class, way back in 1980. We were studying the 19th unification of Germany. One student sighed. "What's the point of all this?" he wondered aloud.

Our teacher replied, "Well, if you take a long enough point of view, you'd see it as merely reunification. They'd already had a go a thousand years earlier. Indeed, we may well see East and West Germany reunify in our lifetime."

Oh the naivety, we mused. How could something as final as the Cold War ever come to an end? How would a duly divided Europe ever again be regarded as one?

Well, in thirty years, we seem to have gone a circle and a half; reunification of Germany; confederation of Europe; and... the downfall of western civilization?

We shall see. In the meantime, my recollection serves to remind that fixed points of view are dangerous, especially for the historian.

**David Ash**  
Editor

## The Forbes Lecture 2011

But calling a club a spade does not make it one. Permitting a taxpayer to control the economic destiny of a transaction with labels would, as the Court discusses more completely below, exalt form over substance, thereby perverting the intention of the tax code.<sup>1</sup>

And permitting judges to control the conduct of litigation...? This year's Forbes Lecture was presented by Associate Professor Shaunnagh

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Dorsett on 16 November 2011. Shaunnagh's topic was "Adapting Law to the Circumstances of the Colony: The First Supreme Court Rules of New South Wales and New Zealand".

The Lecture was a delight. Oh that the executive and legislative reformers of the judiciary in mid-19th century Britain had paid more heed to the experience of earlier judges of empire...

Shaunnagh's paper, based on the Lecture, will be published in the December 2011 issue of the *Australian Bar Review*.

## The ANZLHS 30th annual conference

The 30th annual conference of the Australia and New Zealand Law and History Society will be held in Brisbane on 12 and 13 December 2011. The following is extracted from the site [www.law.uq.edu.au/anz-law-and-history-conference](http://www.law.uq.edu.au/anz-law-and-history-conference), at which registration details may be got:

The 2011 conference theme – “Private Law, Public Lives” – examines the social dimensions of private law in history. What has been the historical role of private law in the creation of core social values? How did private law in areas such as the laws of marriage, property, succession, labour or contract, for example, shape colonial and postcolonial societies? What are the wider social implications of family law as well as commercial, corporations, competition or insurance law in the common law world and beyond?

The conference is hosted by UQ’s TC Beirne School of Law and Faculty of Arts, and will be held at the historic Customs House, located on the shores of the Brisbane River.

Highlights of this year’s conference include twin keynote speakers: Professor John McLaren, professor emeritus of the Law School, University of Victoria, BC, Canada, and author of *Dewigged, Bothered and Bewildered: British Colonial Judges on Trial* (University of Toronto Press, 2011), and Professor Rosalind Croucher, President of the Australian Law Reform Commission.

Also, by special arrangement with the American Society for Legal History, we will be including a panel from the ASLH, including Professor Constance Backhouse, Distinguished University Professor, University of Ottawa and President of the ASLH; and Professor Chris Tomlins, Chancellor’s Professor of Law, University of California, Irvine.

Details concerning the Bruce Kercher Conference Scholarships can be found at the following link: <http://www.waikato.ac.nz/law/anzlhs/Scholarship%202011.htm>

## A symposium: The Legal Profession and the Defence Forces: Historical Connections, UTS, 24 March 2012

From the importance of form to the resilience of substance, our 2011 lecturer is one of the persons involved in producing this symposium. From the website [www.law.uts.edu.au/research/conferences/historical\\_connections.html](http://www.law.uts.edu.au/research/conferences/historical_connections.html):

Jointly sponsored by the Faculty of Law, UTS, the Francis Forbes Society for Australian Legal History and the New South Wales Bar Association, speakers include:

- The Hon Tom Bathurst, Chief Justice of New South Wales, who will open the Symposium
- The Hon Justice Brereton, NSW Supreme Court, topic tbc
- The Hon Justice Logan, Federal Court, on Queensland Barristers in the Second World War
- Professor George Parsons, Macquarie University, on Arthur Hyman and Claims Officers in the First World War,
- Philip Selth, AOM, Executive Director NSW Bar Association, on the Trials of John “Mangrove” Murphy
- Tony Cunneen, History Teacher, St Pius X College, author, on the Law and War in 1917
- Col James Waddell, former Director of Army Legal Services, on the Army Legal Department

Other contributions (including a panel discussion) from:

- The Hon Bruce DeBelle AO QC, on Victor Windeyer
- The Hon Justice Slattery, NSW Supreme Court, on Admiral Farncomb

Registration will be available in January 2012.

Any inquiries please contact Tony Cunneen ([acunneen@bigpond.net.au](mailto:acunneen@bigpond.net.au)) or Shaunnagh Dorsett ([Shaunnagh.Dorsett@uts.edu.au](mailto:Shaunnagh.Dorsett@uts.edu.au)).

## Conference of the Legal Histories of the British Empire

National University of Singapore, July 5-7, 2012.  
From the Canadian Law and Society Association website, [www.acds-clsa.org/en/news\\_article.cfm?news\\_id=48](http://www.acds-clsa.org/en/news_article.cfm?news_id=48):

The First International Conference on the Legal Histories of the British Empire will be held in Singapore from July 5-7, 2012. The Faculty of Law at the National University of Singapore is the local host.

The Conference is supported by the American Society of Legal History, the Australian and New Zealand Legal History Association, and the Osgoode Society for Canadian Legal History.

The Conference is designed to provide a vehicle for a wide ranging sample of current scholarship on imperial and colonial legal history – cultural, institutional, social, biographical, doctrinal, prosopographical and theoretical. The objectives are:

- (1) to bring together scholars (senior, junior and graduate students) working in the fields of imperial and comparative colonial legal history, to share the work that is already underway, and
- (2) to encourage those with an incipient interest in these fields and others to join in this scholarly endeavour and expand the field.

## Books to read

*Dewigged, Bothered & Bewildered – British Colonial Judges on Trial, 1800-1900*

John McLaren

Publisher: Osgoode / Forbes Societies, 2011

Distributor: The Federation Press

\*Special price for Members of the Forbes Society \$59.50, for Non members rrp \$69.50

*Judge Advocate Ellis Bent – Letters and Diaries, 1810-1821*

Paula Jane Byrne (ed)

Publisher: Forbes Society / Federation Press, 2012

\*Special price for Members of the Forbes Society \$35.00, for Non members rrp \$TBA

Go to the website of Federation Press, [www.federationpress.com.au](http://www.federationpress.com.au), for more details.

## News from the Capital Punishment Database Project

At 9 o'clock on 28 February 1855, convicted wife-murderer William Ryan approached the newly erected scaffold in Darlinghurst Gaol. Pinioned and flanked by two clergymen, the condemned man was said to have climbed the ladder in a firm and collected manner.

Ryan's execution marked a turning point in colonial penal culture. His was the first 'private' execution in Australia, a reform achieved some thirteen years before the British instituted the same practice. In 1855, *Bell's Life*, a popular Sydney newspaper, reported favourably on the new method, noting that a small crowd of women and children had gathered outside the gaol but were "prevented the gratification of their curiosity". This was exactly the result proponents sought, having long feared that bearing witness to public spectacles of violence had a brutalising effect.

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This is one of the many important cases that appear in the expanded version of the Francis Forbes Society Capital Punishment Database, scheduled to go live early next year.

The database contains information on all 3,300 NSW capital convictions from 1788-1954, including searchable particulars on prisoner, victim, conviction, and execution. It makes available to the public a wealth of material collected through many years of intricate historical research. We believe it will form a crucial backbone for future projects in law, history, criminology, socio-legal studies, genealogy, gender studies, and Indigenous studies.

The significance of the death penalty traverses historical periods and traditional disciplinary boundaries. This is what makes it such a compelling research topic. Convict enthusiasts, for example, will make good use of the expanded database. Some may come across the case of James Dabbs, a man who felt the effects of colonial justice. Convicted of property offences, Dabbs was sentenced to suffer 1,500 lashes. When he reoffended in 1806 and was convicted of felonious burglary, officials decided it was time for him to meet the executioner. Dabbs case exemplifies the use of capital punishment to demonstrate the power of the law in the unruly convict colony.

By contrast, the 1938 execution of child murderer Alfred Spicer (the penultimate person hanged in NSW) will interest researchers of psychiatry and politics. Evidence given at the trial threw doubt on Spicer's culpability, claiming that he suffered a degree of mental deficiency brought on by service in WWI. His cause was taken up by the Howard Prison Reform League, an important public critic of capital punishment, who held public meetings and organised petitions for the commutation of his sentence. Controversy ensured, however, when the Chairman of the League gave a public statement in support of the execution for extreme cases such as this. Spicer's execution highlights the continual public interest in debating the death penalty.

Aside from the pending completion of the database, we have two other important developments to report. The first is that Tim Castle has teamed up with historian Amanda Kaladelfos (University of Newcastle). Amanda is the current holder of the Arts NSW Archival Research Fellowship, a grant received to write a history of capital punishment in that state. Amanda is set to incorporate material from her own database of sexual assault convictions and supervise the completion of the database at large. One of the strengths of the database is that it is a truly a collaborative project. The end result will be the combined labour of those trained in law and history—Tim Castle, Ken Macnab (University of Sydney), Amanda Kaladelfos, law student Justin Gill and a team of undergraduates.

The second development is that Tim and Amanda are planning a symposium to bring together legal professionals and academics interested in the history of capital punishment in Australia. The symposium is currently proposed for Sydney in May 2012. This is a timely point to return to Australia's own experiences with the death penalty, as we follow the high-profile cases of Australians living on death row in Indonesia and other overseas jurisdictions. We aim to start a conversation about this part of Australia's legal history which will eventually result in a peer-reviewed edited collection on Australia and the death penalty.

Stay tuned for more details!

## Major grant for Australian legal history

The Australian Research Council has awarded a grant of \$330,000 towards a colonial legal history library. This key grant means that the project will now go ahead for two years from the beginning of 2012. The project partners are ten Australian universities, Austlii, and the Australian Law Librarians Association. Together with the partners' contributions, the total budget for the two year project is \$750,000.

The project title is "The Australasian Legal History Library: creating historical depth in legal data on AustLII, to improve all legal research". The Australasian Legal History Library, to be located for free access on AustLII ([www.austlii.edu.au](http://www.austlii.edu.au)), will provide comprehensive legislation and case law from all colonies (subsequently Australian states, territories and New Zealand) up to 1950. Its citator will show how these historical materials are used in current legal decisions. It will be a revolution for legal history research, allowing easy access to core legal materials.

There will be several steps in the creation of the legal history library:

1. The project partners will scan (where necessary) and make searchable all decisions in the published law reports series, from inception up to 1950, for each state and territory and New Zealand. The same will apply to Privy Council appeal decisions from 1873 onwards.
2. The partners will also scan and publish on the Austlii website all the statute law of the Australasian jurisdictions back to the creation of colonial legislatures. This has already been done for NSW, NZ and Victoria, but there is much to do for the other jurisdictions.
3. Key historical documents will receive the same treatment, including law journals, law reform reports and treaties.
4. Importantly for the incorporation of historical material into the present law, the historical case law will be included in Austlii's Law Citator, showing where they have been cited subsequently.

The emphasis of this project will be on the scanning, republication and organisation of existing nineteenth and twentieth century printed material, much of which is presently inaccessible to many researchers. The project, will however, add to the considerable work already completed and underway of uncovering and publishing hidden colonial court records. In New Zealand, the Lost Cases Project (<http://www.victoria.ac.nz/law/nzlostcases/default.aspx>) is based on the manuscript and newspaper records of nineteenth century case law; many lost cases have now been placed on the web. In Australia, a similar project has long been underway for New South Wales and Tasmania, through Macquarie University's Colonial Case Law website:

[http://www.law.mq.edu.au/research/colonial\\_case\\_law/](http://www.law.mq.edu.au/research/colonial_case_law/)

The new Australasian Legal History Library will work cooperatively with those projects. There is very much still to do for the recovery of Australian lost cases, where much of the nineteenth century case law of is still a mystery.

## Spring Quarters<sup>2</sup>

### In spring 1811

On 7 November 1811, William Henry Harrison won the Battle of Tippecanoe. Three decades later, his presidential campaign with running mate John Tyler spawned the song and, ultimately, slogan "Tippecanoe and Tyler too".

### In spring 1861

On 23 October 1861, US President Lincoln suspended the writ of habeas corpus in Washington DC for all military-related cases.

### In spring 1911

On 26 October 1911, the Chinese Republic was proclaimed.

### In spring 1961

On 6 October 1961, US President Kennedy advised Americans to build fallout shelters from atomic fallout in the event of a nuclear exchange with the Soviet Union.

## Endnotes

1. [taxprof.typepad.com/files/schering-plough-v-us-trial-opinion-8-28-09.pdf](http://taxprof.typepad.com/files/schering-plough-v-us-trial-opinion-8-28-09.pdf) [accessed 17/11/2011].
2. Usually, the Flyer draws the references from timelines. ws or from [en.wikipedia.org](http://en.wikipedia.org).



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