



Forbes Flyer

THE NEWSLETTER OF THE FRANCIS FORBES SOCIETY FOR AUSTRALIAN LEGAL HISTORY

ISSUE 1 JULY 2003

History reports itself

In 1803, the *Sydney Gazette and New South Wales Advertiser* commenced publication, being the first major newspaper in Sydney-town. Now, in 2003, two hundred years later, is the publication of the first edition of this newsletter.

While the arrival of this publication (brief and unassuming as it is) does not claim to have the same historical significance as the *Gazette*, it is hoped that it will be a useful tool for the members of the Forbes Society. Here you will find information about events of historical legal significance, articles of interest and details of the activities and future plans of the Society. The publication is intended to be quarterly and will expand with the needs and interests of the Society and its members. Contributions of short articles, information about events or initiatives related to legal history, or letters and opinion pieces related to the history of Australian law are all warmly welcome.

This edition contains information about the activities of the Forbes Society to date, news about the inaugural Forbes Society lecture recently presented by Ian Barker QC, and some words on how to preserve one's name for posterity by the Society's namesake Sir Francis Forbes.

The editor looks forward to your feedback. Please contact me or the Society's Committee at editor@forbessociety.org.au

Catherine Douglas

Editor

The Francis Forbes lectures

The inaugural Francis Forbes lecture on Australian legal history was delivered by Ian Barker QC on 28 November 2002 in the Banco Court, Queen's Square.

Barker QC was introduced to the audience by the Chief Justice of New South Wales, the Hon Justice Spigelman AC and the President of the Forbes Society, Professor Bruce Kercher of Macquarie University. A special guest in the audience was Karen Forbes, a descendant Sir Francis Forbes.

Speaking on 'The history of trial by jury in New South Wales', Barker QC described the way in which a penal colony, governed by the military, and with deep social divisions, was able to implement a system of trial by jury and gradually broaden eligibility for jury service. He concluded with an overview of more

recent legislation that has served to gradually restrict the right of an accused to a trial by jury. He warned that this important protection of civil rights is increasingly denied to citizens accused of all but the most serious of crimes and calls for trial by jury to be protected.

The Hon PE Powell AM will present the 2003 Forbes Lecture on Wednesday 15 October, at 6.00pm in the Banco Court, Level 13, Law Courts Building, Queens Square, Sydney. The topic of the lecture will be: 'The Origins and Development of the Protective Jurisdiction of the Supreme Court of NSW'.

The Forbes Society will publish the lectures as monographs later in the coming months. The publication will be available to members of the society at discounted rates.

About the Forbes Society

The Francis Forbes Society for Australian Legal History (ACN 099 158 620) is a registered public company, limited by guarantee.

The society is named after Sir Francis Forbes, the first chief justice of New South Wales, between 13 October 1823 and 1 July 1837.

The aims of the society, as expressed in its Constitution are to:

- encourage the study and advance the knowledge of the history of Australian law;
- publish and promote, for the benefit of the public, books, journals, periodicals and other literary publications;
- arrange and promote, for the benefit of the public, continuing education; and
- promote the compilation of authentic records relating to Australian law.

The members of the council of are:

- President: Professor Bruce Kercher of Macquarie University
- Senior Vice President: The Hon Justice Keith Mason, President, NSW Court of Appeal
- Junior Vice President: Wendy Robinson QC, Crown Prosecutors
- Secretary : Geoff Lindsay SC, 8 Wentworth Chambers
- Treasurer: Carol Webster, St James Hall Chambers
- Members:
 - Michael Sexton SC, Solicitor General of NSW
 - Laurie Glanfield AM, Director General, NSW Attorney General's Department
 - Mark Richardson, Chief Executive, Law Society of NSW
 - Stephen Toomey, Toomey Pegg Drevikovsky Solicitors
- Honorary Executive Director: Phillip Selth, Executive Director, NSW Bar Association

Unreported Privy Council appeals from the Australian colonies before 1850

By Bruce Kercher, Professor of Law, Macquarie University School of Law

In this article Bruce Kercher examines the earliest Privy Council appeals from Australia, based on extensive use of archival records in London. The first reported appeal from an Australian colony was decided in 1844, but the archives show that there were numerous appeals before then. The article traces the law of appeals before 1850, and offers some explanation of the likely effect of these appeals on the shape of Australian colonial law.

Anyone who reads the Law Reports might think that very few cases went to the Privy Council from the Australian colonies before 1850. Only four of those appeals appear in the English Reports before 1850. In fact, however, 22 appeals were sent there in this formative period of Australian law. They tell us rich stories about colonial life, including the attempt to remove a distinguished barrister from the rolls, trade between a Sydney ex-convict and King Pomare of Tahiti, and the financial collapse of early enterprises.

First period, before 1814

From 1788 onwards there was provision for appeal from New South Wales to the Privy Council, although the first appeal was decided only in 1809. On 2 February that year, an appeal committee of the Privy Council decided the case of *Lord v Palmer*. Its decision was in the form of a report to the King in Council, which confirmed the Committee's recommendation four days later. This upheld a decision of Governor King of New South Wales, sitting as the colony's Court of Appeal. He, in turn, had confirmed the decision of the colonial Court of Civil Jurisdiction.

Lord v Palmer concerned the distribution of the assets of the deceased estate of an intestate, John Stogdell. This was a dispute between Simeon Lord, a former convict and non-lawyer who was an agent for Hugh Mehan (a creditor of the estate), and John Palmer, the administrator of the estate. Behind Palmer, we can see the wiles of George Crossley, the best known of the colony's

convict attorneys. Lord won, ultimately, because the Privy Council ordered that the assets of the estate be distributed rateably among creditors of equal degree. Palmer's claim for preference was over-ruled at the highest legal level of the empire.

This was not simply a matter of appeal from one legal amateur to another and then another more highly placed group of them in London. Neither Richard Atkins (the Judge Advocate of New South Wales) nor Governor King had any legal training, and the Privy Council appeals committee at this time included some lay people. On this occasion, however, the appeals Committee consisted of the Master of the Rolls as well as Nepean and Dundas. The establishment of a Judicial Committee of the Privy Council in 1833 made it a thoroughly professional body, but as this case shows, the earlier committees often had high levels of legal expertise as well, even if they sat infrequently.¹

Lord v Palmer cannot be found in the Law Reports. The relevant volumes of the *English Reports* (volumes 12 and 13) include no Privy Council appeals from the Australian colonies before *In re Sherwin* (1844) 4 Moo PC 311; 13 ER 323. But records of earlier decisions do exist. To see them, it is necessary to go to the office of the Judicial Committee of the Privy Council in Downing Street. Most of the Privy Council's judicial records are kept there, including Minute Books and very many volumes of the Printed Papers which the Privy Council's appeals committees have required litigants to produce since the end of the eighteenth century. In many cases, the committee reports on the

outcomes of the appeals (in effect, the judgments) were handwritten into the Printed Papers. Further Privy Council records are held at the Public Records Office at Kew, particularly the *Council Registers*. These include the minutes of some appeals hearings, particularly before the establishment of the Judicial Committee of the Privy Council in 1833.² The Minute Books in the office of the Judicial Committee of the Privy Council begin only in 1830. For formal minutes of appeal cases before then, it is necessary to go to Kew.

Simeon Lord appealed under the provisions of the colony's First Charter of Justice, which was in force from 1788 until 1814. This allowed an appeal from the Court of Appeal in matters where the debt or thing in demand exceeded £300.³ On the face of it, this provision created a right of appeal. The appeals provisions varied from time to time, and colony to colony. Some gave disappointed litigants a right to appeal, and others required them to seek leave to appeal, either from a colonial court or from the Privy Council. In practice, according to the standardised records in the Judicial Committee office, there were four phases to appeals: an application to appeal, a reference by the King in Council to the appeals Committee, a report by that Committee recommending a particular outcome, and finally the King in Council approved that recommendation. In *Lord v Palmer*, there was more than usual substance to the first phase, because Palmer found that he had to seek leave to cross-appeal, that having been refused by Governor King. The Privy Council granted him permission to appeal in a preliminary decision on 26 November 1806.

The New South Wales governors were highly critical of the litigiousness of emancipated convicts such as Simeon

¹ See PA Howell, *The Judicial Committee of the Privy Council 1833-1876* (Cambridge University Press, Cambridge, 1979), pp 8, 15, 37; DB Swinfen, *Imperial Appeal: the Debate on the Appeal to the Privy Council, 1833-1986* (Manchester University Press, Manchester, 1987), pp 5-6.

² My grateful thanks are due to Mr Frank Hart, Chief Clerk of the Judicial Committee of the Privy Council, for his kind assistance. The Council Registers at the Public Record Office are in group PC2, and see also PC1/3672C for *Lord v Palmer*.

³ Letters Patent, 2 April 1787. The source used for this and other charters is JM Bennett and AC Castles, *A Source Book of Australian Legal History* (LBC, Sydney, 1979).

Lord, especially their propensity for appealing to the Court of Appeal and the Privy Council. The governors thought that appeals to London were particularly harmful, since they were usually pursued simply to delay payment. Judge Advocate Ellis Bent claimed that debts above the £300 Privy Council appeal limit were effectively unenforceable for this reason, but this overstates the case. Balmain also exaggerated when he claimed that 'references without end are made ... to the higher powers in England, and justice is left to sleep until answers are returned on the subject.'⁴

In fact, there were relatively few Australian appeals before 1850. One way to test this is by reference to the 'Enquiries' listed at the end of the *Appeal Book 1781-1819*, which is in the Judicial Committee office. This lists 485 cases up to 1826, of which only 7 were from New South Wales. (This list is incomplete, but is useful for comparative purposes.) In this and the other two appeal books covering the period up to 1850, the bulk of the appeals came from the West Indies (particularly Jamaica), India and the Channel Islands. This is confirmed in the *Minutes of the Judicial Committee*, which begin in 1830. The first three volumes of this series cover 1830 to 1853. They include four cases from New South Wales and three from Van Diemen's Land (and only one from New Zealand). There were 56 appeals in these years from colonies which are now parts of Canada, but the great bulk of appeals were again from the West Indies and India (Bengal 117; Jamaica 63; British Guiana 43; Bombay 31). Later in this period, a significant proportion of the time of the Privy Council's appeal Committee was taken up by cases concerning compensation for the abolition of the slave trade (27 cases listed in the *Minutes*).

The point is that New South Wales took little of the Privy Council's time, although there is some substance to the complaints about Simeon Lord's litigiousness. By 1810, his financial empire was collapsing, and his bills of exchange drawn on London merchants were being protested for non-payment. He lodged four further appeals to the Privy Council, but it seems clear that he was doing so merely to gain time. These four were either dismissed

for non-prosecution, or he failed to provide the required Printed Papers for his appeal. Nothing came of two other cases, in which he was respondent to appeals by others but in which Lord failed to press his case in London. Lord's appeals dominated this first period of Privy Council litigation from Australian colonies. There were only five cases in which he was not a litigant, and one of those (*Kable v Harris*, 1815) also concerned his habit of drawing large bills of exchange that were not met. Of these First Charter of Justice cases in which the cause of action is revealed, nearly all concerned commercial matters. The causes of action included bills of exchange, breaches of contracts or bond conditions, and accounts. (In four cases, the cause of action is not revealed by the surviving records.)

Second period: appeals from decisions made 1814-1824

The complaints about the manipulation of appeals to the Privy Council under the First Charter had an effect. The Second Charter of Justice for New South Wales once again provided for an appeal to the governor sitting alone as the Court of Appeal, and from him to the Privy Council. This time, however, the financial limit for appeals was lifted to £3000.⁵ This was an unusually high limit for the right to appeal. The average limitation on appeals from the colonies at this time was £500.⁶ As shown below, later Australian limits were less than £3000.

The records in London show that there were only three appeals under the Second Charter of Justice. These appeals were initially from the new Supreme Court, which operated under the new Charter between 1814 and 1824 in civil matters only. This was a more professionally constituted court than the Court of Civil Jurisdiction that preceded it (although the barrister Judge Advocate Ellis Bent spanned the end of the First Charter and the beginning of the Second). The Privy Council dismissed one of these three cases for non-prosecution by the appellant (*Campbell v McArthur*, the claim being for over £20,000). The other two cases went through to final report to and affirmation by the full Privy Council. That is, 'judgment' was delivered in two

of the Second Charter appeals.

Campbell v Cox was finalised only in 1828, yet it concerned bills of exchange issued by William Cox, the Paymaster of the New South Wales Corps, between 1801 and 1803. (The appeal was received at the Privy Council's appeals office in 1825.) Cox's affairs fell into informal insolvency (there being no bankruptcy or insolvency laws in the colony at that time). He owed over £7000 to Robert Campbell, who received dividends totalling 15 shillings in the pound. This claim was for the balance, but Campbell lost in all three tribunals, the Supreme Court, the Court of Appeal and the Privy Council. His action apparently turned on title to the bills in question, Field J in the Supreme Court having declared that Campbell was not their holder. The Privy Council confirmed this.

The other appeal in this second period concerned a much more gripping yarn. *Eagar v Henry* reached its final stage in the Privy Council in 1827. Edward Eagar was one of several disgraced attorneys who had been transported as convicts to New South Wales. By 1820 he described himself as a merchant. He alleged that he had entered into an agreement with King Pomare of Tahiti. Under this, Eagar bought a trading ship in Sydney on behalf of Pomare, which he promised to send to him at the Society Islands (which included Tahiti). In return, Pomare would send the ship back to Sydney with a cargo of pork, to repay Eagar. Under the alleged agreement, Eagar would also become Pomare's agent in Sydney and England for other trading adventures, at a commission rate of 50 per cent. Eagar bought the ship and despatched it under the command of Samuel Henry.

The voyages to and from Tahiti were completed as planned, the ship returning to Sydney with the agreed cargo of pork. But then the Rev Samuel Marsden, on behalf of the London Missionary Society, intervened. The Society had declared its opposition to trade with the people of Tahiti. Marsden influenced Captain Henry to attempt sell the pork rather than allowing Eagar to do so. Eagar dismissed Henry from his post, took charge of the cargo, and sold it at Sydney. Henry then sued Eagar in trover, arguing that the property in the pork was his. This was the claim that went to the Privy Council, after both the Supreme Court and the Court of Appeal had found in favour of Captain Henry.

⁴ Balmain to Banks, 24 May 1802, *Historical Records of Australia*, 4/1, p 35. On this paragraph, see B Kercher, *Debt, Seduction and Other Disasters: the Birth of Civil Law in Convict New South Wales* (Federation Press, Sydney, 1996) pp 14-17.

⁵ Letters Patent, 4 February 1814.

⁶ See Howell, op cit n 1, p 76.

The Privy Council's decision is recorded both in the Printed Papers in the Judicial Committee office, and in the *Council Register* in the Public Records Office. It overturned the decisions of the two colonial courts, and declared both that the ship belonged to Pomare, and that the cargo of pork had been the property of Eagar, as he had claimed. Marsden had apparently managed to interfere with future trade, but not to overturn the contract between Pomare and Eagar. The tort of interference with contract had not yet fully developed, so no action was taken against Marsden.⁷

Third period: appeals up to 1850

The third period of pre-1850 Privy Council appeals commenced with the *New South Wales Act* 1823 (4 Geo 4 c 96) and the Third Charter of Justice. These created the permanent Supreme Court of New South Wales, this time with both civil and criminal jurisdiction. Clause 19 of the Third Charter allowed an appeal in civil cases from the Supreme Court to the Court of Appeal (again, the Governor sitting alone: s 15), and from there to the Privy Council in matters concerning over £2000 or where the Governor reversed the Supreme Court.⁸ The *New South Wales Act* was replaced by the *Australian Courts Act* in 1828 (9 Geo 4 c 83), but this no longer provided for a Court of Appeal. The Third Charter continued in force, but not the Court of Appeal. So from 1828 onwards, there was no apparent structure for appeals from the New South Wales Supreme Court to the Privy Council. Section 15 of the new Act authorised the crown by charter, letters patent or Order in Council to allow any person to appeal from the Supreme Court to the Privy Council in any manner as seemed appropriate. The crown did not act on this until 1850, when an Order in Council provided a new structure for appeals.

There were no appeals from New South Wales to London in the first part of this period, between 1824 and 1828 when there was a clear right of appeal from

the Court of Appeal to London. However between 1828 and 1850, there were a few appeals to the Privy Council, regardless of the absence of a New South Wales Court of Appeal. In *Lord v Wentworth* in 1829, the Supreme Court of New South Wales declared that there was a prerogative power in the Privy Council to allow appeals to be heard despite the absence of an Order in Council. The Supreme Court described these as common law appeals.⁹ In 1845, the Privy Council affirmed its power to hear such appeals, basing it on the *Judicial Committee Act*, 1844. This allowed Orders in Council to be made in individual cases for appeal from any colonial court, even if it were not a Court of Appeal. The 1844 legislation is ambiguous: it was either a new statutory power to hear appeals, the prerogative power having been abolished by implication under the 1828 Act, or it was a recognition of the continuation of the prerogative power throughout the whole period.¹⁰ While it is clear that there was power to hear appeals from New South Wales before 1850, the position was thus unclear between 1828 and 1844. There are no cases from these years.

Van Diemen's Land obtained a separate Supreme Court which began operation in 1824, with the same appeals provisions as those from New South Wales at first. The 1823 and 1828 Acts were common to it and New South Wales. Section 15 of the 1823 Act provided that the Court of Appeal from the Van Diemen's Land Supreme Court was to consist of the New South Wales Governor sitting alone, and clause 19 of the First Charter of Justice for Van Diemen's Land¹¹ provided for an appeal from the Court of Appeal to the Privy Council in the same circumstances as in New South Wales. Again there was no Court of Appeal in the 1828 Act, but on this occasion the crown acted more quickly to repair the omission concerning appeals to London. A Second Charter of Justice¹² for Van Diemen's Land created new appeals provisions from 1831 onwards. It provided for a right of

appeal direct from the Supreme Court to the Privy Council where more than £1000 was in issue, and reserved the crown's right to receive appeals on petition under that amount. So the only period of doubt for Van Diemen's Land was between 1828 and 1831, when there was no Court of Appeal while the Van Diemen's Land First Charter provided only for appeal from that court.

The *English Reports* contain only four pre-1850 appeals to the Privy Council from the four Australian colonies in this period, two dismissed and two allowed. There were also two appeals against the removal of judges of these courts, one each from New South Wales and Van Diemen's Land.¹³ The first reported appeal was from Van Diemen's Land, *In re Sherwin* (1844) 4 Moo PC 311; 13 ER 323. In it, Lord Brougham refused to exercise the discretion to allow an appeal under £1000, saying the matter would only be one for a jury in any event. The other appeals were from New South Wales.

A careful study of the records in the Judicial Committee office and the Public Records Office reveals only one unreported decision from this third period, *In re Stephen* 1847. No appeals are recorded, then, between 1828 and *In re Sherwin* in 1844. Among other things, this means that there were no appeals from Forbes C.J. of New South Wales, although there were other mechanisms to check his decisions as shown below. Nor were there any appeals from South Australia or Western Australia in this period.

In re Stephen was an appeal from Van Diemen's Land. Sydney Stephen was the son of the first puisne justice of the New South Wales Supreme Court, a brother of Alfred Stephen (Attorney General of Van Diemen's Land, and later Chief Justice of New South Wales) and first cousin of James Stephen junior of the Colonial Office. He also made a powerful, though unsuccessful, argument in *R. v Murrell* (1836) 1 Legge 72, concerning the autonomy of Aboriginal peoples. It may

⁷ See JG Fleming, *The Law of Torts* (8th ed., LBC, Sydney, 1992), pp 688-689.

⁸ Letters Patent, 13 October 1823, clauses 19-22.

⁹ See www.law.mq.edu.au/scnsw; and see the view of Burton J in the notes to *Lyons v Morgan*, 1837, at the same place, and Forbes and Dowling to McLeay, 14 August 1834, Chief Justice's Letter Book, 1824 - 1835, State Records of New South Wales, 4/6651, 382.

¹⁰ *Flint v Walker* (1845, 1847) 5 Moo PC 179 at 193; 13 ER 459 at 464; and see *Minutes of the Judicial Committee*, 1845-1853, Vol. 3, 18 July 1845, p 31 (in the Judicial Committee of the Privy Council office). See AR Blackshield, *The Abolition of Privy Council Appeals: Judicial Responsibility and the Law for Australia* (Adelaide Law Review Research Paper No 1, Adelaide, 1978), pp 14-23 (arguing for the 1828 abolition of the prerogative power, by implication); Howell, op cit n 1, pp 55-56.

¹¹ Warrant, 18 August 1823, see *Historical Records of Australia*, series 3, vol 4, p 478.

¹² Letters Patent, 4 March 1831.

¹³ *Willis v Gipps* (1846) 5 Moo PC 379; 13 ER 379 (allowed); *Montagu v Van Diemen's Land* (Lt Gov) (1849) 6 Moo PC 489; 13 ER 773 (dismissed). Willis was also moved in Upper Canada: see *Printed Papers*, vol. 13, *Upper Canada Papers. Relating to the Removal of. Mr Justice Willis 1829*, and see Howell, op cit n 1, p 33.

seem surprising, then, that such a man was struck off the roll of practitioners in Van Diemen's Land. The conflict concerned his action to recover professional fees due to him as a legal practitioner. (Admitted as both attorney and barrister, most of his practice was as a barrister.) Chief Justice Pedder and Montagu J struck him off in 1842, alleging that it was an offence for a barrister to receive fees in the form of bills of exchange and promissory notes, that he sued in a false name, that he concealed the contents of an affidavit, and that he swore affidavits 'bordering on perjury'.

In April 1847, the Privy Council ordered the rescission of the Supreme Court order to disbar Stephen. The Printed Papers show that after he was struck off in Van Diemen's Land, a general meeting of the New South Wales Bar (including the colonial Attorney General and Solicitor General) had unanimously declared that there were no sufficient grounds to prevent the members of the bar from associating with Stephen as a barrister of the New South Wales Supreme Court. He remained on the rolls of that court for both Sydney and Port Phillip. The Judicial Committee of the Privy Council (including Lord Brougham, Lord Campbell and the Master of the Rolls) reported in Stephen's favour in March 1847. Two years later, it was not Stephen who was thrown out of his position, but one of the Supreme Court Justices who had attempted to strike him off the roll in Van Diemen's Land. In 1849, Lord Brougham presided over a Judicial Committee meeting which reported that there had been sufficient grounds for the amoval from office of the erratic Montagu J. (*Montagu v Van Diemen's Land (Lt Gov)* (1849) 6 Moo PC 489; 13 ER 773).

The role of the Privy Council in early Australian colonial law

Some of these are gripping stories, but they are important for more than that. In over 60 years from 1788 to 1849, only 22 cases were appealed to the Privy Council from the Australian colonial courts or concerning Australian judges. Six of them were reported, and 16 unreported. Of these, 13 were from New

South Wales (including the Willis' case on amoval) and 3 from Van Diemen's Land (including Montagu's appeal against amoval). There were no appeals from South Australia or Western Australia before 1850. The Privy Council's *Appeal Book 1837-1867* states that the first South Australian appeal to the Privy Council was in 1864.¹⁴ For the other colonies, the first appeal dates are: Western Australia, 1871; Victoria, 1859; Queensland, 1860. Many thousands of cases were decided in the colonial Supreme Courts before 1850, but only 22 appeals to London were finalised by then. The number of appeals increased sharply from 1850 onwards. In the 1850s, the *Appeal Book* shows, there were 17 Australian appeals. There were 74 more in the 1860s.

This indicates that the Privy Council played little practical role in keeping the Australian colonial courts on the straight and narrow of English legal propriety before the 1850s at least, particularly by comparison with some other colonies such as Jamaica. Many of the 22 Australian cases before 1850 were dismissed without examination of the merits, meaning that very few actually went through to reversal or affirmation of the colonial courts' decisions.

When the Privy Council's appeals committees did decide an appeal from the Australian colonies before 1850, it rarely gave more than a formal statement of its decision. One of the longer reports of an appeal committee was in the first Australian case, *Lord v Palmer*. In it, the committee recited the facts at length, including the process of appeal from one court to the next. Then it stated its decision as follows:

Their Lordships do agree humbly to report as their Opinion to your Majesty that inasmuch as John Palmer the Respondent in the original and Appellant in Cross Appeal, had no claim to the Administration except as a Creditor of the Intestate, the Civil Court of Judicature might and ought when it granted Administration to him in that Character to have imposed upon him the Condition of distributing the Assets rateably

*among all the Creditors in equal Degree, and that therefore the Judgment or Decree of the Governor of New South Wales of the 7th of October 1803 directing such rateable Distribution should be affirmed, and as the time limited for making such Distribution is now elapsed that it should be referred to the Civil Court of Judicature to fix some other reasonable period for that purpose.*¹⁵

There is little about the relevant legal principle here, but that is more than appears in most cases before 1850. In *Campbell v Cox*, for instance, an extensive summary of the facts was followed simply by 'Their Lordships do agree humbly to report as their Opinion to Your Majesty that the Judgment of the Court of Appeals in New South Wales of the 20th. of April 1824 should be affirmed with £100 Sterling Costs.'¹⁶ *Eagar v Henry* was decided in just two sentences.¹⁷ *In re Stephen* was decided with the words 'Their Lordships agreed to report that the Order of the Judge of the Supreme Court of Van Diemen's Land should be rescinded.'¹⁸

The law reports suggest that the members of the Judicial Committee or appeals committees frequently gave oral reasons for these decisions, which are now lost to us. Volumes 12 and 13 of the *English Reports* record sometimes extensive reasons for the 'judgments' in these cases. This series of reports of colonial Privy Council appeals begins in 1829, although there are a couple before then, in 1809. From 1829 onwards, it seems that the reporters who were present in the committee room in Downing Street recorded the words spoken by the committee members as they announced the reports that they would make to the King in Council, as well as the oral arguments of counsel. The six reported appeals from Australian colonial courts before 1850 are all recorded in the official minutes and papers with only the sparsest account of the reports or 'judgments', like the cases mentioned in the previous paragraph. The *English Reports* of the same cases are much more extensive, sometimes recording the views of more than one

¹⁴ See also Howell, op cit n 1, p 74. For the Orders in Council for these colonies, see Bennett and Castles, op cit n3, pp 233-236.

¹⁵ Public Record Office, PC2/179 *Council Register 1 Dec. 1808 to 28 Feb. 1809*, pp 400-404, 2 February 1809. See also *Sydney Gazette*, 23 February 1811.

¹⁶ PC2/209 p 101, 9 February 1828.

¹⁷ PC2/208 *Council Register 1827*, p 241, 26 May 1827; *Printed Cases in Indian and Colonial Appeals Heard in 1827*, pp. 307-331 (latter in Judicial Committee office records).

¹⁸ *Printed Cases in Indian & Colonial Appeals, Heard in 1847* (Judicial Committee office records).

member of the committee, including discussion of previous case law.

In the almost complete absence of law reporting before 1829, and in the unreported cases even after then, the Privy Council operated less as a principled guide to colonial courts, than as a body of authority. The appeals committees were responding to appeals to the King, and acted as an advisory body to him. In the absence of recorded reasons, the colonial courts were only told that they had made an error or otherwise. The object was correction of those errors in individual cases, not general guidance. As a practical matter, this left the colonial courts relatively free to adapt inherited English law to colonial circumstances, the only risk being occasional reversal.

This does not mean that the colonial judges had no English guidance before 1850. No colonial judges at this time had judicial tenure. Some of them had an independent attitude despite that, although even these judges received and accepted guidance from the British government. This guidance mainly occurred in one of two situations: advisory opinions, and declarations that colonial legislation was repugnant to

English law.¹⁹ These opinions and declarations were subject to review by the Law Officers of the crown in London (the Attorney General and Solicitor General). Amoval was the price to pay for disobedience or displeasure of the British government, as Willis, Montagu, Jeffery Bent²⁰ and Benjamin Boothby²¹ learned. Before 1865, this vulnerability plus the strength of the judges' inherited legal culture seem to have played a greater role in keeping Australian colonial law to Englishness than occasional reversals by the Privy Council.

There are wonderfully rich resources at Downing Street, where the Judicial Committee of the Privy Council sits, and in the Public Record Office in Kew. These records do not include official accounts of judgments before 1854, when a new series of printed volumes called *Judgments of the Judicial Committee of the Privy Council* began.²² But even before then, the official records of the appeals and Judicial Committees provide rich material for legal historians and general historians. In them, we can discover details about cases from around the empire. None of this material is indexed. This article, then, is yet another

plea for expensive work in the archives. The records in the basement in Downing street are safely preserved, but need to be indexed by case name, by jurisdiction, and by kind of case and outcome at the very least. If an index of that kind were placed on the web, it would help scholars from all around the old empire. We are decades away from the writing of a comprehensive legal history of the post-American empire, but this would be a good place to start.

¹⁹ See for example, *See Transportation Opinion*, 1826, and *Newspaper Acts Opinion*, 1827 at www.law.mq.edu.au/scnsw.

²⁰ See *Printed Cases in Appeals &c. Decided in 1832 and 1833* Vols 18 and 19, (in the Judicial Committee office), concerning his suspension from office as Chief Justice of Grenada.

²¹ See *Appeal Book 1837-1867* for 1868, and see AC Castles, *An Australian Legal History* (LBC, Sydney, 1982), p 411.

²² These are kept in the Judicial Committee of the Judicial Committee office.

Recent research

The Privy Council was the central institution in keeping colonial law on the straight and narrow path of English rectitude, yet the *English Reports* include only four appeals from Australia before 1850. The records of the appeals committees of the Privy Council show that there were many more than this: they include 22 appeals to London in those years. Many were abandoned after formal papers were lodged in the office of the appeals committee, but some went on to judgment ('report').

The records are kept in the office of the Judicial Committee in Downing Street, and in the Public Record Office. The most interesting of the unreported cases is *Eagar v Henry* (1827). Eagar was a former attorney,

who had been transported to New South Wales as a convict. After his emancipation he became a self-styled merchant who entered into a contract with King Pomare of Tahiti. He bought a boat for Pomare, which he sent to Tahiti with a cargo of goods. In return, he was to receive a cargo of pork, after which he would become Pomare's agent in Sydney and London. The London Missionary Society objected to trade with natives, and its Sydney agent, the Rev Samuel Marsden intervened to wreck the arrangement. Eagar won his appeal to London, though that may not have resuscitated his future arrangements.

For further details, contact bruce.kercher@mq.edu.au.

Extract from letter written by Chief Justice Francis Forbes to R. Wilmot-Horton on 20 September 1827, reproduced as letter 59 in Bennett, J.M (ed) *Some Papers of Sir Francis Forbes*, New South Wales Parliamentary Library, Sydney, 1998.

Francis Forbes was a prolific letter writer, astutely documenting all significant legal developments that occurred within the colonial New South Wales of his time. Yet as can be seen in the letter extract below, he also had a keen awareness of history, and in particular his place within it.

Forbes' reference to the latin maxim *de non existentibus et non apparentibus eadem est ratio* means 'of things which do not appear and things which do not exist, the rule in legal proceedings is the same'. The name 'Sallustius Crispus' refers to the Roman historian more commonly known as Sallust today, but who remains eclipsed by more famous Romans of his time – Caesar, Cato, Cicero.

We have an old, an inelegant maxim in the law, that *de non existentibus et non apparentibus eadem est ratio*. If this be true at all, it is especially so in distant settlements. And perhaps the force of its application may be calculated in the exact ratio of the distance which divides the Colony from the parent country, and, according to such a scale, this settlement, above all others belonging to the British Crown, presents the widest field for the statesman, the philosopher and the philanthropist, to exercise their various talents and virtues. I cannot conceive a fairer occasion for the exertion of those qualities which belong to the truly great and truly good, than is here presented. Of all those feelings which go forth in the work of human benefaction, with no ambition but the happiness of the human race, for no applause but the silent approval of their own heart. For the exercise of such feelings this Colony presents a wide and inestimable field: whether we consider the wretched exiles, victims of crime and misfortune, but not incapable of feeling and being reclaimed, the planting of a young and ambitious colony of Europeans in the heart of Asia; the education of England's giant Son in a manner suited to his illustrious birth, and fitted to perpetuate in this Eastern clime, to the end of time and the earth's duration, the glorious institutions of England's laws, the beautiful productions of England's literature, the sacred fire of England's genius.

These are awakening thoughts. Be assured that the man, who would build an imperishable monument to his name, may advantageously forgo the immediate returns of fame in London, for the remote but far more durable memorials of Australian history. The name Sallustius Crispus is nearly buried in dust. It is with great men as with mountains, their elevation is more observable at a distance, and is most remarkable when they stand alone. Is it not worth the ambition of some one of our great statesmen to emulate the fame of Romulus or Theseus? I have been dreaming of days to come. I fear they are far, very far off. At this moment I cannot fancy any place where an unfortunate servant of the King can find himself less agreeably situated, than the exact one now in the tenure of him who sits down to contrast the fair-eyed future of Botany Bay with the sober present of old England. Be it so. Without hope at the bottom, this life were indeed a bitter chalice, and her promises being always greatest where her gifts are least, it may be that, from the absence of every thing just now that one could wish, I am led to speculate more ardently and more devoutly upon that which is to be. Now for dull reality...'

For enquiries about membership of the Forbes Society, or to obtain an application form, visit the Forbes Society's web page at

www.forbessociety.org.au

Alternatively, you may contact:

The Secretary,
The Francis Forbes Society for
Australian Legal History
C/- NSW Bar Association
Lower Ground Floor, Selborne
Chambers
174 Phillip Street
Sydney NSW 2000
Ph: (02) 9232 4055
Fax: (02) 9221 1149
e-mail: secretary@forbessociety.org.au