



Forbes Flyer

THE NEWSLETTER OF THE FRANCIS FORBES SOCIETY FOR AUSTRALIAN LEGAL HISTORY

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History reports itself

Despite John Lennon's entreaty, the world doesn't live as one. That said, a significant part of it tries to live as a federation of some form or another. There is Australia. There is Canada. There is the Commonwealth of Nations itself. There is the European Community. There is Russia. And there are others, including that ancient democracy the US of A, whose original constituent members tried, failed, and tried again to emerge with the world's premier federal system.

Like other human endeavours, federation is not a static thing. It draws much of its colour from its surrounds. In 1976, the Australian Liberal government of Mr Fraser was offering a pro-state "new federalism" in answer to the centralist tendencies of the previous government. Two decades on, the *Sydney Morning Herald* of 3 July 2006 was able to report that "a new federalism, in which the states would be reduced to branch offices" had been flagged by the Liberal government Treasurer.

Whatever, the concept of federation seems to me to be on balance a good rather than a bad thing, something where control on one level is constantly being bartered with co-operation on another. It is a dynamic and not a static model.

Something else which is proving itself to be a dynamic model of our time is the internet. Merely as a repository, it is as close to infinite as the non-mathematicians among us can contemplate. As important, it challenges the ways that we think. We have known for centuries that our thought and our accumulation of knowledge is not simply

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linear. However and ironically, one of our greatest freedoms, the written word, has in its printed form been also a prison. We have been limited to one article, one journal, one book. Cross-referencing can be cumbersome. With the web, cross-referencing is an instant transportation to another source, a written one, a visual one, an audio one. And we are only a decade or so into the development of this extraordinary thing.

Federation is a construct which is ideally suited to the net, something which can be imposed on an unkempt democracy of facts and ideas, without killing off the freedom of thought that makes each home page a unique work.

There are a number of sites which deal with one aspect or another of Australian legal history, each with its own emphases, its own idiosyncrasies, its own surprises for its users. From time to time starting with this issue, the Flyer will highlight one of these sites. In this issue, we highlight the Queensland Supreme Court History Program.

David Ash
Editor

Society membership for 2007

Memberships are renewed annually and run over the financial year. For the current financial year, membership rates remain unchanged. If you are not a Member, please think about joining. If you are already a member, please think about renewing. Membership rates for 2007 are unchanged! Among the benefits, you get the Flyer and discounts on the Society's publications.

If you have not received a Form, please go to the Society's home page @ www.forbessociety.org.au/, and access the box "Membership". If you have any queries, please contact Memberships Officer David Jay, by telephone on 02 9236 8626 or by email to membership@forbessociety.org.au. The Society looks forward to your continued membership and support. Help make history.

The Francis Forbes Lecture 2006

The annual Francis Forbes Lecture for 2006 will be delivered by Rosemary Annable on 9 November 2006 in the Common Room of the New South Wales Bar Association, down the stairs at Selborne Chambers, 174 Phillip Street, Sydney. The theme is "A setting for justice: building for the Supreme Court of New South Wales".

In October 1819 Governor Macquarie laid the foundation stone for 'the new Courthouse in Hyde Park', the first permanent, purpose-built home for the Colony's law courts. Intended as a handsome ornament to the town of Sydney, it was to be designed by the emancipist architect, Francis Greenway. Eight years later when the building was finally completed, it was on another site, to a different design and was already too small for its important purpose. In 1833 its judicial occupants thought it 'inconvenient, inadequate and comfortless'. A hundred years later the complaint was just the same.

When it finally vacated the site in 1977, after one hundred and fifty years of use, to move into a new

building on Queen's Square, it seemed as if the Supreme Court's continuing association with its first court house would be only token. But twenty years later the Supreme Court moved back and as work began to conserve and enhance these much complained of buildings, some of their history began to be revealed.

Rosemary Annable is a consultant historian who has worked for over twenty years in the field of heritage studies, researching buildings and sites for conservation projects. She is a Fellow, and past President, of the Royal Australian Historical Society; a Fellow of the Federation of Australian Historical Societies; and the Honorary Archivist of St James' Anglican Church, the Supreme Court's closest and oldest neighbour. She is currently a member of the Heritage Council of New South Wales and the Chair of its History Panel. Rosemary's research on the King Street Courts was undertaken for the firm of PTW Architects, on behalf of the Attorney-General's Department, as part of the extensive programme of restoration and refurbishment undertaken on the King Street Courts site since 1997.

The second annual Cable Lecture

Readers will recall that the Second Annual Cable Lecture was given in September 2005 by the Honourable Justice Keith Mason AC, President of the Court of Appeal of the Supreme Court of New South Wales. Justice Mason had previously as counsel represented various parties seeking the ordination of women in proceedings in the Appellate Tribunal of the Anglican Church and the Supreme Court of New South Wales in the period 1985 to 1992.

The Society is delighted to note that the lecture, "Believers in Court: Sydney Anglicans going to Law", is available in hardcopy from the Crypt Shop of St James' Church, King Street, Sydney, and online at the NSW Supreme Court's web page.

The Queensland Supreme Court History Program

This is the first in an occasional column noting websites that are concerned with legal history, particularly Australian legal history.

Queensland has been prominent on the Australian legal scene. For example, it has thrown up three chief justices, 'Damn Sam Griffith', as he was known to the colony's planters in the 1880s,ⁱ Sir Harry Gibbs and Sir Gerard Brennan. The Supreme Court itself had a colourful beginning, being initially located in the chapel of some disused convict barracks.ⁱⁱ

In 2000, the Queensland Supreme Court History Program was established. Its homepage is www.courts.qld.gov.au/schp. The homepage says:

Its primary goal is to foster research and publication in the area of legal history through an ongoing publications program. In addition, it seeks to preserve Queensland's legal heritage and ensure its accessibility to the wider Australian community by undertaking curatorial functions that facilitate the acquisition, preservation and dissemination of relevant historical material.

One area of interest is the oral history project. The legal milieu of a particular time and place is always difficult to capture. One recent and successful effort is that of Dr Bennett's edition of *Callaghan's Diary*, published by the Forbes Society. The work is the 1840s Sydney diary of Thomas Callaghan, barrister-at-law and later a foundation judge of the District Courts of New South Wales. When the participants in the milieu are alive and able to pass on their own recollections of activities and, importantly, attitudes of members of the legal profession, the benefits are all the greater. The program in Queensland promises to be a prime resource in coming generations.

The Program is not only an online affair. This year marks the first of what we can only hope is the first in a series, the *Supreme Court History Program*

Yearbook 2005. Its editors are Michael White QC & Aladin Rahemtula, the editorial assistant is Christina Raymond, and it has been published by the Library. It says, far too modestly, that it is "a convenient reference work for those seeking information about the Queensland legal profession". It is much more, bundling up utility and originality.

As Chair of the Library Committee the Honourable Justice K G W Mackenzie notes in his introductory remarks, it is "[a] combination in one volume of historical articles which augment the growing body of published Queensland legal history, notes of cases decided during the year, and information that will provide, for future researchers, a snapshot of the profession as it was in 2005." As the silver jubilee of one of the most important cases in common law history – the *Snail in the Bottle* case – falls in May next year, of particular interest is Gerard Carney's article, "Lord Atkin: his Queensland Origins and Legacy".

This exciting publication marries history and the present in a stimulating, informative way. A review of it will follow in a later issue. In the meantime, the Library is presenting "Shakespeare and the Law: obligation, vengeance and the abuse of power", an exhibition featuring the First Folio, commencing on 17 July 2006. A brochure with the details of the exhibition, including the venues for all events, may be got from www.courts.qld.gov.au/library/exhibition/shakespeare/brochure.pdf

The letters of Sir William Blackstone

Not every legal scholar is immortalised in literature. But Sir William Blackstone was no mere legal scholar, and so we find in chapter 90 of Hermann Melville's *Moby Dick*.

Now when these poor sun-burnt mariners, bare-footed, and with their trowsers rolled high up on their eely legs, had wearily hauled their fat fish high and dry, promising themselves a good L150 from the precious oil and bone; and in fantasy sipping rare tea with their wives, and good ale

with their cronies, upon the strength of their respective shares; up steps a very learned and most Christian and charitable gentleman, with a copy of Blackstone under his arm; and laying it upon the whale's head, he says- "Hands off! this fish, my masters, is a Fast-Fish. I seize it as the Lord Warden's." Upon this the poor mariners in their respectful consternation- so truly English-knowing not what to say, fall to vigorously scratching their heads all round; meanwhile ruefully glancing from the whale to the stranger.

The Selden Society has just published *The Letters of Sir William Blackstone*, the editor being the University of Adelaide's Professor Wilfred Prest. Further details can be found at the University's William Blackstone Project page @ www.law.adelaide.edu.au/research/blackstone/ .

Winter Quarters

In winter 1806

On 6 August, the Holy Roman Empire ceases to exist, with the abdication of Francis I.

In winter 1856

On 10 July, the House of Lords decided *Scott v Avery* (1856) 10 ER 1121. The *Scott v Avery* clause or its variants remains part of the contract draughtsman's armoury, an important mechanism for alternative dispute resolution.

In winter 1906

On 12 July, French captain Alfred Dreyfus was found innocent despite his earlier court-martial for spying for Germany.

In winter 1956

On 30 July, Anita Hill was born. She became a professor of law at the centre of the controversy that was Clarence Thomas's nomination for the US Supreme Court. On the same day, "In God we trust" became the authorised motto of the US.

Judges and dictionaries

Noah Webster is one of the fathers of the modern dictionary. However, he met his match in US Chief Justice John Marshall. Webster sought endorsement for his dictionary from that august figure, but was told that the justices had resolved "not to subscribe to any paper of the character of that proposed by you at this place or in a body".ⁱⁱⁱ

With typical firmness, Sir Frederick Jordan once said^{iv} that "[t]he question what is the meaning of an ordinary English word or phrase as used in the Statute is one of fact not of law... This question is to be resolved by the relevant tribunal itself, by considering the word in its context with the assistance of dictionaries and other books, and not by expert evidence..."

This statement is an example of Justice Holmes' dictum, "The life of the law has not been logic; it has been experience."^v A dictionary, from the litigator's point of view, is hardly a suitable thing. Upon what basis is it received? As primary evidence, it is hopelessly hearsay.^{vi} I don't think even the most optimistic advocate has attempted to get it in as a business record.^{vii} Maybe someone should have a go at getting it in as expert evidence, although there is the question of being able to cross-examine.

The justification for using dictionaries, of course, is the classic common law justification, “because we always have”. Lord Coleridge puts it thus in *R v Peters*, the case most often referred to on the point:^{viii}

I am quite aware that dictionaries are not to be taken as authoritative exponents of the meanings of words used in Acts of Parliament, but it is a well-known rule of courts of law that words should be taken to be used in their ordinary sense, and we are therefore sent for instruction to these books.

At issue in *Peters* was the meaning of the statutory restraint on undischarged bankrupts “obtaining credit” without disclosing their status.^{ix} Peters bought a horse with no stipulation being made as to the time or mode of payment. The ingenuity of advocates knowing no bounds, Peters argued that he was not “obtaining credit”. That, he said, was the obtaining of a contractual right to defer a payment due under a contract. Here, he as the buyer was merely profiting by the kindness of the vendor.

Inter alia by reference to the dictionaries of Dr Johnson and Mr Webster, Lord Coleridge had no difficulty in concluding that Peters had obtained credit, whether or not he had stipulated for it at the time of the purchase. Three other judges agreed. Manisty J dissented. This, his Lordship said, was a cash transaction, as the vendor could have sued for the price from the moment of delivery.^x

The case of *Peters* is cited in the usual sources.^{xi}

But it seems to me that if there is an Australian authority on point, earlier in time, we as patriots should do our best to rely on it, rather than on foreign stuff.

With last year’s publication of *Dowling’s Select Cases*,^{xii} we get such an opportunity. Sir James Dowling was the second chief justice of the Supreme Court of New South Wales. One of the

regular litigants in his court was Edward Smith Hall, editor of the *Monitor*, and before him came an information filed by the Attorney-General. The case arose by virtue of Governor Darling’s ongoing fight with the press, including the *Monitor*.

One of the ways in which Governor Darling tried to suppress the press was to require delivery to the Colonial Secretary at his office on the day of publication, a copy of any newspaper, on pain of a £100 penalty. Hall did not deliver, and was duly fined. The information was filed in an attempt to recover the penalty. Wentworth as counsel for Hall argued successfully that the publication was not a newspaper. Part of Sir James’s reasoning was:

Does this publication then satisfy this popular as well as statutable definition? In point of form it certainly does not, for it consists of several sheets of paper sewed together in the form of a book. If it does not satisfy the formal definition then we must inquire whether there is any other known species of publication which it most resembles. Looking at the title and to the form I should say it was a pamphlet because it completely satisfies all the popular as well as legislative definitions of that nature, and does not come within the definition of a newspaper. In fact it is a pamphlet. According to Bailey it is “A little stitched book” and Dr Johnson defines it to be a small book; properly a book sold unbound and only stitched.

By the bye, Hall was a fascinating creature. He was a founder of what became known as the Benevolent Society. He was the first cashier and secretary of the Bank of New South Wales, now Westpac Banking Corporation. In 1819 Governor Macquarie appointed him Coroner. Seventy-two years later, Sir Henry Parkes was able to say “I think this country and all Australia can never adequately thank that singular pioneer in the cause of civil liberty, Mr Edward Smith Hall”.^{xiii} Yet, and despite some attention from historians over the years, he is now largely forgotten, save

for Hall Street at Bondi Beach, which intersects with O'Brien Street, named for his son-in-law.

However, it may be safe to say that Hall is undergoing a reassessment. Mr John Pilger, himself no stranger to controversy, says in the introduction to the 2004 compilation *Tell Me No Lies*, "To most Australians, the name Edward Smith Hall will mean nothing; yet this one journalist did more than any individual to plant three basic liberties in his country: freedom of the press, representative government and trial by jury."^{xiv} Dr Erin Ihde of the University of New England also published in 2004 *Edward Smith Hall and the Sydney Monitor*.^{xv} Most recently, in the 2005 Cable Lecture whose publication is reported in this issue, Justice Keith Mason deals with the extraordinary litigation spawned by the antipathy between Hall and the splendidly-named Archdeacon Thomas Hobbes Scott.

Enough of Mr Edward Smith Hall. What of the dictionary in the current day? What dictionary should our judges use? The distinguished jurist Lord Cooke, Law Lord and sometime President of the New Zealand Court of Appeal, is on record as saying that the *Chambers English Dictionary* is the

best single volume English dictionary.^{xvi} However, I think the *Macquarie* has the edge in Australia. Certainly, there is high authority to support it. The earliest reference to it that I have found in High Court judgments is by Justice Murphy, who in the famous *Church of Scientology* case talks of "The major Australian dictionary, the *Macquarie Dictionary* (1981)".^{xvii} By *Dalton v NSW Crime Commission*, if not before, the whole Court was referring to it.^{xviii} Being a case involving the meaning of Constitutional words, their Honours were of course scrupulous to use the 2001 Federation edition.

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ⁱ Graham Fricke, *Judges of the High Court*, 1986, Hutchinson, page 212.

ⁱⁱ See the Queensland Courts page "About the Courts", www.courts.qld.gov.au/about/history.htm.

ⁱⁱⁱ Juan A Perea, "Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English" (1992) 77 Minnesota Law Review 269, 298. For a modern view on the US Supreme Court's use of dictionaries, see the Note "Looking it up: Dictionaries and statutory interpretation" 107 Harvard Law Review 1437.

^{iv} *The Australian Gas Light Co v The Valuer-General* (1940) 40 SR(NSW) 126, 137.

^v O W Holmes, *The Common Law*, 1881.

^{vi} Cf *Evidence Act 1995 (NSW)*, s 59(1).

^{vii} Cf *Evidence Act*, s 69.

^{viii} *R v Peters*(1886) 16 QBD 636, 641.

^{ix} Still an offence: *Bankruptcy Act 1966 (Cth)*, s 269(1). The case is still cited: McDonald, Henry & Meeks, *Australian Bankruptcy Law & Practice*, Butterworths, [265.5.15].

^x 16 QBD, 642.

^{xi} See eg Pearce & Geddes, *Statutory Interpretation in Australia*, 5th ed, 2001, Butterworths, 2001, [3.27]; *Halsbury's Laws of England*, 4th ed (reissue), vol 44(1), [1371].

^{xii} *Dowling's Select Cases 1828 to 1844*, ed T D Castle & Bruce Kercher, 2005, The Francis Forbes Society for Australian Legal History.

^{xiii} See J A Ferguson, "Edward Smith Hall and the 'Monitor'" (1931) 17.3 JRAHS 163, p 200.

^{xiv} John Pilger (ed), *Tell Me No Lies*, 2004, Jonathan Cape, page xviii.

^{xv} Erin Ihde, *Edward Smith Hall and the Sydney Monitor*, 2004, Australian Scholarly Publishing.

^{xvi} Referred to by Wright J in *Unilever Australia Ltd v The Australian Workers' Union, NSW & Anor* [2005] NSWIRComm 2, [76].

^{xvii} *Church of the New Faith v Commissioner of Pay-Roll Tax (Victoria)* (1983) 154 CLR 120, 159.

^{xviii} *Dalton v NSW Crime Commission* [2006] HCA 17, [117].