



# Forbes Flyer

THE NEWSLETTER OF THE FRANCIS FORBES SOCIETY FOR AUSTRALIAN LEGAL HISTORY

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## History reports itself

Despite the best intentions of those historians who paint the big picture, our appreciation of history remains the most informed by, and defined within, our reaction to the persons who comprise it.

Over the break, we have been witness to this process on at least occasions.

First, the release of David Hicks. To read and to listen to many commentators, it is Mr Hicks and about nothing else. Either you are against him or you are not. The prospect that one may object to Mr Hicks's behaviour but be concerned about his detention, and about the rather complex question of the place of rule of law in times of strife, is one which too many of us seem to find contemptible, or at least unintelligible.

And then there was the latest instalment in the Bhutto tragedy. My thoughts about the region and about the instability of the Musharraf regime fell away as I listened to and saw, live time, the mundane inevitability with which her young son took up this poisoned chalice.

My wife scours secondhand bookshops to find bits and pieces of Australian legal history to keep me out of harm's way over holidays. In a Perth shop, she found a gem, Justice Nicholas Hasluck's *The legal labyrinth: the Kisch case and other reflections on law and literature*.<sup>1</sup>

Egon Kisch, it will be recalled, was the cause célèbre for the 1934-1935 summer break, the journalist from middle Europe who became the darling of Australia's left as he – no mean linguist – failed the Immigration Act's dictation test, famously administered him in Scottish Gaelic.

Mr Kisch's training probably made him far better able than Mr Hicks, to present his own story, and eventually he did, in *Australian Landfall*.<sup>2</sup> But what I enjoyed more were the background legal players.

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The full bench of the High Court got to be entertained by the debacle on three occasions, on the first being game enough to hold that the test was invalidly applied, Scottish Gaelic not passing the prerequisite of being a European language.

As one *Sydney Morning Herald* correspondent frothed:

... are we to suppose that a language is not a language unless it is the speech of a politically independent community? What then becomes of Welsh with its flourishing literature, journalistic and otherwise? But perhaps our uncompromising jurisconsults would proscribe it too. Good and well: yet new misgivings will arise. If this is what the framers of the Act had in their minds, why did they not say so?

The correspondent signed off as "Columbinus" but, according to Kisch's advocate, was Sir Mungo MacCallum, then chancellor of Sydney's university and formerly its professor of modern literature.

Meanwhile, the attorney – the member of the executive charged with what some saw as Kisch's persecution – was Robert Menzies, while the member of the bench most sympathetic to Kisch was Mr Justice Evatt. Almost two decades later, the nation's supreme court would again be the ideological battleground for these two, in the *Communist Party* case.

And from the twentieth century to the nineteenth and the twenty-first, a big congratulations and thanks to Andrew Tink, sometime barrister and politician, for his

colourful, enthusiastic and necessary portrait of William Charles Wentworth, sometime barrister and politician. This, the 2007 Forbes lecture, was given in the bowels of the building known to the last couple of generations of Sydney lawyers as Wentworth Chambers.

Mr Tinks' biography of Wentworth will be out in due course, but for those parochial New South Welshmen who are terrified that other parts of Australia may become more notorious than their own, I recall Cyril Pearl's delightful opening to *Wild Men of Sydney*:<sup>3</sup>

Some day someone will write the full story of Australian roguery, from the rum racketeers of the First Fleet to the beer racketeers of the Second World War, from land swindlers to mine swindlers, from William Wentworth to Claude de Bernalles. The *dramatis personae* will be well assorted – red-coated English officers and wide-hatted Australian squatters; Tories and Socialists; knights and nobodies; politicians, policemen, aldermen; racing-men and brewers; and every State will provide a scene or two, though, unquestionably, New South Wales will steal the show.

**David Ash**  
Editor

## Jonathan Swift

Summer is the time to enjoy the labours of others in preference to the fruits of one's own, and so it was, between Robert Harris's *The Ghost* and John Dickson Carr's *Patrick Butler for the Defence*, that I found myself joining Lemuel Gulliver in his *Travels into Several Remote Nations of the World*.

In the second of the four parts, Swift's hero finds himself in Brobdingnag. Like Lilliput and the other remote nations, Brobdingnag is near New Holland. (The time is 1703.) Below's extract opens innocently enough, only to turn upon the subjects of its description.

Of course, Swift spreads his venom: lawyers and politicians are always easy targets, but he hones in elsewhere on physicians and academics, to name but two others.

What makes me set out the passage in this, a journal about Australian legal history, is that for all the crudeness and unsophistication of early European Australian law, it nonetheless was an offshoot of a system whose weakness was not sophistication but oversophistication, whose curse was not crudeness, but the very opposite, the corruption of maturation.

Here, then, is a highly gifted writer's view of his own

world, penned almost a century before it was to colonise another, from chapter six of part two:

The king, who, as I before observed, was a prince of excellent understanding, would frequently order that I should be brought in my box, and set upon the table in his closet: he would then command me to bring one of my chairs out of the box, and sit down within three yards distance upon the top of the cabinet, which brought me almost to a level with his face. In this manner I had several conversations with him. I one day took the freedom to tell his majesty, "that the contempt he discovered towards Europe, and the rest of the world, did not seem answerable to those excellent qualities of mind that he was master of; that reason did not extend itself with the bulk of the body; on the contrary, we observed in our country, that the tallest persons were usually the least provided with it; that among other animals, bees and ants had the reputation of more industry, art, and sagacity, than many of the larger kinds; and that, as inconsiderable as he took me to be, I hoped I might live to do his majesty some signal service." The king heard me with attention, and began to conceive a much better opinion of me than he had ever before. He desired "I would give him as exact an account of the government of England as I possibly could; because, as fond as princes commonly are of their own customs (for so he conjectured of other monarchs, by my former discourses), he should be glad to hear of any thing that might deserve imitation."

Imagine with thyself, courteous reader, how often I then wished for the tongue of Demosthenes or Cicero, that might have enabled me to celebrate the praise of my own dear native country in a style equal to its merits and felicity.

I began my discourse by informing his majesty, that our dominions consisted of two islands, which composed three mighty kingdoms, under one sovereign, beside our plantations in America. I dwelt long upon the fertility of our soil, and the temperature of our climate. I then spoke at large upon the constitution of an English parliament; partly made up of an illustrious body called the House of Peers; persons of the noblest blood, and of the most ancient and ample patrimonies. I described that extraordinary care always taken of their education in arts and arms, to qualify them for being counsellors both to the king and kingdom; to have a share in the legislature; to be members of the highest court of judicature, whence there can be no appeal; and to be champions always ready for the defence of their prince and country, by their valour, conduct, and fidelity. That these were the ornament and bulwark of the kingdom, worthy followers of their most renowned ancestors, whose honour had been the reward of their virtue, from which their posterity were never once known to degenerate. To these were joined several holy persons, as part of that assembly, under the title of bishops, whose peculiar business is to take care of religion, and of those who instruct the people therein.

These were searched and sought out through the whole nation, by the prince and his wisest counsellors, among such of the priesthood as were most deservedly distinguished by the sanctity of their lives, and the depth of their erudition; who were indeed the spiritual fathers of the clergy and the people.

That the other part of the parliament consisted of an assembly called the House of Commons, who were all principal gentlemen, freely picked and culled out by the people themselves, for their great abilities and love of their country, to represent the wisdom of the whole nation. And that these two bodies made up the most august assembly in Europe; to whom, in conjunction with the prince, the whole legislature is committed.

I then descended to the courts of justice; over which the judges, those venerable sages and interpreters of the law, presided, for determining the disputed rights and properties of men, as well as for the punishment of vice and protection of innocence. I mentioned the prudent management of our treasury; the valour and achievements of our forces, by sea and land. I computed the number of our people, by reckoning how many millions there might be of each religious sect, or political party among us. I did not omit even our sports and pastimes, or any other particular which I thought might redound to the honour of my country. And I finished all with a brief historical account of affairs and events in England for about a hundred years past.

This conversation was not ended under five audiences, each of several hours; and the king heard the whole with great attention, frequently taking notes of what I spoke, as well as memorandums of what questions he intended to ask me.

When I had put an end to these long discourses, his majesty, in a sixth audience, consulting his notes, proposed many doubts, queries, and objections, upon every article. He asked, "What methods were used to cultivate the minds and bodies of our young nobility, and in what kind of business they commonly spent the first and teachable parts of their lives? What course was taken to supply that assembly, when any noble family became extinct? What qualifications were necessary in those who are to be created new lords: whether the humour of the prince, a sum of money to a court lady, or a design of strengthening a party opposite to the public interest, ever happened to be the motive in those advancements? What share of knowledge these lords had in the laws of their country, and how they came by it, so as to enable them to decide the properties of their fellow-subjects in the last resort? Whether they were always so free from avarice, partialities, or want, that a bribe, or some other sinister view, could have no place among them? Whether

those holy lords I spoke of were always promoted to that rank upon account of their knowledge in religious matters, and the sanctity of their lives; had never been compliers with the times, while they were common priests; or slavish prostitute chaplains to some nobleman, whose opinions they continued servilely to follow, after they were admitted into that assembly?"

He then desired to know, "What arts were practised in electing those whom I called commoners: whether a stranger, with a strong purse, might not influence the vulgar voters to choose him before their own landlord, or the most considerable gentleman in the neighbourhood? How it came to pass, that people were so violently bent upon getting into this assembly, which I allowed to be a great trouble and expense, often to the ruin of their families, without any salary or pension? because this appeared such an exalted strain of virtue and public spirit, that his majesty seemed to doubt it might possibly not be always sincere." And he desired to know, "Whether such zealous gentlemen could have any views of refunding themselves for the charges and trouble they were at by sacrificing the public good to the designs of a weak and vicious prince, in conjunction with a corrupted ministry?" He multiplied his questions, and sifted me thoroughly upon every part of this head, proposing numberless inquiries and objections, which I think it not prudent or convenient to repeat.

Upon what I said in relation to our courts of justice, his majesty desired to be satisfied in several points: and this I was the better able to do, having been formerly almost ruined by a long suit in chancery, which was decreed for me with costs. He asked, "What time was usually spent in determining between right and wrong, and what degree of expense? Whether advocates and orators had liberty to plead in causes manifestly known to be unjust, vexatious, or oppressive? Whether party, in religion or politics, were observed to be of any weight in the scale of justice? Whether those pleading orators were persons educated in the general knowledge of equity, or only in provincial, national, and other local customs? Whether they or their judges had any part in penning those laws, which they assumed the liberty of interpreting, and glossing upon at their pleasure? Whether they had ever, at different times, pleaded for and against the same cause, and cited precedents to prove contrary opinions? Whether they were a rich or a poor corporation? Whether they received any pecuniary reward for pleading, or delivering their opinions? And particularly, whether they were ever admitted as members in the lower senate?"

## Summer quarters

### In summer 1808

On Australia Day, NSW Governor William Bligh is found under his bed, rebellion being the order of the day.

### In summer 1858

On 25 January, Felix Mendelssohn's "Wedding March" was played at the wedding of Queen Victoria's daughter Princess Victoria to the crown prince of Prussia, popularising it for weddings, although it first went down the aisle in 1847.

### In summer 1908

On 20 January, New York City's Sullivan Ordinance barred women from smoking in public. While it was soon killed by the mayor, smokers past and present of the "international passport to smoking pleasure" will be bemused by the Times's leader for the next day: *NO PUBLIC SMOKING BY WOMEN NOW; The Sullivan Ordinance, to be Passed by the Aldermen Today, Makes It Illegal. WILL THE LADIES REBEL As the Ladies of New Amsterdam Did When Peter Stuyvesant Ordered Them to Wear Broad Flounces?*

### In summer 1957

On 20 December, one Elvis Presley received his draft notice.

## Endnotes

- 1 Nicholas Hasluck, *The legal labyrinth: the Kisch case and other reflections on law and literature*, 2003, Freshwater Bay Press.
- 2 Some copies of a 1969 reprint by the Australasian Book Society are listed @ [abebooks.com.au](http://abebooks.com.au).
- 3 Cyril Pearl, *Wild Men of Sydney*, 1970, Universal Books.

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## The 2007 Australian Legal History School Essay Competition

On Australia Day, 26 January 2008 the Francis Forbes Society announced that James Triggs (a Year 9 Student, in 2007, at Doncaster Secondary College in Victoria), and his School, have been awarded prizes – having a total value of \$1,850.00 – for James' Essay entitled "Authority, Democracy and the Rule of Law", submitted to the Society in its 2007 Australian Legal History School Essay Competition. The School has been awarded \$750.00 and a Book Voucher of equivalent value supplied by Abbey's Bookshop of Sydney as a Sponsor of the Competition. James has been awarded a personal prize of \$100.00 and a \$250.00 Abbey's Book Voucher. An edited version of James' Essay will be published in a forthcoming issue of the *Australian Bar Review*.

The Society acknowledges the support of the 2007 Essay Competition provided by its Sponsors: The NSW Bar Association; The Law Society of NSW; The Division of Law, Macquarie University; Abbey's Bookshop; The State Library of NSW; State Records NSW; Federation Press; and *The Sydney Morning Herald*.

The Society anticipates that arrangements for the 2008 Australian Legal History Essay Competition will be announced on this web site on or before 15 February 2008.