



# Forbes Flyer

THE NEWSLETTER OF THE FRANCIS FORBES SOCIETY FOR AUSTRALIAN LEGAL HISTORY

Winter 2007

## History reports itself

I'm something of a US Supreme Court junkie, following with interest its confirmation hearings and the more notorious of its decisions. I made sure that I touched Chief Justice Marshall's foot when I visited the Court in 2005. For all the good it's done.

Recently, a friend who lives in Connecticut and who knows my addiction greatly aggravated things by sending me two books, *The Supreme Court: The Personalities and Rivalries that defined America* and *Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court*.<sup>a</sup>

It doesn't matter if you are not a US Supreme Court junkie. You probably can't help it. But what must fascinate as much as what I hope lies inside the cover of each book, is the outside of each, namely, the titles.

From time to time, the relationships among the Judges of the High Court of Australia have undoubtedly been tense. Sir Garfield Barwick and Justice Lionel Murphy would not have spent every evening swapping jokes. From an earlier time, at least one Judge is now remembered for his acerbic comments on his colleagues as much as for his judgments.

For all that, who among us can imagine any legal historian ever writing a book about the High Court of Australia with such a title? And what does this very question tell us?

To my mind, it tells us something about the nature of the two polities. In particular, two crucial differences. The first is the existence of a – or, at least, an explicit – Bill of Rights over that side of the Pacific. One result of a Bill is that the small group of unelected middle-aged to elderly (usually) male Wasps over that side of the Pacific is more likely to intrude into the daily lives of the people in its jurisdiction, with the result that those people feel more intimately concerned with how the group is made up.

The second is the selection process. The Australian process is shrouded in mystery, while the US process

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is shrouded in nothing at all. I suspect the US process provides an important safety valve. As we know, the US system of government is about a true separation of powers, while the Westminster system, the system which operates in Australia, fudges the division between two of the three, the Executive and the Legislature. In the US, what the Executive seeketh to have done, a bloody-minded Legislature can seeketh to have undone. Ask ex-Nominees for the US Supreme Court Professor Bork and Chief Judge of the Court of Appeals (DC Circuit) Ginsburg.

I don't know which system is better, although I confess a preference for a judiciary that doesn't have publicity. Still, I wouldn't mind the film. What shall we call it? "The Secret Seven"? And can Russell Crowe play the Chief Justice? I really liked his style of leadership in "Master and Commander". Meanwhile, in the spirit of equality which ought infect both legal systems, this issue of the Flyer uncovers two secrets from government in in the 1840s: our unremembered colony and our ally's unremembered president.

Finally, please don't forget the Australian Legal History School Essay Competition, whose details are on the Society's site and again repeated hereunder. The competition deadline is **5.00 pm, Monday, 12 November 2007**. Please have no hesitation in tipping off teachers and parents for whom this will be of interest.

David Ash  
Editor

## MQRES Legal History PhD Scholarship closes 30 June 2007

A Macquarie University Research Excellence Scholarship (MQRES) is available in the Centre for Comparative Law, History and Governance at Macquarie University, for a PhD project that will compare aspects of the legal history of property relations in Australia and Canada in the nineteenth century. The colonial Australian and nineteenth century Canadian jurisdictions were both similar yet different jurisdictions existing in broadly similar yet distinctively different settler societies. The resolution of property disputes in colonial settler societies was complicated by the competing jurisdictions of common law and equity. The project is a study of comparative legal history. The focus of the project will be a detailed comparison of law and property relations in Canada and Australia.

The Centre for Comparative Law, History and Governance is an official University Research Centre at Macquarie University. It contains specialists in law, history and politics, as well as a cluster of leading legal history scholars.

MQRES Scholarships are available to Australian and international students. Applicants should have completed an Australian four-year undergraduate degree in Law with first class honours, or demonstrate equivalent research qualifications (such as a Masters course with substantial research component) from an Australian or overseas University. A background in legal history is desirable.

MQRES scholarships pay a stipend, currently \$A19,616 per annum, tax exempt (2007). The tenure of the scholarship is 3.5 years full time, subject to satisfactory progress. Tuition fees will be funded for the scholarship tenure. Eligible domestic students will receive Research Training Scheme (RTS) placement for their tuition. International award holders will have their full tuition fee and Overseas Health Care costs paid under the award.

To obtain further information regarding this project applicants are encouraged to contact Associate Professor Andrew Buck, co-director of the Centre for Comparative Law, History and Governance, email: Andrew.Buck@law.mq.edu.au.

Application forms and conditions of award are available from the Higher Degree Research Office, email: hdrschol@vc.mq.edu.au, telephone: (02) 9850 7987.

Applications should be forwarded to:

**The Scholarship Officer  
Higher Degree Research Office  
Cottage C4C  
Macquarie University  
NSW 2109  
Australia**

## Judges and Judging: The 18th British Legal History Conference

**2–5 July 2007**

The 18th British Legal History Conference will be devoted to scrutiny of judges and their work in many varying times and places. Some seventy speakers from the UK and across the world will be presenting the fruits of the latest legal-historical research.

The conference will be held in Oxford, at St. Catherine's College, the venue for the successful Tenth British Legal History Conference organized by the late Peter Birks.

Conference accommodation with full board in comfortable en suite rooms at preferential rates has been arranged at St. Catherine's. The number of rooms is limited and rapid booking is advised.

Three plenary sessions will be held, with papers by Paul Brand (All Souls College, Oxford), John Langbein (Yale Law School) and Michael Lobban (Queen Mary London Law Department). These papers will be on medieval,

early modern and more recent aspects of the "Judges and Judging" theme. A full list of the other speakers and their papers will be found on the conference website.

For details of the timetable and accommodation plus a registration form see: <http://denning.law.ox.ac.uk/18blhc/home.php>.

Please direct accommodation and booking inquiries to: Ms Freya El Baz ([f.el\\_baz@hotmail.com](mailto:f.el_baz@hotmail.com))

The organizers of the conference, who can be contacted with any conference questions, are:

Dr Paul Brand ([paul.brand@all-souls.oxford.ac.uk](mailto:paul.brand@all-souls.oxford.ac.uk))  
Dr Joshua Getzler ([joshua.getzler@law.oxford.ac.uk](mailto:joshua.getzler@law.oxford.ac.uk))  
Dr Mike Macnair ([mike.macnair@st-hughs.oxford.ac.uk](mailto:mike.macnair@st-hughs.oxford.ac.uk))

# The “Death of ex-Judge Dowling”

Juliette Brodsky of the Victorian Bar’s Oral History Project, mentioned separately below, was kind enough to pass on to the Flyer two books which have made their way down her family and into her hands. The first is a 1909 text by barrister James Moriarty with the imposing title *The Law of Actionable Defamation whether Spoken or Written in the State of New South Wales*. It is certain the author was not Sherlock Holmes’s archenemy, but the Flyer thinks he may have stood for the Senate in 1901, without success. The second is a curiosity indeed, a short scrapbook of newspaper obituaries for none other than James Sheen Dowling, the son of the second Chief Justice of New South Wales.

The scrapbook was compiled by H W H Huntington, who notes at the beginning to the effect that he was the author of those in the *Evening News* and the *Evening Star* and the source for those in the *Daily Telegraph* and the *Herald*. Huntington was something of an Australian legal history buff. He also compiled a manuscript “Australian Judges” held in the NSW State Library,<sup>c</sup> and penned an article for the Journal of the Royal Australian Historical Society on Lieutenant-Colonel David Collins, the first deputy judge advocate of the colony of NSW.<sup>d</sup>

Printed below is a transcript of the *Daily Telegraph’s* obituary, which appeared on 5 May 1902.

Ex-Judge Dowling died yesterday morning at his residence, Woollahra, at the age of 83 years, after an illness extending over three weeks. It is some 13 years since he retired from the bench. The funeral will take place this afternoon, at the Waverley Cemetery, the cortege leaving All Saints’, Ocean-street, at half-past 2.

He was in his 83<sup>rd</sup> year, having been born in England on 2<sup>nd</sup> December, 1819. In 1836 he was sent back to England to be educated, and he subsequently took his degree at King’s College, London. Choosing the law as a profession on leaving college, he in 1840 spent some time in “reading” in the offices of Messrs. Jones and Blaxland, a well-known firm of solicitors, in London; and entering at the Middle Temple in the same year, he was called to the Bar in 1843. Finding practice in England the reverse of lucrative, he resolved to return to New South Wales, and on the eve of his departure from England, he received the news of his father’s death, which took place on 27<sup>th</sup> September, 1844. Arriving here he was admitted to practice on the proposition of the then Attorney-General, Mr. J. H. Plunkett. The Supreme Court Bench at that time consisted of Sir Alfred Stephen, Mr. Justice Dickinson, and Mr. Justice A’Beckett; and among those at the Bar were Richard Windeyer, J. B. Darvall, Archibald Michie, and Robert Lowe (afterwards Lord Sherbrooke). The only survivors of the solicitors of the period are Messrs. Deane,

William Russell, James Greer, T. J. Lee, James Norton, R. W. Roberts, J. M. Thompson, William Walker, and W. W. Billyard. In 1847 Mr. Dowling was appointed Attorney-General of the young Port Curtis settlement, and proceeded on his journey thither in company with Colonel Barney, the Administrator, and Mr. W. W. Billyard, solicitor, to form the new colony. The old sailing vessel, Lord Auckland, in which the voyage was attempted, went ashore at Port Curtis, and the colony was then abandoned, but the flourishing Queensland town of Gladstone now stands in the same locality. After some further practice at the bar, Mr. Dowling was appointed in 1851 police magistrate for the city of Sydney, and after five years’ occupancy of that office was appointed Crown prosecutor for the whole colony. In 1858 he received appointment as one of the first three District Court Judges, his colleagues being Mr. Alfred Cheeke and Mr. Callaghan. In 1861 he became the senior metropolitan and coast district judge, residing in Sydney, a position which he held until his retirement therefrom through failing health in February, 1889. His farewell to the profession was the occasion of an affecting ceremony.

The lameness from which the judge suffered was the result of a coaching accident met with some 25 years ago, while travelling with another judge. His thigh-bone and one of his arms were broken, and as a consequence his power of movement was for every after very seriously interfered with.

In “Brougham,” Wallis-street, Woollahra, he had lived for 40 years.

His wife was the daughter of the late Deputy-Commissary General Laidley, and died in 1901. A family of six children survive, and reside in this State. Mr. V. J. Dowling, of “Lue,” Rylestone, was a second cousin.

It is understood that the late judge’s very valuable reminiscences of the early days of colonial development will be given permanent form.

For those interested in the colony mentioned, Wikipedia includes in its entry for Gladstone:<sup>e</sup>

For a brief moment in its history, Gladstone was considered as a potential capital city for a new colony. Queen Victoria signed the Letters Patent on February 17, 1846 resulting in the establishment of the Colony of North Australia, with the intended capital of this colony being the settlement on Port Curtis. These plans were shelved when the colonists were withdrawn in 1847. In 1859, Gladstone was again considered as a potential capital as the colony of Queensland seceded from New South Wales - this honour later went to Brisbane, a decision that caused some disquiet north of Brisbane.

# The Australian Legal History School Essay Competition

The Society has launched a competition, with the support of the New South Wales Bar Association, the Law Society of New South Wales, Macquarie University Division of Law, Abbey's Bookshop, The Federation Press, The State Library of NSW, State Records NSW and the *Sydney Morning Herald*.

## Eligibility

The Competition is open to all Students enrolled in an Australian Secondary School, not limited to NSW or to Students enrolled in a formal course of study in History or Legal Studies. Prior experience in the study of law or history is not necessary. Research material is available online.

## Prizes

### *Senior Secondary School Category*

- School Prize (for the School of the Winning Essayist): \$1,000 cash and a \$1,000 Abbey's Book Voucher.
- Essayist's Personal Prize: \$200 cash and a \$500 Abbey's Book Voucher.

### *Junior Secondary School Category*

- School Prize (for the School of the Winning Essayist): \$750 cash and a \$750 Abbey's Book Voucher.
- Essayist's Personal Prize: \$100 cash and a \$250 Abbey's Book Voucher.

### *Participation/merit certificates*

- Each Essayist will receive a Certificate of Acknowledgment acknowledging his or her participation in the Competition. At the discretion of the Society, Merit Certificates may be issued to selected Essayists.

## Essay submission deadline

5.00 pm, Monday, 12 November 2007.

## Competition theme

Lessons for Today in Development of the Rule of Law in a Frontier Society, focusing on the Rum Rebellion of 1808 and the Waterloo Creek Massacre of 1838.

## Essay winners announcement

Australia Day (26 January) 2008, the 200th Anniversary of the Rum Rebellion and the 170th Anniversary of the Waterloo Creek Massacre.

## Competition rules/research assistance

- The Rules of the Competition and substantial Research Assistance are available on the Website of the Forbes Society ([www.forbessociety.org.au](http://www.forbessociety.org.au)).
- Background Papers published on the site provide a detailed outline of each of the Rum Rebellion and the Waterloo Creek Massacre, with references for further study and explanations of legal issues.

## Women at the Victorian Bar

In April 2007, the Flyer was delighted to be visited by Juliette Brodsky. Juliette has played a key role in the Victorian Bar's Oral History project.<sup>b</sup> She graciously took a technophobic editor on a tour through the site, impressing him with its ease of navigation. (Be careful. It speaks.) Of particular interest is the recent incorporation of segments from "Raising the Bar", a documentary filmed by Sarah McLeod for the Women Barristers Association, to commemorate its 10<sup>th</sup> anniversary in 2003. The site also includes a timeline "Victorian Women and the Law – Milestones".



## Winter Quarters

### In winter 1807

On 11 August 1807, US legislator David Rice Atchison was born. Some claim he was president for a day, 4 March 1849.<sup>f</sup>

### In winter 1857

On 25 June 1857, Gustave Flaubert goes on trial for public immorality in relation to his novel *Madame Bovary*. Just a few days later, on 30 June, sometime court reporter Charles Dickens gives his first public reading, from *A Christmas Carol*. It is not known whether he was arrested.

### In winter 1907

On 1 July 1907, the Asiatic Registration Act became law in Transvaal, South Africa.

### In winter 1957

On 31 August 1957, the Malaysian Federation achieves independence.

## Endnotes

a The first is by Jeffrey Rosen, and was first published in 2006 by Times Books. The second is by Jan Crawford Greenburg, and was first published in 2007 by the Penguin Press.

b See [www.vicbar.com.au/vicbar\\_oral/index.asp](http://www.vicbar.com.au/vicbar_oral/index.asp).

c See [www.adb.online.anu.edu.au/biogs/A040392b.htm](http://www.adb.online.anu.edu.au/biogs/A040392b.htm), under “Select Bibliography”.

d See (1916) vol 3 pt 3.

e See [en.wikipedia.org/wiki/Gladstone,\\_Queensland#History](http://en.wikipedia.org/wiki/Gladstone,_Queensland#History).

f See [en.wikipedia.org/wiki/David\\_Rice\\_Atchison#.22President\\_for\\_One\\_Day.22\\_Claim](http://en.wikipedia.org/wiki/David_Rice_Atchison#.22President_for_One_Day.22_Claim).

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