

The Forbes Flyer

The newsletter of the Francis Forbes Society for Australian Legal History

Summer 2009-10

History reports itself

Does history matter if the world is ending? I suppose it depends on the quality of the post-apocalypse record storage facilities. Whatever, history is certainly proving its own adaptability in the climate change debate, with Galileo Galilei being brought in to support every conceivable position.

Meanwhile, I leave you with an observation by John Viscount Morley, one of the 19th century's great liberals and someone who, having left an indelible impression on a range of doers and thinkers from Keynes to Hayek and on to the founder of Pakistan, is today forgotten. In his work on Voltaire, he said "Where it is a duty to worship the sun, it is pretty sure to be a crime to examine the laws of heat".

For believers and for skeptics both, be of good cheer and take on another Morleyism embraced by all legal historians, "Even good opinions are worth very little unless we hold them in the broad, intelligent, and spacious way."

David Ash

Editor

Membership 2010

If you have not sent your renewal, please do so as soon as you can, and welcome aboard for the next year. Help make history.

Contents

History reports itself	1
Membership 2010	1
www.macquarie2010.nsw.gov.au	1
The 2010 Macquarie Lecture	2
The 2009 Forbes Lecture	2
Holiday reading	2
2009 Australia and New Zealand Law and History Conference report	3
Summer Quarters	4
Contacting the Forbes Society	4

www.macquarie2010.nsw.gov.au

The website says:

The 200th anniversary of Lachlan Macquarie's appointment as Governor of New South Wales will be commemorated in 2010 with a statewide celebration program aimed at enriching our knowledge of the past and inspiring our vision for the future.

State and local government agencies, community organisations, businesses and individuals are encouraged to be part of history by organising a new activity or theming an existing event 'Macquarie' and applying for endorsement.

Please keep an eye on the site. The stewardship of Macquarie is a significant period for those interested in the relationship between civilization and the rule of law. Some say each defines the other. Conflicts during this period allow us to question such a view.

The 2010 Macquarie Lecture

As part of this exciting year, arrangements have been made by for Brent Salter to deliver "The Macquarie Lecture" on 10 March 2010 in the Common Room of the NSW Bar Association, commencing at 5.15pm and finishing no later than 6.30pm. Brent's working title for the Lecture is "The Rule of Law in the Macquarie Era".

The Lecture will be presented on behalf of the Forbes Society (in conjunction with its principal supporters) and with participation by one or more representatives of the Macquarie 2010 Bicentenary Committee.

The Lecture will provide an occasion to celebrate, not only the Bicentenary of the commencement of Lachlan Macquarie's governorship on 1 January 1810, but also the publication by the Forbes Society (via Federation Press) of *The Kercher Reports*, co-edited by Emeritus Bruce Kercher and Brent Salter. *The Kercher Reports* will provide an authoritative report of the most significant court judgments in Australia's early history (between 1788 and 1827), at a time when the relationship between law, society and politics was especially fluid.

Please mark "The Macquarie Lecture" in your diary.

The 2009 Forbes Lecture

Associate Professor Mark Lunney of the University of New England delivered the 2009 Forbes Lecture on 5 November 2009 in the common room of the New South Wales Bar Association. The theme was "Federation and Beyond: What the History of Australian Tort Law Can Tell Us". In a delightfully engaging talk, Professor Lunney evaluated the traditional view by considering three leading cases in Australian tort law from three different periods, *Balmain New Ferry Co Ltd v Robertson* (1906), *Australian Knitting Mills Ltd v Grant* (1933) and *Hargrave v Goldman* (1963).

Holiday reading

Reviews of the following will appear in the next edition of the *Flyer*. That is no excuse for you not to get hold of them, now.

First, J M Bennett, *Sir Alfred Stephen – Third Chief Justice of New South Wales 1844-1873*, 2009, Federation Press (www.federationpress.com.au). The publisher's blurb reads:

Sir Alfred Stephen (1802-1894) was descended from generations of Stephens celebrated in England for their contributions to the law, literature, politics and public administration. A creature of the nineteenth century, Sir Alfred personified its values. Born at St Kitts, educated in England and there called to the Bar, he at first progressed so slowly that he decided to return to the colonies. As a pioneer Crown Law Officer in Tasmania he was ambitious, aggressive, and astonishingly successful financially. But, lacking tact, he fell out with the Lt-Governor and the judiciary.

Taking another chance, he accepted a temporary judgeship at Sydney (1839), won immediate respect, and became Chief Justice (1844), serving with great accomplishment until 1873 – a term never equaled in New South Wales. He was first President of the Legislative Council after Responsible Government (1856), returning to the Council on resigning as Chief Justice. His many public services included being Lt-Governor; helping to establish The University of Sydney; and supporting such institutions as hospitals, museums and art galleries. Despite the difficulty, on a fixed income, of providing for his many children, he was great philanthropist.

His name and works, now much forgotten, but of world renown in his day, are recalled in this biography by Dr John Michael Bennett, AM, whose project to write it was awarded the 2006 News South Wales History Fellowship.

Second, Tony Earls, *Plunkett's Legacy*, 2009, Australian Scholarly Publishing (www.scholarly.info). The publisher's blurb reads:

For over twenty eventful years the Attorney-General John Hubert Plunkett was a keystone in the administration of New South Wales, applying himself with vigour. This book considers his life and times, but goes further, searching his Irish past for explanations as to why he was such a distinctive lawyer. As a young man Plunkett was himself disenfranchised by statute owing to his Catholicism, and took an active part in the Irish campaign for Catholic Emancipation under Daniel O'Connell. The success of that campaign led directly to his being appointed to a government position in the colony, where he continued to strive for civil equality regardless of race or creed on issues which are still relevant to Australia today.

Third, Rob McQueen, *A Social History of Company Law – Great Britain and the Australian Colonies 1854-1920*, 2009, Ashgate (www.ashgate.com). The publisher's blurb reads:

The history of incorporations legislation and its administration is intimately tied to changes in social beliefs in respect to the role and purpose of the corporation. By studying the evolution of the corporate form in Britain and a number of its colonial possessions, the book illuminates debates on key concepts including the meanings of *laissez faire*, freedom of commerce, the notion of corporate responsibility and the role of the state in the regulation of business. In doing so, *A Social History of Company Law* advances our understanding of the shape, effectiveness and deficiencies of modern regulatory regimes, and will be of much interest to a wide circle of scholars.

Fourth, Lisa Ford, *Settler Sovereignty – Jurisdiction and Indigenous People in America and Australia, 1788–1836*, 2009, Harvard University Press (www.hup.harvard.edu). The publisher's blurb reads:

In a brilliant comparative study of law and imperialism, Lisa Ford argues that modern settler sovereignty emerged when settlers in North America and Australia defined indigenous theft and violence as crime.

This occurred, not at the moment of settlement or federation, but in the second quarter of the nineteenth century when notions of statehood, sovereignty, empire, and civilization were in rapid, global flux. Ford traces the emergence of modern settler sovereignty in everyday contests between settlers and indigenous people in early national Georgia and the colony of New South Wales. In both places before 1820, most settlers and indigenous people understood their conflicts as war, resolved disputes with diplomacy, and relied on shared notions like reciprocity and retaliation to address frontier theft and violence. This legal pluralism, however, was under stress as new, global statecraft linked sovereignty to the exercise of perfect territorial jurisdiction. In Georgia, New South Wales, and elsewhere, settler sovereignty emerged when, at the same time in history, settlers rejected legal pluralism and moved to control or remove indigenous peoples.

2009 Australia and New Zealand Law and History Conference report

The annual conference was held in Wellington from 11 to 13 December 2009. Correspondent and author Tony Earls (see above) attended, and provided the *Flyer* with the following record.

It would be hard to find a more evocative historical venue than that enjoyed by the Law Faculty of the Victoria University of Wellington. It is housed in Old Parliament House, the largest timber building in the Southern Hemisphere. Built in the 1870s to convincingly resemble an Italian stone palace, the architecture is just as interesting inside, with polished timber craftsmanship from a bygone era.

Attendees were given a traditional Maori welcome, and amongst the varied papers that followed the highest proportion related to indigenous rights and land issues, including that of the plenary speaker Professor Stuart Banner of UCLA. Banner considered the use of history from the perspective of a legal advocate. By way of illustration he visited a Shoshone Indian Land Claim that came before the US Supreme Court in 1943, and in particular the decision of the distinguished American lawyer Robert H Jackson (later a prosecutor at Nuremberg).

Justice Jackson felt bound to join the majority in a 5-4 decision rejecting the Shoshone claim. But Jackson had the strongest sympathy for the injustices suffered by the Shoshone. In obiter he gave an historical analysis that stressed why the Executive rather than the Court had, and should exercise, the power to do justice to the Shoshone. This seems to have overestimated the power of the State Department to secure the necessary appropriations from Congress on a sensitive political issue.

The judge's well-intentioned piece of judicial advocacy had the effect of burning bridges that Native Indians may have had available to them at law. Not only that, but the accuracy of Jackson's historical analysis was arguable. Banner pointed to this, and similar cases, to argue that advocacy that sought justice by over-emphasising how poorly indigenous people had been treated historically had the potential effect of being counter-productive legally: if harshness had been the intent of our forebears, that argued for a similar intent in the application of their laws of conquest, statute or treaty.

Conversely, it would be easier to obtain a present day legal remedy, if one accepted a historical analysis that our forebears in their conduct and laws afforded the widest rights and entitlements, and that any exception was a breach rather than a rule. Such at least was the seeming paradox that Banner posed in the context of American treaties. A lively discussion ensued, with mixed opinions as to the differing context of Aboriginal and Maori land claims, and with reference to the work of Henry Reynolds.

During the conference the Australian New Zealand Law and History Society conducted its AGM. Forbes Society Councillor Wendy Robinson QC was voted onto the ANZLHS Executive specifically to strengthen the liaison between the work of the two societies.

The next ANZLH conference is scheduled for Melbourne from 3 to 5 December 2010.

Summer Quarters¹

In summer 1810

On 10 January 1810, the church annuls the marriage of Josephine and Napoleon I.

In summer 1860

On 25 January 1860, Charles Curtis, vice president under Hoover, is born. He is the first to hold either of the two high offices with an acknowledged non-European ancestry and the last to hold either office with facial hair, in his case a moustache.

In summer 1910

On 19 February 1910, Mary Mallon ("Typhoid Mary") is released from four years' quarantine.

In summer 1960

On 1 February 1960, four black students attend a lunch counter in a dime store in Greensboro, North Carolina, where they had been refused service, to conduct the first of the 1960s sit-ins.

Endnotes

1. Usually, the *Flyer* draws the references from timelines. ws/.



Contacting the Forbes Society

The Francis Forbes Society for Australian Legal History

ABN 55 099 158 620

Basement
Selborne Chambers
174 Phillip Street
Sydney NSW 2000

Phone: 02 9232 4055
Fax: 02 9221 1149

E-mail enquiries@forbessociety.org.au