

# The Forbes Flyer

The newsletter of the Francis Forbes Society for Australian Legal History

**Autumn 2012**

## History reports itself

It is likely that next year will see a referendum on race and the Constitution. At this stage, it also seems likely that there will be two sets of proposals. The first, a proposal to remove existing references to race. The second, a proposal to insert new references said to be beneficial.

Almost all of us who aren't in jail and most of us who are, are conservative, liberal, social democrat or collectivist in our political ethos, or "some or all of the above". Each of us is likely to support the first proposal. As to the second, expect some vigorous debate.

What is exciting for us as legal historians is that some rather arcane sections of the Constitution will be held up for a sustained public gaze, giving us an opportunity to reflect on the background to the sections and how they came to be inserted in the first place. Stay tuned.

**David Ash**  
Editor

## The 2012 Forbes Lecture

The Society is delighted that Dr J M Bennett, an elder statesman of Australian legal history, has agreed to present the 2012 Forbes Lecture on Wednesday, 31 October 2012. The Lecture will be held in the Common Room of the NSW Bar Association in Phillip Street, Sydney. Further information will be published shortly. We note in the meantime that it promises to be a fitting celebration of the Society's first decade of work in the promotion of Australian legal history.

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## A symposium: The Legal Profession and the Defence Forces: Historical Connections, UTS, 24 March 2012

It is paradoxical but not coincidental that many whose professional lives have been involved in the maintenance of law have also been thinkers and doers when the maintenance of law is most at challenge. This important symposium is now full and can take no more registrations. However, that is no reason not to summarise what promises to be an interesting day.

## Speakers include:

The Hon Tom Bathurst, Chief Justice of New South Wales who will open the Symposium

The Hon Justice Logan, Federal Court, on Queensland Barristers in the Second World War

Professor George Parsons, Macquarie University on Arthur Hyman and Claims Officers in the First World War

Philip Selth, OAM, Executive Director NSW Bar Association, on the Trials of John “Mangrove” Murphy

Tony Cunneen, History Teacher, St Pius X College, author, on the Law and War in 1917

Col James Waddell, former Director of Army Legal Services, on the Army Legal Department

## Other contributions (including a panel discussion) from:

The Hon Paul Brereton AM RFD, on Not So Strange Bedfellows: the Professions of Law and of Arms

The Hon Bruce DeBelle AO QC, on Victor Windeyer

Geoff Lindsay SC, on CEW Bean

The Hon Justice Slattery, on Admiral Farncomb

## My summer holiday

My family decamped for a touring holiday in Van Diemen’s Land, or Tasmania as it was by the 1850s. I took a photo of my son standing behind a headstone in a cemetery near New Norfolk, up the River Derwent from Hobart. The inscription read “Near this spot was laid to rest Betty King the first white woman to set foot in Australia”. Rather proud of this discovery, I emailed the snap to family members. By an excellent coincidence (in legal history standards), my brother was crossing me in cyberspace with another emailed snap, with the

subject “Accurate? Norwich Castle”. His photo was of a blurb on the castle tour:

### Prison stories of the past continue to be important today

The people imprisoned in Norwich Castle provide us with an important bridge from the past to the present. Interest in family history has led to more and more stories about personal tragedies being explored. We can also appreciate the huge change in society’s view of appropriate punishments for prisoners, including the abolition in our time of sentences once considered normal.

Perhaps nowhere is this link with the past clearer than the case of Henry and Susannah Kable, whose story continues to have an importance and resonance in the modern world. Their fate of being transported in the First Fleet with a baby had led to a number of charitable gifts by members of the public, such as clothes for their new life. However, most of these were stolen during the voyage. In a remarkable legal action, the Kables were allowed to bring a prosecution against the ship’s captain, Duncan Sinclair, for the loss of their possessions. This was the first civil action in Australian legal history. Most important, it established that while condemned prisoners had no right to hold property under English common law, in Australia they could. Therefore, from the very start the new colony established its own distinctive legal rule.

Norwich Castle continues to receive visitors and enquiries from the descendants of former prisoners and staff every year – do you have any family stories from the prison? Do let us know!

Indeed. On 8 March 2012 in the Jubilee Room of the NSW Parliament, Andrew Tink’s latest contribution to Australian historical scholarship, *Lord Sydney: The Life and Times of Tommy Townshend*, was launched. A review will follow. Sydney was instrumental in both the First Fleet and in the particular bounty enjoyed by Kable. One of Kable’s descendants, the Honourable Michael Egan, sometime Treasurer of NSW and now Chancellor of Macquarie University, was present at the launch. For more information about the book, go to <http://www.scholarly.info/newrelease/>

## Awards for the 2011 Australian Legal History Essay Competition

Prizes for the 2011 Australian Legal History Essay Competition have been awarded to Christine Iacono of Macquarie University (in the Tertiary Students Category) and Ben Nam of Year 11 at James Ruse Agricultural High School (in the Senior Secondary School Students Category).

Christine's essay addressed the question whether, from a legal perspective, the "Rum Rebellion" against Governor Bligh on 26 January 1808 can be justified. It is now published in the *Australian Bar Review*.

Ben's essay addressed the Essay Competition's set question about the law of contract as it relates to rewards offered to the public. Ben is a second-time winner of the Competition. In 2008, as a Year 8 student at St Pius X College, Chatswood, he won a prize in the Junior Secondary Student Category.

Christine and Ben received a formal certificate, cash and a book voucher from Abbey's Bookshop ([www.abbey.com.au](http://www.abbey.com.au)) as a personal prize for their respective essays. Ben's school will also receive a cash award and an Abbey's book voucher.

The Society has also awarded Certificates of Merit to entrants in the Competition. In the Tertiary Students Category, Merit Certificates have been awarded to Martin Bernhaut (Sydney University / College of Law), Rosa Grahame (Australian National University), Leah Mills (University of New England) and Alice Rumble (ANU). In the Senior Secondary School Students Category, Merit Certificates have been awarded to James Begeng, Michael Loomes and Ciaan Perera, all of Year 11 at St Pius X College, Chatswood.

## The 2012 Australian Legal History Essay Competition

Entrants in the 2012 Australian Legal History Essay Competition are invited to address any question of their own choice on "Australian Legal History" or to address one of four questions proposed by the Society.

The set questions respectively address: (1) The Reception of English Law in Australia; (2) Patterns in the Legal Histories of Australia and other British Colonies; (3) "Mining Rights" in Australian Legal History; and (4) The Australian Parliament's "Marriage Power".

Read the [Conditions of Entry and Guidelines](#), which incorporate brief Background Notes on each of the four nominated questions.

## A conference at the National University of Singapore, July 5-7, 2012

I've registered, and hope to see you there. From the conference website, <http://legalhistorieempire.ca/>

In recent decades there has been an impressive growth of research and writing on the legal history of various former British colonies. These include settler colonies, such as those that became Australia, Canada, New Zealand and the United States, and multi-cultural territories such as those in the Caribbean, Southern and South East Asia and Africa. The result is a developing body of scholarship on a variety of legal historical topics, embodying cultural, institutional, substantive, procedural, theoretical and biographical themes, that provides a strong basis for comparative scholarship within the Empire, and so, imperial legal histories.

The recent emergence of comparative colonial legal historical research provides important examples of the value of this form of analysis, commentary, and critique, and pointers for future work in the general field. To date this scholarship has included research and writing on: the treatment of Aboriginal and Indigenous populations; property rights; the treatment of the unfree - slaves and convicts; the law and practice of indenture; the administration of justice and the rule of law; master and servant law and labour regulation; martial law in colonial settings; crime and criminal justice; formal and informal resolution of private disputes; the law and gender; the colonial judiciary; the legal professions; the law of libel and press freedom, to name but some. There has also been an developing body of important scholarship on the connections between colonial rule and law and the governance and law of post-colonial states. Some scholars have taken the further step of making comparisons between the approaches of different imperial legal systems to common problems.

The growth of interest in colonial, and by extension imperial, legal history has occurred during a period when there has been a discernible renewal of interest among historians in



cultural, political and economic histories of empire. Too often this general history of empire has ignored or downplayed legal developments within the imperial system.

In recent years a historiography of connections not only between the metropolis and various colonies, but also between colonies has taken root that looks at the transference of ideas about governance and society that was assisted by the movement of individuals to and within the Empire. A well-known example is the colonial ideologue, Edward Gibbon Wakefield. Although this work has not focused to any great extent on legal players in the colonies, they provide an obvious focus of interest. Several pioneer biographies of peripatetic colonial judges and studies of the translation of doctrine, legislative schemas and institutional models within the Empire provide a sense of potential of this type of research in a legal historical context.

Together these factors point to the value of mounting an International Conference on the Legal Histories of the British Empire.

The Conference is designed with three purposes in mind:

**As a vehicle for a wide ranging sample of current scholarship on imperial and colonial legal history** – cultural, institutional, social, biographical, doctrinal, and theoretical. The Conference will bring together scholars at various stages in their careers who are working in the fields of imperial and comparative colonial legal history, to share the work that is already underway, and to encourage those with an incipient interest in these fields and others to join in scholarly endeavour and expand the field.

**To produce a scholarly publication** in the form of a book of essays developed from papers selected from amongst those delivered at the conference. The book will be published through a major university press, and will represent an original and innovative contribution to scholarship.

**To create a permanent network of scholars in the field of imperial and comparative colonial legal history** that will ensure a lasting interest in this field, provide the basis for further collaboration in the future and constitute a platform for links with scholars examining the legal dimensions of imperial and colonial rule by states other than Great Britain. This will be the enduring legacy of the Conference.

The Conference is a joint project of the **Faculty of Law, National University of Singapore**, and the **Faculty of Law and Centre for Asia-Pacific Initiatives, University of Victoria**, British Columbia, Canada. The **American Society for Legal History** and the **Schulich School of Law, Dalhousie University** have provided both encouragement

and funding. The **Australian and New Zealand Law and History Society**; **The Francis Forbes Society for Australian Legal History** and the **Osgoode Society for Canadian Legal History** have encouraged and publicized the conference.

## Books to read

*Dewigged, Bothered & Bewildered – British Colonial Judges on Trial, 1800-1900*

John McLaren

Publisher: Osgoode / Forbes Societies, 2011

Distributor: The Federation Press

**\*Special price for Members of the Forbes Society \$59.50 For Non members rrp \$69.50**

*Judge Advocate Ellis Bent – Letters and Diaries, 1810-1821*

Paula Jane Byrne (ed)

Publisher: Forbes Society / Federation Press, 2012

**\*Special price for Members of the Forbes Society \$35.00. For Non members rrp \$TBA.**

Go to the website of Federation Press, [www.federationpress.com.au](http://www.federationpress.com.au), for more details.

## Major grant for Australian Legal History

The Australian Research Council has awarded a grant of \$330,000 towards a colonial legal history library. This key grant means that the project will now go ahead for two years from the beginning of 2012. The project partners are ten Australian universities, Austlii, and the Australian Law Librarians Association. Together with the partners' contributions, the total budget for the two year project is \$750,000.

The project title is "The Australasian Legal History Library: creating historical depth in legal data on AustLII, to improve all legal research". The Australasian Legal History Library, to be located for free access on AustLII ([www.austlii.edu.au](http://www.austlii.edu.au)), will provide comprehensive legislation and case law from all colonies (subsequently Australian states, territories and New Zealand) up to 1950. Its citator will show how these historical materials are used in current legal decisions. It will be a revolution for legal history research, allowing easy access to core

legal materials.

There will be several steps in the creation of the legal history library:

1. The project partners will scan (where necessary) and make searchable all decisions in the published law reports series, from inception up to 1950, for each state and territory and New Zealand. The same will apply to Privy Council appeal decisions from 1873 onwards.

2. The partners will also scan and publish on the Austlii website all the statute law of the Australasian jurisdictions back to the creation of colonial legislatures. This has already been done for NSW, NZ and Victoria, but there is much to do for the other jurisdictions.

3. Key historical documents will receive the same treatment, including law journals, law reform reports and treaties.

4. Importantly for the incorporation of historical material into the present law, the historical case law will be included in Austlii's Law Citator, showing where they have been cited subsequently.

The emphasis of this project will be on the scanning, republication and organisation of existing nineteenth and twentieth century printed material, much of which is presently inaccessible to many researchers. The project, will however, add to the considerable work already completed and underway of uncovering and publishing hidden colonial court records. In New Zealand, the Lost Cases Project (<http://www.victoria.ac.nz/law/nzlostcases/default.aspx>) is based on the manuscript and newspaper records of nineteenth century case law; many lost cases have now been placed on the web. In Australia, a similar project

has long been underway for New South Wales and Tasmania, through Macquarie University's Colonial Case Law website:

[http://www.law.mq.edu.au/research/colonial\\_case\\_law/](http://www.law.mq.edu.au/research/colonial_case_law/) .

The new Australasian Legal History Library will work cooperatively with those projects. There is very much still to do for the recovery of Australian lost cases, where much of the nineteenth century case law of is still a mystery.

## Summer Quarters<sup>1</sup>

*In summer 1811-1812*

On 11 February 1812 in Massachusetts, Governor Elbridge Gerry signs a redistribution law that favours his party, giving rise to the term "gerrymandering." One of the more contorted efforts in the Boston area is shaped like a salamander.

*In summer 1861-1862*

On 14 December 1861, Prince Albert, husband of Queen Victoria, dies.

*In summer 1911-1912*

On 29 December 1911, Dr Sun Yat-sen is elected the Provisional President of the Republic of China.

*In summer 1961-1962*

On 3 January 1962, Pope John XXIII excommunicates Fidel Castro.

## Endnotes

1 Usually, the Flyer draws the references from [timelines.ws](http://timelines.ws) or from [en.wikipedia.org](http://en.wikipedia.org).



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