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History reports itself

While the year may be rapidly drawing to a close, there is still much activity happening on the publishing front.

Following on from the successful third annual Forbes Society lecture, the Forbes Society in conjunction with the Council of Law Reporting for New South Wales will publish Dowling's Select Cases, as edited by Tim Castle and Bruce Kercher. Chief Justice Spigelman AC will supply the foreword. Details as to the release of this publication will be available in the New Year.

A further development in legal history is the *Macquarie Law Monographs: Studies in Law and History*, to be edited by Dr Andrew Buck of Macquarie University, and published by Australian Scholarly Publishing. The first title in the series will be *The Poor Man* by A.R. Buck and Nancy E. Wright, and will be available in March 2005. Dr Buck has advised that the monographs will focus on topics such as legal biographies and the historical development of substantive law. Comparative legal historical studies, both inter-colonial and international, are also encouraged. Submissions to this series should be directed to:

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For those of you who are keen readers with a little spare time during the summer break, John Bennett's latest release in his *Lives of the Australian Chief Justices* series published by Federation Press is *Sir Henry Wrenfordsley: Second Chief Justice of Western Australia 1880-1883*. Federation Press have supplied us part of the foreword to the book and an extract.

The Forbes Society wishes its members a happy and safe Christmas and New Year.

Catherine Douglas
Editor

The Lives of Australian Chief Justices

Dr John Bennett continues his remarkable project, *Lives of Australian Chief Justices* with the publication of *Sir Henry Wrenfordsley: Second Chief Justice of Western Australia 1880-1883*.

This issue of the *Forbes Flyer* contains an extract discussing Sir Henry Wrenfordsley's appointment as second Chief Justice of Western Australia.

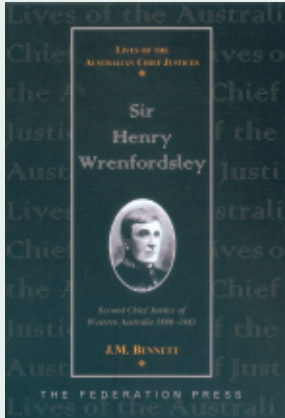
In Professor Roy M. Mersky's words (in the Foreword to the book):

If the life of the law has not been logic, but rather experience, then judicial biography has a great deal to tell us about the law, and in particular about its historical development. This is especially true during a nation's formative stages, when such bedrock ideals as the rule of law, the separation of powers, and the independence of the judiciary could not be taken for granted. In such an unsettled context a judge's work can have a defining influence on the direction of legal history. ... In this volume of the series [*Lives of the Australian Chief Justices*] Dr Bennett turns his attention to Sir Henry Wrenfordsley, the second Chief Justice of Western Australia from 1880 to 1883 and again (as Acting Chief Justice) in 1890 and 1891. ... Dr Bennett's other subjects to date were ... serious, firm, talented, and dedicated judges. ... Unfortunately, in the course of this biography of Sir Henry Wrenfordsley, Dr Bennett concludes that he cannot say anything analogous about him.

Members of the Forbes Society will be interested to note that J.M Bennett's biography of Sir Francis Forbes is also published in this series.

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From *Sir Henry Wrenfordsley: Second Chief Justice of Western Australia 1880–1883*, by J.M. Bennett, Chapter 3 “Three Years in Western Australia”, pages 25–30

The unexpected death, on 21 November 1879, after a very brief illness, of Sir Archibald Burt, Chief Justice of Western Australia, came as a shock to that Colony. He had been the first Chief Justice, and sole judge, since 1861. The character of the Supreme Court reflected his own standing as a lawyer of distinction, committed to running the court and administering justice in a highly professional way.¹

While the Colonial Office received the news, with regret, on 12 January 1880, it was relieved that a vacancy was created into which the importunate Wrenfordsley might be placed and, with any luck, at such a remote outpost, be forgotten. Wrenfordsley accordingly received his telegram, asking how quickly he could proceed to Western Australia.² His acceptance was taken for granted, and Governor Ord was advised in Perth that “Wrenfordsley, Advocate General in Mauritius is appointed Chief Justice and will shortly arrive”. A warrant for Wrenfordsley's appointment was hurried to him at Alexandria.³

For the first time in his life he had the world at his feet. The office of Chief Justice he had craved so much was his. And all he had done to deserve it was to make political friends and be a

persistent nuisance. Despite his limited legal ability, had he conducted himself in Western Australia with the same professionalism Burt had brought to the court, Wrenfordsley might have remained Chief Justice, perhaps for 20 years, and been respected as a great contributor to the Colony's development. Although his judicial performance in Western Australia was the best of his various colonial postings, his term of office was brief. His downfall was due wholly to himself – his exaggerated estimation of his own importance, coupled with a compulsive meddling in executive politics, and a consistent inability to live within his means.

In 1880, needing no further encouragement from the Colonial Office, he sailed for Albany in the *Bangalore* with his constant travelling companions – his sister Louisa, his cousin Elly Finch, and probably his “nephew” Hatton Richards (of whom more presently).⁴ The *Bangalore* called at Galle in Ceylon, with serious consequences. Some passengers contracted measles there, and one died from the disease.⁵ It was more galling to Wrenfordsley to find, on arriving in King George's Sound, that he would not receive the stately reception due to

one of Her Majesty's Judges. Instead, he and his family were pushed into quarantine “without luggage, on a barren island”, quite indiscriminately with the other passengers.⁶ Worse were the financial consequences. He was kept out of the full salary that would accrue only on his entering upon his office, and charged £40 for the detention of his party.

Ego and bank balance equally bruised, he arrived in Perth in a choleric frame of mind. A local observer perceived him to be “a small man, aged, clean shaven and voluble”.⁷ Wrenfordsley was gratified, however, to be received most graciously at Government House by the newly installed Governor Sir William Robinson. A fellow Anglo-Irishman of a cultured disposition, being “associated with musical, literary and educational groups”,⁸ Robinson struck up an accord with the new Chief Justice that developed into enduring friendship. Robinson was a competent Governor with wide experience in colonial administration, particularly in the West Indies. While usually a good judge of men, his affinity with Wrenfordsley can be explained only by the skill of the latter in ingratiating himself, throughout his career, with many people of influence.

¹ See generally, J.M. Bennett, *Lives of the Australian Chief Justices – Sir Archibald Burt* (Sydney 2002).

² Minute paper, C.O. 18/191, f. 185.

³ Colonial Office to Ord, 23 January 1880, *ibid.*, at f. 192; confirmed by despatch of even date, *ibid.*, at ff 193, 193a, 194; *Inquirer*, 4 February 1880, 3.

⁴ See below, text following n. 101 and n. 127; and Ch. 6, text following n. 15.

⁵ *West Australian*, 9 March 1880, 2.

⁶ Wrenfordsley to Derby, 20 November 1883, S.R.O.(W.A.), C.S.O. 3098/03: minute paper 851/84.

⁷ Hillman, “Diary for 10 Years”, quoted, Russell, 207.

⁸ (1976) 6 A.D.B. 50.

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Wrenfordsley was an excellent social companion who could engage in intelligent yet entertaining conversation in superior company. He looked the part, and his airs and graces – ever conspicuously displayed – made him seem convincing.

That was the pose he struck in public on his first appearance as Chief Justice in Perth. He cut a grandly patronizing figure: an English judge, an emissary of Her Majesty herself, come to dispense the benign blessings of British justice to a dark and lonely corner of Empire. He regarded the court as a theatre and himself as the leading actor. He used every occasion to deliver exhortations to the community as if he were custodian of the social conscience. Taking his seat as Chief Justice for the first time on 7 April 1880, he postured as if a great celebrity, even though Acting Attorney-General G. W. Leake, Q.C., seemed oblivious to the fact. Leake, offering a few welcoming words, wondered at the isolation an English barrister must feel on being separated from "the ennobling intercourse with the English Bench and Bar – the most highly cultivated and intellectual body of gentlemen in the world".⁹ The innuendo was plain that, from the outset, the colonial Bar regarded the new Chief Justice as an outcast from that select English company, as, of course, he was.

Undeterred, Wrenfordsley offered pompous platitudes. He came to them, he said, "with a moderate share of experience in our profession", having also "held two important appointments, and ... served under two distinguished Governors". His sole object in life, he added, was to perform his duty and to sustain the dignity of the Bench. He presumed to pay tribute to the late Chief Justice

Burt, of whom he knew nothing, and he declared that, when his own time came to depart, "I desire in the end to leave behind me the respect and esteem of this community".¹⁰ Those were the very attributes he would not earn for himself in Perth: and his departure would occur much sooner than he could then have foreseen.

For the occasion, many magistrates were seated at the bench, and their representative congratulated the new Chief Justice. Wrenfordsley replied that, in a colony like Western Australia, with so scattered a population, "there is no office connected with the Government which is of so much importance as that of a magistrate". He was particularly well qualified to know, because "I come from a colony in which everything centred on the magistracy, and in my office as Procureur General I was, *ex officio*, the chief of the magisterial body".¹¹

Another occasion to display his theatrical qualities occurred soon afterwards. William Thompson was tried for and found guilty of rape. The Chief Justice pronounced an inevitable death sentence, preceded by a sanctimonious discourse for the edification of prisoner and court alike.

In England, there is a great deal of crime, but much of that crime comes from poverty. Poverty brings drink, and drink brings crime. I have seen many a fine fellow standing in the dock, in England, suffering almost as you suffer, and yet he suffered simply from the evils brought on by drink. But there is no such excuse in this colony.¹²

Protesting that he had "nothing else to do but to pass the sentence of the law" and that he must "fulfil [his]

duty, however painful the discharge of that duty may prove", Wrenfordsley, as "the mere instrument of the law ... assumed the black cap", which added greatly to his self-importance. He consigned the prisoner to the gibbet, holding out no hope of mercy: which counted for nothing with Thompson who "appeared quite unconcerned".¹³

The Chief Justice persisted in using the court to instil a sense of dramatic excitement into criminal trials, and, as arbiter of life and death, to preach moral values to the community.¹⁴ He reinforced those values by imposing sentences at the highest scale. For example, in *R. v. O'Grady*, in 1881, the Colonial Office noted that "the prisoner does not appear to have been convicted on very strong evidence, and the sentence is a severe one".¹⁵ Typically, in sentencing O'Grady to 20 years' penal servitude for the manslaughter of a Chinese cook on a vessel of which O'Grady was master, the Chief Justice said, dismissively:

This colony is entering upon a new career and it must go forth to the public that the law will uphold the case of the weak as well as that of the strong; and you may take it with you, when I see you no more, that, in inculcating that lesson, I deeply regret the duty you have cast upon me. But I am powerless in the matter.¹⁶

Only a strong recommendation to mercy by the jury had saved the prisoner from a life sentence.

Wrenfordsley constantly addressed anyone who might be interested on the sensitivity he felt at being sole judge, a perception that had not troubled the robust and prompt judgements of his predecessor

⁹ *West Australian*, 9 April 1880, 2.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Id.*, 9 April 1880, 3.

¹³ *Ibid.*; for a comparable case, *R. v. Li Ki Hong*, *id.*, 4 April 1891, 5, 6.

¹⁴ For example, *R. v. Kelly & Bailey*, *id.*, 9 April 1880, 3; *R. v. Ah Ket*, *id.*, 9 January 1883, 2; *R. v. Jumbo*, *id.*, 9 January 1883, 3.

¹⁵ Minute paper, C.O. 18/196, f. 40.

¹⁶ C.O. 18/198, at f. 493.

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Sir Archibald Burt. In *Von Bibra v. Director of Public Works*, in 1882, the Attorney-General applied on the Director's behalf for the entry of a non-suit on the ground that a jury verdict against the Director had been contrary to the weight of evidence and that the jury had not been impartial, being predisposed to find against a government instrumentality. Wrenfordsley, irritated at the challenge to his own directions to the jury at trial, demurred – "my duty is to keep my mind as free as possible from all popular impressions", he insisted. The following exchange then occurred:

The Attorney-General: a single Judge in a colony like this has a far more responsible and arduous task to perform than a single Judge in England, being, as he is, the sole repository of justice ...

His Honor: And you would cast upon him a duty of this delicate character – that because a case is against the Government, he must apply certain legal principles for the protection of the Government as against the general public.¹⁷

In a lengthy judgement, Wrenfordsley vindicated his original charge to the jury, declaring that the application was not equivalent to one for a new trial, that no error had been demonstrated, and that "I must be careful ... not to interfere with the due course of justice, or the right which is accorded by the Crown to the subject".¹⁸ He discharged the application for a non-suit.

Playing to the gallery, as Wrenfordsley delighted to do, was relatively harmless. But the quality that made him a bad judge was his duplicity in money matters. Thus, he affected to lecture the public about standards of commercial morality, using the opening of the July sittings in 1880 to complain of the want of a grand jury to whom such questions might be addressed. He had been concerned to notice that a recent judgement, which had led to a debtor's bankruptcy, had

been described as a hard one. But the court had its duty to perform:

I wish the commercial community to understand, that if a man owes money, he has no right to resist the payment of that money, and in doing so, to put his debtor [*sic*] to the expense and to incur the inconvenience of a law suit, and then, if there is a judgement against him, immediately afterwards to answer it by filing a petition in bankruptcy ... The law of bankruptcy in this colony is not what it ought to be, and it will not be my fault if it is not amended.¹⁹

The commercial community of Perth were not yet to know that Thomas Bailey & Co., of London, had obtained judgement against Wrenfordsley in the City of London County Court for a debt of £15, before he left for Mauritius. They pursued him there and in Perth and had received from him many devious letters promising payment, which promises were never honoured. By 1881 they pressed their claim upon the Earl of Kimberley, Secretary of State for the Colonies, who, while dismayed by Wrenfordsley's conduct, closed the file with the note "it is not desirable that the Colonial Office should make itself the collector of debts of private persons".²⁰

Bailey & Co. were not the only creditors whom Wrenfordsley sought to defraud by placing himself beyond their reach. His chronic insolvency forms a continuous thread throughout following chapters. Yet here was a persistently impecunious Chief Justice, who laughed his own creditors to scorn, while admonishing the citizens of Perth about commercial morality. The worst feature was that he could not perceive the turpitude of his own double standards. In an 1883 address to the Working Men's Institute of Perth, having echoes of his addresses to similar audiences at Peterborough, he declared that "the working men of Perth wanted

thrift, and he thought the working men of Perth wanted method in their industry".²¹ He was the last person to be delivering homilies of that kind.

It was accordingly impossible for bankruptcy matters in the Supreme Court of Western Australia to proceed with any objectivity before a sole judge who was insolvent. An alarming example was *In re Kirkup's Bankruptcy*, in 1882. Wrenfordsley rebuked the trustee for making remarks to creditors that appeared to reflect on the court. "If he does that again", Wrenfordsley roared from the bench, "I will commit him for contempt of Court; I will indeed. I will not allow any quarrels with the Court as to its decisions". He was quite satisfied that the bankrupt had been ill-used by the trustee – "this poor man ought to have had his discharge long ago. The Act was never intended to be used as a weapon of oppression or persecution".²²

Septimus Burt, for the trustee, rejoined, "Your Honour seems to think that the Act was passed for the benefit of bankrupts rather than creditors". He went on to say that Kirkup had wasted his property in riotous living, squandering his means in drink, and "was entitled to little or no sympathy from any right-minded man, acquainted with all the circumstances". Wrenfordsley, on the brink of losing his composure, declared that "I have not said one half of what is on my mind", reiterated his sympathy for "this unfortunate man (the bankrupt)", and took refuge in adjourning the court.²³ Community confidence could not be placed in a Chief Justice who conducted himself so irresponsibly.

¹⁷ *West Australian Supplement*, 24 October 1882.

¹⁸ *West Australian*, 24 November 1882, 3.

¹⁹ *Id.*, 9 July 1880, 3.

²⁰ Minute paper, C.O. 18/196, f. 478 at f. 479a.

²¹ *West Australian*, 18 May 1883, 3.

²² *Id.*, 16 June 1882, 3.

²³ *Ibid.*

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Conclusion:

Sir Henry Wrenfordsley: Second Chief Justice of Western Australia 1880-1883, by J.M. Bennett (2004, ISBN 1862875286, HB, 160pp, rrp \$49.50), was published by The Federation Press. *Lives of Australian Chief Justices* is a series of historical biographies, written by the eminent Dr J.M. Bennett. A selection of biographies is published each year, commencing from 2001.

Titles in Lives of Australian Chief Justices Series:

- *Sir William a'Beckett: First Chief Justice of Victoria 1852-1857*, by J.M. Bennett (2001, ISBN 1862874093, HB, 232pp, rrp \$49.50)
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