Forbes Flyer

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The newsletter of the Francis Forbes Society for Australian Legal History

History reports itself

This is the last edition of the Forbes Flyer with me as its editor. I have enjoyed the experience and look forward to making further contributions in due course.

Like all human conditions, law is incapable of definition. This is because a definition is a plan. The Yiddish saying is *Mann tracht un Gott lacht*, or man plans and God laughs. What is singular about law is that it is man's attempt to maintain the plan after the laughter has subsided.

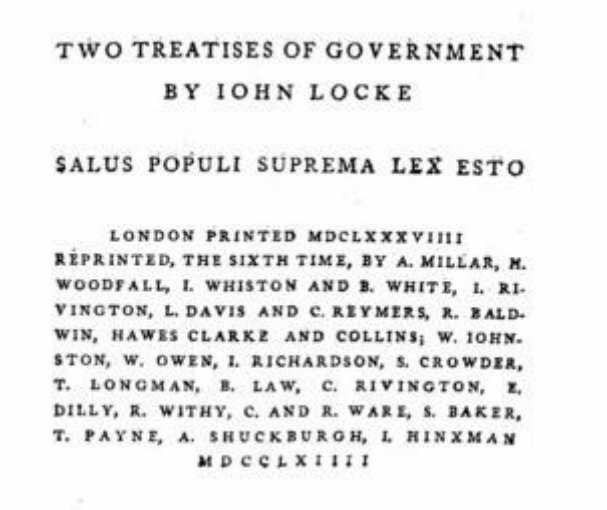
On Audible, I am enjoying Andrew Sachs's narration of Simon Schama's *The Story of the Jews*. At one stage, Schama suggests that law is one of our answers for the questions "Who are we?" and "Why is this happening to us?"

Liberty and safety have been themes for lawmakers through the centuries. Through a western lens, they are the ancient goddesses Libertas and Salus dragged into the ideologies of republican and later, imperial Rome. Would Cicero - would any of us a year ago - ever have thought that "salus populi suprema lex esto" was to be ground out with necessary but perhaps Orwellian efficiency every five minutes on every rail platform in the world as "Your safety is our greatest concern"?

Liberty and safety are themes for this edition. One way that lawgivers can provide liberty and safety is through laws about the land on which we live. Possession, dispossession, and in the Jewish case repossession, are concepts as controversial as they are vital.

For Australian indigenous communities, white law certified dispossession in the late 19th century and certified repossession in the late 20th century. The conditions and qualifications of the latter certification, and indeed the right of white law to provide any certification, remain matters of high

and hot debate. The fact that this discussion is had at all shows that even things thought basic are capable of being rethought. This edition looks at the piece of land that gave rise to *Cooper v Stuart*, and the nearby piece of land that formed the Block.



TWO TREATISES OF GOVERNMENT

BY IOHN LOCKE

SALUS POPULI SUPREMA LEX ESTO

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A frontispiece – Whose safety, what people, which law?

David Ash, editor

The Ninth Annual Plunkett Lecture

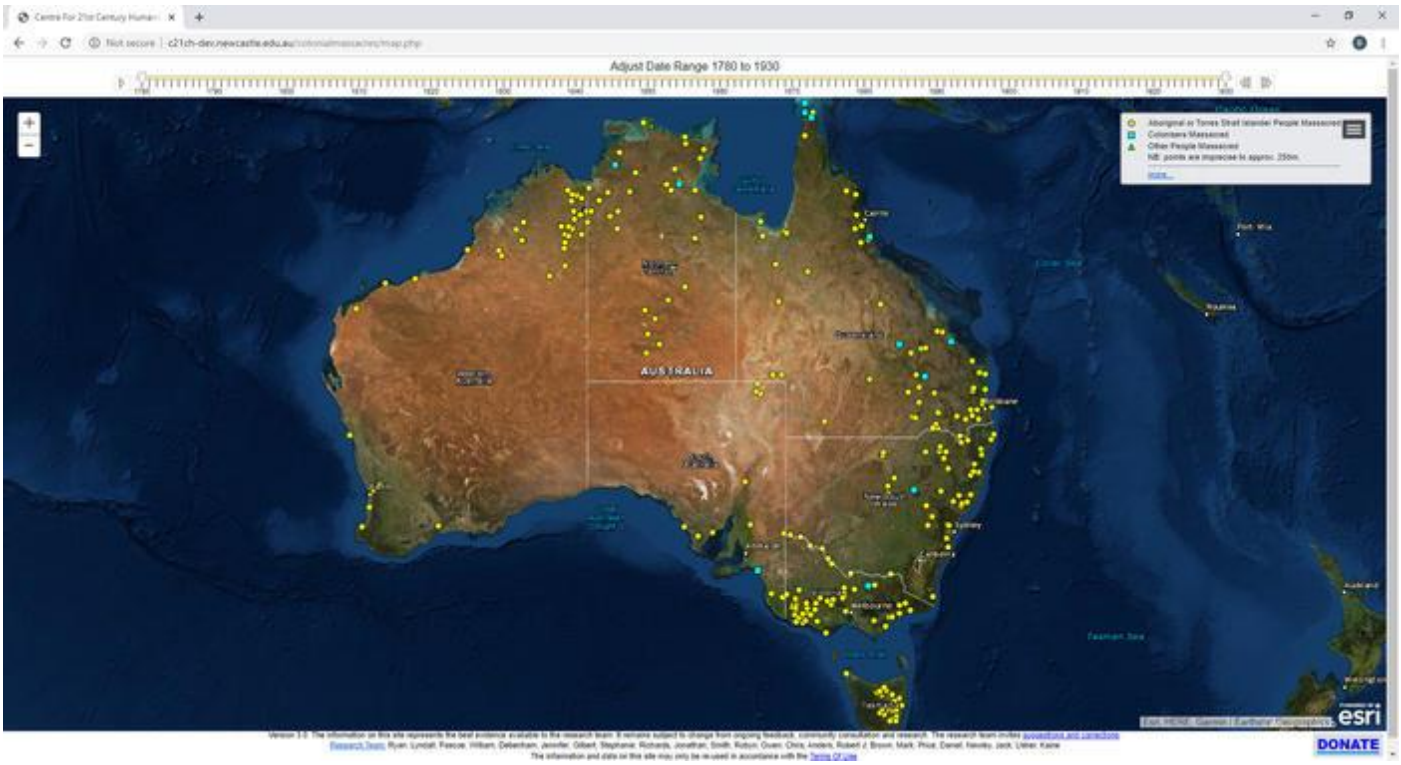
On 24 November 2020, the Ninth Annual Plunkett Lecture was delivered by Dr John McLaughlin AM. The JH Plunkett Lecture honours the memory of one of this State's pivotal Attorneys General. John Hubert Plunkett (1802-1869) arrived in NSW, from Ireland, in 1832. For more than 30 years thereafter he made a major contribution to colonial law and society, serving, inter alia, as Solicitor General and Attorney General. In 1835 he published *The Australian Magistrate*, the first Australian legal practice book. He was the first Australian lawyer to be granted a commission as Queen's Counsel. He led Roger Therry, another Irish-born barrister, in the conduct of the Myall Creek Murder trials. Dr McLaughlin's lecture is available on Youtube.

The Colonial Frontier Massacre Map Project

On 5 November 2020, Professor Lyndall Ryan at the University of Newcastle gave a lecture ""Making the Past Visible: The Colonial Frontier Massacre Map Project and the Legacies of Frontier

massacres". The address was presented under the joint auspices of the Ngara Yura Committee and the Society and was facilitated by the Judicial Commission of NSW.

Between 1794 and 1928, at least 300 massacres of Aboriginal people took place across the Australian frontier with an estimated loss of nearly 10,000 lives. Professor Ryan and a research team have been concerned with a digital online map of the massacres.



A disturbing specificity

This provoking address was to a capacity audience. Its importance is obvious. The process of unreceiving received truths is necessary, difficult and exciting, at a personal level, at a community level, and at a national level. Getting evidence to redress facts (and what is a fact but a received truth?) is a precondition of this process.

The project is here.

Alexandria Park, the home of terra nullius

William Hutchinson was a convict. In the way of things, when he arrived in Sydney he was convicted afresh of theft from the King's stores in Sydney, sent to Norfolk Island, and in the finest tradition of

poacher turned gamekeeper, appointed overseer of government stock. In time, he became a well-established businessman, counting Dr Redfern among his partners.

Redfern is remembered today by the suburb where he held substantial land. Hutchinson is not. But there is a rich and difficult history attached to two grants received by Hutchinson. Both were near Redfern's.

This article is about the second of those grants, but first and briefly… the first grant to Hutchinson was made by Governor Macquarie on 31 August 1819. It was for 52 acres.

On 15 April 1973, 150 years after the passage of the Charter of Justice, the Federal Government made a statement that it was "to finance an imaginative community housing development put forward by Aborigines in Sydney". The exact proposal was explained in the following terms:

> *The Minister for Aboriginal Affairs, Mr Gordon Bryant, announced today that he had authorised negotiations to proceed for the purchase of 41 terraced houses in the inner city suburb of Redfern for development by an Aboriginal co-operative housing society.*
>
> *The society, when registered, would receive a Government grant of $530,000 to cover the cost of the houses and the immediate necessary improvements.*

Those 41 terraced houses were built upon the grant made to Hutchinson 154 years before. The history of the Block is a fascinating study not so much in white/indigenous relations, but in relationships among indigenous people, and the tensions between those who came from other countries in Australia and those who already lived here. But it is a history for others to write.

In the meantime we go to Alexandria Park. The park forms the third point of an equilateral triangle. The Block and Redfern Park, where Prime Minister Keating made his 1992 speech, making the other two.

Lord Watson opened the judgment of the Lords of the Judicial Committee of the Privy Council in the Appeal of *William Cooper v. The Honourable Alexander Stuart (Colonial Secretary)* with the words:

> *His Excellency Sir Thomas Brisbane, then Governor-in-Chief of New South Wales and its Dependencies, on the 27th May 1823, made a grant to one William Hutchinson, his heirs and assigns, of 1,400 acres of land in the county of Cumberland and district of Sydney,*

> *" reserving to His Majesty, his heirs and successors, such timber as may be growing or to grow hereafter upon the said land which may be deemed fit for naval purposes; also such parts of the said land as are now or shall hereafter be required by the proper officer of His Majesty's Government for a highway or highways; and, further, any quantity of water, and any quantity of land, not exceeding ten acres, in any part of the said grant, as may be required for public purposes; provided always, that such water or land so required shall not interfere with, or in any manner injure or prevent the due working of the water mills erected or to be erected on the lands and watercourses hereby granted."*
>
> *The Appellant is the successor in title of William Hutchinson, the original grantee.*
>
> *By a proclamation dated the 4th November 1882, duly made and published, His Excellency Lord Augustus Loftus. the Governor of the Colony, in pursuance of the reservation in the grant, and on the recital that the land (the subject of this action) was required for a public park, gave notice that he thereby resumed and took possession on behalf of the Government of the Colony of a parcel of land 10 acres in extent, being part of the 1,400 acres granted to the predecessor in title of the Appellant, to the intent that these 10 acres should revest in Her Majesty to be used as and for a public park. In terms of the proclamation the Government at once proceeded to take actual possession of the land, fenced it off, and excluded the Appellant.*

The appellant, William Cooper, came to be successor in title because his great-uncle, Daniel Cooper, had purchased Hutchinson's lot. Cooper and his partner Solomon Levey made prudent land purchases across Sydney from the earlier generations and, often, the first grantees. Some, like Captain Piper who had received much of what we now know as Woollahra, were unsuccessful managers. Some, like Mr Hutchinson who had received much of what we now know as Waterloo and Alexandria, had made their lot and wished to consolidate their move up the social ladder as pastoralists.

Cooper's own father, also Daniel, was a successful businessman in his own right who later inherited much of his uncle's wealth. The second Daniel would become the first holder of the baronetcy of Woollahra, his first son the second, and his second son William, the holder of the land the subject of *Cooper v Stuart*, the third, in 1909.

In August 1885, a columnist for Sydney's first evening paper, *The Evening News*, protested:

> *The huge grants of valuable land in and around Sydney made in the early days of the colony form one of the remarkable facts in our history. How these grants came to be made is a question more easily asked than answered now a days. Some of them include a very large part of the foreshore of the harbor, and the "unearned increment' of the land has made the grantees and their heirs ' "rich beyond the dreams of avarice.' Yet the local representative of one of these fortunate families thought it quite consistent with the fitness of things to fight the Government in the Supreme Court the other day over a reserve of ten acres out of a grant of 1400, known as the Waterloo Estate. This grant was made on the 27th May, 1823 — sixty-two years ago — and contained a proviso that ten acres of the land might be resumed for public purposes. The Government resumed their ten*

acres accordingly for a public park in November 1882. The grantee, considering himself a very ill-used man, retained four leading counsel to oppose this resumption. They moved for an injunction accordingly, and exhausted their ingenuity in a vain effort to discover a flaw in the Crown's title. But the suit was dismissed at once, the points raised being clearly untenable.

Ten acres out of 1400 was a very modest reservation for public purposes. So modest, indeed, as to show us how little importance' was attached in the old days to the establishment of public parks or recreation grounds. Sydney is miserably deficient in that matter. Instead of being studded with beautiful reserves like Melbourne, it has only one or two to boast of. True, we have Sir Henry Parkes left to us; but even that magnificent property — even if it was unencumbered — would hardly make up for the want of necessary breathing grounds. As to the Waterloo Park, one would suppose that the last person in the world to object to it would be the present owner of the land. Recollecting how – much the Cooper family have made out of the colony — millions of money and a baronetcy — and how very little they have done for it in return, they might at, least have handed over the ten acres graciously. There would be a still nearer approach to a quid pro quo if they were to hand over a hundred acres out of their immense estates, and dedicate them to the public to which they owe so much.

If thou are rich, thou art poor;
For, like an ass whose back with ingots bows,
Thou bear'st thy heavy riches but a journey,
And death, unloads thee.

The author errs, in as much as he supposes the Cooper family the grantees of the land. As we have seen, their ownership was not unearned but earned by the success of other endeavours. But the theme is clear enough. Fourteen hundred acres, with but 10 reserved for the public good, and the family can't even abide this.

Cooper's counsel had not exhausted their ingenuity. Their flair for the technical carried them to the Privy Council. The issue was the applicability of the rule against perpetuities.

The rule has been described in the pages of the Harvard Law Review as a "technicality-ridden legal nightmare" and a "dangerous instrumentality in the hands of most members of the bar". The Supreme Court of California has relieved at least one practitioner for inadvertently failing to apply it, in *Lucas v Hamm 56 Cal.2d 583 (1961)*. (Where one piece of confusion is acknowledged, another can be created; this, I understand, was the first US decision to depart from the rule that only a client could sue their lawyer for professional negligence.)

Cooper argued that the rule against perpetuities (a) applied to strike down Crown grants; (b) formed part of the law of NSW at the time of the grant in question, 1823; and (c) by virtue of (a) and (b), this grant failed.

The Privy Council assumed without deciding (a) in Cooper's favour. However, it found that the rule did not apply to Crown grants in NSW in 1823, ie it rejected Cooper's argument (b), so the conclusion (c) fell away.

What is important for Australia was the legal reasoning underlying the Privy Council's rejection of (b). Essentially, the Council accepted that at the time of being discovered and planted by English subjects, the land called by them New South Wales was, in Blackstone's general language, "an uninhabited country", and the Council concluded that "[t]here was no land law or tenure existing in the Colony at the time of its annexation to the Crown". This was the proposition that would be rejected by the High Court in *Mabo*.

There is also the question of why the Privy Council relied on itself to apply Blackstone's generality to the colony of NSW in particular. The Full Court of the Supreme Court of NSW had already passed on the question.

In 1836, Mr Murrell, an indigenous Australian, was charged under colonial law with the murder of another indigenous Australian. To this he pleaded that "he [was] a native Black… not now, nor at any time heretofore… a subject of the King of Great Britain and Ireland, nor was nor is subject to any of the laws or statutes of the Kingdom of Great Britain and Ireland [and that, so too, was the alleged victim]", with the result that the colony had no jurisdiction.

Mr Justice Burton for the Full Court observed:

> *… although it be granted that the aboriginal natives of New Holland are entitled to be regarded by Civilized nations as a free and independent people, and are entitled to the possession of those rights which as such are valuable to them, yet the various tribes had not attained at the first settlement of the English people amongst them to such a position in point of numbers and civilization, and to such a form of Government and laws, as to be entitled to be recognized as so many sovereign states governed by laws of their own.*

History, law and culture are each founded on received truths and take much of their richness for their ability to deal with challenges to those truths. There is a tendency in all of us to say "That was then, this is now, let the past bury the past." There can be much good in this, but it cannot allow us to avoid dealing with such challenges.

From *Murrell* to *Cooper v Stuart* to *Mabo*, there is a clear progression; "We won, so our system rules" to "We are, you are not, and we do not acknowledge that you ever had a system", to "'We' now includes you, and that synthesis means a fresh synthesis of what the system is". Received truths are cultural artifacts, and with this in mind, each step of the progression can, I think, be seen as having a truth; a cruel truth, an arrogant truth, and then a confused truth.

Whether a confusion of truths can beget a new received truth in a democratic age is a much-debated dilemma. I only observe that the merely factual truth, that state-sponsored massacres of indigenous Australians continued well into the 20th century, is a truth that continues to emerge.

I have always enjoyed another progression, the development of Stephen Decatur's famous toast. In its first version, it was "Our Country! In her intercourse with foreign nations may she always be in the right; but right or wrong, our country!" In its second version, it became "My country, right or wrong; if right, to be kept right; and if wrong, to be set right." For the populist, it has always been "My country, right or wrong."

In a democratic and post-colonial Australia, the question for each of us may be "What is our nation? What is foreign and what is ours?"

New books – Three Sydney Judges

This book sketches the lives of three Justices of the High Court of Australia, the nation's supreme court. Albert Bathurst Piddington, George Rich, and Adrian Knox are part of Sydney's history. They also inform our present.

Rich was a nineteenth century liberal, instrumental in the establishment of the Women's College in the University of Sydney. His long tenure on the Court was marked by scrupulous courtesy at a time when the bench was deeply divided. But for all his brilliance, his narrow outlook, a personal tragedy and, later, senescence, yielded a contribution far less than it might have been. By the end of his tenure, it was well-known that other judges including the great Chief Justice Sir Owen Dixon often ghosted his judgments.

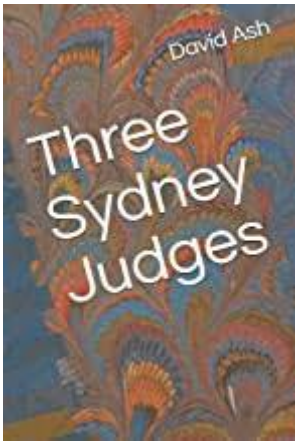
Knox was a scion of one of Australia's most powerful families. A gambler, a Tory and easily the first advocate of his day, he continues to be acknowledged as a great administrator of Australian racing. Under his leadership Sydney's Randwick racecourse was practically rebuilt and the totalisator was introduced, an innovation which soon spread to all other major race clubs across the country.

The volcanic and erratic Piddington was the least judicial and least judicious of the three. For all that, he deserves the accolade of HV Evatt, Dixon's rival and one of the founders of the United Nations, who wrote of him that in 'a long and distinguished public career [he] was destined to carry the flag of liberalism and social reform'. When Montesquieu looked at eighteenth-century England, he saw state power comprised of a legislature, an executive, and a judicature. This trident inspired America's founding fathers, but also limited their imagination.

In the words of one Australian judge, Australia's founding fathers counted to four, imagining an independent economic regulator comprising a fourth arm of national government. They provided for this fourth arm in the Australian Constitution and called it the Inter-State Commission.

As the COVID-19 tragedy unfolds and Australia's institutions look for tools to rebuild the nation, it may be time to re-explore the dreams and intentions of Australia's founding fathers and the structure of our Constitution. This book discusses the Inter-State Commission's delayed birth, its brief life under Piddington's leadership, and its untimely death.

The book is available in hardcopy and as an ebook from Amazon.com.au .



New books – Australian Jurists and Christianity

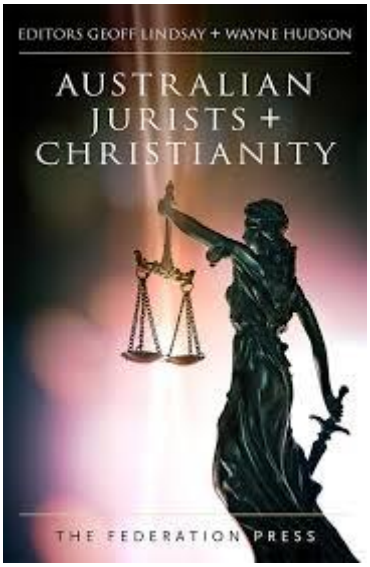
Australian Jurists and Christianity provides new perspectives on the relationship between law and religion in Australia. It claims that the relationship between law and religion was more significant in Australia than has been suggested. Specifically, it suggests that Christianity was a significant influence on Australian jurists, both as public figures and as makers of Australian law.

The volume does this by means of case studies of some 24 leading Australian jurists: Lachlan Macquarie, James Stephen, Richard Bourke, John Hubert Plunkett, George Higinbotham, Samuel Griffith, Inglis Clark, Henry Bournes Higgins, Alfred Deakin, Edith Cowan, Lord Atkin, Robert Menzies, WJV Windeyer, Roma Mitchell, Gough Whitlam, Ron Wilson, Christopher Weeramantry, Gerard Brennan, William Deane, Robin Sharwood, Eddie Mabo, Murray Gleeson, Michael Kirby and John Hatzistergos.

The case studies are introduced by a substantive guide to the nature of Australian legal practice which brings out distinctive features of the Australian experience. The volume also offers suggestions for how the role of religion in Australian legal history might be rethought in the future.

This volume forms part of the international series *Great Christian Jurists* produced under the auspices of the *Center for the Study of Law and Religion* at Emory University and includes a foreword by Australia's renowned legal historian, Bruce Kercher.

The book is to be published imminently and can be ordered now from Federation Press.



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