

Lives of the Australian chief justices

Sir Francis Forbes

First chief justice of New South Wales
1824 – 1837

By J. M. Bennett
Federation Press 2001

Sir James Dowling

Second chief justice of New South Wales
1837 – 1844

By J. M. Bennett
Federation Press 2001

Sir William a'Beckett

First chief justice of Victoria 1852 – 1857

By J. M. Bennett
Federation Press 2001



Unlike the portraits of later New South Wales chief justices, contemporary portraits of the first, Sir Francis Forbes, depict him wigless. In his recently published biography of Forbes, the distinguished legal historian, Dr J M Bennett, reveals how this seemingly minor fact sheds light on the character of Forbes and the political battlefield he deftly negotiated as the first truly independent judicial officer in the young colony.

Anger at Forbes's aversion to the traditional judicial head-gear came to a head upon the arrival in Sydney on a 'fearfully hot' February afternoon in 1828 of James Dowling to take up his post as the second puisne Judge of the Supreme Court. The contrast between the fully robed and wigged Dowling being greeted by the robed but unwigged Forbes rankled traditionalists such as Dr Robert Wardell, the leader, with William Charles Wentworth, of the Sydney Bar. Not long afterwards, at a 'prickly' dinner at the home of colonial secretary Alexander McLeay, Wardell and governor Darling's private secretary Colonel Dumaresq goaded Forbes into (by his own admission) 'the sin of having slandered wigs'. This was a tactical error for which Forbes was later admonished by the Colonial Office. So, from March 1828, despite his discomfort in the hotter months, he good-naturedly undertook to wear his wig at all

subsequent sittings of the court.

Of course, Bennett's biography considers many larger issues than Forbes's dislike of horsehair. It is the first of an ambitious series of volumes on the lives of the Australian chief justices of the nineteenth century. This intriguing and very readable work shows that the sour assessments of Forbes in earlier biographies are quite wrong and that, despite the coincidental rather than considered nature of his appointment by the Colonial Office, no other appointment '...could have been more fortunate for the future of the Australian legal system than was that of Forbes.'

Forbes's robust and independent character was shaped not in the stuffy Inns of Court in London but in his birthplace, Bermuda, where his early legal career flourished, and Newfoundland, of which he became Chief Justice in 1816 at the tender age of 32. His was a colonial career-path par excellence in an age of enormous challenges in which life-changing opportunities to cross the world could spring out of nowhere.

Bennett builds a convincing case for the pivotal role of Forbes in laying the foundations of an independent Australian legal system which fostered the subsequent development of the rule of law and democracy in what, prior to his arrival, was little more than a military outpost dominated by a class of privileged settlers. Forbes's stand against the excesses of vice-regal authority, such as governor Ralph Darling's attempts to control the press, seems all the more lonely across the mists of time. Yet the court he established is now one of the great courts of the democratic world.

Forbes's position was complicated by the fact that he had to certify laws propounded by the governor as not repugnant to the laws of England before they could be considered by the Legislative Council. His diligent exercise of this and his judicial duties frequently earned him the ire of the governor and self-interested settlers such as the execrable James Mudie, who, in his vituperative *The Felony of New South Wales*, described Forbes as the 'patron or protector of the felony'.

History, most particularly in Bennett's work, has judged Forbes more kindly. He is remembered as a truly important Australian jurist and champion of democracy whose wit, work ethic and good

humour helped him guide his developing court, and the rule of law, through the shark-infested waters of Sydney in the 1820's and 1830's.

In the second volume of his series, Bennett draws a very different portrait of Sir James Dowling, who became the second chief justice of New South Wales upon Forbes's death in 1837. Bennett's judgment that 'perhaps Dowling's very dullness was a stabilising glue in a time of great social change' seems just a little harsh on a man who had a very hard act to follow and whose personal correspondence reveals both self-deprecation and dry wit. In an 1838 letter Dowling complained to his son about his two colleagues on the bench, William Burton and John Willis thus:

Neither of my colleagues particularly love me, but of the two Burton is the least disagreeable. Willis is a fidgety restless conceited self-opinionated fellow and it requires a good deal of forbearance and caution on my part to go on smoothly with him. Some people have the opinion that he is cracked. However I hope to get on without quarrelling. Anything for a quiet life.

Although his father was Irish, Dowling spent most of his formative years in England. Early recollections of his fondness for jokes and conversations give way to the later picture of a dour and dutiful man who ultimately worked himself to death on the bench of the New South Wales Supreme Court.

Nineteenth century London resembles Sydney today insofar as who you knew was at least as important as what you knew. Bennett's skilful and elegantly woven narrative shows how Dowling's career owed as much to chance and patronage as it did to design. It was thanks to his chief patron, Lord Brougham, that he was appointed the second judge to the bench of the New South Wales Supreme Court in 1828.

It was not only Dowling's desire but his natural inclination to stand above the hurly burly of politics and personality in New South Wales. But, like Forbes before him, he found this impossible. Applying the rule of law to the detriment of one of the young colony's powerful individuals automatically condemned Dowling to being that person's enemy. Bennett details some of the painful lessons Dowling learned in this regard during, for example, the lengthy series of proceedings brought for or against two of New South Wales's

most powerful newspaper publishers – Edward Hall and Atwell Hayes. The impression left is that Dowling lacked the energy for these encounters. Yet, when it came to winning the prize of the chief justiceship on Forbes's death, Dowling's doggedness in insisting on his seniority of a matter of weeks over William Burton won through and he became chief justice in 1837.

Stabiliser rather than innovator is perhaps the best assessment of Dowling's career. He managed little progress in the development of trial by jury, for example. But Bennett notes that this really took a generation from the commencement of the Supreme Court to attain its most complete form. During Dowling's term an anomalous hangover from the penal days remained. Criminal matters were tried by a 'jury' of seven military men. The tribunal of fact in civil matters comprised two magistrate assessors and the judge. Bennett notes that the soldiers on criminal juries were frequently bored and responded by behaving like schoolboys. In one case they left insulting messages carved into the jury box for the civil assessors they expected to be there the following day.

In that climate, stability cannot have been a bad thing. They were tumultuous times and Bennett's account of Dowling's role in such events as the Myall Creek massacre trials will fascinate many readers. It won't come as a surprise that he singles Dowling out for particular praise for his pioneering work in legal reporting. This work did not make front page news but it was utterly essential to the establishment of a successful and robust Supreme Court.

William a'Beckett, the subject of the third of Bennett's biographies, also played a role in the Myall Creek trials. He was part of a defence team retained by subscriptions from rural landholders who successfully defended the first trial, which was heard before Dowling. The defence – that no victim could be identified (in fact, mutilation of the bodies rendered that impossible) succeeded, and the defendants were acquitted to the wild cheering of many white settlers in court. But a courageous stand by attorney general John Hubert Plunkett saw new proceedings instituted for the murder of one identified child. A plea of *autrefois acquit* failed before Justice Burton and the accused were found guilty and subsequently hanged.

Bennett notes the parallels between later criticisms of Dowling's conduct of the first Myall Creek trial and the historical criticism of a'Beckett's handling of the criminal trials which followed the rebellion at the Eureka Stockade in Ballarat in 1854. As with Dowling, Bennett proposes a revised assessment of a'Beckett's role in one of the most highly charged political events in Australian history. He also presided over the trial of alleged offenders at the Bakery Hill riots at Ballarat. These riots occurred on 29 November 1854, the day before the Eureka rebellion. Bennett seeks to distinguish the silence from the press and later commentators about a'Beckett's very pro-defence charge to the jury in this trial from the attacks he received in relation to his handling of the Eureka trials.

It is difficult not to feel some sympathy for a'Beckett. His father was a dour London solicitor, said to be the model for the cold-hearted Ralph Nickleby in the Charles Dickens novel *Nicholas Nickleby*. True to this characterisation a'Beckett senior refused to brief a'Beckett junior when the latter was called to the Bar in London, so young William eventually made his way to Sydney and developed a thriving practice. The desire for advancement saw him assume the chief justiceship of the new Victorian Supreme Court in 1852. His irritability on the bench may well have been due, Bennett writes, to a life-long spinal illness rather than dissatisfaction with his work. The Melbourne he presided over was convulsing with one of the greatest economic booms in Australian history due to the rivers of gold running through it from the north-west. The resulting social dislocation and excess appears to have distressed a'Beckett, not to mention the spirit of republicanism which aggressively rang around his courtroom every time another alleged Eureka rebel was acquitted.

As with Forbes and Dowling, Bennett reassesses a'Beckett as a misunderstood figure whose foundational role in establishing the rule of law has been drowned out by the intense politics of a young nation inventing itself.

Reviewed by Christopher O'Donnell

Conflict of laws in Australia (7th ed)

*P E Nygh and M Davies
Butterworths 2002*



The publication of the 7th edition of this text, in which Peter Nygh is joined as a co-author by Martin Davies (formerly Harrison Moore Professor of Law at the University of Melbourne and now

Co-Director of the prestigious Maritime Law Centre at Tulane Law School), is timely for a number of reasons.

First, it is some seven years since the 6th edition was published. In that time, Australian courts and the High Court, in particular, have delivered a series of important decisions in this area: *Henry v Henry* (1996) 185 CLR 571; *CSR Limited v Cigna Insurance Australia Limited* (1997) 189 CLR 345; *Agar v Hyde* (2000) 201 CLR 552; *Akai Pty Limited v People's Insurance Company* (1997) 188 CLR 418; *John Pfeiffer Pty Limited v Rogerson* (2000) 203 CLR 503; *Renault v Zhang* [2002] HCA 10.

Secondly, the other leading Australian text in the area, Sykes & Pryles *Australian Private International Law* (3rd ed) was last published in 1991 and is now extremely out of date.

Thirdly, the leading English texts in the area, *Dacey & Morris and Cheshire & North*, have diminished utility for Australian practitioners by reason of the fact that private international law in the United Kingdom has been radically affected, both in the areas of jurisdiction and choice of law, by the impact of Europe. Choice of law in contract and tort are now governed by statute and questions of jurisdiction and the recognition and enforcement of foreign judgments is predominantly governed by European Council Regulation 44/2001, formerly the Brussels Convention.

This work has always dealt with the subject of conflict of laws in both federal and transnational contexts. In the former context, the decision of the High Court in *John Pfeiffer Pty Limited v Rogerson* (2000) 203 CLR 503 is dealt with in numerous parts of the text, as is only appropriate given its importance not only on questions of federal choice of law but