Sir William Stawell: second chief justice of Victoria 1857-1886

By J M Bennett

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In June 1858 the township of Stawell at Pleasant Creek in Victoria, was named in honour of that colony's second chief justice. It was so named by Charles Gavan Duffy, then minister of lands, and also by then father of a future Australian chief justice.

As Stawell was in the second year of his commission, it is safe to infer that the honour was a recognition only of his political achievements and of his instrumental role in drafting the colony's constitution. Indeed, when Stawell – pronounced to rhyme with 'stall' – held its first Gift foot race in 1878, the chief justice had eight years of office to go. His pronunciation rhymed with 'stole'.

This is another installment in Dr Bennett's series *Lives of the Australian chief justices*, published by The Federation Press, and dealing at least to date with early colonial, rather than later national, appointments. At first glance, the stories of the later have a more immediate appeal, touching as they must on more recent legal and political controversies, and each of David Marr and Professor Ayres have enjoyed justifiable success on their quite different studies of, respectively, Sir Garfield Barwick and Sir Owen Dixon.

Yet, as Dr Bennett and an increasing number of other scholars are demonstrating, there is as much to be learnt about our colonial forbears through the law and its personalities as through other more moulded prisms. And to be learnt about the present: the more one delves into nineteenth century tensions between law, politics and the press, the more one feels that the only thing making it different from today is the absence of talkback radio.

Of course, things were not entirely the same, back then. As attorney-general, it was Stawell's custom to prosecute personally in all criminal cases. Even if something like that were vaguely feasible today, our system of government, with its heightened sensitivity as to the isolation of matters judicial, for the most part reserves the machination of prosecution to an independent statutory body.

There are also more mundane differences. When a trial of bushrangers broke down upon a crown witness's recanting, Stawell initiated another charge and set off with five constables to get further witnesses. It is no discourtesy to Attorney General Debus or to Director of Public Prosecutions Cowdery, but a tribute to our modern highway system, to note that Stawell had to gallop cross-country, swim through a rain-swollen river, and travel all night and all the following day, to ensure success.

Although Stawell's family motto was *'en parole je vis'* – 'by the word I live' – he didn't, at least not as a barrister in Ireland. Born in 1815, he is reputed to have said in 1842 that, as there were 40 hats on the Munster circuit and not enough work for 20, it was time to go. In Melbourne, he quickly established himself at the bar and in politics, becoming attorney-general within a decade.

This was a time of great change on the political front, in particular with the move to responsible government, and of great turmoil, in particular with the discovery of gold. Stawell's role in the Eureka trials is discussed at length; that his political and judicial ambitions were not derailed by the debacle was a testament to good fortune and strong character.

Victoria's first chief justice was William á Beckett. His health and constitution had never been good: his career at the New South Wales Bar had been hampered by spinal damage upon a youthful cricket injury. He had accepted the more sedentary – if not more arduous – task of holding office as last resident judge of Port Phillip, becoming chief justice of the new colony in 1852.

Despite being given two years' leave on full pay, by 1856 it was apparent that á Beckett's health meant that he was no longer equal to the task. One wonders, too, at the effect in 1855 on this austere man with a distaste for the liquor trade, of his daughter's marriage to an ex-convict and brewer, a relationship which was to spawn the Boyd dynasty, Martin, Robin, Arthur, et al.

Into the breach rode Stawell, and while some controversy surrounds the circumstances of the appointment, Bennett concludes that the new chief justice had done no wrong 'in succeeding in advancing himself as he did'.

And what of Stawell the judge? In his foreword, John Phillips, himself chief justice from 1991 to 2003, suggests that he was ideal for the times. 'In the latter half of the nineteenth century Victoria had no need of a Lord Denning or a Sir Owen Dixon. What it needed, and got in Stawell, were judges who were able to dispense justice speedily and without elaboration – men who were also well known public figures prepared to lead the community by speaking out, in a variety of venues, on the necessity of the rule of law as the most vital plank in an ordered society.'

Certainly, while Stawell seems to have had a very happy home life, he seems to have preferred for his family a crisp Socratic method which may have found favour in courts other than Sir Owen's. Bennett recounts that while on leave in Europe, Stawell and his family holidayed in Europe. One of his boys fell ill, and was unable to return to school in London with his siblings. When better, he worried at travelling alone. 'Do you know a train when you see it?' his father asked. 'Yes', was the answer. 'Can you get into it when you see it?' 'Yes.' 'Then where is the difficulty?'

In the 1920s, an attorney-general claimed the office of lord chief justice, as of right. According to the author of *The Oxford*

companion to law (1980, Clarendon Press, at page 565), the successful claimant was 'characterised as perhaps the worst chief justice since the seventeenth century, not as being dishonest but as lacking in dignity, fairness, and sense of justice.' Stawell was an attorney-general happy to reward his own ambition, but the result is a chief justice of vitality and probity, vain perhaps, but not lacking in those three qualities of the ideal judge.

Reviewed by David Ash

To have but not to hold: a history of attitudes to marriage and divorce in Australia 1858-1975

By Henry Finlay

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The institution of marriage, in all facets including its breakdown, has been central in the development and evolution of Australian society. The study of the manner in which the colonies, states and Commonwealth imported and developed principles dealing with the breakdown of relationships and the attitudes evinced in the process is the focus of this work.

The author prefaces the work with a quote from G M Young, *Portrait of an age* which reads '[f]or that matter, what is history about? And the conclusion I reached was that the real, central theme of history is not what happened, but what people felt about it when it was happening.' The scene is set for a glimpse into the attitudes of Australian society during the period from the introduction of divorce in South Australia in 1858 to the sweeping reforms of the *Family Law Act 1975*.

The book commences with a promising introduction which outlines the emergence of divorce in England and outlines various models of marriage and separation. What then follows is a detailed account of the adoption and amendment within Australia of the English legislation. Unfortunately for those seeking a broader societal analysis of the development of the various principles and their emergence in Australia, this work disappoints.

The introduction and conclusion are of considerable insight, interest and substance. The freely dissoluble marriage prior to the Council of Trent to the declining relevance today of the formal marriage itself mark the two historical extremes of the analysis and reflect a curious evolution of attitudes in the light of the increasing regulation of, and consequences attaching to, marriage.

The balance of the work records in considerable detail the commissions of inquiry and debates in each of the colonial legislatures and their successors surrounding the introduction and development of the various pieces of state and ultimately Commonwealth legislation. The research into these processes is meticulous and the result a comprehensive overview of the lengthy gestation that divorce legislation endured in the parliamentary arena.

Complete as such analysis is, it represents a largely arid survey of the utterances of members of the various legislatures without providing a broader view of societal attitudes save to the extent that parliamentary committees recorded the same. The result is an exploration of the legislative development of divorce without providing the reader with a broader social context within which to appreciate the attitudes of members of the community at large.

Reviewed by Michael Kearney