

Resurrecting our First Superior Courts: Reporting the Law of Colonial NSW

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In this paper we provide an overview of the preparation of a volume of law reports for NSW between 1788 and 1827. The report is a collection of the earliest court decisions in Australia. We examine the materials used to create this project and acknowledge Australia's first legal officers. We identify some of the key cases that will be published in the report with particular attention given to practice, procedure and evidentiary issues in the Court of Criminal Jurisdiction.

This new book will complement the recently published volume of Dowling's reports from 1828 to 1844.¹ The new volume of the reports will be far from conventional law reports. The judicial practice before 1815 was rarely to supply what we now think of as judgments. Instead the court records and newspaper reports usually included detailed accounts of the evidence and the result, and sometimes included the parties' own arguments.

The differences are largely dictated by the subject matter. The earliest judges had no training in law, but by the end of our period the judges were highly trained barristers. There appears to be little in common between *R. v. Barsby*, 1788, the first superior court case in Australia, and the sophisticated legal arguments of the 1827 decisions we have included here. *Barsby* was heard only a fortnight after the colony commenced, without the aid of any legally trained assistance. Its records do not show what legal reasoning might have been in operation, if any. Like so many of the early cases, any legal principle underlying the decision must be inferred from its facts and outcome, which are all that we have.

The period that the report covers were the years of famine, of battles with indigenous people, of convict rebellions, of the beginnings of bushranging and even the only military coup in Australian history. All of those events are well known to Australians,

¹ See T. Castle and B. Kercher, *Dowling's Select Cases 1828 to 1844* (2005).

but less well known is that this was also the time of the development of the rule of law.²

A case such as *Barsby* cannot be reported in the traditional way. There can be no headnotes or long formal judicial statements of law in such a case. Yet we cannot ignore *Barsby*. It was the beginning of judge-made law in this country. In order to understand it, and the hundreds of cases which follow it, we decided that it was necessary to provide the case with its own commentary. In many of these cases, the commentary must tease out the point of law in order for readers to see it.

Law reports

Unlike in many North American jurisdictions, Australian states and their colonial forebears do not have extensive early collections of law reports. Western Australia and Tasmania are in the worst position, with almost no reports before 1900. New South Wales is better off, but there is still one large gap which this new book will aim to fill. Until recently the earliest published reports in New South Wales were those compiled by Gordon Legge.³ Marked to begin in 1825, the earliest reported case in *Legge's Reports* was decided only in 1830. Legge compiled these reports at the end of the nineteenth century, mostly from newspapers and with only occasional reference to archival sources. Legge saw the gaps in law reporting, and his attempt to fill them is helpful but not complete. His volumes contain only seven cases from the period of Francis Forbes, the first Chief Justice (on the bench from 1824 to 1836), and nothing from the first 40 years.

New South Wales also has a 13 volume series called *Reports of Cases Argued and Determined in the Supreme Court of New South Wales*, covering cases decided between 1863 and 1879. They, too, were based on newspaper accounts, and they also included a few cases before 1863. Apart from a volume published in 1846, contemporaneous law reporting as we now know it did not begin until the *New South Wales Law Reports* commenced in 1879.

As we said, three years ago, the Francis Forbes Society for Australian Legal History published a volume of reports initially prepared by the second Chief Justice of New

² In the introduction of book we consider the development of judge made law in greater detail.

³ Legge, *Selection of Supreme Court Cases*.

South Wales, James Dowling.⁴ Dowling was preparing these reports from his own notes when he died in 1844. The Forbes Society volume was based entirely on Dowling's notebooks, and until now it contained the earliest reported cases in Australia (1828 to 1844).

The present volume takes law reports back to the beginning of Australian superior courts on 11 February 1788. It covers the period from then until 1827, which leads on to the Dowling volume. It has quite a different character to that volume, being based on a much broader range of sources from much less uniform courts. In effect, this volume completes the project of supplying printed case law for the whole history of New South Wales. This volume covers 1788 to 1827, the Dowling volume covers 1827 to 1844, and the latter overlaps with Legge. Legge then overlaps with the 1863 to 1879 volumes. There have been continuous reports since then.

All of the cases in this volume are online⁵ as part of a long term Macquarie University project of uncovering and publishing the hidden case law of the Australian colonies. That project has been operating for over ten years now, and presently includes New South Wales cases from 1788 until 1842, Tasmania from 1824 to 1843 and Privy Council appeals from Australian colonial courts before 1850. The great advantage of electronic texts online is that every word is searchable, but the online versions of the cases in this new book do not include this introduction, or the commentaries on the individual cases. Books and electronic files complement rather than compete with one another.

Sources

The transcriptions in this new book are taken from multiple sources in both Sydney and London. The records of the first two superior courts, the Court of Criminal Jurisdiction and the Court of Civil Jurisdiction, are kept by State Records N.S.W. These records include minutes of proceedings, the original informations (criminal charges), and civil court papers. From the civil courts, there was an appeal to the Court of Appeals, consisting of the Governor sitting alone. Some of the Appeals Court's records are in State Records N.S.W. and others are in the Mitchell Library. From the Court of Appeals there was a further appeal to the Privy Council in London,

⁴ T. Castle and B. Kercher, *Dowling's Select Cases*, above n 1.

⁵ At 'Decisions of the Superior Courts of New South Wales, 1788-1899'
<www.law.mq.edu.au/scnsw>.

the records of which are kept by the National Archives in London and in that great treasure store, the basement of the building which houses the Judicial Committee of the Privy Council.

Official and personal correspondence provided further accounts of court proceedings. The Governors sent regular dispatches to London, with copies of letters and other documents concerning court cases. Many of these were published a century later by *Historical Records of Australia*, which is another important source for this new book.

In 1803, the colony's first newspaper was established, the *Sydney Gazette*. In 1824, it was joined by the *Australian* and later by other newspapers, including the *Monitor* (1826) and eventually the *Sydney Herald* (1831, later becoming the *Sydney Morning Herald*). These newspapers published accounts of the activities of the courts. They employed shorthand writers to record what was said, sometimes in great detail. Frustratingly, they sometimes reported what the witnesses said, but not what the judges said.

The most reliable reports of judgments are authorised, that is, published with the authority of the courts. There was no such convention in New South Wales in the first 40 years, but sometimes there is good reason to be confident about the written texts we have used. Beginning with Field J., the judges sometimes provided the text of their judgments to the newspapers. Occasionally too, such as in *Walker v. Scott*, 1825, the Governor or judges declared that a newspaper account of a judgment was accurate.

For the period covered by this new book, we do not have the judges' own accounts of their judgments or court minutes. In later years, beginning with Dowling C.J. in 1828, judges' notebooks became a major source. Chief Justice Forbes' notebooks for his years on the bench in Newfoundland are in the Mitchell Library, but his books from his time in Sydney are missing.

The most important gaps in the manuscript records between 1788 and 1827 are those covering the periods of Field J. (1817 to 1823) and Forbes C.J. (1824 onwards). These were the two judges who provided the first real judgments in the superior courts of New South Wales. Fortunately, the newspapers published very detailed accounts of their judgments. Field provided the text of his judgments to the *Sydney Gazette*, and

the *Australian* was established by two members of the bar, Dr Wardell and W.C. Wentworth. The *Australian's* reports in these years were generally reliable. There is also an important gap in the manuscript record for the years 1807 and 1808, up to and including the coup against Governor Bligh. Another gap in manuscripts is between the death of Ellis Bent J.A. in 1815 and the arrival of Wylde J.A. in 1816. Frederick Garling was acting Judge Advocate at that time, while Jeffery Bent was the inactive Judge of the Supreme Court. We have to rely on the newspapers to fill this gap too.

We have relied heavily on some very reliable works of legal history, particularly those of Alex Castles⁶ and John Bennett. Apart from the Court of Civil Jurisdiction (1788-1814) and the permanent Supreme Court from 1824 onwards,⁷ the early courts have suffered relative neglect by historians.

The judges of the period

There are book length studies of the lives of some of the judges.⁸ Others are relatively neglected, except by the *Australian Dictionary of Biography*. Here we provide a brief impression of the key legal officers of the period that appear as central characters in the new book.

David Collins. David Collins was an officer of the Marines without formal legal training. He was appointed the colony's first Judge Advocate and remained in office in Sydney from 1788 until 1796. There were no lawyers on the first fleet, just a collection of the basic law books of England (including *Statutes at Large* and Blackstone's *Commentaries*). No one could be represented effectively, yet they could be flogged or hanged.

These were the starvation years, but they were also the foundation years for the rule of law. Convicts were not flogged without trial. They were taken before the Court of

⁶ A. C. Castles, *An Australian Legal History* (1982) is a cornerstone of the subject.

⁷ B. Kercher, *Debt Seduction and Other Disasters: the Birth of Civil Law in Convict N.S.W.* (1996); J.M. Bennett, *A History of the Supreme Court of New South Wales* (1974). We also acknowledge the considerable contribution of David Neal, *The Rule of Law in a Penal Colony: Law and Practice in Early New South Wales* (1991).

⁸ C.H. Currey, *David Collins: a Colonial Life* (2000); J.F. Nagle, *Collins, the Courts and the Colony: Law and Society in Colonial New South Wales* (1995); C.H. Currey, *The Brothers Bent* (1968); C.H. Currey, *Sir Francis Forbes, the First Chief Justice of the Supreme Court of New South Wales* (1968); J.M. Bennett, *Sir Francis Forbes, First Chief Justice of New South Wales, 1824-1837* (2001).

Criminal Jurisdiction, where they were tried in proceedings recognisable by English standards if not always matching them. This began on 11 February 1788, just a few days after Collins read the Act and First Charter of Justice establishing the courts. The first case, *R. v. Barsby*, 1788, established the pattern. It was a formal trial before a properly constituted court, but today we might wonder what was one of the offences charged, “abusing” the soldiers? Collins showed a principled approach to his judicial activities despite the complexities of the law which he did not always seem to understand, and despite the conflicting roles he had to perform. He was simultaneously the committing magistrate, public prosecutor and judge.⁹ Unlike the military role from which the title was derived, the Judge Advocates in New South Wales voted on the final outcome in criminal cases.¹⁰ The military officers who sat on the criminal court were accused of being “openly biased and unreasonable”, objected to performing non-military procedural duties and set about dispatching court business as “quickly as the tediousness of the process would allow”.¹¹

Collins established the colony’s civil law in the celebrated case of *Cable v. Sinclair*, in July 1788. This was apparently an action for detinue. Two young convicts successfully sued the Master of one of the first fleet ships for the loss of their baggage on the voyage. Deliberately or otherwise, Collins allowed the plaintiffs to recover damages despite the law of felony attainder. Both the plaintiffs had been sentenced to death in England and their sentences respited to transportation. They should have been attainted, unable to hold property let alone to sue for its recovery. The rule of law was in force in the colony, but it was not always to be the rule of English law. Collins began the process of bending the inherited laws of England to Australian circumstances. He developed that on the first day of mass debt recovery, showing creativity in judgment debt enforcement which the First Charter of Justice did not allow.¹²

Collins firmly endorsed the rule of law in *Boston v. Laycock*, 1795-1796, an action for assault in the Court of Civil Jurisdiction. The plaintiff was a free settler who clashed with some soldiers. In finding for the plaintiff, Collins and Governor Hunter in the Court of Appeals found that soldiers had no special status in the colony. No one was

⁹ Currey, *Brothers Bent*, above n 8,13.

¹⁰ Castles, *Australian Legal History*, above n 6, 48.

¹¹ W. Tench, *A Complete Account of the Settlement at Port Jackson in NSW* (1793), 10.

¹² See *Palmer v. Jones*, 1796.

above the law. Everyone was entitled to its protection.¹³ Other cases show Collins in a less flattering light. In *R. v. Marshall and others 1795*, he showed a lack of judicial balance. In attempting to assure three men received punishment “for the good of the state” for an alleged sexual assault, Collins tried the men twice for what was essentially the same offence.¹⁵

Richard Atkins. Atkins was the second legal amateur to hold the position of Judge Advocate. Legal disputes became increasingly complex during his long periods in office, such as land disputes.¹⁶ At the same time, military officers were placing increasing pressure on the Governors. Atkins had to cope with the superior legal skills, and the dishonesty, of George Crossley, the most prominent of the convict attorneys who appeared before him in the civil court. The Governors made a number of calls for a legally trained judge to be sent from London.

Atkins held the office of Judge Advocate in broken terms from 1796 until 1809. He held temporary appointments until 1802, when he finally received a formal appointment from England. There were two breaks in his time in office. The first was during the period in office of Richard Dore, 1798-1800, and the second was in 1808, discussed below.

Atkins had a bad reputation. He was known for his troubles with alcohol and debt. Governor Bligh called him a “disgrace to human jurisprudence”.¹⁷ Atkins also clashed with the powerful military clique which eventually overthrew the Governor in 1808. Atkins’ weaknesses and the political nature of the opposition to him were evident in *Atkins v. Harris*, 1799, heard before Dore J.A. Atkins sued for defamation when he was called a swindler. His defence was that while he was indebted, he was not dishonest. The Court of Civil Jurisdiction awarded him £30 damages.

Legal historians of the calibre of John Bennett and Alex Castles¹⁸ emphasise Atkins’ weaknesses, yet we think that a close study of his civil court decisions in particular

¹³ On Collins, Nagle, *Collins*, above n 8. On these and other judges we have also relied on Kercher, *Debt, Seduction*, above n 7, chap. 2, and *Australian Dictionary of Biography*.

¹⁵ Nagle, *Collins*, above n 8, 248-252.

¹⁶ See *Crossley v. Edwards and others*, 1804.

¹⁷ Kercher, *Debt, Seduction*, above n 7, 29.

¹⁸ J.M. Bennett, ‘Richard Atkins – An Amateur Judge Jeffreys?’ (1966) 52 *JRAHS* 261; Castles, *Australian Legal History*, 97. On Atkins, see also Atkinson, ‘Richard Atkins: The Women’s Judge’ (1999) (1) *Journal of Australian Colonial History* 115-142.

show that he created a sophisticated body of law which matched the colony's needs. For example, he took Collins' debt recovery decisions and adapted them into a system which balanced the colony's need for successful farmers and the rights of the farmers' creditors. He did the same with contract law in *Macarthur v. Thompson*, 1806. He also presided over a number of firsts in Australian law, such as the first prosecution of a European for the killing of an Aborigine: *R. v. Millar and Bevan*, 1797.

Eventually, the military officers were able to take advantage of Atkins' weaknesses. The precipitating cause of the military coup against Governor Bligh in January 1808 was the case of *R. v. Macarthur*, 1808. Captain Macarthur managed to gain title to one of Atkins' unpaid bills of exchange. When the prosecution took place, Macarthur argued that Atkins could not preside as Judge Advocate due to partiality. Macarthur's brother officers on the Court of Criminal Jurisdiction pressed the point on Governor Bligh, who replied that the court could not sit without the Judge Advocate. The confrontation ended when Major Johnston arrested Bligh, proclaimed martial law and suspended Atkins from office. A series of military officers acted as Judge Advocate for the rest of 1808, after which the rebel government felt it had no choice but to restore Atkins to the position, which he then retained until the end of 1809. Despite the criticisms of him, Atkins had skills which others lacked.

Richard Dore. The colony received a lawyer Judge Advocate when the attorney Richard Dore arrived in Sydney in 1798 and held office until his death at the end of 1800. He had no lasting effect on the courts. Governor Hunter soon complained that Dore was showing an independence in legal thought, and, of greater concern, that he became too close to the military officers who were already showing the behaviour which culminated in the coup against Governor Bligh. C.H. Currey said that Dore's opinion became "warped by the influence of the military oligarchy".¹⁹ Dore was not completely under their control however. While he was less sympathetic to small farmer-debtors than Atkins and thus more sympathetic to the officer-traders, Dore did require the military to be bound by civil law in the important decision of *Harris v. Kemp*, 1799. The case also concerned the issue of how free people should be treated in a convict colony. Dore also presided over the important trial of a number of

¹⁹ See C.H. Currey, *Brothers Bent*, above n 8, 22.

Europeans for killing Aborigines, *R. v. Powell and others*, 1799, which had such an ambiguous verdict.

Dore's legal training did not exempt him from legal mistakes.²⁰ On Dore's death, Atkins resumed his interrupted judicial career, receiving a formal appointment from London in 1802. The first experiment with a trained lawyer had not lasted long.

Ellis Bent. After the military coup and two years of illegal government, London acted strongly to reinforce the rule of law in New South Wales. It sent a new Governor, Lachlan Macquarie, a new military regiment, and a new Judge Advocate, the young Ellis Bent. They arrived at the end of 1809. Bent was the first barrister to hold judicial office in Australia. For the rest of the period covered by this new book, all the judges of the superior courts were members of the bar.

Bent did not leave us formal written judgments, though he did give extensive, well-reasoned summaries of the law and facts in some criminal cases, such as *R. v. McNaughton and Connor*, 1813. For formal written judgments the colony had to await the arrival of Wylde J.A. and especially Field J.

Ellis Bent said of Atkins' records that everything was in the utmost confusion, and that all law business had been slovenly, irregular and illegal.²¹ Bent was determined to apply English law in the colony, ending the legal creativity of Atkins and Collins. However, he soon found that New South Wales was different from England and that the differences dictated differences in law. In *Sanders v. Jones*, 1814, for example, Bent was forced to face the informalities of land-holding in the colony. Titles to land should have been clear. The Governor issued Crown grants, and the titles could then be sold from person to person. There was also a colonial registration system, yet the titles were frequently confused. Grants were not issued formally, conveyancing was scrappy, documents were lost, and land-holders were illiterate. In this case, Bent endorsed these informalities. He had little choice.

²⁰ See *R. v. Nicholls*, 1799; Evatt, *Rum Rebellion* (1975 ed) 27.

²¹ Kercher, *Debt, Seduction*, above n 7, 45.

Bent also had to deal with problems arising from the illegality of the courts during the rebel period. Governor Macquarie declared that the rebels' civil court decisions were void. On its face, that would have required Bent to rehear all the civil cases decided over the previous two years. Instead, he decided to let completed cases alone, and to rehear only unfinished cases.²² Macquarie also proclaimed that no person could sue members of the rebel courts unless the claim went beyond the simple illegality of the courts. Convicts who had been flogged on the orders of rebel courts could not sue for assault.²³ George Crossley, the ex-convict attorney, was successful, however. The rebels had transported him to Newcastle on a blatantly political charge.²⁴

Ellis Bent also dealt with increasingly complex litigation concerning shipping, land law, currency, contract law and the legal complexities of the legal position of a woman married to an attainted convict. He brought a more professional approach to the courts. There was a noticeable improvement in the detail and variety of documents from 1810 onwards. This suggests a shift away from a summary approach to process. The arrival of Ellis Bent was the beginning of judicial independence in Australia. He advocated reform of the colony's courts. Complex causes required more formal procedures, and Bent strongly advocated a move away from the military administration of the criminal court. His desire for reform slowly began to filter into court procedure and the courts' jurisprudence through the clearer articulation of legal principle. Bent recommended the establishment of a Supreme Court with power over both criminal and civil matters and the abolition of appeals to the Governor.²⁵ These reforms were not put into place until 1824 and afterwards. In the meantime, London went only half way. The imperial government decided that the military influence should remain for the criminal court and that the Governor should remain in control of civil matters. When the Second Charter of Justice was issued in 1814, the office of Judge Advocate was retained as was an unchanged criminal court. The Charter created a new Supreme Court headed by a Judge, but the appeal to the Governor remained. Ellis Bent continued in office as Judge Advocate after 1814, as head of the Court of Criminal Jurisdiction and of the new lower level civil court, the Governor's Court.

²² *Hudson v. Fitzgerald*, 1811.

²³ See *Hook v. Paterson and others*, 1810 for an unsuccessful action.

²⁴ *Crossley v. Johnston and others*, 1810.

²⁵ C.H. Currey, *Brothers Bent*, above n 8, 59-60.

Jeffery Bent. The first Judge of the newly established civil court, the Supreme Court, was Ellis Bent's brother Jeffery. Jeffery Bent made only one important decision, and that led to him hear no other Supreme Court cases before he was removed from office. In a decision which we have called *Admission of Convict Attorneys*, 1815, he refused the application of ex-convict attorneys for admission to legal practice in the Supreme Court. The other members of the court wanted to admit them, so Bent boycotted the court, forcing its closure until his dismissal. In the meantime, the Governor's Court also failed to sit until 1816. The new Supreme Court did not sit until Bent's replacement arrived in 1817. The colony had no functioning civil court in the meantime.²⁶

The emancipated former attorneys had been the only source of legal advice in the Court of Civil Jurisdiction from 1788 until its abolition in 1814. Richard Atkins and Ellis Bent had both allowed them to practise in that court.²⁷ George Crossley was the most active of the convict attorneys. He arrived in the colony in 1799 and quickly established a legal practice. He acted for some of the principal traders of the colony, and both Atkins and Governor Bligh were also reliant on his legal skills. In *Lord v. Palmer*, 1803-1809, the first Australian case to be decided by the Privy Council, Crossley made Australia's first serious constitutional argument. He examined the sources of the colony's law, and the basis of its reception of English law. Other cases demonstrate that his reputation for dishonesty was well deserved.²⁸ The founder of the Australian legal professional was highly skilled but equally devious.

John Wylde. Wylde succeeded Ellis Bent as Judge Advocate. He arrived in 1816 and held the office until 1824, in which year the Court of Criminal Jurisdiction was finally abolished. Legal historians have accused him of enthusiasm for both the death penalty and solitary confinement.²⁹ Like his contemporary Field J., Wylde sometimes delivered sophisticated judgments which were reported in the *Sydney Gazette*.³⁰ His most important criminal case was *R. v. Kirby and Thompson*, 1820, the first case in

²⁶ Castles, *Australian Legal History*, above n 6, 106-108, 114; Currey, *Brothers Bent*, 99-117.

²⁷ Kercher, *Debt, Seduction*, above n 7, 60-63.

²⁸ See *Wentworth v. Crossley*, 1801 and *Crossley v. Kable*, 1814.

²⁹ See G.D. Woods, *A History of Criminal Law in NSW: The Colonial Period 1788-1900* (2002), 44; P. Byrne, *Criminal Law and Colonial Subject: 1810-1830*, (1995) 281.

³⁰ See *R. v. Fork and others*, 1817.

which a European was executed for the murder of an Aborigine. He also made the important convict rights decision of *Eagar v. Field*, 1820. This was a decision in the Governor's Court, Field J. being one of the parties.

Barron Field. Field succeeded Jeffery Bent as Judge of the Supreme Court, arriving in Sydney in 1817. At first welcomed by Governor Macquarie, Field lost the Governor's support after he became involved in a number of the colony's controversies. He supported Crossley's admission to practice before the Supreme Court, but was blocked by the other two members of the court. He came to be disliked by the emancipists because of his support for the application of felony attain in the colony³¹ and because of his opposition to trial by jury and a representative legislature. He was close to Rev. Marsden, but fell out with John Macarthur.

To date, little has been written about the judicial decisions of Field J. He did not decide as many cases as Atkins or Ellis Bent had done, but Field's heavily referenced and lengthy judgments were published in the *Sydney Gazette*. They were expressed in a very formal style, including quotations in Latin and a curious reluctance to allow his sentences to come to an end.³² There may have been reason to suspect his impartiality in some of the cases he heard.³³ He did, however, bring professionalism to civil litigation which had not always been evident previously. He dealt with many of the major issues which required such care by his successors, such as land title law, the rights of convicts, the relationship between the courts, and control over inferior courts. He remained in office until 1824, leaving Sydney some time before the arrival of Forbes C.J.

Francis Forbes. Forbes is very much better known than either Wylde or Field, being the subject of two book length biographies.³⁴ He was the first Chief Justice of New South Wales, the first person to head the Supreme Court which is still in operation. His was very largely a colonial career. Born in Bermuda, he became Attorney General there, Chief Justice of Newfoundland (on the bench 1817-1822) and finally Chief

³¹ See *Doe dem. Jenkins v. Pearce and wife*, 1818.

³² See *Terry and others v. Ritchie*, 1819 and especially *Marsden v. Howe*, 1818.

³³ See *Marsden v. Howe*, 1818; *Eagar v. Field*, 1820; *Eagar v. de Mestre*, 1820; *Marsden v. Lawson and Douglass*, 1823.

³⁴ Currey, *Forbes*, above n 8; Bennett, *Forbes*, above n 8.

Justice of New South Wales (1824-1836). He spent only a few years in England, first in preparation for his call to the bar, secondly between his Newfoundland and New South Wales appointments (when he worked on the legislation governing both colonies) and finally for part of his retirement (at which time he was knighted). He returned to Sydney, where he died in 1841.

Forbes brought to Sydney both lucidity in the writing of judgments and the experience he had gained in Newfoundland in dealing with the kinds of issues that also arose in New South Wales. These included the control of inferior courts, the delicate requirement to hold Governors to the standards of the law, contact with indigenous people and reconciling informal land-holding with legal formalities. He was the reverse of Field in some ways, being less hostile to the emancipist cause and untouched by the hint of personal interest in his legal work. But he, too, was affected by the occasionally poisonous politics of the colony. He clashed with Governor Darling and with John Macarthur. Forbes had the great advantage over Field that cases were argued before him by very competent barristers.

The new book covers only the first few of Forbes' years on the New South Wales bench. The other years are covered by the volume of Dowling's reports.³⁵ For this volume, we have emphasized Forbes' contributions to the written law of the colony, his judgments and opinions, rather than his busy work as trial judge. Among his judgments is *R. v. Magistrates of Sydney*, 1824, which Alex Castles called "the first major constitutional case in Australian history".³⁶ Other decisions in this volume deal with some of the great issues which came before him in later years as well, including the reception of English law, freedom of the press, land law, supervision of inferior courts and the rights of indigenous people. His first important decision on the latter was *R. v. Lowe*, 1827, which has recently received the academic attention it deserves.³⁷

³⁵ Castle and Kercher, *Dowling's Select Cases*, above n 1.

³⁶ Castles, *Australian Legal History*, above n 6, 185-186.

³⁷ S. Banner, *Possessing the Pacific: Land, Settlers, and Indigenous People from Australia to Alaska* (2007) 33-34; L. Benton, *Law and Colonial Cultures: Legal Regimes in World History 1400-1900* (2002) chap. 5; B. Kercher, 'The Recognition of Aboriginal Status and Laws in the Supreme Court of New South Wales under Forbes C.J., 1824-1836' in A. Buck, J. McLaren and N. Wright (eds), *Land and Freedom: Law, Property Rights and the British Diaspora* (2001); A. Tink, *The Life of William Charles Wentworth* (forthcoming) chap. 13.

Modern lawyers might be surprised by the lack of attention paid to the separation of powers at the time Forbes was on the bench. He was a member of the Executive Council and the Legislative Council. As Chief Justice, he was required to certify that the Legislative Council's decisions were not repugnant to English law.³⁸ We have included his *Newspaper Acts Opinion*, 1827 in which he made a repugnancy declaration, as well as his *Convict Assignment Opinion*, 1827 which was closer to an advisory opinion. The colony had an Attorney General, but Forbes occasionally wrote advisory opinions of this kind.

John Stephen. John Stephen was the first puisne judge of the Supreme Court of New South Wales. Like Forbes, he had substantial colonial experience before arriving in Sydney. He was the first Solicitor General in New South Wales before being appointed to the colony's Supreme Court in 1825, which position he held until 1832.³⁹ Due to the illness of Forbes, he acted as Chief Justice in 1826. Stephen was the uncle of James Stephen junior, the influential Under Secretary of the Colonial Office, and father of Alfred Stephen, later Chief Justice of New South Wales.

Some of the key cases in the Criminal Jurisdiction

In the remaining sections of this paper we direct our attention towards some of the criminal materials we have included in the collection. By focussing our attention on the criminal records we are not suggesting they are any more important than the civil collection. Indeed, the majority of cases in the first forty years of the colony involved disputes over personal debt – the domain of the civil jurisdiction. Our focus is aimed at promoting awareness. Apart from a handful of scholars who have published wonderful work based on the archived criminal records of the first forty years of settlement, including Castles,⁴⁰ Byrne,⁴¹ Nagle⁴² and more recently Ford,⁴³ there is generally a paucity of research that relies on these primary materials. One of the most

³⁸ 4 Geo. 4, s. 96, s. 29.

³⁹ On the complications of his appointment, see C.H. Currey, *Forbes*, above n 8, 95-98.

⁴⁰ Castles, *Australian Legal History*, above n 6.

⁴¹ P. Byrne, *Criminal Law and Colonial Subject*, above n 28.

⁴² J.F. Nagle, *Collins*, above n 8.

⁴³ Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in Georgia and New South Wales 1788-1836*, Ph.D. dissertation, Columbia University 2007, (forthcoming revised manuscript: Harvard University Press, 2010).

common questions we have been asked during the editing of this new book, particularly from members of the legal community, has been “what criminal records still exist from the period and do they provide anything more than mere registers?”

A collection of firsts:

As the project consists of a collection of cases from the 1788 it has been important for us to include cases that, in one way or another, are firsts. Apart from the *Barsby* case discussed above, on the opening day of the Court Judge Advocate Collins and six military officers heard two other cases. William Cole was charged with taking and carrying away from the rear of the governor’s guard two planks. He was found guilty and sentenced to 50 lashes.⁴⁴ Thomas Hill was charged with ‘detaining a convict and forcibly taking and carrying away a certain quantity of bread’. Hill was also found guilty and ‘confined in irons for the space of one week, on bread and water on the small white rocky island adjacent to the cove’. That island was Pinchgut, or what we now know as Fort Denison.⁴⁵

By the end of 1790 the Court of Criminal Jurisdiction had heard assault cases⁴⁶; facing a dire shortage of food, the court tried multiple cases regarding the theft of flour, potatoes, biscuits and cabbages.⁴⁷ By 1790 the Court had conducted murder trials⁴⁸; tried John Callaghan for slander against the Lieutenant Governor⁴⁹; and had conducted the first carnal knowledge trial: the horrific assault on an 8 year old girl.⁵⁰ By the end of February 1788 Collins and officers had sentenced its first prisoners to death for conspiracy to rob a store and steal food,⁵¹ and by 1789 the court had sentenced its first woman to death by hanging: Ann Davis, a transported convict, who had stolen various articles of clothing from another convict Robert Sidaway.⁵²

⁴⁴ See *R v. Cole*, 1788.

⁴⁵ See *R v. Hill*, 1788.

⁴⁶ See *R v. Barsby*, 1788.

⁴⁷ See for eg *R v. Hill*, 1788 ; *R v. Sherman and Others*. 1788; *R v. Halford*, 1790; *R v. Williams and Others*, 1790.

⁴⁸ See *R v. Baker and Others*, 1789.

⁴⁹ See *R v. Callaghan*, 1789.

⁵⁰ See *R v. Wright*, 1789.

⁵¹ See *R v. Barrett and Others*, 1788.

⁵² See *R v. Davis*, 1789.

In addition to the above cases, by 1824 the Court had charged and tried prisoners under a range of crimes known to statutes and the common law as they applied to England including: sedition⁵³; sodomy⁵⁴; bestiality⁵⁵; arson⁵⁶; forgery⁵⁷; vagrancy.⁵⁸ Apart from the more common crimes, by 1824 the Court had also held trials concerning: ‘bushranger’ highway robbery⁵⁹; in 1797 the first trial of a settler for the murder of a native⁶⁰; in 1816 the first native legally tried and executed in Australia for sexual assault and robbery⁶¹; and in 1820 the Criminal Court of Jurisdiction convicted and executed the first person for the murder of a native.⁶² We have also included case records relevant to the Rum Rebellion, although very few survive, including the John Macarthur trial of January 1808 and the trial *R v. Sutter* (or Suttor), in which the defendant rejects the legality of the rebel courts after the rebellion of 1808.

Issues of Court Procedure and Evidence:

The new book is as much a work of history as it is of law. It is our attempt to blend the two, to show that it is not possible to understand the law of this jurisdiction without understanding something of its history. In saying this, we have endeavoured to identify specific examples of cases, in the everyday operation of the Court, that challenge the relevance of English law. From the very first decision of *Barsby*, these challenges become evident. Samuel Barsby had committed four offences but was indicted for the one ‘summary’ offence; it was to this single charge set out in the indictment that the plea of guilty was taken. On one reading it could be suggested, from the first day of proceedings, the NSW Court of Criminal Jurisdiction operated with a degree of informality and imprecision in the framing of criminal charges, created uncertainty in practice and procedure and raised the potential for injustice. The case could alternatively be read as one that illustrates the necessity of adaptation

⁵³ See *R v. Webb*, 1794.

⁵⁴ See *R v. Wilkinson*, 1795.

⁵⁵ See *R v. Hyson*, 1796.

⁵⁶ See *R v. Pawson*, 1795.

⁵⁷ See *R v. McArthur and Others*, 1796.

⁵⁸ See *R v. Sanders and Evans*, 1797.

⁵⁹ See *R v. Geary and Ors*, 1821.

⁶⁰ See *R v. Miller and Bevan*, 1797.

⁶¹ See *R v. Moowattin or Mow-watty*, 1816.

⁶² See *R v. Kirby and Ors*, 1820 discussed above.

to a penal colony. It is this constant negotiation between application and adaptation which emerges throughout the selection.

We have also selected many cases where the court has extended the opportunity to the prisoner to be heard in their own defence,⁶³ to raise alibis,⁶⁴ to cross examine Crown witnesses⁶⁵ and allowed prisoners to submit their own written defence.⁶⁶ In addition, there are also examples in the collection where a prisoner has been acquitted because an error has been made in drafting the charge⁶⁷ and a number of examples where the prisoner has been acquitted even though the Judge presiding over the case had framed the charge.⁶⁸

In terms of evidentiary issues we have included cases where ‘expert’ evidence had considerable influence on the Court. Doctors regularly gave evidence about the cause of injury and the cause of death.⁶⁹ The selection also includes examples of cases where the ‘ordinary person’s’ understanding of admissible evidence significantly differed from that of the legally trained mind of the Judge (particularly post 1810). Depositions and the oral evidence of witnesses, for example, commonly included comments based on nothing more than suspicion, hearsay and superstition – particularly in some of the murder cases. For example, Eliza Campbell, a servant, was charged for murdering her master, Brackfield. She was suspected of the crime because she would not touch a shroud.⁷⁰

There is no better example of a travesty of justice arising out of a judge’s incorrect application of the laws of evidence than in the case of Isaac Nicholls.⁷¹ Nicholls, a pardoned convict, was in charge of labour gangs in the colony and had earned the ire of the military. He was charged with being the receiver of stolen goods (tobacco). Although Nicholls submitted a strong case in his defence, he was found guilty and

⁶³ See for eg *R v. Anderson and Ors*, 1816.

⁶⁴ See for eg *R v. McGee and Ors*, 1816.

⁶⁵ See *R v. Callaghan*, 1789: cross-examining the Governor himself

⁶⁶ See *R v. Luttrell*, 1810.

⁶⁷ See *R v. Till and Bottom*, 1799.

⁶⁸ See *R v. Plowman*, 1789.

⁶⁹ See *R v. Baker and Ors*, 1788.

⁷⁰ See *R v. Campbell*, 1825; See Paula Byrne, *Criminal Law and Colonial Subject*, above n 28.

⁷¹ See *R v. Nicholls*, 1799: Dore J.A.

sentenced to 14 yrs transportation on the basis of *third hand* hearsay evidence. Evatt writes in *Rum Rebellion*:

I do not suppose that in the whole history of any criminal court in the British Empire had similar evidence – hearsay upon hearsay upon hearsay – ever been admitted.⁷²

Despite these dramatic stumbles, we have also included cases where the Judge Advocates have taken very specific care in applying the formal requirements of the rules of evidence. For example, in the sexual assault case previously mentioned involving an 8 year old female victim, David Collins, who was not legally trained, went to great lengths to assure the girl knew her catechism and made her recite the Lords Prayer before her evidence could be sworn.⁷³ Richard Atkins also followed the same procedure in two cases involving the sexual assault of minors in 1804 and 1805.⁷⁴

The fascinating trial of Ann Davis also illustrates David Collins's awareness of English criminal procedure and the rules of evidence. Davis was the first woman executed in the colony. When hearing her sentence, she claimed she was 'quick with child'. Under English law a panel of twelve matrons were to be sworn to examine, and give evidence, as to the truth of such a claim. Despite jury trials being prohibited in the colony, twelve women were found who held she was not quick with child.

Drawing comparisons between Judges in the post colonial period

Although we are unable to reproduce every court document in the records, we have attempted to select multiple cases across each term for comparative purposes. The secondary source material often draws a convenient distinction between the 1788 – 1808 period, that consisted mostly of judges who were not legally trained (exception being Dore); and the 1809 – 1824 period, where all the judges had strong legal credentials. The implication is that this latter period gave rise to a more competent

⁷² Evatt, *Rum Rebellion*, above n 19, 27.

⁷³ The prisoner, Wright, was convicted and sentenced to death. He was however pardoned by Governor Phillip on the condition of being removed to Norfolk Island. Tragically, Wright repeated his behaviour and attempted to rape a 10 yr old two years later on Norfolk Island.

⁷⁴ See for eg *R v. Bevan*, 1804; *R v. Daily*, 1805.

and professional court. Alex Castles, for example, remarks that when Bent and Wylde arrived in the colony ‘they brought higher standards to the working of the Court compared with their predecessors’.⁷⁵

We have included cases that illustrate the lack of legal ability, or fortitude, of the pre 1810 Judges. For example, the legally trained Richard Dore’s ‘hearsay’ trial in *R v Nicholls* previously discussed. We have also included the trial of John Marshall who was charged for assaulting Edward Abbott and threatening John Macarthur. In that trial, Richard Atkins was unable to advise the court whether the acts complained of were an assault in law, or whether the governor’s direction to re-open the case, and consider new evidence, should be obeyed.⁷⁶ However, we have also selected a number of cases where Atkins and Dore carefully follow the rules of practice and procedure and exhibit a degree of thoroughness in their judicial responsibilities.⁷⁷

In making our selection it has also been important to identify circumstances where judges have had to consider similar fact patterns or consider similar subject matter. For example, in the collection we have included at least one decision in each judicial term where a Judge Advocate, or Acting Judge Advocate, has had to consider a case regarding an aboriginal.

Conclusion

It is our hope that the publication of the 1788-1827 report will give a wider audience, who may not have previously had access to this primary material, the opportunity to engage with the existing commentary with reference to the original case documents and first hand case accounts. Commentary on the period rarely draws direct comparisons between the jurisprudence of the pre 1824 judges, or examines to what extent the judges might be developing their own internal rules. Publishing court documents allows these direct comparisons in judicial approaches to occur in terms of case subject matter, practice and procedure, the application of evidence, the treatment of witness testimony, cross examination and attitudes towards prisoner defences. This,

⁷⁵ Castles, *Australian Legal History*, above n 6, 66.

⁷⁶ See *R v. Marshall*, 1801.

⁷⁷ See for eg *R v. Daily*, 1805.

of course, is only a sample of the possibilities. The interdisciplinary possibilities are limitless. In addition, the materials will hopefully be a useful 'comparative starting point' to begin to explore whether the judges of the period are following each other's precedent; particularly in circumstances unique to the colony that challenge the relevance of English law.