

BOOK REVIEWS

Sir Francis Forbes, by C. H. CURREY, M.A., LL.D., Author and Historian.
(Angus and Robertson Ltd, 1968), pp. i-xii, 1-586. \$10.00

The Brothers Bent, by C. H. CURREY, M.A., LL.D., Author and Historian.
(Sydney University Press, 1968), pp. 1-176. \$4.75.

The scholarly study of legal history is generally a slow, painstaking process, frequently made more arduous by the need to combine the skills of the lawyer with the arts of the specialist historian. In Australia, the study of this country's legal history is often an even more demanding exercise. As yet, the systematic analysis of Australian legal history is still in its infancy. On the honour roll of pioneering efforts to open up such studies of Australian legal history the works of Dr C. H. Currey, exemplified by his two latest works in this field of scholarship, seem certain to find a notable place. In both, Dr Currey's tremendous industry, over many years, has laid a firm foundation for a new understanding of important periods in the first fifty formative years of legal history in New South Wales.

Of these two works, the large, detailed biography of Sir Francis Forbes is, almost of necessity, much more than a biographical study of the judicial career of the first Chief Justice of the Supreme Court of New South Wales. Forbes, by force of circumstance, was for many years embroiled deeply in the conduct of political as well as judicial affairs in the colony. He was a member of the Executive Council from 1825 to 1829 and a foundation member of the Legislative Council on which he served until his departure on leave from the colony in 1836. His activities on these bodies as well as his work in his judicial capacity often made him a focal point in the bitter conflicts which ranged around such issues as the demand for trial by jury, the stamp tax on newspapers proposed by Governor Darling and other *causes célèbres* of the period 1825-1836.

Dr Currey has spared neither time nor effort in exposing the problems, the legal complexities, the public and personal feuds which surrounded the Chief Justice during his term of office. Through it all, Forbes rightly emerges as a lawyer of distinction with a keen sense of justice which often, and unjustifiably, brought him into disrepute with conservative elements in New South Wales and Britain. In many ways, in comparison with others of his time in colonial government, Forbes had perhaps an unequalled understanding of the problems of colonial government at every level of its operation. His youth in Bermuda, his period as Chief Justice of Newfoundland and his work at the Colonial Office before his appointment to New South Wales, gave him this understanding and an accompanying sense of perspective with respect to colonial affairs which was so often lacking in the general run of colonial administrators, colonial judges and the officials at Whitehall who supervised Britain's overseas possessions. This understanding and perspective manifested itself in a variety of ways. On the Bench, it enabled the Chief Justice, who would on occasion call in aid not only British but colonial precedents as well, to adapt English law to the prevailing circumstances in

New South Wales in a way which less experienced colonial judges might well have believed to be impossible. In this fashion he helped to create standards on the operation of the law in this country which have, in some instances at least, stood the test of time. In the non-judicial spheres of government in which he was so closely involved, Forbes' colonial background gave him an undoubted capacity to gauge the temper and needs of his times and this, combined with his moderate liberalism, made him a strong force for balanced progress whilst earning him the enmity of the Macarthur faction and other conservative forces in both New South Wales and Britain.

One of the greatest sources of scholarly strength in this work, and ironically, in some places, a cause of weakness, is the meticulous attention which Dr Currey has paid to official source materials. A mass of official papers from the Colonial Office, Governors' correspondence and records from the Supreme Court of New South Wales have been examined exhaustively and synthesized for this biography. In sum, they make this volume a unique repository of information on the Forbes' period in New South Wales. Because of this, there is no doubt that this work will long be used and acknowledged with gratitude by succeeding generations of legal and general historians. At the same time, however, there are instances of what seems to be an undue concern with the *minutiae* of official correspondence and official attitudes which sometimes tends to make it difficult to comprehend and assess the importance of the general trend of events surrounding aspects of Forbes' career in New South Wales. There are places, too, where source materials speak too much for themselves, unanalyzed and uncriticized.

Dealing with Forbes' work on the Bench, Dr Currey explores, in considerable detail, several of the important cases which influenced strongly the course of events in this period. The action for seditious libel against Dr Robert Wardell for his attacks on Governor Darling in the *Australian*, the case concerning the seizure of the *Almorah*, the proceedings concerning James Ring and other judicial hearings in which factional disputes in New South Wales led to recourse to the courts are dealt with fully and effectively. As in the late Dr Evatt's *Rum Rebellion*, the analysis of cases like these creates new levels of understanding for those concerned with the history of this time. The importance of these cases was, however, limited basically to the time and place in which they were decided and unfortunately Dr Currey has not shown the same interest and concern with other, perhaps more mundane judicial pronouncements which nevertheless, in the long term, put the stamp of Forbes' style of judicial mind on later developments in the law in Australia. Forbes, for example, probably held unusual views on the application of English law in overseas British possessions and sought to put these into operation in New South Wales. Dr Currey, however, fails to examine this issue in any great depth, failing, as a result, to provide the form of perspective which would enable constructive judgments to be made on his subject's contribution to the subsequent development of law in this country.

Whatever the defects of this work, the fact remains, however, that it provides a permanent, significant memorial to one of the great figures in the history of the law in Australia. It is always difficult in a biography of this type, which calls for a balance to be set between the needs of general historical exposition and lawyer-like analysis, to succeed completely in the task. Dr Currey has succeeded more than most in attempting this process and if, in the last analysis, he leans more to history rather than to law it may be that history, too, will judge Forbes more by his work off the Bench than when he was presiding over the Supreme Court of New South Wales.

In contrast to the Forbes' era in the history of New South Wales, which had long term influences on the political and legal life of the colony, and other Australian colonies as well, the period covered by the sojourn of the brothers Bent in Australia is of much less present day importance. The New South Wales Act of 1823 and the Australian Courts Act of 1828 transformed effectively the legal system of the colony with the result that the complexities and legal conflicts of the earlier period no longer affected vitally the later development of the law. Even so, there is much of intrinsic and lasting historical interest in the legal history of this early period. In dealing with the life and times of Ellis Bent, who was Judge Advocate of New South Wales from 1809 to 1815, and of his elder brother, Jeffery Hart, who was the first Judge of the new Supreme Court created under the Charter of Justice of 1814, Dr Currey recalls some of the colourful and sometimes almost satirical beginnings of the law in Australia.

In *The Brothers Bent* Dr Currey carefully sketches in the historical background to the work of these two judicial officers in New South Wales. In a more incisive fashion, when compared with his writing in *Sir Francis Forbes*, Dr Currey sets this background with neat, entertaining pen pictures of such *dramatis personae* as the Gilbertian Richard Atkins, Ellis Bent's immediate predecessor as Judge Advocate, and the plausible rogue, George Crossley, the ex-convict attorney who, for a time, returned to practice in New South Wales and was at least partially, if unintentionally, responsible for the fall from grace of Jeffery Hart Bent. Dr Currey also gives a brief account of the structure of the courts in the period 1788-1823 and the problems which complicated the operation of the law at the time of the Bents.

In dealing with Ellis Bent, Dr Currey has an obvious and justifiable sympathy for his subject. As the first, long term, legally trained Judge Advocate, Ellis Bent had much to contend with after his arrival in the colony. Not only was he required to supervise and preside over the already unsuitable superior criminal and civil courts, he sat regularly as a magistrate for many years as well as advising Governor Macquarie and carrying out other duties, both official and otherwise, with respect to the operation of the law. Dr Currey is perhaps a little cursory in his examination of Ellis Bent's work in his judicial capacity, preferring to concentrate more on the aspects of the Judge Advocate's life in the colony as they related to the general course of historical events during

this period. Even so, this biographical essay on Ellis Bent fills a long felt need for the study of the early years of the Macquarie era in New South Wales.

Although, in contrast to his treatment of Ellis Bent, Dr Currey clearly has little sympathy with Jeffery Hart Bent, he fails sometimes to bring out, as effectively as he might have done, the absurdity of the situation faced by Governor Macquarie when the self-righteous, pompous, elder brother of Ellis Bent refused to sit on the Bench of the newly-created Supreme Court for more than two years. The vain self-seeking, elder brother Bent may have had some justification for his stand in refusing to take part in Supreme Court proceedings, thus stopping them effectively, when faced with the almost certain possibility that George Crossley and other ex-convict lawyers would be admitted to practice before the tribunal. The almost childish acts of petulance which followed, however, and which are recalled by Dr Currey, demonstrated that the elder Bent had few, if any, traits, to commend him. The story of Jeffery Hart Bent's sojourn in Australia fortunately has had few parallels in Australian legal history although, in later years, the actions of Boothby J. in South Australia, leading up to his removal, are, to some extent, reminiscent of the situation created for New South Wales by its first Supreme Court Judge.

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Australian Divorce Law and Practice, by PAUL TOOSE, C.B.E., Q.C., LL.B., RAY WATSON, Q.C., B.A., LL.B. and DAVID BENJAFIELD, LL.B. (Syd.), D. PHIL. (Oxon.), Professor of Law, University of Sydney, Member of the Law Reform Commission of N.S.W., 1966-1967. (The Law Book Company Limited, 1968), pp. i-cvi, 1-1162 and Supplement by RAY WATSON, Q.C., B.A., LL.B., pp. 1-22. \$29.80.

Few good books have been written specifically for Australian legal practitioners. *Australian Divorce Law and Practice* is one of them. It presents an exhaustive coverage of its subject in the form of annotations to the Matrimonial Causes Act 1959-1966 (Cth) and the Matrimonial Causes Rules, and the Marriage Act 1961-1966 (Cth) and the Regulations made under it. This method of presentation, supported by extensive indexes, facilitates access to the immense store of information which the authors have gathered, though it entails much repetition of material which is relevant to more than one statutory provision. The authors and publishers, however, have clearly determined that considerations of space should not unduly inhibit them in providing a comprehensive handbook for the busy practitioner. Extracts from judgments in leading cases are lavishly quoted, and where a conflict of judicial opinion has arisen on a significant issue, each side of the controversy is permitted to speak for itself at generous length.

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