

BOOK REVIEWS

LIVES OF THE AUSTRALIAN CHIEF JUSTICES: SIR FRANCIS FORBES: FIRST CHIEF JUSTICE OF NEW SOUTH WALES 1824-1837

FEDERATION PRESS, SYDNEY, 2001, 176 PAGES

SIR JAMES DOWLING: SECOND CHIEF JUSTICE OF NEW SOUTH WALES 1837-1844

FEDERATION PRESS, SYDNEY, 2001, 212 PAGES

SIR WILLIAM A'BECKETT: FIRST CHIEF JUSTICE OF VICTORIA 1852-1857

FEDERATION PRESS, SYDNEY, 2001, 130 PAGES

JOHN M BENNETT

Professor John Bennett is undertaking one of the most ambitious projects of scholarship ever attempted in Australian law. He plans to follow these three beautifully presented short biographies of Forbes, Dowling and a'Beckett, with 37 others. The subjects of these books were the first two Chief Justices of New South Wales, and the first in the newly separated colony of Victoria. This series of the *Lives of the Australian Chief Justices* is intended to cover all of the nineteenth century Chief Justices of the Australian colonies. The author and the Federation Press deserve the warmest praise for the project.

This series follows a strong tradition of short biographies of eminent judges. Campbell's ten volumes of the *Lives of the Lord Chancellors*¹ set the pattern for much of what followed. They were published in the middle of the nineteenth century, and have since been supplemented by further volumes about the subsequent holders of that office.² There is a similar tradition of judicial biography in the United States, where the mid-nineteenth century saw short biographies of the

¹ See for example, John Lord Campbell, *Lives of the Lord Chancellors and Keepers of the Great Seal of England, from the Earliest Times to the Reign of King George IV* (4th ed, 1857) vol 9.

² See R F V Heuston, *Lives of the Lord Chancellors 1885-1940* (reissued with corrections, 1987); R F V Heuston, *Lives of the Lord Chancellors 1940-1970* (1987).

Chief Justices of the Supreme Court, collected two or more to a volume.³ As in England, judicial biography certainly did not end in the United States with the turn of the twentieth century.⁴ There are also numerous biographies of Australian judges, although book length judicial biography in Australia began only 40 years ago.⁵ If it was once fashionable to sneer at judicial biography,⁶ intellectual currents now run in its favour. If anything, it is now growing in significance, rather than declining.

The great man view of history is less easy to discard in legal history than elsewhere, because the (nearly always) men who preside in court rooms are so often very influential in shaping the law. As our belief in the fairy tale of strict legalism fades, biographers can have more to say. When they were convinced that judges were merely technicians through whom the law passed essentially unchanged and unaffected by the judges' own values, judicial biographers could do little more than examine the personal lives and pre-judicial (sometimes political) careers of judges. Biographers had little to say about their subjects' most important roles, as the writers of legally creative judgments. All that an earlier generation of biographers could say about judges as judges was that they had a frosty personality or not, and that they were legally skilled or otherwise. Those who no longer believe in the fairy tale can go much further, beginning with analysis of judgments in terms of the judges' values.

These books span these two kinds of judicial biography. Over the past few decades, John Bennett has provided us with some of the cornerstones of Australian legal history, through his histories of the courts and institutions of the law, particularly in New South Wales. He describes C H Currey, the first important legal biographer in Australia, as his mentor,⁷ which links Bennett to the effective beginning of energetically studied legal history in this country. John Bennett is a barrister, one of the great scholars of that profession, as well as a skilled historian, and in these books we can see both elements.

³ George Van Santvoord, *Sketches of the Lives, Times and Judicial Services of the Chief Justices of the Supreme Court of the United States* (first published 1854, 2nd ed 1882 reprinted, 1977); Henry Flanders, *The Lives and Times of the Chief Justices of the Supreme Court of the United States* (1881, reprinted no date) vol 1.

⁴ See for example, Leon Friedman and Fred Israel (eds), *The Justices of the United States Supreme Court 1789-1978: their Lives and Major Opinions* (reprinted, 1980) vol 1.

⁵ See for example, C H Currey, *The Brothers Bent: Judge-Advocate Ellis Bent and Judge Jeffery Hart Bent* (1968); C H Currey, *Sir Francis Forbes: the First Chief Justice of the Supreme Court of New South Wales* (1968); John Reynolds, *Edmund Barton* (1948); A J Hannan, *The Life of Chief Justice Way* (1960); Roger Joyce, *Samuel Walker Griffith* (1984); David Marr, *Barwick* (1980); Zelman Cowen, *Isaac Isaacs* (1993); Peter Crockett, *Evatt: a Life* (1993); Graham Fricke, *Judges of the High Court* (1986); Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001).

⁶ Heuston, *Lives 1885-1940*, page vii.

⁷ J M Bennett, *Sir Francis Forbes, First Chief Justice of New South Wales 1824-1837* (2001) page x.

Bennett obviously admires Francis Forbes, the first Chief Justice of New South Wales, and for very good reason. Forbes was a great judge, one who stood up for law against two governors who were more used to military or naval discipline than the subtleties of law. More importantly, Forbes wrote lucid judgments, using the tools of the law to fashion new solutions to problems barely known to mother England. On this point it is possible to engage with the arguments in the first of these three volumes. Bennett emphasises the Englishness of Forbes' approach,⁸ while others might emphasise difference and innovation. He also argues that Forbes' political allegiances 'are strictly irrelevant to, and a distraction from, a proper understanding of the discharge of his judicial duties'.⁹ Few legal historians whose work has developed more recently would make that claim, strictly or not. There is more to say about Forbes' judicial style than this book does, or even Currey's much longer biography of the first Chief Justice of New South Wales. Forbes was one of the great creators of Australian law, a powerful adapter of the inheritance to Australian circumstances, yet one who was sometimes frustratingly inconsistent.¹⁰

In the volumes on Dowling and a'Beckett the author provides us with general legal history as well as biographies of these Chief Justices. In the Forbes biography, Bennett left out much of the case law because it had been examined by Currey,¹¹ but not so with the other volumes. This is where these books shine. When all 40 volumes are published, we will have a new general history of nineteenth century case law in Australia. There are still thousands of cases to draw out of the obscurity of nineteenth century newspapers and judges' notebooks, and these volumes will play a significant role in that important work.

These three volumes have much in common with Campbell's *Lives of the Lord Chancellors*, because their subjects had so much in common. The earliest Chief Justices of colonial Australia, like the Lords Chancellor of England, were more than judicial figures. They had legislative and judicial roles as well, which Bennett emphasises. The strength of his books rest in his analysis of the interweaving of these roles and his emphasis on case law in two of these volumes. When this is added to the comparative analysis of other writers,¹² and the rediscovery of primary sources,¹³ we are on the verge of something new in Australian legal history: a contextual and comparative analysis of judicial decision making in a new legal land.

⁸ Ibid 23, 30.

⁹ Ibid 71.

¹⁰ Contrast, for example, his approach in *R v Ballard*, 1829, with that in *R v Murrell*, 1836 (both at www.law.mq.edu.au/scnsw). Like *R v Gardener*, 1829 and *R v Farrell*, 1831, these cases can be distinguished technically, yet the broad approach varies without explanation. These cases also show Forbes' creativity with English law.

¹¹ Bennett, above n 7, 61.

¹² See Peter Karsten, *Between Law and Custom: 'High' and 'Low' Legal Cultures in the Lands of the British Diaspora - the United States, Canada, Australia, and New Zealand, 1600-1900* (2002).

¹³ See www.law.mq.edu.au/scnsw and /sctas.

These three books and those to follow are the culmination of 40 years' work by one of Australia's founding legal historians. His significance has been marked by his recent appointment as Adjunct Professor of Law at Macquarie University, from which John Bennett was one of the first graduates in history.

Professor Bruce Kercher
Macquarie University