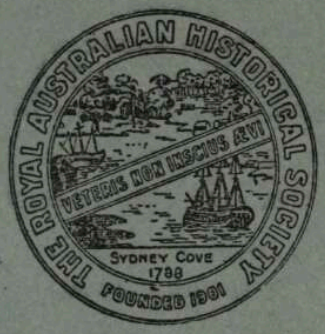
Royal Australian Historical Society.

FOUNDED 1901.



JOURNAL AND PROCEEDINGS

VOL. XIX. PART II.

Sydney

1933

For contents see back cover

Royal Australian Historical Society

JOURNAL AND PROCEEDINGS.

Vol. XIX. 1933. Part II.

The First Three Chief Justices of the Supreme Court of New South Wales.

By C. H. CURREY, M.A., LL.D.

(Read before the Society, October 25, 1932.)

I.—SIR FRANCIS FORBES.

Francis Forbes, the first Chief Justice of New South Wales, was born in 1784 on the island of Bermuda. He was called to the English Bar in 1812, and returned, in 1813, to Bermuda as its Attorney and Advocate-General. Three years later he became Chief Justice of Newfoundland. There he spent six happy years. In 1822, he was so fortunate as to have the choice of the seat he occupied, or a lucrative judicial appointment in India, or the Chief Justiceship of the Supreme Court of New South Wales. Happily for this State, he decided to become its first Chief Justice.

With his wife and three boys he left England on August 28, 1823. On March 5, 1824, they entered Sydney Heads. "How can I describe my sensations on that beautiful morning?" wrote Lady Forbes. "It took us four hours to sail up the harbour to our anchorage in Sydney Cove, and, during the whole of that time, fresh beauties in the scenery around us were continually arresting our attention. The numerous bays, the white sandy beaches, and the green-capped islands which rose

from the limpid plane of blue water seemed to me rather like some glimpse of a fairy dreamland than actual reality. And this paradise was to be our future home."

"At 2 p.m. on Monday, May 17," reports the *Sydney Gazette* of May 20, 1824, "the Supreme Court opened. At a quarter past two, His Honor the Chief Justice took his seat on the Bench, accompanied by the members, William Wemyss and Edward Riley, Esquires. Upon the conclusion of the reading of the Charter of Justice by Mr. Joshua John Moore, His Honor addressed himself to the Attorney-General, Mr. Saxe Bannister, whose Commission was then read. The oath of office was administered to that gentleman. Mr. Joshua John Moore was sworn in as the Prothonotary of the Court, and Mr. John Gurner as the Registrar. His Honor the Chief Justice then informed those gentlemen who had practised as solicitors in the former Courts, that the Court would be ready to receive applications, accompanied by such credentials as they might be prepared to submit, for admission to practice in the Supreme Court on Wednesday morning at 10 o'clock, to which hour His Honor directed the Court to be adjourned. We need hardly say that the auditory upon this occasion was the most respectable, distinguished, and crowded that has been witnessed for years. The inhabitants seem to have awakened, as it were, to the valuable extension of their immunities, so graciously conferred by Parliament and approved and confirmed by Her Majesty."

Conscious of a solemn obligation to do justice to all men impartially and dispassionately, feeling that the people of the colony looked to the Supreme Court to protect them in the enjoyment of their lives, their liberty and their property, the new Judge established in New South Wales the tradition of a fearless and independent judiciary and won for himself a name that will endure in the history of our legal institutions. "Sir Francis Forbes," wrote Mr. Justice Therry,* was the model of an excellent Judge. He possessed judicial qualities of a high order—imperturbability, calmness of temper, acute discrimination, and a thorough acquaintance with legal

**Reminiscences*, p. 333.

principles." Heavy and exacting as was his judicial work, no judgment, decree, order or sentence ever fell hastily from his lips. We lawyers," he wrote,† "are bred in a severe school. Accustomed to watch the seat of judgment at Westminster, and to hear the pure oracles of the temples of Eleusis, we feel what is just with the force of a passion, and any abuse there seems nothing short of sacrilege. For myself I can sincerely say that the possibility of having pronounced an erroneous opinion upon even a disputable point of law or fact at a trial is quite sufficient to disturb my pillow; what feelings would follow upon a malicious or vindictive judgment I can only conjecture."

To his labours on the Bench, Forbes added those which fell to an active member of the Legislative Council. Before leaving England he had helped to draft the first supremely important Act in the constitutional history of New South Wales. It was enacted in 1823, and is cited as 4 Geo. V., c. 96. In it is to be found the statutory basis of both the existing Supreme Court and the first Legislative Council. When, in obedience to it, the latter body was created, Forbes was one of its original members, and there remained until ill-health compelled him to retire in 1836. When it met for the first time on August 24, 1824, he took the chair. Thus he became the first President of our Legislative Council—a position he occupied until, at the direction of the Colonial Office, he vacated it in favour of Governor Darling.

In the Council, the Chief Justice took a liberal view of the questions that arose. Three of the major issues in his generation centred about the winning of self-government, the trial of persons in criminal cases by a jury of twelve citizens, and the abolition of transportation. His influence in determining the final result in each case was considerable.

"I am immovably convinced," he wrote in 1827,‡ "of the rectitude of the opinion that New South Wales can only be governed in New South Wales. The voice of the public will be heard, and, if it is not permitted to

†*Historical Records of Australia*, Series IV., Vol. I., p. 713.
‡*Ibid*, p. 707.

speak through the medium of a House of Assembly, it will seek such other channels of proclaiming itself as cannot be closed—the English Press and the English Parliament." The Australian community was then divided into two parties. Forbes named them the emigrants and the liberals. The former included most of the upper classes, while the latter was the more numerous. In point of wealth and possessions, they were nearly balanced. Both parties agreed that the Legislative Council, as constituted by the Acts of 1823 and 1828, had lost the confidence of the public, but they disagreed as to the reform of it. The emigrant party wished to retain it as a nominee House, but to increase the number of its unofficial members. The liberals proposed a Legislative Assembly chosen by the people. "In this, as in most other cases," wrote Forbes, "a middle course is the safest. A Legislative Council composed of double the number of the present members, one half to be nominated by the Crown and the other half elected by the inhabitants, seems to present the nearest point of approximation to both parties, to be the least exposed to objection, and best calculated to unite public confidence with a due support of government."

At Governor Bourke's request, he drafted the Bill which became the basis of the Act of 1842 whereby New South Wales secured representative government. "Assuredly," wrote the Governor some years later, "the liberal party in the colony ought not to forget his services. If I had any success in removing abuses and opening the way to a better course of government in the colony, to the assistance I received from Forbes I am mainly indebted."

The opposition to trial by a civil jury in criminal cases had its root in the same vehement prejudices as had that to the granting of self-government. "With respect to trial by jury," wrote Bathurst in 1815, "it was a matter of doubt whether, in a society so constituted as that of New South Wales, individuals might not bring with them into Court passions and prejudices ill-fitted for the discharge of their duty as jurymen. If

free settlers, whose feelings towards convicts and their descendants in many instances appeared to be but little under restraint, were to sit in judgment on convicts, and that, too, in cases where settlers might be parties, the priciple of jury trial that a man should be tried by his peers could not fairly be acted upon."

Forbes did not share these misgivings. In 1824, he so construed Sec. 19 of 4 Geo. IV., c. 96, that trial by an ordinary jury of twelve citizens was the regular practice in the Courts of Quarter Session, whereas, in the Supreme Court, the jury consisted of six naval or military officers nominated by the Governor. In the result, none of the evils anticipated by Lord Bathurst occurred. "I verily believe," wrote Governor Brisbane in 1825,¶ "that there are not a dozen individuals in the whole colony who would openly come forward and oppose it being still further introduced." In 1828, however, the British Government provided by statute that because of "the peculiar state of society in the country" the form of trial used in the Supreme Court should be observed in the Quarter Sessions.

"The propriety of the verdict of the military juries has never been questioned to my knowledge in any cases of felony or ordinary misdemeanour," wrote the Chief Justice.‖ "But I apprehend that mere correctness in finding their verdict forms but one, and not the primary virtue of trial by jury. The essence of this mode of trial consists in its entire exemption from all supposable means of influence and in the consent of public opinion. A jury composed of the officers of the Army or Navy wants these essential qualities of a common jury. They are a small body in the State; they are governed by a code of laws peculiar to themselves; they have not that community of interest and feelings with the accused, that reciprocity of rights and obligations in the society to which they belong, which is essential to the notion of peers or equals, as they are understood in a legal sense, and which gives such peculiar force to the verdict of the country—as the finding of a jury is emphatically called.

¶*Historical Records of Australia*, Series I., Vol. X., No. 11, p. 893.

‖*Ibid*, Vol. XV., p. 773.

There are," he continued, "sufficient materials for framing juries in this country; the supposed party spirit and mutual mistrust between the free and freed population, which are apprehended in England to prevail to such an extent in New South Wales as to influence the feelings of juries, are not founded in fact; the verdicts of juries in this colony are likely to be as just and temperate as the verdicts of juries in any part of His Majesty's Dominions."

Forbes' views were shared by Governor Bourke, who did what he could to give effect to them. In 1833, by his casting vote, a Bill was carried through the Legislative Council which gave an accused person the option of being tried by a military jury or a civil jury of twelve. The result was encouraging for the liberal party. "I have the honour to state," wrote Mr. Justice Dowling, "that, in my opinion, the verdicts of the juries of civil inhabitants have, in general, answered the ends of law and justice." Six years later (1839) military juries were abolished.

Forbes' survey of the problem of transportation was characteristically clear and reasoned. He noticed its place in the criminal code of the United Kingdom, its nature as a punishment, the extent to which in New South Wales it had answered the ends for which it was introduced, its economic value to the colony in that it supplied cheap man power, the serious economic consequences of its sudden discontinuance, and its effects upon the character and prospects of the colony. "Convictism has tended," he wrote, "to lower the tone of society in Australia and to engender a lax morality on some points among all classes of the community. There can be no doubt that it would be desirable, in the highest degree, for the social welfare of the colony, that the whole population should be free and uncontaminated." He therefore urged that it should be gradually discontinued, while, at the same time, free and virtuous immigrants should be extensively introduced. In 1840 it was abolished.

Important as were the services of Forbes the legislator, those of Forbes the Judge were more noteworthy. He established the rule of law in New South Wales.

While acting in the public interest, both Governor Macquarie and Governor Brisbane had exceeded their powers and had thus brought themselves into conflict with their legal officers. To prevent the recurrence of such events, Parliament provided by Sec. 29 of 4 Geo. IV., c. 96, that no law or ordinance should be laid before the Council by the Governor for its advice or approval, unless a copy thereof was first laid before the Chief Justice, and unless he transmitted to the said Governor a certificate, under his hand, that such proposed law was not repugnant to the laws of England, but was consistent with such laws so far as the laws of the colony did permit.

W. C. Wentworth predicted that the power thus vested in the Chief Justice could not fail to set the Governor and the Chief Justice by the ears, unless they both happened to be men of singular prudence and moderation. General Darling, who succeeded Sir Thomas Brisbane in 1825, had fine qualities, but he was not a man of "singular prudence and moderation." Austere, quick tempered and suspicious, he could neither grip men's hearts by his kindliness and sympathy, nor command their respect by the power of his intellect and personality. His harsh treatment of Sudds and Thompson, the two privates who committed a petty theft in the hope that, having been punished, they would be dismissed the service, evoked the virulent criticism of the unofficial Press. To silence this criticism Darling brought down two Bills. For neither of them would Forbes give the certificate required by the Act of 1823. In the result, relations became so strained that the Secretary of State for the Colonies threatened to recall the Judge and to relieve the General of his command unless they composed their differences.

Forbes did not favour an unrestricted Press. "An unrestricted Press," he wrote,* "is not politic or safe in a land where one half of the people are convicts who have been free men, and the other half of the people are free." But he declined to certify that Darling's Bill, requiring all publishers of newspapers to take out annually a licence revocable at any time by the Governor on

Ibid, Vol. IV. p. 682.

the advice of his Executive Council, was not repugnant to the law of England. "By that law," he wrote,† "every free man has the right to use the common trade of printing and publishing newspapers. By the proposed Bill, this right is confined to such persons as the Governor thinks proper. By the law of England, the liberty of the Press is regarded as a constitutional privilege, which liberty consists in exemption from previous restraint; by the proposed Bill, a preliminary license is required which is to destroy the freedom of the Press and place it at the discretion of the Government. By the law of England, every man enjoys the right of being heard before he can be condemned, either in person or property; by the clauses under consideration the Governor, with the advice of the Executive Council, may revoke the license granted to any publisher at discretion, deprive the subject of his trade without his having the means of knowing what may be the charge against him, who may be his accuser, upon what evidence he is tried, for what violation of the law he is condemned." The Governor had no option but to submit his proposal and Forbes' argument to the Colonial Office, which, in its turn, submitted both to the law officers of the Crown. They held that the Chief Justice had "correctly executed his duty, and that the reasons assigned by him for his decision were valid and sufficient. It is satisfactory to me to find," added the Colonial Secretary,‡ "that, in this instance, Mr. Forbes has justified the opinion entertained by my predecessors in office of his professional ability and knowledge."

The second of the Governor's two Bills imposed a stamp duty of fourpence on newspapers. Its ostensible purpose was to provide a fund for defraying the cost of printing the public Acts, Proclamations, Orders and Notices. In effect, it would have taxed the newspapers out of existence. "The *Monitor* and *Gleaner*," wrote Howe, the editor of the *Gazette*, to Forbes,§ "must have died instanter, though the *Australian*, from its more abun-

†*Ibid*, Vol. XII., p. 290.
‡*Ibid*, Vol. XIV., p. 356.
§Papers from R.O., 126-27.

dant resources, might have survived two or three months, but no longer." If the papers survived, it was estimated that the tax would yield £3000 per annum, whereas the cost of the printing, which it was imposed to defray, averaged £120 per annum. Its real purpose was obvious. Forbes withheld his certificate, not because the tax was fourpence, when, conceivably, one farthing would have been sufficient, but because he thought the Bill contrary to Sec. 27 of 4 Geo. IV., c. 96, which required that "the purpose for which every tax or duty may be imposed, and to or towards which the amount thereof is to be apportioned and applied, shall be distinctly and particularly stated in the body of every law and ordinance imposing every such tax or duty."

"The policy of these careful provisions of the Act," he wrote,¶ "is too obvious to be misunderstood. Parliament had conferred very large powers upon a very small body of individuals. It had delegated to them the very delicate trust of taxing the people of a distant colony. It was anxious to guard against abuse, and, as a means of enabling it to see how far this power was exercised with justice and moderation, it required that every purpose, every intention with which any tax was imposed, should be openly, clearly and truly stated. If any latent purpose be entertained, if a tax be professedly imposed for one object and covertly intended for another and different object, it is contrary to the letter of the Act, it is a breach of faith with Parliament, it is an abuse of the trust confided in the Council, it is derogatory to the Government."

The British Attorney-General did not deem the imposition of a stamp duty, even to the extent of fourpence, as being repugnant to the law of England. Yet, being of the opinion that the Chief Justice had come to his decision honestly, he held that he had but done his duty in refusing to give the necessary certificate. Darling was instructed to bring down a similar Bill, but, added the Colonial Secretary, "it is necessary strictly to adhere to the principle that the duty must be *bona fide* levied with a view to revenue, and that the amount must

¶Letters from the Records Office, June 14, 1827.

not be regulated by the supposed advantage which might arise from suppressing or impeding the publication of newspapers in the colony."

On other occasions, and for the same fundamental reason, but in less dramatic circumstances, it was the painful duty of the Chief Justice to insist on the supremacy of the law. In 1827, in accordance with the spirit of 4 Geo. IV., c. 96, s. 29, and Lord Bathurst's instructions of March 31, 1823,‖ he directed attention to certain illegalities in the treatment of convicts, and, in the result, applied a statutory check to the abuse of executive power. The practice of assigning convicts to officers and settlers, introduced by Governor Phillip, had been followed by his successors. As the colony developed, the property which the Governor's assignees legally had in the services of their servants appreciated in value. Without labour land was of little use, and the only labourers who could be held securely—more securely than mediaeval serfs—were the assigned prisoners. The Governors, prior to and including General Darling, had always claimed and exercised the power of revoking assignments when pleased so to do. Darling informed those who had assigned servants that they were not to reassign them without His Excellency's consent. They were also given to understand that they would be deprived of their servants by the local Bench of Magistrates should that body conclude that the assigned servants were being improperly treated, allowed to work out, or be at large.

This regulation was issued with a slight gesture of defiance towards Forbes, who had previously intimated that, in his opinion, the Governor had no legal authority to interfere with a convict once he had been assigned. "There can be no doubt," he wrote,* "that the assignee of a person transported by law to New South Wales has a legal property in the services of such a person during the period of his term of transportation, and that he can only be divested of such property by law or by the act of reassignment to such other person as he may think fit.

‖*Historical Records of Australia*, Series I., Vol. XI., p. 68.
**Ibid*, Vol. XIII., p. 609.

The law is the only rule in interpreting this right of property; it is peculiar in itself; it is the creature of Acts of Parliament; and the Acts themselves must be strictly followed. Where they are silent, there is no law. The relative situation and duties of the convict and his owner or proprietor can only be understood and regulated with reference to Acts of Parliament, and such plain consequences arising out of them, as are clearly and indisputably implied consequences of the Acts, such, for example, as protection, food, clothing, etc., on the part of the master, and the performance by the assigned servant of the labour imposed. Any limitations upon the free right of assignment conveyed by Acts of Parliament, any reference to tribunals not legally recognised, anything, in short, not in Acts themselves, are illegal and void, unless it can be shown to be derived from the local laws of the colony, such laws not being an encroachment upon or at variance with the Acts of Parliament.'' The matter was referred by the Secretary of State to the legal advisers of the Crown for their opinion. They concurred with Francis Forbes.

The learned Judge also called attention, in 1827, to the necessity for legalising the practice of granting tickets of leave.† He thought it ''founded in wise principles,'' but opposed to the law. 30 Geo. III., c. 47, the only statute, he pointed out, which clothed the Governor with authority to mitigate the judgment of an English Court, contained no reference to such an extension of mercy. Further, as the statutes relating to transportation made service for the entire period of transportation a condition precedent to the restitution of civil rights and obligations, the expectation of being ultimately restored to the full status of a free man, natural to every convict, was apt to be disappointed. He was therefore of the opinion that the regulations of the local government governing the granting of tickets of leave were contrary to the specific provisions and the entire policy of the transportation statutes. Darling turned to Attorney-General Baxter and Solicitor-General Foster, who, ''after full and serious consideration,'' assured him

†*Ibid*, Vol. XIII., p. 612.

that they had no doubt as to the legality of the prevailing practice.‡ Thus fortified, His Excellency continued to follow it, until, in due course, he was informed that, in the opinion of His Majesty's legal advisers, Francis Forbes was again right.

The Chief Justice held no brief for convicts *qua* convicts, although, his wife tells us, he was frequently distressed when obliged inflexibly to enforce the criminal code, then so severe. But he never hesitated to throw over them the shield of the law whenever their rights were invaded. In 1833, the British Government decided to correct "the very erroneous notion" which then, they said, existed in Great Britain, that transportation was rather "a boon and a benefit rather than a state of suffering and punishment."§ They therefore decided to adopt the principle of subjecting prisoners, after they had been transported, to different degrees of severity, according to the magnitude of their offences and the notoriety of their previous course of life. Sir Richard Bourke was accordingly instructed that the most hardened criminals were to be confined at Norfolk Island or Macquarie Harbour; those whose crimes were less heinous, and of whose repentance and reformation greater hopes might be entertained, were to be put to severe labour on the roads in the chain gangs; whilst the least offending were to be subjected only to the restrictions usually imposed on convicts.

With his despatch acknowledging the receipt of these instructions, Bourke enclosed the opinion of Forbes that the Governor had no power so to alter the sentence of the British Courts as to subject the transport to a severer punishment for his original offence than such sentence implied. The imposition of irons, as was directed in the case of the second class of offenders, he described as an unauthorised change in the nature of the punishment ordained by law.¶ The judgment of the Court, Sir Francis argued,‖ must be according to the known law of the land, and the execution must strictly

‡*Ibid*, Vol. XIII., p. 623.
§*Ibid*, Vol. XVII., p. 199.
¶*Ibid*, Vol. XVII., p. 315.
‖*Ibid*, p. 331.

pursue the sentence. Transportation as a punishment, being unknown to the common law of England, derived its whole force from Acts of Parliament, which, like other penal laws, had to be construed strictly, and could not be extended by construction to the prejudice of those upon whom such a penalty was inflicted. The whole power of a colonial Governor over a convict was derived from 5 Geo. IV., c. 84, s. 8, which conveyed to him a right of property in the service of such offender, which continued in him, or the person to whom the convict was assigned or reassigned, during the remainder of the offender's term of transportation. In virtue of this right of property, the convict was bound to perform such work and labour as might be required from him by his master, not, however, as a punishment by the master for his original offence, since the master could not be considered an executioner of the law. Had he been so considered, he would have been bound to enforce labour by his convict servant as a duty and have become liable to penal consequences himself should he neglect it. The master, therefore, could not work his servant in fetters or superadd anything as a punishment to servitude, because such additional punishment was not a part of the sentence of transportation and was not a necessary consequence of it. By parity of reasoning, the Governor, who might order the use of fetters as a means of security, could not lawfully order a convict, in whose services he had only a property, to be worked in irons as an additional punishment for his original offence, or have him removed to a penal settlement for a similar purpose.

This argument, when submitted to the legal advisers of the Crown, was by them endorsed. "The Government," wrote Lord Aberdeen to Bourke,* "have no power to alter the sentence of the British Courts so as to subject a convict to a severer punishment after his arrival in the colony than his original sentence implied. . . . . It would be idle to affect any reserve in acknowledging that the instructions which proceeded from this office on the subject of chains were founded on a misconception of the law. It is not in my power to ascer-

Ibid, Vol. XVII., p. 690.

tain the origin of the error. The consequences of it, however, must be repaired, so far as they are reparable, with the utmost possible promptitude. All persons who are at present confined in chains in New South Wales under any order from this office must be immediately relieved from them." He thought it probable that the colonists concerned would bring actions for damages, but hoped that, in that event, Bourke would "encounter the exigency" with his "characteristic firmness and discretion." Nothing in the history of New South Wales better illustrates what Dicey describes† as "the noble energy" with which Judges have maintained the rule of law.

By virtue of his offices, Forbes was brought into close contact with the several Governors who ruled the colony during the eventful years of his Chief Justiceship. In the urbane, scholarly, and liberal minded Sir Thomas Brisbane he found a kindred spirit. "While Sir Thomas and Lady Brisbane remained in New South Wales," wrote Lady Forbes, "our home circle and that of Government House were like one family." On the eve of his return from England, when, as he wrote,‡ he could have been influenced by no other motive than a spontaneous desire to express his true sentiments to him, Brisbane addressed to Forbes the following remarkable tribute:—

On board the *Mary Hope*,
Sydney Cove,
28 : 11 : 25.

My dear Sir,

I am most anxious, amidst bustle and confusion, to devote a few minutes of the last evening I shall pass in this colony to give vent to those feelings of grateful obligation I owe to you for a long course of valuable, important and disinterested services, rendered me on many occasions in which I stood as much in need of such assistance as you have uniformly and unceasingly given me; the impressions, resulting from which, have been so indelibly engraven upon my heart, that neither time nor space can impair, far less obliterate them. It is, to me, a remarkable fact that, throughout the course of a pretty long life, I have never considered myself under the same degree of obligation to any human being; neither have I ever entertained the same esteem and regard for any person as I feel towards your-

†L. of C., 289.
‡*Historical Records of Australia*, Series I., Vol. XV., p. 669.

self. This I ascribe as much to your character and talents as to the sense of obligation I am under to you for those services.

At first the relations between Brisbane's successor and the Chief Justice were no less cordial. "We are now fairly entered upon a new dynasty," wrote Forbes in June, 1826. "I am ostensibly, and, I have no reason to doubt truly, a favorite at Court." His refusal to certify that the Licensing (Newspaper) Bill was not repugnant to the law of England, however, brought about a change in the vice-regal attitude, which became more hostile as the English authorities upheld the Judge's opinion in each contested case. At last Darling became obsessed with the idea that, as he put it,§ "Mr. Forbes' constant aim was to set the Government aside and to shew that the Chief Justice and the Supreme Court alone were competent to decide here." In private and confidential despatches to the Imperial authorities, he tried to blacken Forbes' character. "He is too crafty," he wrote, "not to use any means in his power to gain his ends. . . . . He is not remarkable for a strict attention to facts when an opposite course is better suited to his purpose."¶ ". . . . His statements are naturally distorted to answer his crooked purposes. . . . . You may be sure that he will not stick at trifles in carrying his point. . . . . He will succeed if human ingenuity can prevail against truth and honesty."‖ ". . . . My situation is extremely arduous, having to contend with a man of acknowledged skill as a lawyer who is without principle . . . . and greedy of power almost beyond example." "To be a friend or even an acquaintance of the Chief Justice," wrote Lady Forbes,* "was sufficient to place the culprit so offending upon the black books at Government House. As nearly all the officials in the Crown colony days held their appointments at the Governor's pleasure, subject to the approval of the Secretary of State, it was scarcely to be wondered at that many people fought shy of our friendship and sought rather to

§*Ibid*, Vol. XIV., p. 116.
¶*Ibid*, Vol. XIV., p. 259.
‖*Ibid*, Vol. XIV., p. 366.
*S.S. in C.C. Days, p. 123.
**Sydney Society in Crown Colony Days*, p. 123.

avoid than to seek our society. If we gave a dinner party, General Darling would issue invitations, at the last moment, to our guests, for the same evening, his invitations being headed, 'The Governor commands your attendance at dinner,' etc., and our promised guests would arrive at our house to make their excuses so that they might obey His Excellency's mandate. In order to save ourselves and our friends from this humiliation, we ceased to entertain except at the usual Bar dinners, when we felt sure of our guests, as the members of the Bar were not subject to Government control."

With Bourke, as with Brisbane, Forbes was in complete accord. "Your Lordship," wrote Bourke to Viscount Goderich,† "need not now apprehend the revival of any differences between this Government and the Bench. I have reason, not merely to be satisfied with the conduct of the Chief Justice, but to be thankful for the assistance he has afforded the Government in transacting their business in the Legislative Council." "In the whole range of the Council Courts," he wrote, when recommending him for a knighthood,‡ "I believe it would be difficult to point out a person on the Bench who, from integrity and ability, legal knowledge, and devotion to His Majesty's service, is better entitled to the honour of a knighthood than Chief Justice Forbes." This view His Majesty endorsed by conferring a knighthood upon him on April 3, 1837. In the same month Sir Francis resigned.

The strain imposed upon his health by his many and onerous duties had soon impaired a constitution sound but never robust. As early as September, 1825, Brisbane reported§ that "the weight of business in the Supreme Court, as well as in the Council, and the undivided responsibility of the Chief Justice in the discharge of his heavy and complicated duties, had so impaired his health as, at last, to endanger his life." Repeated draughts on a depleted reservoir of strength and energy, which he was never to replenish by a timely and sufficient holi-

†*Historical Records of Australia*, Series I., Vol. XVI., p. 745.
‡*Ibid*, Vol. XVIII., p. 378.
§*Ibid*, Vol. XI., p. 841.

day, resulted in a complete breakdown of his nervous system which a sojourn at his little country cottage on the Nepean, near Penrith, called Edenglassie, could not rebuild. "I regret to inform your Lordship," wrote Governor Bourke early in 1836,¶ "that the state of the health of Mr. Forbes will no longer allow of his remaining in the colony. His anxiety for the public service and the credit of the Court in which he presides induced him to continue his official labors much longer and more intensely than a due regard for his health warranted. His strength at last gave way, and an immediate change of air and scene, with a cessation from business, are deemed indispensable by his medical advisers." Hopes of restoration were not realised. The nervous debility increased, and his resignation followed.

As no provision had been made for retiring pensions for colonial Judges, Lord Glenelg recommended that the retiring Chief Justice should be paid a pension of £700 a year. Many years later, provision was made by the colonial Legislature for the payment of pensions to Judges on a scale more generous than that which gave Sir Francis £700 per annum in 1837. It is a signal tribute that the leaders of the next generation in New South Wales, John Robertson, Henry Parkes, and James Martin, were then glad to pay homage to the memory of the great man who had passed away here in 1841, by passing an Act in 1866 whereby Lady Forbes was paid the difference between what her husband had received and what he would have received had the pension allowed him in 1837 been what was secured to the Chief Justice by law in 1866. Amongst those who spoke in the course of the debate was an old man, himself no inconsiderable figure in our history, who remembered the arrival here of Sir Francis, had been by his side when he laid the foundation stone of the Grammar School, and looked back to him, as he said, with feelings of reverence and esteem. That man was Dr. Lang, who described this unprecedented and generous Act of the Legislature as "an act of justice towards one of the greatest men that ever adorned our colonial history."

¶*Ibid*, Vol. XVIII., p. 368.

II.—SIR JAMES DOWLING.

The successor of Sir Francis Forbes differed from him in character and capacity. Each of them spent himself in the public service, each was jealous of the independence, the status and the reputation of the Supreme Court. But we do not detect in the urbane and genial Sir James that touch of austerity and aloofness which distinguish the first Chief Justice. Nor do his letters, opinions, and decisions reveal the discriminating judgment, the grasp of basic principles, and the strength and clarity of mind which characterise those of Sir Francis. One leaves the latter with the impression that he was not only a first-rate lawyer, but also an educated thinker who brought to the consideration of his diverse public problems a definite philosophy. The former knew his law, and did good service in the Legislature, but on the Bench and in the Council he was a less commanding, a more mediocre figure. Secretaries of State, James Stephen, the Law officers of the Crown, Governors Brisbane, Bourke and Gipps held and expressed the highest opinion of the ability and personality of Forbes; they recognised in Dowling an efficient, high-minded, devoted public servant.

The tireless pen of the second Chief Justice enables us to know him more intimately than we do his predecessor. We have nothing from Forbes comparable to the long and admirable letters from Dowling to his son while the latter was a student in London. They reveal an affectionate father anxious only that his son should become a cultured Christian gentleman able to win and hold a respected place amongst his professional brethren. "My whole soul," he wrote, "is wrapped up in your happiness and prosperity. . . . . My ambition is that you should be a fine, manly, sensible, intelligent, well-informed, gentlemanly young fellow whose society is agreeable to persons of worth and honour, and who is out to work his own way through the world by personal merit."

"I need not urge upon you the propriety of going to church every Sunday. . . . . You may safely regard that man either as a fool or a rogue who has the courage to avow that he has no religion, or has the bad taste to treat such matters contemptuously. . . . . Let the sub-

lime morality of the Gospels be deeply implanted in your mind, and endeavour to live after the principles therein contained. 'Kowledge is power!'—always keep this maxim in mind as the polar star of your life. . . . . Knowledge to the mind is like money to the miser, only with this difference—that a sensible, well-informed man can never spend or be robbed of his mental riches, whilst the sphere of his enjoyments is every day enlarged in proportion to his hoarding. . . . . I never had leisure to read systematically. The moment I was old enough to make an effort to get my own living I was pushed into the world. . . . . Lose no opportunity of filling your mind with stores of ideas. . . . . Become a learned man. . . . . A competent knowledge of Greek and Latin are necessary to enable you to enjoy the literature of almost every country in Europe. Nothing tends so much as Mathematics to improve the reasoning faculties. History, Geography and Chronology must form the combined fund of that general information which is to fit you for the active exercise of the mind. Next to these in importance is the study of logic. . . . . Academic honours are of infinite importance at the outset of life. They are the victor's laurels, and are always emblematical of industry and merit. . . . . Be an attentive listener, and whatever strikes you as new and interesting, silently turn to your own account. . . . . Take judicious and improving trips to the Continent to liberalize your mind. . . . . Avoid all low and vulgar company. Neither use or seek to understand low and vulgar language. Be wary of making intimate acqaintance of persons of loose habits and morals . . . . vice is so fascinating that she cannot be looked upon without peril to the beholder. . . . . Acquire a habit of personal cleanliness and gentlemanly neatness, without foppery and dandyism. Outward show is often a fair index to what is passing within. . . . . Be modest, polite, and good humoured to all. . . . . Acquire habits of early rising and moderation in eating and drinking. . . . . Keep your eyes open and look to make yourself marketable. . . . . Here there is room for you. Better to be in a field where there is a crop for a clever fellow to reap than to become a starving gleaner in an already picked stubble. . . . . When you

write, remember I shall expect to see some improvement in penmanship—an accomplishment not to be despised by the profoundest scholar. . . . . The lecture is now ended, and I leave the chair for more homely matters." The object of this solicitude, writing to his aunt, Miss Blaxland, on December 13, 1841,* after referring to his father's poor opinion of David Forbes (son of Francis), remarked, "I must look to myself on this score. I have ever dreaded our meeting—my father is one who expects much, but I am sure he will be disappointed."

"Being on the eve of forty years of age, with a wife and six children, and minded to seek some official employment in one of the British colonies by means whereof (he) might have the opportunity of better advancing the interests of (his) family than in their native land," Dowling wrote to Viscount Goderich on June 6, 1827, offering his services "for some judicial or other professional appointment in any of the British Colonies."† He supported his application with testimonials from Lord Lyndhurst, Mr. Justice Bayley, Sir N. C. Tindall, and Henry Brougham, to all of whom he was known as a Court reporter, as the part author of Ryland's and Dowling's Reports, and by reason of his presence at the Bar from time to time during his twelve years of practice. Brougham actively intervened on his behalf. He was given an interview by Goderich, who offered him the Chief Justiceship of Sierra Leone or Dominica.

"It was true," said his Lordship,‡ "that there was another situation, *viz.*, the office of the Puisne Judge in New South Wales, more eligible in many points of view, though not of equal rank with the others he had offered; but, for that situation, there were too many candidates who were so powerfully supported in their claims by persons of rank and political influence, that he could hold out no hopes to (me) of a preference merely on the score of professional character." In consequence, however, of the "friendly and confidential communications" he had with James Stephen, Dowling wrote to the Secretary

*Blaxland Papers, p. 30.
†*Journal*, p. 1.
‡*Journal*, p. 11.

of State begging to be allowed to withhold a definite answer with respect to the offer of the Chief Justiceship of Dominica until a decision was come to with regard to the vacancy in New South Wales. On the following day he learned that he was recommended for that appointment. His Commission was dated August 6, 1827.

As a Government official he was given a free passage out for himself, his family, and his servants. The contract between him and Peter John Reeves, the captain of the *Hooghly*, the vessel of 465 tons on which he elected to sail, for the supply of food to him and his party during the long trip, is an interesting document. In consideration of £323 cash and £100 in addition to be paid, subject to conditions, on arrival at Sydney, Reeves agreed "to find, provide and supply to and for the said James Dowling, his family and servants, consisting altogether of fourteen persons, all good and sufficient meat, drink, provisions, and other necessaries suitable to cabin passengers." They were to be "regularly and every day during the said voyage furnished with a proper supply of fresh meat, poultry, bread, cheese, butter and other wholesome food, and also with wines, spirituous and malt liquors." . . . . "The breakfast and tea table respectively" were to be supplied "with new and fresh baked bread, tea, coffee, sugar, butter, and cow's fresh and new milk." . . . . The servants were to be provided with such portions only of wine and spirits as were necessary to and for the preservation of their health and comfort during the voyage. They left England on November 5, and one hundred and nine days later cast anchor in Port Jackson, on February 24, 1828.

"On the afternoon of February 25," we read in the Journal, p. 63, "I left the ship in a Government boat under a salute of eleven guns. I wore my robes of office and wig. On leaving, the military guard of the ship presented arms, and the prisoners gave me three cheers. I landed at the stairs of the Government House lawn, and was there met by Chief Justice Forbes, the Attorney-General, the Sheriff, and a numerous assembly of barristers and practitioners of the Supreme Court and other gentlemen. The Chief Justice wore his gown and bands, but no wig, and, with me, led the procession to Govern-

ment House. The day was fearfully hot. On arriving at the steps of Government House, a great number of civil and military officers were assembled, who received me with all reverential courtesies. I was then ushered into the drawing-room at Government House, at the upper end of which was General Darling in full military costume, attended by his Aide-de-Camp and other officers. He shook hands with me. I was attended by Mr. George John Rogers, as my clerk, who handed me my Commission, which I presented to the Governor. It was then read by Mr. John Stephen, junr., the Acting Registrar of the Supreme Court, after which the usual oaths of allegiance, supremacy, and of office were administered to me. As soon as the form and ceremony were over, I made my bow and retired through a lane of civil and military persons and other gentlemen. I was accompanied to the waterside by the Chief Justice, and returned to the ship—altogether the ceremony was as imposing and formal as I had expected." "A day to be remembered in my brief earthly pilgrimage."

Mr. Justice Stephen had secured for him a house in Kent Street, afterwards the City Night Refuge and Soup Kitchen, for which Dowling paid a rental of £200 per annum until his own house, built on his grant of nine acres at Darlinghurst, was ready for occupation. As a tribute to his benefactor, he called his permanent home Brougham Lodge. "Before leaving England," wrote his son,§ "my father was made aware that he could claim both a town and country grant of land by virtue of his official position. To a man who never owned a foot of land in his life, and, perhaps, had he remained in England, would never have done so, the mere thought of becoming the owner of many acres must have been the source of great satisfaction." When this chronicler first knew the Kent Street property, it was "surrounded by paddocks, and comparatively in the country." Darlinghurst was known for its windmills. "My father," he writes,¶ "was a famous pedestrian, and would take my brother and myself with him in his walks. We sometimes

§*Reminiscences of Judge Dowling.*
¶*Ibid*, p. 124.

rambled on Surry Hills, then quite open and unoccupied, or almost so. At other times we would go into Rushcutters Bay. There was no well defined road, and we had to cross the salt water creek, still running, by means of large stepping stones, and, after ascending the hill by a track, we could branch off to Darling Point, where there was no road except the faintest track."

Mr. Justice Dowling's first impressions of his new home were most unfavourable. Before leaving London he had had interviews with James Stephen, the chief adviser to the Colonial Office, and Mr. Hay, the Under-Secretary of it. The former had given him to understand that "a most unpleasant misunderstanding" had arisen between the Governor and the Judges with respect to the control of the Press. He gathered from the latter that it was the opinion of the Imperial Government that the Governor had not received that support from the Judges which might have been expected, considering that the latter were, in effect, the advisers and counsellors of the supreme authority, and that, assuming the Judges were perfectly correct in their views, in point of law, still the official tone and formal manner which the difference of opinion had assumed was not to be commended on account of its necessary tendency to produce disunion and want of confidence between the constituted authorities of the colony."‖ The Secretary of State, Mr. Huskisson, who had taken over the Seals of the Colonial Department from Lord Goderich, had impressed upon him* that "it could not but be deterimental to the public service if there should exist any want of confidence or harmony between those whose duty it was to administer colonial affairs." "The most effective mode of obtaining this end," he said, "was to avoid the rigid line of demarcation between the military and judicial functions in matters of legislation and counsel where the general welfare of the colony was at stake. Composed, as the colony of New South Wales was, of such peculiar elements, the Governor had a right to expect the assistance and cordial co-operation of those legal authorities

‖*Journal*, p. 55.
**Ibid*, p. 56.

whose advice was essential to the maintenance of the government. However honestly the Judge of such a colony might act in adhering to the strict line of judicial duty, it must be borne in mind that although such a spirit of precise deportment might be justified in the well established machine of the maternal Government, it was not quite compatible with the conditions in a distant colony where the military Governor had no collateral assistance to guide his administration."

His Honor was thus prepared for a difficult situation in which he would have to comport himself with tact and prudence, but he had not reckoned on the depressing effect of our February days, the demeanour of some of the principal functionaries, and the disagreeable social atmosphere. "The Governor," he wrote,† "appeared to me to be a cold, stiff, sickly military person. He had none of the frankness and ease of a soldier, and I absolutely froze in his presence. . . . . The Chief Justice appeared very unwell, and looked full fifty-five years of age, although but forty-three. His manner was, I thought, cold and rather forbidding. He seemed very unhappy, and had a roundheaded republican look which was anything but encouraging to a person of my temperament. . . . . Mr. Justice Stephen appeared very infirm, shattered, and in bad health. He seemed to me to be marked down for another world. Mr. Macleay, the Colonial Secretary, consumed me with a prying, reconnoitring curiosity. His carriage and look were altogether ungentlemanly and discouraging. I soon found he had a vulgar Scotch dialect, neither highland nor lowland. This unfavourable impression I have never been able to get over. I could not help observing that the Governor and some of his officers were not on the best of terms.

"My first day in the colony was anything but pleasant. The appearance of Sydney was to me forbidding and utterly unlike what my imagination had pictured. I became melancholy, anticipating that I should have a difficult part to play. Being a freshman, I imagined every movement of mine would be watched with

†*Ibid*, p. 65.

great circumspection. In the evening, the whole proceedings of the day and my observations thereon gave me a sensation which I had never experienced before. My heart sank within me at the prospect in view, and I devoutly wished myself back again in London to go on with the quiet, slavish drudgery of my bygone days. It was then too late. I therefore resolved within myself to pursue a plain, straightforward path, to do my duty according to the best of my understanding and ability, and to keep aloof from all parties and sets of people in the colony."

His Celtic spirit, however, soon revived. "I like my colleagues very much," he wrote to his patron six weeks later. "The greatest harmony exists between us. We agree admirably in temper and disposition, and go on with great smoothness." "I arrived here," he informed the same correspondent on November 5, 1829,‡ "in very ticklish times; when, in fact, there was something like an open war raging between the highest authorities in our little State. . . . . All the important cases, especially those which at all savoured of a political or popular tendency, and God knows we have had enough of them, have fallen to my lot to try in consequence of the feeling created by the war above alluded to. I have been regarded as a neutral power, and upon my demeanour much has depended. I possess the entire confidence of the Government, and enjoy public respect and popularity." This happy relationship was due in no small degree to his own good temper, innate kindliness, and consideration for the feelings of others. These qualities enabled him, shortly after his arrival, to extricate himself from a difficult and unexpected situation.

He had hardly taken his seat upon the Bench, when he was informed by Governor Darling that, in the despatch announcing his appointment, the Secretary of State had directed that he was "to take rank in the Supreme Court next to the Chief Justice." Immediately upon the receipt of the despatch, his Excellency had communicated its content to Sir Francis Forbes in

‡Letters, Vol. I., p. 293.

the expectation that he would break the news to Mr. Justice Stephen, and that the latter would thereupon, in due course, vacate his chair on the right hand of the Chief Justice. This, for some unexplained reason, the latter failed to do. He probably felt unwilling to be the harbinger of such information to an old colleague whom he felt was wronged by such a decision. The new Judge took the place indicated for him by the date of his Commission and his legal standing. When the Governor was apprised of the facts, he informed Dowling verbally and in writing that he did not conceive that anything was left to the discretion of any individual or that his Honor could consistently, with what he owed to His Majesty, waive a right which His Majesty had been pleased to confer upon him.§

Dowling was greatly embarrassed. Mr. Justice Stephen, mortified and incensed, told him plainly that if he acted upon the instructions of Lord Goderich, he would publicly express his sentiments from the Bench, as he was not conscious of having deserved the mark of degradation thus attempted to be put upon him. Further, he said, he had received no intimation from Home on the subject, and, by his own Commission, was expressly designated the Second Judge.¶ In his dilemma, Dowling begged the Chief Justice to have the goodness to put upon paper some tangible ground of legal or technical objection to the arrangement of the Secretary of State sufficient to justify him representing to Darling that it would be inexpedient to press for the strict observance of the letter of the Goderich instructions pending further advice.

In reply, Forbes pointed out‖ that the puisne Judges at Westminster took precedence according to their seniority. This usage he declared to be part of the law of England. By 4 Geo. IV., c. 96, the King was empowered to appoint three Judges to the Bench of the Supreme Court—a Chief Justice and two additional Judges. No provision was made as to the rank and

§*Ibid*, Vol. XIV., p. 91.
¶*Ibid*, Vol. XIV., p. 88.
‖*Ibid*, Vol. XIV., p. 93.

precedence of the Judges who, therefore, should, in his opinion, take their seats according to their seniority conformably to the law of England. The Charter of Justice of the King's Bench, and, by analogy, Mr. Justice Stephen and Mr. Justice Dowling, would rank according to the date of their respective Commissions. This view of the mere law of the case raised, in his mind, two questions: Could His Majesty, by virtue of his prerogative, give rank and precedence to a junior above a senior Judge? Could a despatch from the Secretary of State be considered a sufficient form for the exercise of the prerogative? To these questions he ventured no answer, but indicated that they suggested the advisability of referring the matter to the Secretary of State for his decision.

Dowling thought this argument sufficiently cogent to warrant him urging the Governor to let the question remain in abeyance until the receipt of further instructions. Reluctantly the General agreed. He disliked Stephen, and had the liveliest suspicion of Forbes, of whom he feared Dowling might allow himself to be made "a tool," as, he asserted, Stephen had.* The soundness of Forbes' advice, and the wisdom of Dowling's forbearance, were manifest when the answer from Downing Street was delivered.† In assigning to the junior Judge precedence over his senior, Lord Goderich had thought he was consulting the wishes of Stephen who, he understood, wished to be spared the responsibility of acting as Chief Justice in the event of the absence or sickness of Forbes. As, however, it appeared that he did not desire to be relieved in the event of any such contingency, the Government had no intention of depriving him of the station to which his seniority entitled him. At the same time the Secretary of State warmly commended the courtesy and restraint of the junior Judge.

In the same conciliatory spirit, Dowling tried to bring about more cordial relations between his Chief and the Head of the Executive. His letters to them were dicated by fine feelings and great good sense. They reveal a keen insight into their respective characters. So,

Ibid, Vol. XIV., p. 116.
†*Ibid*, Vol. XIV., p. 460.

too, despite much provocation, he bore patiently with his colleague, Mr. Justice Willis, until the latter assailed his integrity and cast reflections upon his judicial capacity. "I am a peaceable person," he wrote, "but even a lamb will flinch from the knife." But he was quick to bury the knife. "I have now the sincere pleasure of informing your Excellency," he wrote to Gipps on June 7, 1840,‡ "that Mr. Justice Willis yesterday personally expressed to me his sorrow and regret, in the presence of Mr. Justice Stephen, at having wounded my feelings and given offence. Having tendered his hand in the genuine spirit of conciliation, I accepted it with corresponding emotion."

His sense of humour eased his way through life. He was secretly amused by those who ignored James Dowling, but were so friendly to Sir James Dowling. "The nickname," he wrote,§ "has made many people wondrous civil to me, but I know how to appreciate their regard." "My father," wrote Judge Dowling,¶ "was of Irish extraction, and no one could be in his company long without being aware of it. He had all the attributes of an Irishman : was full of fun, of a very happy disposition, fond of his jokes, and in his rambles would converse with almost everybody he met. He was apt to pun even on the Bench, especially if led on by that bright lawyer and punster, Mr. Broadhurst." "On one occasion," Judge Therry tells us,‖ "a witness was brought forward in such a state of helpless intoxication, that he rolled down the steps leading to the box and fell upon the floor quite motionless. 'Take this man away,' ordered Mr. Justice Dowling; 'I see he is given to the falling sickness!' On another occasion, at a social gathering, in proposing the health of Mr. Cheeke, he assured his learned friend that 'as the Bar of England had given their Cheeke to the Court of New South Wales, the Court, in return for the compliment, would lend him its ear.'" It is surprising to find so genial a spirit concurring, as

‡Letters, Vol. V., p. 126.
§May 15, 1839.
¶*Reminiscences*, p. 154.
‖*Ibid*, p. 340.

a private individual, in the inexpediency of sanctioning a public theatre in this settlement.*

Like his more reticent and austere Chief, he was determined to keep inviolable the independence of the Judgment Seat. In 1831, Governor Darling had asked him for a full report of certain civil actions tried before him in which the parties were ostensibly private individuals, but in which the Government was interested. To such reports, in certain capital cases, his Excellency was entitled, but Mr. Justice Dowling felt that in furnishing them in civil cases he was acting contrary to the duties of his office and destroying his own free agency as a Judge.† "I have complied with your Excellency's pleasure in these instances," he wrote,†† "under the impression that the performance of the task is not obligatory, and forms no part of my duty as a Judge of the Supreme Court. . . . . By the laws of the realm the Judges of His Majesty's superior Courts of Record are necessarily clothed with independence. Any influence, direct or collateral, which has a tendency to fetter their judgment or to destroy that equanimity of mind which is so essential to a due discharge of their sacred functions, defeats the very end and purpose of their office. Their independence is a vital quality of the trust reposed in them. It is not a personal privilege of the Judge. It is the privilege of the subject. It is his guarantee for the upright and impartial administration of justice. In order to maintain this independence, it is a settled maxim of the law that a Judge is not personally liable for any errors of his judgment. The law provides a remedy by appeal for the correction of his errors, but it releases him from personal responsibility. I am sworn to do equal right between rich and poor, and not to be influenced by any letters which your Excellency in the King's name may send to me. The object of this oath was, by the most solemn sanctions, to prevent a Judge from allowing his mind to be influenced. Whether it is intimated to a Judge who is about to try a cause that the Government

*Letter to Rev. Hill, October 1, 1828.
†Letters, Vol. II., p. 237 *et seq.*
††*Ibid*, p. 233.

takes a certain view of the law, and, if the Judge should differ, that the case would be reported to the Secretary of State, or whether the Judge sits down on the Bench under the consciousness that he is exposed to such a consequence, he is under the influence and apprehension of a responsibility at variance with his office because it is calculated to distress his feelings, fetter the natural freedom of his mind, and destroy his judicial independence. This is not an objection in mere theory. I have felt its effects since I have had the honor of holding a seat in the Supreme Court in more instances than one. . . . . If the Government, standing in place of one of the parties in such cases, has a right to call upon the Judge for a full report of the proceedings of the Court, it is difficult to assign a reason why the adverse party should not claim an equal right.'' He refused, therefore, ''to compromise the independence of his office,'' or ''the independent administration of upright and impartial justice to all the King's subjects.'' Four years later, Governor Bourke asked for a report in similar circumstances. In a brief reply, Mr. Justice Dowling, with the full concurrence of the Chief Justice and Mr. Justice Burton, answered‡ that the Judges felt it to be incompatible on principle with their judicial office to furnish reports of the cases in question.

The volume containing this unequivocal reply is but one of the many score which his painstaking industry has left for the perusal of the student. His industry was unflagging, his sense of duty superb. With characteristic self-devotion, he volunteered, in 1833, to go to Norfolk Island when the circumstances made desirable the holding of a Criminal Court there. The voyage over was most unpleasant. ''Still very sick, appetite failed,'' he notes in his diary. But he was charmed by the beauty of the island, of which he gives a vivid description. The infirmities of Mr. Justice Stephen, and the occasional ill-health of the Chief Justice, threw the burden of the work of the Court on his shoulders during his first five years on the Bench. But to the end of his term he was fully occupied. ''The judicial labours,'' he told Brougham in

‡*Opinions*, Vol III., p. 339.

1828, "have indeed been severer than I could have anticipated considering the youthful condition of the colony." "A slavish year in Council and in Court," he remarked at the end of 1840. "Papa is quite well at present," wrote Lady Dowling to her stepson, "but I fear he will not be so much longer, for he is worked so hard. For six days he has been at the Court until seven and eight o'clock in the evening. Yesterday he was there from 10 a.m. until three this morning." Her fears were justified. In 1841 he was at death's door, and was ordered by Dr. Bland to have a long rest in Tasmania. "The Courts are still overwhelmed with law," he wrote in 1842. "I am as usual so much overworked that I have no time to attend to anything outside the pale of my judicial labors. Gaiety is out of the question. . . . . From the age of fifteen I have been a slave. With little intermission, my life has been one of drudgery and anxiety." Overwork undoubtedly contributed to his death. On June 27, 1844, he was carried from the Bench in a state of bodily exhaustion. Three months later he died when on the eve of embarking for England to enjoy two years leave of absence on full pay.

"He enjoyed great popularity during his whole judicial career."§ "Throughout that extended period," said Sir Alfred Stephen on October 21, 1844, "he was remarkable not only for the most strict uprightness and impartiality, but for a painstaking and anxious industry rarely equalled Accessible at all times, a patient listener, careful to ascertain every fact, and ready to hear every argument which might be brought to bear on the case before him, he never failed to make himself its master in every detail. He then devoted himself to its study, exhibiting the most cautious examination of principles and the most unwearied search into decisions illustrating them with a degree of application and labor which nothing could have induced or sustained him in but the most pure and ardent love of justice, the most earnest desire and determination to discharge aright the sacred duty entrusted to him."

§*Therry's Reminiscences*, p. 339.

The gentleman who thus eulogised him had been offered the vacancy on the Bench of the Supreme Court temporarily created by the absence of Mr. Justice Burton in 1839, at the suggestion of Sir James Dowling, as there was no one then in New South Wales, in his judgment, who would have been "acceptable to the public and palatable to the rest of the Bar." He never regretted his recommendation. "My new colleague on the Bench," he wrote eight months later, "is an excellent person, and we agree remarkably well. . . . . He is a trump of the first water." His cordial feelings were reciprocated. "I have to mourn the loss of one," said Mr. Justice Stephen, "from whom I have received a hundred acts of kindness, and with whom I have lived from the hour of my landing on these shores, on the happiest terms of intercourse, official and private, never disturbed by one passing cloud. . . . . I loved him as a brother."

III.—SIR ALFRED STEPHEN.

The sudden death of the Chief Justice threw upon the Governor and his Council the disagreeable obligation of choosing either the senior Puisne Judge or the Attorney-General to occupy his vacated chair until Her Majesty's pleasure was signified. For the reasons already noticed, the choice fell on Alfred Stephen. He was a member of a very distinguished legal family. His father was the first puisne Judge of New South Wales. His uncle, the Honorable James Stephen, M.P., was an eminent lawyer and editor, who actively co-operated with Wilberforce to secure the abolition of negro slavery. His cousin, James Stephen, junr., was the legal adviser to, and, later, the Under-Secretary of, the Colonial Department for many years. Sergeant Stephen, author of the Commentaries on the Laws of England, and Sir James Fitzjames Stephen, the author of the History of the Criminal Law, were his blood relatives, as also, but more distantly, were Leslie Stephen and Albert Venn Dicey.

He was called to the Bar in 1823 at the age of twenty-one, and decided to seek his fortune in New South Wales. He reached Hobart in January, 1825. It so happened that Lieutenant-Governor Arthur was then at arm's

length with his Attorney-General, Mr. J. T. Gellibrand, in whom he had lost confidence. He therefore suggested to Stephen that he should remain in Van Dieman's Land, and undertook, should he do so, to name him to Sir Thomas Brisbane for the honorary office of Solicitor-General. The suggestion was acted upon. Sir Thomas Brisbane endorsed the recommendation, and so began an official life of long and meritorious service. Ten days later he was appointed Crown Solicitor at £300 per annum. "Shortly after my arrival in the colony," wrote the Lieutenant-Governor,¶ "my attention was called by the Attorney-General to the necessity of appointing some professional gentleman of the Supreme Court to perform the duties of collecting the debts due to the Crown; of eliciting the property forfeited to the Crown, and the nature of such property; and also to assist the Attorney-General in drawing informations whenever he might require additional aid." He was so fortunate as to secure the services of the youthful Stephen, who gave "great satisfaction."‖

Within three months, however, the young Solicitor-General was constrained to tender his resignation because of his inability to continue with Mr. Gellibrand, whom he accused of disloyalty to the Government and professional misconduct. These charges were investigated, at the request of the Lieutenant-Governor, by his Executive Council, who found them well supported. The whole responsibility of sustaining them was thrown upon Stephen, who, during the five months the inquiry lasted, was subjected to a severe and continuous strain. He was traduced by the newspaper edited by Lathrop Murray, the brilliant but unscrupulous friend of the Attorney-General, his witnesses were intimidated, his friends ridiculed, his practice temporarily abandoned. But his courageous exposure of wrongdoing was vindicated by the report of the Commissioners, one of whom was Chief Justice Pedder. Arthur commended "his firm, consistent, and truly honorable conduct" to the favourable notice of His Majesty's Government.* "Sen-

¶*Historical Records of Australia*, Series III., Vol. IV., p. 354.
‖*Ibid.*
**Ibid*, Series III., Vol. V., p. 61.

sible of the manly, straightforward part he had taken to protect the interests of the Government to his own manifest prejudice,"† the Lieutenant-Governor invited him to assume the duties of the Attorney-General, whose suspension had followed upon the report of the Executive Council. But, with commendable good taste, Stephen refused to appear to derive any advantage from his impeachment of Gellibrand, and steadily declined the office.

He remained Solicitor-General and Crown Solicitor until 1830, when pressure of departmental business obliged him to cease to act in the latter capacity. In 1832 he was appointed Attorney-General, and so continued until his resignation owing to extreme ill-health in 1838. As the chief legal adviser to the Tasmanian Government, he made helpful suggestions for the amendment of 4 Geo. IV., c. 96; discovered and corrected flaws in earlier legal documents, particularly in the deeds which had been issued to Crown grantees; and was responsible for some useful measures, such as that relating to insolvency, afterwards adopted in principle and with advantage by New South Wales. When he was offered a puisne Judgeship here in 1839, he was in the most extensive practice perhaps ever enjoyed up to that time by any barrister in these colonies. His income exceeded on the average £3000 per annum.‡ Judging from the source and substance of the numerous addresses received by him on the eve of his departure from Tasmania, from the Chief Justice, both branches of the profession, members of the Executive and Legislative Councils, the clergy of all denominations, three-fourths of the magistrates, and the jurors of Hobart and Launceston, he had won for himself a high place in the respect and regard of those amongst whom he had spent the most active, if not the most mature years of his life.

In his new sphere as puisne Judge, and afterwards as Chief Justice, he devoted himself with characteristic assiduity to his several interests. Every rule of Court, for the improvement of pleading or practice, or for the regulation of its sittings or its officers, made after he

†*Ibid*, p. 106.
‡*Ibid*, Series I., Vol. XXIV., p. 9.

took his seat on the Bench, were drawn, he claimed in 1844,§ by his own hand. So, too, had been every Act passed by the Council in that period for similar purposes. In 1843-5 he published a book on the Constitution, Rules and Practice of the Supreme Court which became the recognised textbook on that subject. In 1846 appeared a collection of his written judgments in leading cases, both at Law and in Equity. In 1856 he snatched time during a vacation to amend and consolidate the rules of Court, and publish them in convenient form.

His capacity for work was remarkable. "For the last seven years," he said in 1857,¶ "I have never been able to call three evenings in the week my own. I am frequently compelled to sit up, in the preparation of judgments, or in other judicial duty, to an early hour in the morning." The usual sitting hours of the Court were from 10 to 4.30 o'clock, "with no interval for refreshment or other purpose."‖ On circuit, the hours were usually from 9 a.m. to 5 p.m. "On the circuit last but one at Maitland," he said in 1860,* "I sat for twelve days for the trial of causes nearly ten hours daily, the weather being excessively hot." Before 1852 the Judges never sat on a Saturday. Thereafter they did, and found it "about the heaviest day in the week."†

But, busy as he was, his judgments betray no trace of slovenliness. It was his practice, he declared, to read every available relevant case on the point at issue before giving his decision. He was essentially a common law man, but appeals were frequently made to the Full Court from the decrees of Mr. Justice Therry when he was the Primary Judge in Equity. Sir Alfred enjoyed the reputation of being a sound lawyer, judicial in mind and temper, with a high conception of the importance and the dignity of his office. The severity of the sentences he sometimes imposed, as contrasted with those now inflicted for crimes more serious, is explained by the atmos-

§*Ibid*, Vol. XXIV., p. 2.
¶J. of L.C., Vol. II., p. 152.
‖V. and P., 1858, Vol. I., p. 1176.
*Banquet, February 11, 1860.
†J. of L.C., Vol. II., p. 155.

phere in which his professional life was spent in Van Dieman's Land and here, the degree of criminality then existent in both colonies, and the relative harshness of the criminal code. "As for your reputation as a Judge," wrote Mr. Justice Dickinson,‡ "no one will, for no one can, assail it. As for myself, I shall always say, as I always have said and have believed and still believe, that so good a Judge as yourself has never existed in the Colonial Empire. I do not imagine there is anyone who has not a very high opinion of your learning and talents."

His interest in law reform was deep and sustained. His letters to the authorities, his evidence before Select Committees, and his work on Commissions, reveal an acute awareness of the proposals of the law Commissioners and of such men as Bentham and Brougham. He was always ready to support such changes in the substantive and adjectival law as were suitable to local conditions and calculated to facilitate the work of justice. "The pure and efficient administration of justice," he once said, "is the real end and purpose for which all government should exist." "You want to put down quirks and quibbles, to destroy needless and unmeaning forms, to prevent justice from being defeated or impeded by technicalities."§ ". . . . It is a matter of great importance to bring justice as near to a man's door as shall be reasonably practicable; to have matters of no great intricacy or amount tried expeditiously and inexpensively to the litigant. In such cases extreme accuracy and rigid legal right are unimportant as compared with these objects." His great work in connection with the amendment and consolidation of the criminal law, and the extension of relief in matrimonial causes, lies outside the scope of this study, but in his ripe old age his passion for perfecting the law continued unchilled.

But Sir Alfred Stephen did not confine his attention to legal matters. He rejoiced in his citizenship. He took an active interest in the life of the community. Good causes found in him an earnest champion. He

‡Letters to Stephen, August 18, 1860.
§V. and P., p. 184.

helped to lay the legal foundation of St. Paul's College. A great advocate of insurance, he revised the forms then used by the Australian Mutual Provident Society for their proposals and policies. Temperance had no more ardent supporter. "Intoxication," he maintained with Mr. Justice Therry, "is the hotbed from which crime springs. Directly or indirectly, all crime is traceable to it—the exceptions being so few as to establish the general rule." In his addresses to the magistrates at the opening of the Court when on Circuit, he adverted again and again to this prevalent besetting source of lengthy Calendars, and enjoined them to do all in their power for the weaker brethren. "The first duty of every man, next to that which he owes his Maker," he said at Berrima on April 17, 1841, "is the duty of repressing the consumption, and, if possible, of entirely preventing the use, of ardent spirits of every kind. Whilst this obstacle to improvement exists, there is little hope in human means for effecting any general reformation or of advancing the great cause of morals and religion."

But his primary extra judicial interest was in legislation. His own list of the Statutes for which he was really responsible when he was not a member of the Legislature is fairly long. In December, 1853, he submitted to the Attorney-General and afterwards published his *Thoughts on the Constitution of a Second Legislative Chamber*. He proposed a House of twenty-five members, consisting of the Chief Justice for the time being, twelve life nominees and twelve elected by the Assembly, four of whom should retire every three years. When he became a member of the Council in 1856, he at once took an active share in its business. When he spoke on such measures as the Electoral Act of 1858, his opinions were strongly conservative, but he was mainly concerned with legal questions. During his first term in the Council, he introduced such Bills as the Titles to Land Bill, Rules Nisi in Equity Abolition Bill, Proceedings in Equity Facilitation Bill, Trust Funds Security Bill, Compensation to Witness Bill, Writs of Trial and Inquiry Bill, and Time of Prescription Bill. Pressure of judicial work forced him from the Chamber, but when he retired from

the Bench in 1873 he returned to it, and left it only two years before his death at the advanced age of ninety-two. It may be doubted whether the annals of New South Wales contain the record of a more worthy life than that of Alfred Stephen.

The first three Chief Justices of New South Wales were men of different temperament, outlook, and capacity. The second and the third seem to have had more in common than either had with the first. No one of them yielded to the other in their respect for the Judgment Seat, or in their devotion to justice. Each of them, with his own tools and to his own design, constructed a monument to himself. That of Sir Francis Forbes is the best. Its architect had the finest mind, the nicest skill, perhaps the greatest opportunity. But those of his successors are of conspicuous merit. If neither of them was his equal in mental strength and subtlety, grip of political fundamentals, or mastery of language, they were perhaps more engaging, more human, better mixers, and therefore no less effective in their relations with their fellows. Such distinctions apart, each of them secured for the Bench he honoured the profound respect of the community during a formative period in the history of New South Wales.