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Bruce Kercher*

Law Reports from a Non-Colony
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Australian Manuscript Decisions
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The author reports on the existence and contents of a manuscript copy of a selection of judgments by Sir Francis Forbes while he was Chief Justice of Newfoundland from 1817–1822. The manuscript found its way into the State Library of New South Wales sometime after Forbes' translation to New South Wales as its first Chief Justice in 1823. The author comments on the insights these manuscript reports afford of the early legal history of Newfoundland as it developed into a British colony. In particular, he draws attention to the significance of twenty-nine judgments in the manuscript but not available in any published series of case reports.

L'auteur rend compte de l'existence et du contenu d'un manuscrit d'une sélection de décisions rendues par Sir Francis Forbes alors qu'il était juge en chef de Terre-Neuve entre 1817–1822. Quelques temps après le transfert de Forbes au poste de premier juge en chef de New South Wales en 1823, le manuscrit fut retrouvé dans la "State Library of New South Wales." L'auteur rapporte les renseignements précieux que contient ce manuscrit portant sur l'histoire juridique de Terre-Neuve au moment de sa naissance en tant que colonie britannique. En particulier, il attire notre attention sur l'importance de vingt-neuf décisions contenues dans le manuscrit qui ne sont publiées dans aucun recueil de jurisprudence.

Lawyers often think of law reports as being solid, authoritative and unchallengeable. In our positivist way, we consider them to consist of official words which are as well accepted as statutes (and usually just as dull). Unlike legislation, however, case reports have not always been accurate or reliable. In the early nineteenth century, some British colonies had no choice but to rely on newspaper accounts of judicial decisions; there were no organized, formal reports. In New South Wales, for example, the newspaper reports were cut out and collected by the courts as the only public records of their judgments. The most reliable law reports are those made by the judges, or at least subject to their final approval (as modern official reports are), but these were rarely available 150 or 200 years ago.

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Newfoundland was unusually well served by formal law reporting in comparison with other early nineteenth century British jurisdictions.¹ Its reports began with Wakeham's *Decisions of the Supreme Court of Newfoundland*, which is volume 1 of the Newfoundland Law Reports, and with Tucker's *Select Cases of Newfoundland 1817–1821*. In each set, the volumes begin with the decisions of Francis Forbes, Chief Justice of Newfoundland from 1817 until he left St. John's in 1822. Even a quick reading of these reports shows that they are not quite the same as modern law reports. Forbes' reasoning relied very much less on case analysis and more on broad legal principles. These reports provide fascinating details of the social and economic practices of another age.

Francis Forbes was an important figure in Newfoundland law, a transitional judge who helped to move the place from its curious pre-colonial state, in which even settlement was supposedly unlawful, to a colony eventually with its own legislature.² His decisions challenged the authority of the governors to make law on their own. Under him, Newfoundland was a place of law and not mere autocratic power. Forbes also asserted, even against the Crown law officers, that the Supreme Court of Newfoundland was truly a supreme court; he considered he had power to oversee the decisions of the magistrates and surrogates (traveling naval officers with civil powers) in the lower courts. He was British but not English, a man for whom the Empire rather than England was home. His early life was spent partly in Bermuda and, apparently, partly in the United States. His legal education was in England, after which he returned to Bermuda as Attorney General before his appointment to the Newfoundland court.³ Such a man was unlikely to follow English law slavishly; Forbes was aware of variations in colonial circumstances and willing to make allowances for them. In 1823 he became the first Chief Justice of New South Wales, jumping from one imperial oddity to another, from a supposed non-colony to a penal colony which was also in the process of moving into the mainstream of imperial society.

1. Unlike Lower Canada in the first half of the nineteenth century. See R. Crete, S. Normand & T. Copeland, "Law Reporting in Nineteenth Century Quebec" (1995) 16 *J. Leg. Hist.* 147.

2. See C. English, "The Development of the Newfoundland Legal System to 1815" (1990) 20 *Acadiensis* 89; S. Ryan, "Fishery to Colony: a Newfoundland Watershed, 1793–1815" (1983) 12 *Acadiensis* 34; P. O'Flaherty, "The Seeds of Reform: Newfoundland, 1800–18" (1988) 23 *J. Can. Studies* 39 and "Sir Francis Forbes" in F.G. Halpenny, ed., *Dictionary of Canadian Biography*, vol. VII (Toronto: University of Toronto, 1988) at 301. The latter includes useful analyses of many of Forbes' judgments.

3. See P. O'Flaherty's entry on Forbes in the *Dictionary of Canadian Biography*, *ibid.*; and C.H. Currey, *Sir Francis Forbes: the First Chief Justice of the Supreme Court of New South Wales*, (Sydney: Angus and Robertson, 1968) c. 1.

The Mitchell Library, part of the State Library of New South Wales, holds a legacy of this career change of Francis Forbes in the form of a manuscript copy of some of the legal decisions he had made in Newfoundland.⁴ Whoever selected and compiled the cases in the Mitchell manuscript also wrote a preface to it, stating that they were taken from the judge's notes and that "they are but a few of several thousand cases, involving property of some hundreds of thousand pounds in amount, and arising in the course of about five years; they are selected, as being more particularly connected with the Trade and Fisheries of Newfoundland." Elsewhere the manuscript states that there is only one criminal law case in the collection, and it was included only because it raised a point about the jurisdiction of the Supreme Court.⁵

It seems clear from the context of the manuscript's preface that it was written by Forbes himself. In particular, it has a legal historical tone which is also evident in many of his judgments. His respect for the legal history of Newfoundland led him to incorporate its customs into many of his decisions. (He later did the same in New South Wales.) At least, the manuscript contains the cases which Forbes himself thought worth taking to his new posting in the penal colony and considered to be the most important of the thousands which he decided in St. John's. In effect, they are the early nineteenth century equivalent of official reports.

In many of these cases, the manuscript and the first volume of the *Newfoundland Law Reports* [hereinafter N.L.R.] are all but identical, with only a few changes to grammar, punctuation and spelling. (In the N.L.R. Forbes' "rateable" becomes "ratable" for example.) Unlike the manuscript, the N.L.R. has headnotes, while the manuscript often has fuller details of the parties' arguments. However the judgments themselves are almost the same in most cases. This means, of course, that the N.L.R. reports are also taken from Forbes' notebooks, which shows that they are reliable records of what Forbes intended to say.

The Mitchell library manuscript is not merely an early version of the N.L.R. volume because there are significant differences between the two. Some cases reported in the N.L.R. are not in the manuscript and, more significantly, twenty-nine decisions recorded in the manuscript are not in the N.L.R. or the Tucker volume. Even when the N.L.R. and the manuscript both record the same case, on a few occasions there are some significant differences between the two reports. The manuscript also

4. Sir Francis Forbes, *Decisions of the Supreme Court of Judicature in Cases Connected with the Trade and Fisheries of Newfoundland 1817-1821*, Mitchell Library, New South Wales, A740 [hereinafter Mitchell manuscript].

5. *The King v. Herring* (11 September 1820), Mitchell manuscript at 280.

includes some Surrogate Court judgments from which appeals were being heard, as well as the Privy Council's 1821 decision to affirm Forbes' judgment in *Newman v. Meagher, Murphy and Gleeson*.⁶

The Mitchell manuscript adds important new information about a number of Forbes' celebrated cases which are reported in the N.L.R. For example, in *R. v. Kough*,⁷ Forbes held that, despite firm imperial policy, it was after all possible to acquire title to land in Newfoundland. This was a large step towards the official recognition of the island as a place of lawful settlement like any other colony, and further evidence of Forbes' willingness to impose his version of law on the governors. The decision is rightly acclaimed, but the Mitchell manuscript contains a judgment which is almost as significant. The N.L.R. report of *Williams v. Williams*⁸ states that the bulk of Forbes' judgment is missing. In fact it is in the Mitchell manuscript. Contrary to the *Dictionary of Canadian Biography* entry on Forbes, the missing parts of the judgment in *Williams* do not state that land on the island could not be owned. Instead, the judgment says that land within the fishery, in this case a house and garden in the harbour area of St. John's, was subject to a customary local title. English land law, including primogeniture, was inapplicable to fishery land according to this case, but other law was available. The best source of law on this point, Forbes held, was local usage under which fishing plantations were chattels real, attachable for debt and subject to equal distribution on death. Incidentally, a note in the manuscript on this case, presumably by Forbes, refers the reader to *R. v. Kough*. That note and others like it show that the manuscript is a considered document, rather than a mere contemporary notebook.

One of Forbes' clashes with other officials concerned the supervisory powers of the Supreme Court. In *Clift v. Holdsworth*⁹ Forbes stated that his court had inherent power to overturn the decisions of the inferior courts of Newfoundland. He was campaigning against the amateurism of the magistrates and surrogates, and was attempting to bring the whole of Newfoundland's law under his version of the rule of law. This judgment, reported in the N.L.R., is also well known, but the Mitchell manuscript additionally contains the contrary opinion of the Crown lawyers and Forbes' long, careful reply. As shown later, he did not give up this point.

The manuscript also has additional material on *Jennings and Long v. Hunt and Beard*,¹⁰ the Labrador fishing monopoly case in which Forbes

6. (1821), 1 N.L.R. 182.

7. (1819), 1 N.L.R. 172.

8. (1818), 1 N.L.R. 103.

9. (1819), 1 N.L.R. 167.

10. (1820), 1 N.L.R. 220.

declared that the governor had no power to make law. This was the most radical of his decisions. Anti-monopolistic and anti-governor, if it had been given full effect it would have made Newfoundland and Labrador ungovernable. Newfoundland had only been granted a year-round governor in 1817, and it was not the only British jurisdiction at the time with no legislature. New South Wales did not have one either until 1824. There too, the governors filled the vacuum in law-making power by issuing a series of formal proclamations in exercise of what they thought was the prerogative power of the Crown. Jeremy Bentham considered the Crown had no power to make general law even in these circumstances, as did James Stephen of the Colonial Office as well, so Forbes was in good company. Most cautious modern Australian commentators disagree, arguing that the absence of a legislature meant the governors could make laws so long as they were consistent with the law of England.¹¹ The Colonial Office usually thought the same, since it approved many of the orders and proclamations made by the governors of the Australian colonies before they were granted legislatures.

The additional manuscript material on *Jennings and Long v. Hunt and Beard* includes a copy of the governor's order and of the Surrogate Court's decision which Forbes overturned. The manuscript also contains an extraordinary judgment of another surrogate, James Booth, delivered only a few months after Forbes left Newfoundland. Dated 22 July 1822, it reaffirmed the monopoly of Beard and Co. and stated that this was not in violation of any of the statutes regulating Newfoundland and Labrador. It was as if Governor Hamilton and the surrogates were only too glad to see the back of Forbes, who was regarded as having "opinions of the freest tendency" as Hamilton put it,¹² and to reaffirm their old ways of oligarchic government.

The twenty-nine judgments which appear in the Mitchell manuscript but not in the published reports concern the same kinds of issues as those in the reports, most interestingly on the powers of the governors and the difficulties of imposing formal law on legally amateur judges. Many others concern the complex local laws on debt and insolvency. These explain the gloss which Forbes and other judges imposed on the statutory preferences enjoyed by wage earners and merchants when their planters,

11. E. Campbell, "Prerogative Rule in New South Wales, 1788–1823" (1964) 50 *J. Royal Australian Historical Society* 161 at 180; R. Else-Mitchell, "The Foundation of New South Wales and the Inheritance of the Common Law" (1963) 49 *J. Royal Australian Historical Society* 1 at 5; H.V. Evatt, "The Legal Foundations of New South Wales" (1938) 11 *Aust. L.J.* 409 at 423; and W.J.V. Windeyer, *Lectures on Legal History*, 2d ed. (Sydney: Law Book Co, 1957) at 306.

12. Currey, *supra* note 3 at 19.

the middlemen, were declared insolvent. Among the most important of the debt cases is *In re Graham's Insolvency*.¹³ These cases, like the ones in the N.L.R., are invaluable sources for economic historians interested in knowing how the fishing industry was funded, as well as historians of labour practices. Newfoundland insolvency law was uniquely favourable to workers even if the practices of the merchants and planters were not.

One of the important manuscript decisions which has not been formally reported was *Brown and others (Magistrates for District of St. Johns) v. Miller, Fergus and Co.*,¹⁴ in which Forbes was faced with rebellion. The winter of 1817 to 1818 was a severe one, with a risk of famine in St. John's and the outports. A mob at Bay Bulls seized a vessel and its cargo, and the magistrates placated them by distributing food. This stretched Forbes' liberalism beyond its limits. He said that conditions must be extreme to break down "one of the very first foundations of society — the preservation of private property." It was the duty of the British government, he stated, "to destroy such lawless associations as rebels to their King and Country, and enemies to the Human race." His liberalism was based on freedom of property.

The liberalism of Forbes was also based on a very early version of the free will theory of contract law. In many decisions he said local customs were imported into formal law via implied terms in contracts. This was his main method of adapting English law to local circumstances, but he made it subject to any contractual intention contrary to the custom. Forbes' concern with the superiority of the parties' actual agreement also meant that he saw his primary task as interpreting agreements, not rewriting them when they were unfair. In *O'Brien v. Kennedy*¹⁵ he said that he was willing to relieve against fraudulent and immoral contracts, but not foolish ones, such as the case before him. Together with a concern for private property, his liberalism had *laissez faire* overtones. This, of course, allowed the merchants to hold the planters at their mercy, with little inquiry into the merchants' practices and none into their prices.

Some of the Newfoundland judgments foreshadowed the disputes in which Forbes would become embroiled in New South Wales. There, too, he clashed with a governor who thought he had autocratic powers; there too, Forbes' judgments gave heart to reformers. Governor Darling took a strict line because New South Wales was still a penal colony. One of the main conflicts between Forbes and Darling concerned the governor's repressive attempts to control the New South Wales press which was so

13. (1821), Mitchell manuscript at 244.

14. (1818), Mitchell manuscript at 84.

15. (1818), Mitchell manuscript at 99.

hostile to his despotic ways. Forbes held that freedom of the press was one of the inherited marvels of all British subjects.¹⁶ He had shown the same attitude in Newfoundland in *Bland v. Carson*,¹⁷ a libel action over an article in the *Mercantile Journal*. In that case he was concerned that publishers should not be compelled to “lay open the whole proceedings of their Press and themselves to criminal prosecutions.” He also reiterated that the Newfoundland Supreme Court was not bound by strict procedure: in civil matters at least, “this Court is not nice in matters of mere form, where the ends of justice can be obtained without it.”

Forbes was much more concerned about formality in criminal matters, as shown in the Newfoundland case of *Norris v. Carter and Morrison*.¹⁸ Norris was charged before the magistrates of the Court of Sessions with selling liquor without a licence and on a Sunday. He was fined £10, and, when he failed to pay, his boats were seized in execution. Norris then sued in trespass, in effect appealing against the initial decision. This led to a long, important judgment by Forbes, in which he held that English Sunday trading laws were in force in Newfoundland. “[T]he laws of England,” he declared “are regarded by the Court as a common fund, from which the Colony may draw as often and as largely as its exigencies may require.” Noting that “the eyes of the country are upon us,” Forbes determined that the decision as to which laws of England were in force in Newfoundland was initially for the local courts, which meant particularly the Supreme Court. In this way he got around the views of the Crown law officers that his court had no general supervisory jurisdiction. Another important part of the inheritance of English law was the institution of a jury, and in the absence of laws to the contrary, Forbes held in this case, the magistrates were required to act only with a jury. Forbes’ judgment in *Norris v. Carter and Morrison* contains his most important Newfoundland statements on the reception of English law, and is also a pointer to his later decisions on the role of juries in convict New South Wales. It is also the most significant of the unreported manuscript cases to modern lawyers, since the reception of English law is still a live issue today.

It is also fair to say that all of the twenty-nine unreported cases are sufficiently important to form part of the canon of the official law reports of Newfoundland, especially since they were apparently selected and approved by Forbes himself. In effect, they are his own version of the law

16. See B. Edgeworth, “Defamation Law and the Emergence of a Critical Press in Colonial New South Wales (1824–1831)” (1990) 6 *Aust. J.L. & Soc.* 50.

17. (1820), Mitchell manuscript at 189.

18. (1821), Mitchell manuscript at 248.

reports, rather than merely a judge's notebooks or unsorted archival records. For lawyers, this process of selection is significant, whereas for social and economic historians the larger archival record, the mass of the apparently unimportant cases, may have greater significance. Even Forbes' selections are peculiar: it is odd, for instance, that *Landergan v. Buchan and Leigh*, one of his principal attacks on the Surrogates' Courts, does not appear in the N.L.R. or the Mitchell manuscript.¹⁹

These records of Newfoundland cases make Australian historians envious. Forbes was Chief Justice of New South Wales from 1823 until 1837 but only seven of his judgments were formally reported, and that did not happen until a few of the many surviving records were collected together at the end of the nineteenth century. Forbes' notebooks of his New South Wales decisions are missing from the state's Archives Office, which means that the only records of most of his cases are in the newspapers and in the notebooks of one of his colleagues who arrived in Sydney part way through Forbes' term of office. There can be no serious comparison of Forbes' judgments in the non-colony with those in the penal colony until the records of his Sydney decisions are painstakingly uncovered. The Mitchell manuscript of Newfoundland cases is an easily accessible collection of authoritative judgments, available on microfilm, which has no counterpart in the place where he spent the larger part of his judicial life.

19. See P. Neary & P. O'Flaherty, *Part of the Main: an Illustrated History of Newfoundland and Labrador* (St. John's: Breakwater Books, 1983) at 59.