

State Library of Western Australia Foundation
Behind the Covers

The Past – not such a Foreign Country

Chief Justice Robert French AC,

16 May 2013, Perth

Your Excellency the Governor, Mr Crisafulli, ladies and gentlemen. I am delighted to be able to join with members of the State Library of Western Australia Foundation this evening to celebrate and acknowledge its acquisition of the papers of the prominent 19th century Western Australian Magistrate, Robert Fairbairn.

Law and history go hand-in-hand. The law administered in the courts every day, both statute and common law, is embedded in historical contexts. The institutions of the law, the legal profession and the courts, are part of a history that predates the European colonisation of Australia. Sir Victor Windeyer once spoke of the nature of a court and court officers for the purposes of the Australian Constitution as:

matters that were well known in England long before the Australian colonies began. The meaning of the word 'court' has thus come to us through a long history; and it is by the light of that that it is to be understood in ss 71, 72 and 73 of the Constitution.¹

That historical understanding has had a part to play in recent years in determining the limits of State law-making power to impose or confer certain functions or duties on courts — limits which are marked out by reference to the essential and defining characteristics of courts.

In a case brought to the High Court in 2010 by members of the Finks Motor Cycle Club challenging organised crime legislation in South Australia and the functions it imposed on the Magistrates Court of that State,² it was useful to be able to refer to some of the history of the magistracy in Australia and in South Australia. Alex Castles in his *Australian Legal History*, published in 1982, said that after 1850 the paid magistracy was made up of 'officials

¹ *Kotsis v Kotsis* (1970) 122 CLR 69, 91.

² *South Australia v Totani* (2010) 242 CLR 1.

who were basically judicial-style functionaries'.³ They were not all qualified lawyers and not all independent of administrative control by heads of department of the Executive Government. However, as three Justices of the High Court were to point out:

The independence and impartiality of inferior courts, particularly the courts of summary jurisdiction, was for many years sought to be achieved and enforced ... by the availability and application of the Supreme Court's supervisory and appellate jurisdictions ...⁴

Robert Fairbairn is part of that legal history for Western Australia. Not unusually for the magistracy as it was, he began his working life in the administration of justice with the Western Australian Civil Service as a clerk to the Magistrates Bench at Busselton progressing to Resident Magistrate at Greenough, Toodyay, Albany, Busselton, Kimberley, Roebourne, Bunbury and Fremantle. He was connected to many of Western Australia's important families having married twice, to Fanny Taylor and Frances Sarah Bussell.

His immense collection of papers, some of which is on display this evening, is not simply a collection about Western Australia's legal history. It provides some concrete detail on the professional and social life, perspectives and experiences, of a person who has been described as an important Western Australian figure. It includes ten of Fairbairn's diaries. They include accounts of his interactions with indigenous people in the Murray District, descriptions of settlers of the area and the introduction of convicts into the Colony. He gives accounts of life in Perth in and after 1860. His diaries cover his time not only in Busselton, but later in the Kimberley, in Fremantle and then in the Murchison and Gascoyne areas. The collection also includes a very large quantity of his correspondence, both official and personal. There are many photographs and articles, including his court dress which he wore when he was presented with the Imperial Service Order by King Edward VII in 1902.

The collection is a cornucopia of engaging historical detail. The legal history to which the courts resort in interpreting statutes and the common law is important, but has a certain dry quality about it. When we look to a record of the kind comprised by the Fairbairn

³ Alex C Castles, *An Australian Legal History* (The Lawbook Co, 1982) 327.

⁴ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 82-83 [84] (Gummow, Hayne and Crennan JJ).

Collection, history comes alive for us in a special way. Somebody once wrote that 'the past is a foreign country they do things differently there'.⁵ However, when we visit the lives and experiences, thoughts and perspectives of the past through collections such as this, it does not seem so foreign. We can observe differences in outlook, but also continuity in traditions that we recognise and value today.

Through collections such as this, members of the legal profession and the judiciary of years past can speak to us with living voices beyond the bounds of their own mortality. Sometimes what they have to say will have a humour and insight that engages us in a very contemporary way. One of my favourite quotations from a legal practitioner, part of the history of the profession in the Northern Territory, came from a legal practitioner in Darwin in 1911, Ross Mallam. He comprised fifty per cent of the Territory profession at that time. He had a demanding client who said he wanted justice. Mr Mallam is recorded as having told his client:

We can probably do better. I think we can win your case.⁶

The history of lawyers, judges, magistrates and judicial officers is part of our social history. It is best understood against the background of a more rounded and holistic view than is provided by court records and documents, valuable historical records that they may be. That social history itself is incomplete without the story of our developing legal infrastructure and with it the development of the rule of law in Western Australia.

I congratulate the State Library of Western Australia and the Foundation for taking this occasion to promote the importance of documentary record collections to our sense and understanding of our legal and wider social history. It is to be hoped that the material which the Library holds in this area, and there is much, can be expanded over the years and become a source of more accessible histories and published articles for the benefit of all Western Australians.

⁵ Leslie Hartley, *The Go-Between* (Hamish Hamilton, 1953) 1.

⁶ Douglas Lockwood, *The Front Door: Darwin 1869-1969* (Rigby, 1968) 234.