Bruce Kercher’s contribution to the study of legal history in Australia is well known through his own impressive corpus of writings and his involvement in the Australian and New Zealand Law and History Society and latterly The Francis Forbes Society for Australian Legal History. Perhaps of longer term significance will be his two web sites, which reproduce a selection of decisions of Australia’s first two Supreme Courts of New South Wales and Van Diemen’s Land. These sites provide a wealth of material for legal historians and their value can only grow. In this present volume of James Dowling’s Select Cases Kercher strengthens his contribution to the study of case law in Australia. He has been joined as editor by Tim Castle, a barrister and Research Fellow at the Division of Law Macquarie University, where Kercher is a Professor.

When English barrister and law reporter James Dowling was appointed as the third judge of the Supreme Court of New South Wales in 1828, he began a project to produce the colony’s first set of law reports. Dowling served for sixteen years, the last seven as Chief Justice, and heard thousands of cases, which in his organised and methodical way he wrote up in 268 general judicial notebooks, complete with index. From these, Dowling compiled nine notebooks of cases (8 volumes of case reports and 1 volume of case notes) with accompanying head or marginal notes to describe the legal principle decided by the case. Dowling called these notebooks his Select Cases. Castle and Kercher rightly believe that they ‘contain a unique record of colonial life and the interaction of law and the community in the colony, as witnessed by the Supreme Court judges during the period 1828 to 1844’. Never before published, the editors have included 465 of those cases (comprising over 425,000 words of handwritten text) in this volume, ‘which convey a remarkable sense of the legal heritage brought to New South Wales by English law’. Some cases are as short as a third of a page, while the longest is about 33 pages (R v Farrell and Others). The editors have reproduced the handwritten cases and headnotes as found in the notebooks and explain their decisions and modifications in preparing the volume for publication. They note that textual changes of the original are not indicated in the book itself. The judgments are supplemented with tables of Cases Reported, of Statutes Considered, and of Cases Judicially

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Considered. In addition there is a Glossary and an Index, all adding value to the judgments.

Dowling helped to develop ‘a distinct common law and legal culture in Australia’ by trying to achieve the ‘practical administration of justice’ in New South Wales. He sought to adapt or mould English law to ‘local difficulties and peculiarities’ (as the editors put it ‘to reconcile the differences between colonial life and English law’). Dowling was guided by ‘public opinion’, which he felt was the ‘legitimate foundation of political government’. By ‘public opinion’ he meant ‘the underlying notions of justice in the society at the time’ as expressed by lawyers, the press, the clergy, business interests and litigants drawn from all segments of society. His main reason for preparing his Select Cases was to record the development of ‘a distinct body of Australian common law by the early work of the Supreme Court’. Some of the most absorbing cases involve the issue of the reception of English law. The editors are impressed with ‘the high quality’ of Dowling’s judgments, which addressed complicated social and legal questions in a sophisticated and learned way. One index of their quality and soundness was the absence of appeals to the Privy Council.

Although the Macquarie Law website contains many of the cases reproduced here, the advantage of this volume is in the arrangement of the cases. The editors have arranged the cases chronologically within twenty-two broad subject categories. In addition Criminal judgments are divided into general, murder and stealing and Procedure judgments into costs, general, and trial. Although criminal cases were dominant in the Supreme Court, the Select Cases have ‘a strong civil flavour’, with 375 civil cases compared with 90 criminal cases. This reflects the concern at the time to recognise and enforce civil rights in actions for damages, the liberty of free and freed citizens, the exercise of judicial power, and freedom of speech. The largest number of decisions relate to commercial matters, an area of special interest to Dowling. Those judgments underline three major themes: consistently applying legal principles to protect property rights, creating circumstances conducive to investment and expanding trade, and enforcing a minimum standard of commercial morality. Topics such as Family, Land, and Wills, Probate and Administration highlight the nature of personal relationships in New South Wales. A number of cases deal with the rights of Aborigines and Convicts. The editors stress how the cases show ‘a vibrant civil community’ and ‘the continuous process of interaction between the law and that community’ between 1828 and 1844.

The editors lament that in the past Dowling and his work have been overlooked by legal and general historians. Dowling’s predecessor Francis Forbes and his successor Alfred Stephen have both received more attention. With the publication of this valuable and well chosen collection the editors will ensure that he will not be neglected in the future.

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