

A chief justice who once ran foul of the law

Michael Pelly

In NSW's early days, two statutes ran side by side - one for the king's subjects and the other for Aborigines, writes Michael Pelly.

When Bob Ballard killed Robert Barnett in the Domain in 1829 the fledgling NSW Supreme Court wanted nothing to do with it. It was a dispute between two Aborigines and the native Australian was not a subject of the king. He had never agreed to be placed under his rule. And, said the court, the crown should not intervene in disputes between Aborigines because "the savage is governed by the laws of his tribe and by these he is content".

While that situation lasted for only another seven years, the decision was recorded in what could be this country's first law reports - the journals of our second chief justice, James Dowling.

Dowling stepped off his ship in 1828 to an 11-gun salute and three cheers from the convicts on board. He ended up making such a mark on the colony that a city road named after him survives - South Dowling Street. The original route ended at his family home.

NSW's second chief justice (1837-44) after Frances Forbes (1824-37) had a passion for not only recording cases but developing a system of law suited to Australia - not England - at a time of growth in the colony.

When Dowling arrived there were only 36,000 people - half of whom were convicts. By his death at 56 - in 1844 - the population had grown five times and the ratio of convicts had fallen to 10 per cent. Transportation had ended in 1840 and in 1842 the Legislative Council was reconstituted with 36 members - 24 of whom were elected.

The Sydney barrister Tim Castle has been working his way through Dowling's 268 judicial notebooks and, with Macquarie University's Professor Bruce Kercher, is preparing a volume of his select cases from nine Supreme Court diaries. They reflect the workings of what Dowling called the first truly democratic institution in the colony - and the habits and customs of its inhabitants.

There was, for example, a dispute over sheep that escaped and went for a frolic on George Street - their handler complaining "they went too fast for me". And in an early personal injuries case, a man was awarded (pound stg.)(pound stg.)250 when his cart overturned in George Street after hitting a mound of dirt left by government authorities.

About 75 per cent of all civil cases - disputes between individuals - concerned bills of exchange, debts and insolvency. The sale of a 200-hectare property at Pittwater was probably our first trade practices case, with the buyer complaining of misleading descriptions in the auction notices.

Murder charges arising out of duels feature, along with a father who sued his son-in-law for seducing his other daughter, aged 16, and getting her pregnant.

And even then jurors sometimes played by their own rules. In one building case, some members inspected a house because they weren't happy with discussion of the issue in court. Then as now, the judge saw no option other than to discharge the jury.

A good deal of his work involved setting parameters for the operation of law. When it decided it had no jurisdiction over Ballard, Forbes reasoned that Aborigines "lived in the uncontrolled freedom of nature" and that authorities had no right to interfere in their disputes - even if they considered the justice meted out to be excessively violent. Ballard was released from the court but not the crown, which sent him to Van Dieman's Land, now Tasmania.

Dowling had said that until Aborigines agreed to the application of English law, they should be left alone. Both native and settler should treat the other with respect, which included not depriving the savage of any property. Seven years later the position was reversed when Forbes agreed with the third member of the court, William Burton, that anyone who lived in the colony should come under the authority of its court. The judgement reflects the terra nullius doctrine - that Australia was an empty land when the English arrived.

Dowling was determined the law should be practical - and applicable to Australia.

His popularity, however, didn't stop him running foul of the law during a sweep for bushrangers. Dowling enjoyed walking to work and had to set off early one day to cover the 18-kilometre journey from a friend's house at Parramatta into the city.

At sunrise, the dishevelled chief justice was stopped by police and thrown into the watchhouse. It was only after he convinced them he was NSW's most senior judge that he was able to take his seat in court.