

## History in the dock

By: Michael Pelly

A judge's notes provide a fascinating insight into the perils and pitfalls of living in early Sydney, writes Michael Pelly.

To face a criminal court in the early days of the NSW colony was a matter of life and death. There were about 100 capital offences and stealing from a house could end in execution, just as would a cold-blooded killing.

It reflected the colony's robust approach to settling disputes, both in and out of court. Sometimes the combatants could barely wait until they came ashore.

On their way to Sydney aboard the ship Elizabeth, mariners Robert Atkin and Charles Pemberthy came to blows during a quarrel and Atkin challenged Pemberthy to a duel. They left the ship and rowed to Garden Island complete with seconds and four observers. The pistols were loaded with ball and gunpowder and after both missed, Atkin's second shot was fatal.

When he came before the court in May 1828, Atkin was joined by the seconds, Thomas Chambers and Henry Milton. By that time duels were no longer treated as an acceptable way of settling a dispute, even though the authorities often turned a blind eye.

The court decided that while Milton had merely been a bystander, Chambers had helped load Atkin's gun. He and Atkin were jailed for three months after the chief justice, Francis Forbes, saw no merit in Atkin's claim that he was defending his honour .

He said: "It would have been far more honourable in you, recollecting the duties you owe, as a member of society, had you avoided a step of this kind. To proceed to such extremes as these, to satiate the ebullition of passions arising out of angry feeling, is indeed false honour. You not only exposed your own life, but placed that of another in jeopardy - the death of your opponent was the consequence.

"You permitted yourself to be hurried on this step by an impulse of feeling which the giddy world is apt to say, arises out of injured feeling, and to resent what you conceive an insult; you satiate that resentment by causing a fellow creature's death. When you, Atkin, laboured under a sense of wrong having been done you, there was a course open to you, by which ample redress might have been obtained. But this will teach you a lesson on the effects of taking the law into your own hands."

Traditionally, duels were pieces of theatre in which 10 steps were paced out and the two men exchanged shots. The pistols were so inaccurate that often no one was hit, and in Atkin's case they had misfired before the fatal shot. However, honour was satisfied and the combatants could live together again.

The other judge in the Atkin case, James Dowling, agreed that such behaviour had no place in the colony. The seconds were just as guilty because "all involved had gone out in the prosecution of an unlawful purpose".

The case would have been one of the first Dowling recorded after his arrival from England in March 1828 to join Forbes on the court. While the newspapers of the day - The Australian and Sydney Gazette - reported the facts and the findings, there were no law reports that explained the legal reasoning.

The Supreme Court was the colony's first superior court of record and would establish precedents that would reflect its social and commercial customs. The common law, adopted from England, would have to be modified to reflect the peculiarities of the settlement.

For the next 16 years, Dowling faithfully recorded the facts, the arguments of counsel and the judge's findings in thousands of cases. Even after he became chief justice in 1837, he would transcribe his shorthand at night and keep important cases in bound volumes.

They were Australia's first law reports, but when he died in 1844, aged 57, his work was not carried on by his son. The diaries were eventually sent to the NSW records office, where they sat virtually untouched for about 150 years.

However, when Professor Bruce Kercher of Macquarie University was researching the early Supreme Court cases he found them a valuable complement to the newspaper reports.

A Sydney barrister, Tim Castle, and Kercher have now gone further. Next month Dowling's work will be published under its original title: Select Cases.

They have sorted the cases into such categories as include murder, stealing, contracts and family law.

The duels are listed in the murder category, reflecting the court's view of what was formerly an "honour" crime.

Only five days after Atkins and Chambers were found guilty, William Guise faced the court after killing a publican, Edward Whitfield, in a bare-knuckle fight for a (pound stg.)(pound stg.)50 purse.

Dowling records Guise challenged the indictment, which charged him with murdering Wakefield. Before a witness was called, Forbes directed Guise be acquitted and then charged with Whitfield's death. A jury convicted Guise of manslaughter, but the chief justice suggested he deserved some latitude. The contest "was prolonged by the obstinacy of the deceased, in refusing to give it up, though frequently intreated [sic] to do so".

However, he could not, "under any circumstances, afford its sanction to such proceedings" and fined Guise (pound stg.)(pound stg.)50. It was the size of the bet, which Forbes considered "as reprehensible as any other part of the affair".

The colony still had its share of grisly crimes. One of the colony's first recorded axe murderers, Thomas Lucas, was sentenced to death after swinging his blade into the left side of Robert Waterworth's face on June 27, 1837.

It was not only the behaviour of those on trial that concerned the court. That year, Thomas James was charged with murdering his wife, but as soon as the first witness started giving evidence, the trial judge, William Burton, realised the witness was too drunk to make sense. Dowling noted the trial was delayed for two hours while the witness was sent to hospital "for the purpose of having remedies applied to him, as were within the skill of the surgeon to restore him to a fit state to give evidence". The man returned and briefly gave evidence before the judge again decided the surgeon's skill had been no match for the volume of alcohol consumed.

The attorney-general wanted to end the farce by discharging the jury. Burton agreed, saying "their minds had been so disturbed from the grave consideration of the case by what they had witnessed". He treated it like a case of sudden illness having accepted "there was no proof the witness had been made drunk by the prisoner or by any person at his instance".

James was convicted by a second jury, when the witness presented himself in better condition. That didn't stop James arguing the first jury should not have been excused and when the case came before the Supreme Court, Dowling wrote that he "could find no other like it".

Juries could be discharged only in criminal cases in unforeseen accidents, and "voluntary drunkenness can scarcely be considered as a sudden and unforeseen accident". Dowling said the judge could have waited a little longer for the witness to recover, but he let the verdict stand.

While any murder dominated the headlines, stealing - as it remains today - was the most common offence. Sheep and cattle featured prominently, but in one case a John Lee was convicted for stealing two emus and sentenced "to work in irons on public roads for 12 calendar months".

One of the more infamous robberies involved the theft of (pound stg.)(pound stg.)12,000 from the Bank Of Australia in 1828 - for which

George Farrell, James Dingle and Thomas Woodward stood trial. Farrell and Dingle had climbed down a sewer, dug for several days, then pierced the bank walls.

The investigation was going nowhere until William Blackstone admitted his involvement. Like Woodward, he had received some of the stolen notes, but had since been convicted of another offence and transported to Norfolk Island. When they faced trial, Farrell and the others challenged the right of the star witness to testify.

It has been a tenet of British law that capital felons - those convicted of offences punishable by death - were treated as incompetent witnesses - or dead in the eyes of the law. The principle was called "convict attaint". Forbes conceded there would not be many potential witnesses left if it applied in Sydney. However, he said Blackstone had been guilty of "attaint upon attaint" and had not been pardoned.

Dowling and the other judge, John Stephen, disagreed, with the former saying: "Judges of this court have constantly found themselves obstructed by local difficulties and peculiarities, arising from the character of the inhabitants."

They had been compelled to adopt courses "which would perhaps startle a lawyer in Westminster". He called Blackstone "an infamous and worthless wretch" but said he had withstood seven hours in the witness box. He reasoned it was better to leave it up to the jury to gauge his credibility, just like any other witness.

As the chief justice disagreed, Blackstone was sentenced to death but this was commuted to transportation for 14 years.

The rule was also considered when James Gardener and James Yeurs faced trial for stealing from a house in 1829, and all the witnesses were capital convicts. The attorney-general argued that if the convict attaint rule applied "it would defeat the ends of justice in two out of three cases, because in the great majority of criminal prosecutions depend solely upon the testimony of attainted felons". Dowling made the wider point that civil contracts, wills, bonds and other agreements might be set aside simply because they were witnessed by convicts.

Gardener and Yeurs were sentenced to hang, along with six others. These public events continued until John Knatchbull - found guilty of murder after the court rejected the colony's first recorded insanity plea - met his fate in Taylor Square in February 1844. The newspapers offered disapproving words about the number of women and children in the crowd of 10,000.

The status of Aborigines also features in Select Cases. In two instances, the court would not allow the trial to proceed because there was no available interpreter.

In one case, the court ruled an Aborigine dubbed Dirty Dick should not be tried under British law because he killed another Aborigine. He was discharged, but was sent to Van Diemen's Land. Dowling recorded Forbes as saying it had been "the practice of the courts of this country - ever since the colony was settled - never to interfere with the quarrels that have taken place between the natives themselves".

But Boatman, a "naked savage" was tried because he committed his offences - stealing sheep - against British subjects. NSW suffered significant depressions in 1828-1830 and 1841-1843 and it was perhaps in that environment the court stated "the Englishman has no right wantonly to deprive the savage of any property the savage possesses".

It took 150 years for the High Court to offer the same view when it restored native title rights in the Wik ruling.

TOMORROW: Negligence cases, property disputes, prenuptial agreements, family squabbles, industrial law, the press and jousts with the governor. For details on cases - and to check whether an ancestor is featured - see [www.law.mq.edu.au/scnsw](http://www.law.mq.edu.au/scnsw). The project is sponsored by the Francis Forbes Society for Australian Legal History, [www.forbessociety.org.au](http://www.forbessociety.org.au)