

Laying down the law in a new land

By: Michael Pelly

A duel at Garden Island. A father outraged that his son-in-law had got his other daughter pregnant. A witness so drunk he was sent to hospital to sober up before giving evidence that afternoon.

The first 20 years of the NSW Supreme Court provide a fascinating insight into life in NSW as it began to loosen the apron strings of mother England.

Founded in 1824, the court handled everything from minor debts to murders. But there were no official court reporters to record evidence until 1911 and no formal law reports until 1863.

When the former law reporter James Dowling took his seat on the court in 1828, he resolved to take notes on the cases he heard. Over the next 16 years he filled 268 notebooks with thousands of cases.

He succeeded the first chief justice, Francis Forbes, in 1837, and before he died in office in 1844, aged 57, Dowling had chosen 465 cases for publication.

His efforts shed light on the customs, mores and expectations in the colony as it grew from 36,000 to 173,300. In 1828, 46 per cent of the population were convicts; by 1844 that proportion had fallen to 11 per cent.

Transportation ended in 1840, and in 1842 the Legislative Council was reconstituted with 36 members, 24 of them elected.

Dowling did not publish the cases before his death. When his son decided they would have no value as legal precedent, they were sent to the state archives.

In a project driven by Tim Castle, a Sydney barrister, and Bruce Kercher, professor of law at Macquarie University, Dowling's Select Cases will be published next month and take its place as a volume of Australia's first law reports.

The cases underline how English law was adapted to suit the needs of the penal colony. On one occasion Chief Justice Forbes said: "Of all the evils upon society, I know none more to be deprecated than to be governed by unsuitable laws."

For example, there was no point in following an English law that banned evidence from those convicted of offences punishable by death. That

would disqualify a good proportion of the population, the court reasoned.

“The decisions established the rules of society in Australia and what was considered acceptable behaviour,” Mr Castle said.