

Power and pain in old Sydney

By: Michael Pelly

The NSW governor had absolute authority in the state's early years, until judges and newspaper editors took him on, writes Michael Pelly.

THE daily business of Sydney's courts provided a ready source of human drama and gossip for the colony's newspapers. They could be insulting and contemptuous, but judges put a high value on the freedom of the press in the fledgling days of democracy.

The governor was the absolute authority in Sydney - its media and the Supreme Court were the only institutions that threatened his dominance.

In the 1820s, the first chief justice, Francis Forbes, had some famous run-ins with Governor Ralph Darling.

Sir James Dowling, who sat on the court with Forbes from 1828 to 1837 and then succeeded him as chief justice until his death in 1844, also didn't shy away from judicial activism.

His recorded facts, arguments and court decisions in 465 cases will be published next month.

The tensions between the Supreme Court and Government House were illustrated when Forbes reined in Governor Darling's bid to assert his control over convicts.

In Jane New's case, Darling revoked an assignment - originally made by the governor of Van Diemen's Land (Tasmania) - of a woman to her husband and sent her to the female factory (women's prison) at Parramatta. He argued he had the right to do so, despite her conviction for stealing being overturned.

New's husband brought her case before the Supreme Court on a habeas corpus action which challenged the power of the governor to detain her.

Forbes effectively decided the case on a technicality, saying Darling had no power to intervene in an assignment made by another governor.

"In upholding the law as he saw it, Forbes was directly standing in the way of Darling's control of the penal colony," says one of the drivers of the Dowling project, Professor Bruce Kercher, of Macquarie University.

The case further enraged the press, which attacked Darling relentlessly,

accusing him of overly harsh treatment of convicts. One of the colony's leading barristers and the co-founder of The Australian newspaper, W.C. Wentworth, even called for the impeachment of Darling.

The publisher of The Australian, Atwell Hayes, had two servants "taken from his service". One was a court reporter, which outraged Forbes.

The editor of The Monitor, Edward Smith Hall, was sent to prison six times for libel - four times for articles written from jail.

Hall, however, had some measure of judicial revenge when the court in 1830 said Darling had no power to cancel the assignment of a convict servant unless done "with a view to his reformation". Hall was seeking (pound stg.)(pound stg.)300 damages from the superintendent of convicts - who acted on Darling's orders - but was awarded only (pound stg.)25.

Debauchery

It wasn't always convicts who were central to loss-of-service claims. In 1842, John Bryan sued his son-in-law, Abraham Pollak, for "debauching the plaintiff's daughter and servant".

Bryan had sent his 16-year-old daughter to live with Pollak, who was married to his elder daughter. "The defendant debauched and got her with child during the 10-week stay," Dowling wrote.

Bryan was awarded (pound stg.)(pound stg.)500 - a huge sum - but Dowling was hardly uncritical. "Doubtless there were some demeritorious circumstances in the conduct of the father, in bringing forward his daughter as a witness and exposing her shame after she had become married to another person . . .

"[But] here there is a gross breach of that confidence which a father naturally reposes in his own son-in-law, trusting that his younger daughter's chastity would be safe from assaults under such seeming protection."

He said the decision of the assessors - who acted as the jury - "did not shock the mind with injustice".

Scandal

Other family scandals were also played out in full view of the public, one of which involved one of the foremost citizens of the colony, the barrister Robert Wardell.

In *Mills v Rowe*, the defendant and his wife agreed to separate. However, they agreed that his payment of a (pound stg.)(pound stg.)150 annuity "would cease if any sum of money was recovered against the husband;

the wife or any of her servants should disturb or annoy the husband or his household; or if the wife became pregnant during the separation”.

The husband objected, saying he had paid a debt incurred by his wife, that his household had been annoyed by the wife and her servants and that she was “living in adultery” with Dr Wardell.

Whether Wardell himself drew up the agreement is not clear, but Forbes accepted there was “no direct stipulation against adultery”.

For that case, Wardell enlisted the services of Wentworth, and the pair are the dominant barristers in the Dowling diaries.

Naked power

In addition to trying to impeach Darling, Wentworth also proved a thorn in the governor’s side on money matters. One case involving tobacco tax emphasises how important the courts were in asserting the rule of law in the face of government excesses.

On August 22, 1828, a ship carrying a huge consignment of tobacco arrived in the colony. On October 16, a law was passed which doubled the duty from one shilling - the amount which had applied since 1825.

Wentworth argued that the power of the governor to impose a duty “is a mere naked power and must be strictly pursued”.

“It is clear he has no power to impose a retrospective duty or a retrospective law,” he said.

The government had argued the merchants had a contract to pay “whatever duty was payable” - just the sort of provision that characterised the governor’s powers.

However, Forbes agreed with Wentworth, saying they were only liable for the duty which had applied when the goods arrived in the colony.

That was probably Australia’s first tax case. The plaintiff in our first industrial relations case had less luck.

As boatswain on a convict ship, James Roberts was ordered by his captain to flog a convict boy but refused, arguing that it was not part of his duties. He was confined on deck for 115 days and the boy was punished by one of the ship’s mates. Roberts said that but for other soldiers giving him “pricker to get relief by flowing of blood” he would have died.

Dowling declared the conduct of the master lawful. It was a reasonable order within the scope of Roberts’s duties. He told the assessors that seamen were bound to obey all lawful orders by the master: “The act of

Parliament creates the duty of punishing. Someone must perform it. The discipline and security of the ship demand it.”

Fair flogging

Flogging was a common form of punishment but frowned upon by the law when administered in cavalier style. In the Cokely v Simpson case, Dowling had harsh words about the rural magistrate who wrongly flogged an ex-convict.

“If the 50 lashes were given under colour of law, but really to appease the insulted dignity of a man armed with a little brief authority, I have no hesitation in saying that this is an excess that ought to be corrected,” he wrote.

John Cokely was awarded (pound stg.)(pound stg.)10 damages.

Dowling also ruled against a man who wanted to dock his employee for losing 27 sheep. He said there was no evidence the man had agreed to this before he started.

He also found against the Crown when a contractor employed by the government to sink a well left a pile of dirt on George Street. The plaintiff’s buggy overturned and he was awarded (pound stg.)(pound stg.)15 damages.

Real estate rorts

One of the colony’s first real estate disputes also had a happy ending for the plaintiff. W.T. Cape had argued that R. McIntosh had falsely described a property - 200 acres of land at Pittwater - that was sold in April 1834 for 13 shillings an acre.

The auctioneer drew up advertisements based on information supplied by McIntosh. Cape did not inspect the property - despite ample time to do so - which would have shown that the stated amount of cleared and cultivated land was incorrect. He wanted to rescind and McIntosh offered to take the property back if he could keep half the purchase price.

Dowling told the assessors that “all transactions of this kind should be founded in common honesty”.

“It is often highly inconvenient, if not impossible for a vendee of distant estates in this country to visit the subject of the sale . . . here the plaintiff made all the inquiries he could short of going to see the property before the sale.”

The assessors awarded Cape (pound stg.)50 which was the difference between the actual value of the land and its fictitious value at auction.

Dowling frequently extolled the virtues of honesty in a colony that often showed no signs of shedding its rogue beginnings.

In the 1832 case of *Rapsey v Singleton*, he found that an auction ordered by the sheriff had been rigged after it was postponed for a day.

Potential buyers had been warned off and the property, valued at (pound stg.)500, sold for (pound stg.)100. The seller, who didn't want it to be "sold at a sacrifice" arranged to then lease it for seven years at (pound stg.)100 a year.

Dowling decided "the cause of the irregularity in the sale arose through the connivance of Hughes and Hoskins and that the sheriff had suffered himself to be an instrument in perfecting their fraudulent attention".

He and Forbes said: "The case is so pregnant with fraud that we are bound to set the sale aside."

Missing fees

The court also upheld the claim of the Crown which sued the estate of a dead sheriff, saying it owed (pound stg.)1000 skimmed from money collected in fines and fees. Wardell acted for the estate and argued that the sheriff had kept the money as pay for another post - that of provost marshall. However, Dowling found that if there were any claim for salary it should have been sought from the Crown, not just taken.

The question of fees also emerged when physician Charles Smith took Richard Kemp - after which Kemps Creek was named - to court. As a physician, Smith could not sue to recover unpaid fees. He wanted to drop his "rank" and sue for his work and labour in attending the family during their illness.

The court, however, upheld the honorary system which had existed in medicine until Medicare in the mid-1970s.

"The doctors and the barristers are, from their distinguished scientific attainments in their respective professions, presumed to act honorarily . . . the law pays him a compliment to retain him as a person above pecuniary consideration . . . he must take the character with all its burdens."

Class in jail

Social position was all-important. Pews were even leased at St James's church in Queens Square and one man was so aggrieved at being ejected that he unsuccessfully sued for reinstatement.

Indeed, "gentlemen" were never expected to be in the company of someone not considered their equal.

John Darley Shelley had to suffer the ignominy of going to Darlinghurst jail after failing to pay two sureties of (pound stg.)(pound stg.)300 each. Dowling wrote that he complained of being “confined on the felons’ side of jail in an unhealthy situation and compelled to listen to the conversation of the worst class of felons”.

Shelley argued he should have “a more airy apartment, less liable to injure his health and less subject to annoyance by the conversation of inmates of the gaol”.

Jails were divided into felony, misdemeanour and fines sections and the court ordered he be moved to the debtors’ side: “We never contemplated that persons of this gentleman’s condition would be compelled to go to gaol for want of sureties.”

CASE NOTES

Sir James Dowling’s record of Supreme Court cases from 1828 to 1844 sat virtually untouched for more than 150 years after his son decided they were not worthy of publication. The barrister Tim Castle, who with Professor Bruce Kercher of Macquarie University will publish the diaries next month, says they “show the transition from rule by the governors to the rule of law”. Many of the cases are also reported at www.law.mq.edu.au/sc. These include those mentioned here: *Roberts v Moncrief*, *Cokely v Simpson*, *Re Jane New*, *Re John Darley Shelley*, *W. T. Cape v R. McIntosh* and *Mills v Rowe*.