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History reports itself

The way that a profession sees itself is very often reflected in its industry publications. It is interesting, then, that the Australian legal profession has such a limited history of publications of that kind. University law journals and academic papers aside, it is only recently that the Australian legal profession has had access to truly national industry magazines with a focus on the business of being a practising lawyer. The last few years have seen the distribution of *Lawyers Weekly* and, more recently, *Australian Legal Business*, which fill this seeming gap in the market.

These recent introductions are not completely without precedent. One such 'industry' rag was published for lawyers in 1870. It was titled *The Australian Jurist and Notes of Cases* and its initial editors were James Purves and W.M. McKinley, both of Melbourne town in Victoria. The magazine aimed for a national audience of lawyers and focussed on political and practice issues (with a few juicy case notes thrown in for good measure). The *Jurist's* run lasted from 1870 to 1873. It was abandoned by Purves and McKinley after two years, and then edited by English barrister Peter Stevenson Davis of Lincoln's Inn, at which point it lost much of its local Australian flavour.

What is of fascination in reading through early editions of the *Jurist* is the striking similarity between the sorts of issues explored by it and the new breed of industry magazines enjoying some popularity at the moment. I suppose it is in the nature of lawyers and historians to look for a causative explanation wherever one can be found, so here's my theory.

The *Jurist* was conceived as a pre-federation publication. Purves, who originally had so much to do with putting the magazine together, was a well-known and active Victorian barrister, and ardent federalist. He had a penchant for the vigorous promotion of a cause, which made him a famed cross examiner and KC in a time when these things were a good deal more theatrical. The polemics that marked the early editions of the *Jurist* were brought about by an intense interest in the nationalisation of the country, which was desired by the editors because of the benefits that they saw in the nationalisation of the legal market.

After the *Jurist* disappeared there is very little which resembles it until the 1980s, when state law societies began to mass-produce magazines for their members. However, it is the commercial publications that we are seeing now that most closely resemble their 1870s counterpart in that they are distributed Australia-wide. My proposed explanation is that once again there is a genuine interest in the benefits of a national legal market and national profession (which has risen, one might say, because economics and technology have combined to see some of the larger firms spread across state boundaries, resulting in a few national and federated corporate law firms now on the scene). It is peculiar to think, that it has taken over 120 years for our profession to progress to a point where we've caught up with the 1870s (or at least Purves' dream at the time). But as Purves himself wrote in the April 1871 edition of the *Jurist* "the proverbial apathy of lawyers to all subjects affecting them as a class, should on this occasion be cast aside" and perhaps it finally has.

Incidentally, while on the topic of largely forgotten legal works of the nineteenth century, this edition of the *Flyer* highlights Tim Castle's and Professor Bruce Kercher's work on the pending publication of the "Select Cases" manuscripts of New South Wales' second Chief Justice of the Supreme Court, Sir James Dowling.

Their article does not only make for interesting reading, but it also gives a taste of things to come when they present the next annual Forbes Society lecture on the topic "Bringing the Supreme Court to Order, 1828-1844." The lecture will take place on Thursday 14 October 2004 at 5.30pm in the New South Wales Bar Association Common Room, and will be chaired by Andrew Tink, the New South Wales Shadow Attorney General.

As always, and until next time, we welcome your comments, letters and suggestions.

Catherine Douglas

Editor

Recognising the Contribution of Sir James Dowling: Chief Justice of New South Wales 1837-1844

By Tim Castle and Bruce Kercher

Sir James Dowling, second Chief Justice of New South Wales, has been a largely forgotten figure of Australian history. One hundred and sixty years ago, Dowling died in office at the age of 57, having been a judge of the Supreme Court for sixteen years, including seven years as Chief Justice. This year, the Francis Forbes Society will be highlighting Dowling's significant contribution to the development of the rule of law in New South Wales, by publishing Dowling's manuscript reports, called the *Select Cases*, and through the Society's annual lecture to be given on the topic '*Bringing the Supreme Court to Order, 1828-1844*'.

The key to understanding James Dowling is to appreciate that he was an extremely methodical, and organised lawyer, who had a deep respect for the law and the institutions of justice. His successor, Sir Alfred Stephen, eulogised him as being remarkable 'not only for the most strict uprightness and impartiality, but for a painstaking and anxious industry rarely equaled'. Dowling apparently had 'great popularity' as a judge, and has been described as being genial with a good sense of humour. He typically worked six days a week, he eschewed colonial politics and public life - unlike his predecessor Sir Francis Forbes - and was the quintessential lawyer's lawyer. Dowling arrived in the colony with his first wife, Maria, and six children, and lived on Woolloomooloo Hill (hence South Dowling Street). Following the death of his first wife in 1834, he married Harriett Ritchie, a daughter of the prominent colonial figure, John Blaxland.

Dowling achieved his success through merit and hard work, rather than by any excessive patronage or family wealth. His father, although qualified as a barrister and experienced in parliamentary reporting, earned a subsistence income as a bookseller in Dublin. From his father, Dowling learned shorthand and also became a parliamentary reporter and journalist. Dowling was called to the Bar in 1815 at the age of 27, where he

practiced for approximately twelve years until his appointment, at age 39, as the third puisne judge to the Supreme Court of New South Wales.

It was Dowling's skills as a court reporter, rather than as an advocate, that brought him to the attention of a number of powerful and influential figures in Britain, including, in particular, Henry Brougham, who subsequently became Lord Chancellor. By the early nineteenth century, the importance of selective and accurate law reporting, as a feature of the development of the common law, was becoming increasingly recognised. However, publication of law reports was a somewhat haphazard affair, as evidenced by the large number of nominate reports prior to the establishment of the English Council of Law Reporting in 1865 which thereafter published the authorised reports. During his time at the Bar in England, Dowling was the joint publisher of a nine volume set of *King's Bench Reports*, a single volume of Dowling and Ryland's *Cases Argued and Ruled at Nisi Prius in the Court of Kings Bench and on the Home Circuit* (now found in 171 ER), and a four volume set of *Magistrates Cases 1822-27*.

Stepping off the boat in Sydney in 1828 in his full judicial regalia, Dowling was taken aback by the world which he encountered. He was less than impressed to find that Forbes CJ had dispensed with wearing his wig - he thought it gave him 'a round head, a republican look', which Chief Justice Spigelman has noted was a particularly derisive remark for the period. Dowling thought that Forbes looked unwell, unhappy and at least ten years older than his age of forty-three. Of the other puisne judge, John Stephen, Dowling thought he looked infirm, in bad health and 'marked down for another world'. Likewise, Governor Darling appeared to him to be 'a cold, stiff, sickly military person'. Dowling was well aware of the tensions that had existed in the preceding three years between Forbes and Darling, and had

received a specific briefing from the Colonial Office to avoid disharmony between the Court and the Governor. Despite his initial impressions, it is clear that Dowling quickly established an excellent rapport with both Forbes and Stephen, and he largely maintained a good working relationship with the judges subsequently appointed on their respective retirements.

The legal system which greeted Dowling was also a novelty. The Supreme Court had been established in 1824, under the Third Charter of Justice, 4 Geo. IV c.96. The Supreme Court was invested with the powers and jurisdiction of all of the Westminster Courts, and there were some interesting variations in the modes of trial available. Criminal matters were conducted by a judge with a military jury of 7 officers appointed by the governor. Civil matters were largely conducted before a judge and two justices of the peace, called 'assessors'. From 1829, a jury of twelve was available at the request of either party in civil cases, this right was extended to many criminal trials in 1832, and military juries remained until 1839. The question of trial by jury was an extremely contentious political issue in New South Wales, as it provided a focus for competing arguments between the 'exclusives' and the 'emancipists' as to the nature of citizenship and distribution of power in the colony, rather than there being any general dissatisfaction with the quality of the verdicts of the military juries. The course of this debate, and the evolution of trial by jury in New South Wales, was comprehensively examined by Ian Barker QC in the inaugural Francis Forbes Lecture in 2002, which the Society has now published.

Although rights of appeal to the Privy Council existed in certain civil cases, and prior to 1828 there was also a right of appeal to the Governor, most important questions of law were determined by the three judges of the Court sitting *in banco*, in what we would now consider to be an appellate role. Whilst most

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cases in the colony were heard by a single judge sitting with a jury or with assessors, the Court appears to have followed the English practice described by Sir Victor Windeyer, whereby judgment could only be entered by 'the Court' – meaning all three judges. For the purpose of obtaining a 'verdict' by the jury or by the assessors, the trial judge would often give a ruling which could then be reviewed by the Full Court. Thus, as the *Select Cases* evidence, parties could 'appeal' against the trial judge's rulings on points of law typically by a motion to arrest a judgment before it was entered, or upon a point of law being reserved by the trial judge for consideration by the full court. Many of these appeals were heard on Saturdays and, because there were only three judges, most of these 'appeals' involved a judge reviewing his own decision – although there are a surprising number of cases in which the trial judge freely admitted his own error at first instance. There is a strong suggestion of collegiality in the *banco* judgments throughout Dowling's tenure, despite the differing personal styles and background of the judges, and the occasional intrigues that occurred in relation to issues of judicial salary and seniority.

Upon his arrival in the colony, Dowling quickly appreciated the need to establish a structure for recording the important judgments of the Court. Implicit in this decision is a belief that the colony had its own 'common law' that needed to be recorded and developed by the Court. This was a major insight, which sets the Supreme Court apart from its predecessors in the colony. Prior to 1824, justice was administered in New South Wales in a highly variable manner, which depended largely upon the personalities and predilections of the judicial officers involved – some had legal training, others did not; some were sound judges, whilst others were incompetent and had significant personal failings, including drunkenness and an inability to recognize personal conflicts of interest. Nevertheless, despite these uncertain beginnings, it is clear that there was a discernable body of popular customary behaviour and expectations, which had developed since the arrival of the British in 1788, and

represented the foundation of a distinct Australian common law.

What Dowling evidently had in mind was the publication of a set of law reports for the colony. This was the genesis of his *Select Cases*, which are to be published later this year by the Forbes Society. Each judge had his own set of judge's notebooks in which the judge recorded evidence, orders, judgments and other matters which occurred in court. All of Dowling's 268 notebooks survive and are held in the State Records. Being the methodical person that he was, the notebooks are numbered and indexed, and there is a separate series for Equity cases after 1841 (when Dowling took up the additional appointment as Equity Judge), and a notebook for Vice-Admiralty cases. The writing in those notebooks varies between Dowling's shorthand record of evidence given at the trials before him, and legible, carefully prepared and edited judgments which he delivered.

The *Select Cases* are a separate set of nine notebooks that contain reports of 455 judgments, which Dowling obviously considered to be of sufficient significance to justify reporting. Over two thirds of these cases concern the court's civil jurisdiction, with a strong emphasis on matters having a commercial flavour. In the early volumes, the *Select Cases* appear to have been transcribed by a clerk from Dowling's judicial notebooks; whilst the later volumes contain the judgments actually delivered by Dowling, complete with edits and insertions in the text. As most of the cases involve decisions of the full court, the *Select Cases* also contain the text or a summary of the judgments of the other judges. It is a mystery why Dowling never published the *Select Cases*, although one possible explanation is that his untimely death in 1844, preceded by several years of ill-health, meant that he was unable to complete the task of preparing them for publication. His son, James Sheen Dowling, decided against publishing the cases because of his view that the circumstances of the colony had changed to such an extent, presumably as a result of self-government in 1855, that the reports would no longer be of any value. Ultimately, the only reports

published of the Dowling era, were Gordon Legge's reports in 1896, which included reports of only 22 cases prior to 1845 and only two of the cases contained an express reference to Dowling's *Select Cases*.

We have undertaken the role of editing the *Select Cases*, and preparing them for publication, on behalf of the Forbes Society. Bruce Kercher has long had an interest in the publication of reports of cases from colonial New South Wales, and has coordinated the establishment of the highly successful Macquarie Law project, which has published over 1600 case reports on the internet since 1997, covering the period 1824–1841. The website address for these case is www.law.mq.edu.au/scnsw. Tim Castle has recently completed a research thesis about the adaptation of English law to colonial customs and circumstances as reflected in the *Select Cases*, as part of a history degree at University of New England. Needless to say, we disagree with James Sheen Dowling's assessment of the significance of the *Select Cases*. Rather, the *Select Cases* offer a remarkable insight into the development of a distinct Australian common law by the Supreme Court during a critical period in the transition of New South Wales from a penal colony to a free society, in which James Dowling was a judge and Chief Justice of the Court.

The *Select Cases* will be published in a form which is readily accessible not only to lawyers, but also to general readers who are interested in Australian colonial history. To do this, we have decided to follow the structure used for the publication of Lord Mansfield's manuscript notebooks, and to present the cases chronologically by subject matter. Thus, for example, the way in which the Court approached the application of English law to Aborigines can readily be seen. Tort lawyers may be interested in early damages cases, such as the case where an injured plaintiff recovered £15 damages when his carriage overturned in George Street because of a hazard created by the defendant. There is also an example of a jury being discharged for organizing its own view of disputed building works, and numerous decisions about the criteria governing the admission and removal of

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legal practitioners and the circumstances in which costs could be recovered in court proceedings. Dowling had an obvious interest in commercial law, with a solid representation of cases concerning bills of exchange, insolvency and relief against debtors. Other matters that feature prominently concern the legal capacity of convicts and women, the freedom of the press and the regulation of administrative action by government officials. Amongst the equity decisions is the refusal of a *mareva*-style injunction, and there are numerous cases involving real property and the construction of the wills, including those of Billy Blue and D'Arcy Wentworth.

What is unique about the publication, in 2004, of the *Select Cases*, is that the person responsible for deciding which cases should be included in those reports was Dowling himself. To that extent, the selection reflects the concerns and emphases of the period rather than the present day. Several themes are, therefore, readily apparent. First, there was an important substantive issue concerning the reception of English law in the colony, which usually involved a divergence between some aspect of English law and colonial practice that had to be resolved by the Court. In some cases, the Court favoured English law, and in other cases it upheld colonial practice. Secondly, there were important issues about the distribution of power in the colony, between the Court and the Executive, within the hierarchy of Courts and as to the limits placed on the press by the laws of contempt and libel. Thirdly, there are a large number of cases concerning the regulation of the Court's own process, both civil and criminal, and the regulation of the legal profession, all of which relate to the establishment of a certain and consistent system of justice in the colony that conformed to the English notion of the rule of law.

This year's Forbes lecture, '*Bringing the Supreme Court to Order, 1828-1844*', will enable the work of James Dowling to be discussed, with specific reference to the *Select Cases* and to themes which we have identified. Clearly, the establishment of the Supreme Court in 1824 provided a sense of order in the administration of

justice which had not previously existed. Yet in a more subtle way, that institution was only able to achieve public credibility and establish the foundation for its own longevity by doing, and being seen to do, justice in a manner which accorded with prevailing notions of the rule of law in a free, English society. Establishing order in the conduct of its business was, therefore, a vital component of the early work of the Supreme Court and had many facets. This required questions to be answered such as: who had capacity to sue and be sued; what substantive rules of law were to apply in the colony; what procedural rules would apply to the conduct of court proceedings; what was to be the relationship between the Court and the legal profession; and to what extent would the Court exercise control over other institutions of power in the colony.

Today, we take the institutional credibility of the Supreme Court, and the answers to many of the questions which confronted Dowling and his judicial colleagues, for granted. However, it may be argued that we do so because of the foundation that was laid through the early work of the Court. Put in its wider context, the Dowling story becomes an engaging form of 'frontier' narrative and of pioneering work by the early judges – not so much in the political arena, but in the case-by-case approach of the English common law tradition as evidenced by the *Select Cases*. In this respect, Dowling differed from Forbes, who believed that the independence of the Court from the Executive required him to protest directly against any perceived incursions by the Governor upon the power and functioning of the Court. This brought Forbes into frequent conflict with Darling, and generated a substantial body of correspondence which has been preserved and recorded in the *Historical Records of Australia*, published in 1916. However, the difficulty with Forbes' approach was that the feuding between the Chief Justice and the Governor was ultimately settled by a threat from the Colonial Secretary, Sir George Murray, in 1829, to recall Darling and the judges if the quarrelling did not end.

Forbes' story has been told, in great detail, in the seminal biography by Dr C.H. Currey published in 1955, and the later work of Dr John Bennett in the first of his series, *Lives of the Chief Justices*, in 2001. Dowling's work is referred to incidentally in those volumes, although Dr Bennett has now produced a short biography of Sir James Dowling, which followed the Forbes edition in 2001. In the wider histories of the colony, Dowling barely rates a mention – thus, for example, there is one reference to him, in passing, in Manning Clarke's *A History of Australia*. Yet the explanation for this phenomenon may be that the previous historians, including Dr Currey, have confined their attention to the questions of statecraft, as recorded in the Historical Records of Australia, and other official and private papers, where Dowling does not figure prominently, and there has been no comprehensive examination of his judgments, beyond the limited cases reported by Legge or some of the more notable trials extracted from the newspapers.

It is in this context that the publication of Dowling's *Select Cases* will add greatly to our understanding of the establishment of the rule of law in New South Wales, and enable a fresh appraisal to be made of the significant contribution of Sir James Dowling to the establishment of the institutional credibility of the Supreme Court. Although the *Select Cases* were not published during his lifetime, they undoubtedly influenced the decision making by Dowling and his fellow judges because of Dowling's extensive indexing system, which meant that they could readily be consulted both on and off the bench. Our intention with the presentation of the *Select Cases* is that they should appeal to readers interested in the social and institutional history of New South Wales, as well as to legal practitioners and academics interested in furthering their understanding of the early common law of New South Wales, and the contribution made by the Supreme Court to establishing the rule of law in the colony in the period immediately preceding the grant of self government in the colony.

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