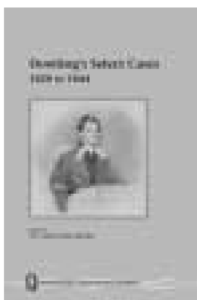
Dowling's select cases, 1828 to 1844

Edited by TD Castle and B Kercher

The Francis Forbes Society for Australian Legal History, 2005



Lord Esher MR said of the *Times Law Reports*, 'We have said that we will accept *The Times* law reports, because they are reports by barristers who put their names to their reports.'[1]

At least, the master of the rolls is reported to have said it, in a case with the citation '(1889) 6 TLR 5'. Perhaps unsurprisingly, the master of the rolls does not appear to have said it in a report of the same case, bearing the citation '(1889) 24 QBD 117'.[2]

To the modern litigator, with all the marvels of the web and, often, the judge's associate's certification of a report, concern over accuracy is hard to fathom. But, as Holt CJ put it in 1704, 'see the inconveniences of these scambling reports, they will make us appear to posterity for a parcel of blockheads.'[3]

In *Dowling's select cases*,[4] the citizens of New South Wales receive an anachronistic privilege; 160 years after the death of our second chief justice, we have a volume of reports not only written by the judge, but in large part headnoted by him, too.

Sir James Dowling was a puisne judge of the Supreme Court from 1828, and chief justice from 1837 until his death in 1844. During his tenure, he completed nine notebooks with a view to compiling the colony's first set of law books, and the 465 cases included in this work bring to fruition that ambition.[5]

Dowling knew the nature of the task, having worked as a law reporter. With Archer Ryland, he reported cases argued at *nisi prius*, in the Court of King's Bench and on the home circuit, reports which appear in the English reports from 171 ER 895.[6]

One wonders whether he was thinking of things to come, when he and his co-author wrote the headnote, 'To sell the dead body of a capital convict, for dissection, where dissection is no part of the sentence, is a misdemeanour indictable at common law.'[7]

But what was New South Wales like in 1828, when Dowling arrived? By 1826, Edward Smith Hall had commenced his newspaper, the Sydney *Monitor*. In his preface to a collection of essays by journalists on government dishonesty published last year,[8] John Pilger says:[9]

> The measure of Hall's principled audacity can be judged by the times. He started his newspaper not in some new Britannia flowering with Georgian liberalism, but in a brutal military dictatorship run with convict slave labour. The strong man was General Ralph Darling; and Hall's defiance of Darling's authority in the pages of his newspaper, his 'insurrection', brought down great wrath and suffering on him. His campaigns for the rights of convicts and freed prisoners and his exposure of the corruption of officials, magistrates and the governor's hangers-on made him a target of the draconian laws of criminal libel.

A different view is put by J M Bennett & N J Haxton:[10]

> Press law reporting was all very well if the integrity of the publisher could be relied upon. In the case of the (Sydney) *Monitor*, under the controversial editorship of Edward Smith Hall, no faith could be placed in the accuracy or objectivity of his reports. Hall constantly played politics and thought little of altering court reports to the prejudice of his opponents. So twisted was his account of a conspicuous case in 1832 that Mr Justice Dowling caused a corrected version to be published in the *Gazette*.

A beauty of *Dowling's select cases* is that one can go straight to the cases in which Hall was involved. And, merely by glancing at the 'Table of cases reported',[11] one could be excused for thinking that Hall was the colony's father of litigation.

In *In re Peter Tyler*,[12] Tyler was a convict assigned to Hall. He was taken forcibly by the superintendent of convicts, one Hely, and put on a road gang. Hall claimed property in the services of the man and prayed a habeas corpus. In April 1829, the court refused the writ. Were that all we knew – and taking into account Hall earlier having been charged with criminal libel, for imputing to Hely cruelty towards another prisoner[13] – we might have suspicions about Hall's treatment.

But in March 1830, on Hall's action for trespass, Dowling held that the governor had no authority to cancel the assignment of a convict servant except for the purpose of granting a remission of sentence, with the result that an action lay against Hely, who, it appears, was acting on Darling's order, to the tune of £25 damages.[14] And, in perhaps the clearest sign that Hall and Hely – or, perhaps, Darling – were not bosom buddies, there was litigation in respect of the taxation of Hall's costs.[15]

In *Dowling's select cases*, the citizens of New South Wales receive an anachronistic privilege; 160 years after the death of our second chief justice, we have a volume of reports not only written by the judge, but in large part headnoted by him, too.

Another of Darling's attempts to get Hall also foundered in Dowling's court. One way of controlling newspapers was to impose a huge penalty if the publisher failed to deliver to the colonial secretary at his office on the day of publication, a copy.[16] On 18 May 1827, Hall failed to deliver the goods, and was duly fined £100. Hall argued that his publication was a pamphlet, and not 'a newspaper or other such paper'.[17]

Dowling, for Forbes CJ, himself and Stephen J, and in an orthodox construction of a penal statute, gave judgment for Hall. It is interesting that judges use dictionaries as much then as now: Dowling had recourse to two, Mr Bailey's and Dr Johnson's.[18]

Apart from Hely, another *bête noire* of Hall's was the dextrously named Archdeacon Thomas Hobbes Scott, described by the historians of his own parish church as being 'of a somewhat overbearing disposition'.[19]

In litigation which makes any current controversies in the Sydney Anglican diocese tame, Hall and Scott jousted over the right of Scott to refuse a pew to Hall and his family at St James' Church, King Street. As our current chief justice tells the tale:[20]

> Hall, the editor of the *Monitor* was, at least on the surface, a religious man. He had come to Australia as a freelance lay missionary with a distinct evangelical bent. Hall rented a pew at St James Church for himself and his six daughters. Probably with the concurrence of Governor Darling, but in any event knowing precisely what the governor's wishes would be, Archdeacon Scott decided that Hall's pew was far too close to the governor for the latter's comfort.
>
> At first the archdeacon simply locked the pew. When Hall and his six daughters attended for Evensong, they climbed over the barrier and sat down. Next time the pew had been boarded up and was guarded by constables with staves. Hall and his daughters squatted on the step outside the altar rails, to the inconvenience, Scott would complain, of the children who were permitted to sit there.
>
> Taking up his pen, and dipping it in his usual vitriol, Hall wrote a *Monitor* editorial on 5 July 1828, attacking Scott. He proclaimed: 'This is the age of cant – cant political and cant religious. Thus we have Ministers of Jesus Christ thrusting their parishioners out of their pews, and then administering the sacrament'.

Among the litigation so spawned was, in December 1828, Hall's application for a writ of mandamus, refused.[21] More seriously, from the point of view of free speech, was Hall's conviction for criminal libel upon Dowling's address to the jury, discussed in more detail elsewhere by the current chief justice.[22] All that said, in April 1830, Hall had the last laugh, in the form of £100 damages upon his action in trespass and assault.[23]

A delightful footnote to the cascade of Hall-driven litigation came in 1830, when the sheriff called on the judge at home, to discuss whether all prisoners should be put in gaol clothing. There is revealed a grudging respect – mingled with mock horror – in the following exchange, reported in *In re Gaol Clothing*:[24]

> I asked the sheriff whether it was contemplated to put all descriptions of persons into gaol clothing? He said yes, with the exception of debtors. I said All! Do you mean to put Mr Hall (then in confinement for a libel) into party coloured clothing? He said in the exercise of his discretion he should not put Mr Hall into the clothing. I said that if this matter depended upon his discretion, it appeared to me that the order ought not to stand on that footing.

In any event, readers lay and legal have been blessed with a number of editorial extras which in no way impugn the text of the judgments, beginning with a lucid introduction which provides an overview of the New South Wales in which Dowling worked and died.

Whether the New South Wales Dowling arrived in was 'a brutal military dictatorship' is for others to debate. Certainly, when Darling left in 1831, Hall announced the event in the *Monitor* in large front-page capitals, 'He's off! The reign of terror ended', while Wentworth hosted a feast at Vaucluse House where an ox, half a dozen sheep and copious amounts of Coopers and Wrights beer was consumed, together with a thousand loaves of bread, and at which a band played 'Over the hills and far away'.[25] Wentworth, of course, had been Hall's counsel of choice through all this time. Whatever, it seems clear enough that Dowling was hardly Darling's man.

In any event, the changes over the following years were fundamental changes. Between Dowling's arrival and death, the population increased almost fivefold, while the percentage of convicts fell from about 50 per cent to 11 per cent.[26] During this time, and while the colony groped towards representative government, the court was a focal point of freedom and of democratic aspirations. That in turn is reflected in the nature and width of the decisions, and the range of subjects.

Indeed, the cases are arranged not chronologically but in topics, presumably in deference to a lay audience. Were there more than one volume, I think a practitioner might have found this frustrating, as the date of a judgment is often important. With one volume, the vitality of the arrangement outweighs this.

In any event, readers lay and legal have been blessed with a number of editorial extras which in no way impugn the text of the judgments, beginning with a lucid introduction which provides an overview of the New South Wales in which Dowling worked and died.

For those who wish to know what choices the editors made in their attempt 'to reproduce, as closely as possible, the handwritten cases as they appear in the notebooks, including headnotes written by Dowling, whilst producing coherent case reports that have legal utility',[27] reference should be had to the notes at pages xxix to xxxii.

I am not sure whether, prior to this work, there has been a volume of law reports up to but not beyond 1844, which includes the now-standard 'Cases judicially considered'. There is now. And, in a particular example of anachronistic value adding, the editors were able to cajole one volunteer or another into linking cases to their *English Reports* citation, those reports not being published prior to 1865.[28]

The 'Table of statutes considered' is divided into imperial and local statutes, and then by regnal year. The first statute was 13 Ed 1 c 11, from 1285, which dealt with 'The masters remedy against their servants, and other accomptants.' I was particularly glad to learn that the regnal years covering the years of Queen Mary's marriage to Philip are designated 'P&M'; I had thought the monarchy's only acknowledgement of things Roman Catholic was its ironic self-description, defender of the faith.[29] (The various forms that tables of statutes have taken in this state's reports, down to the present day, warrant an article in itself. And, as, perhaps, a curious indicator of antipodean morality, the regnal year appeared on the front page of the *Commonwealth Law Reports* for the last time in 1936-1937, the abdication year, 1 Edw VIII & 1 Geo VI.)

Our law is, by definition, a living law. The editors of this work, Tim Castle of the Sydney Bar and Bruce Kercher of Macquarie University's faculty of law, have performed a sterling job, at once isolating and contextualising something which lives but has been dormant for too many years.

There is also a glossary, said to contain 'a short description of a number of frequently appearing legal terms and Latin expressions… particularly for the assistance of general readers…';[30] I think the more modest practitioner will also find it valuable, *ex necessitate*.

Finally, there is the index. Indexing is an art, and all too often publishers in this cost-conscious world seem to think skimping on an index is a useful exercise. Fortunately, this accessible index will be useful to both laypersons and lawyers. There is a separate entry for witnesses, with each named. So too – perhaps a precedent with consequences too awful to contemplate – advocates, with Wardell and Wentworth among the main players. And the great litigator himself scores the delicious entry 'Hall, Edward Smith, newspaper editor and prisoner'.[31]

Dowling has hitherto been overshadowed by Sir Frances Forbes, the colony's first chief justice. Whether that continues to be justified [32] is not within the ambit of this article, for the historical value of the reports as a primary source of life in the colony is self-evident.

But what of their value as legal reports, in the narrow sense? This is a matter of no minor importance. The Supreme Court of Dowling, with its divisions and its appellate jurisdiction, is the Supreme Court of today. The magistracy then was, and is now, subject to the Supreme Court by such appeal provisions as might from time to time be enacted, and in any event subject to its supervision by, most usually, relief in the nature of certiorari. If these cases manifest an abiding theme, 'the omnipresence of continuity and change',[33] what of *stare decisis*, the base of the common law system? Is a single Supreme Court judge to follow a decision of Dowling on point, not subsequently dealt with, and in circumstances where it appears to the judge to be not clearly wrong? And, if the decision be one of the full court, or if the relevant judicial officer is a magistrate, the question is even more taut, for it is not a case of 'Do I follow?' but 'I must apply…'

The mere effluxion of time does not affect the doctrine. As the High Court rather archly reminded an intermediate court in recent years, it is not for a court lower in the appeal chain to ignore a precedent of a higher court in the chain, just because it is seen to be out of date.[34]

It appears that Dowling's notes were regarded as authority in their day. Barrister Thomas Callaghan, later a foundation judge of the District Court, records that Dowling had let him borrow notes so that he might transcribe a copy of a decision to use as a precedent in an argument he proposed to put to the court.[35]

And then there is a full court decision of 1844, *R v John Hodges and Thomas Lynch*.[36] This is one of the few of Dowling's reports which has been the subject of earlier publication, in this case in J Gordon Legge's two-volume series of decisions from 1830 to 1862,[37] itself published in 1896.[38]

In *R v Woolcott Forbes*,[39] a case decided one hundred years and two days later, Jordan CJ, Halse Rogers and Maxwell JJ were faced with a 'purely technical' point raised, it seems, by one Shand KC, where the only authority in the defence's favour was the earlier case.[40] And, having been faced with a purely technical point, the court rallied accordingly, Halse Rogers J saying:[41]

> The *dicta* in the passage [from the 1844 case] which I have quoted seem to show that the court was of opinion that the Act did not authorise concurrent commissions to different persons giving authority to prosecute. But the point now raised was not actually before the court, and we are not, in considering the question before us, bound by any authority on the matter. A hundred years have passed since the decision in *R v Hodges and Lynch*, and the point now relied upon has never in the meantime been raised.

Although Jordan CJ does not say so in as many words, it is a fair inference that he simply declines to follow the earlier decision.[42] Maxwell J does not deal with the issue.[43]

Be all that as it may, the point is that the full court, faced with a full court decision of (just) over one hundred years earlier, did not consider itself entitled simply to ignore that decision; the doctrine of stare decisis required otherwise.

As *R v Woolcott Forbes* illustrates, it is not for editors or commentators to validate or authenticate a set of reports; that is for the judges to whose attention they are brought. Perhaps

the Bar Association or the Law Society might assist by providing, say, the Thomas Callaghan Award for the first advocate to have a case from this volume applied or followed by a judge or magistrate. Not that I wish to be seen promoting maintenance.

A common lawyer cannot talk of 'old' law or 'early' law; the expressions are oxymoronic. Our law is, by definition, a living law. The editors of this work, Tim Castle of the Sydney Bar and Bruce Kercher of Macquarie University's faculty of law, have performed a sterling job, at once isolating and contextualising something which lives but has been dormant for too many years.

Anyone who thinks a project of this type is the scanning of a few diary pages, has never had a hand in publishing anything; it is hard, long work. And, as is clear from the Acknowledgments,[44] many people legal and lay gave of their time and expertise, including a number of Dowling J's successors, puisne and chief. One looks forward to the opportunity to take those successors to one of these reports.

Reviewed by David Ash

1 *West Derby Poor Law Guardians v Atcham Poor Law Guardians* (1889) 6 TLR5, 6.

2 As to reports generally, it is difficult to top the chapter 'These scambling reports' in Sir Robert Megarry's *Miscellany-at-law*, Stevens & Sons, 1955, and see particularly p 293.

3 *Slater v May* (1704) 92 ER 210.

4 *Dowling's select cases, 1828 to 1844: Decisions of the Supreme Court of New South Wales,* 2005, The Francis Forbes Society for Australian Legal History, cited as '(year) N.S.W. Sel. Cas. (Dowling)'.

5 N.S.W. Sel. Cas. (Dowling) vii.

6 And see also the editor's note, 171 ER 895.

7 *R v Cundick* 171 ER 900.

8 John Pilger (ed), *Tell me no lies*, Jonathan Cape, 2004.

9 Op cit, page xviii.

10 J M Bennett & N J Haxton, 'Law reporting and legal authoring', in *No mere mouthpiece: servants of all, yet of none*, Lexis Nexis Butterworths, 2002, 148.

11 N.S.W. Sel. Cas. (Dowling) xxxvii-liv.

12 N.S.W. Sel. Cas. (Dowling) 568.

13 See eg *Ex parte F A Hely; in re E S Hall* (1829) N.S.W. Sel. Cas. (Dowling) 788.

14 *Edward Smith Hall v Frederick Augustus Hely [No 1]* N.S.W. Sel. Cas. (Dowling) 570.

15 *Hall v Hely [No 3]* N.S.W. Sel. Cas. (Dowling) 857.

16 As to Governor Darling's success or lack of it, against the press generally, see pages 125-126 of Peter Coleman's *Obscenity, blasphemy, sedition*, 2000 (first published 1962), Duffy & Snellgrove.

17 *R v Edward Smith Hall [No 1]* (1828) N.S.W. Sel. Cas. (Dowling) 771.

18 *R v Edward Smith Hall* (1828) N.S.W. Sel. Cas. (Dowling) 771, 774.

19 *Historical sketch of* S. James' Sydney, 1919, W C Penfold, page 4.

20 'Foundations of the freedom of the press in Australia - The inaugural Australian Press Council address', 20 November 2002, at http://www.agd.nsw.gov.au/sc/sc.nsf/pages/spigelman_201102 .

21 *R v Hall* [No 3] N.S.W. Sel. Cas. (Dowling) 533. As to the Crown's action against Hall, see *R v Hall [No 2]* (1828) N.S.W. Sel. Cas. (Dowling) 661.

22 Foundations of the freedom of the press in Australia - The inaugural Australian Press Council address", 20 November 2002, at http://www.agd.nsw.gov.au/sc/sc.nsf/pages/spigelman_201102

23 *E S Hall v Scott* (1830) N.S.W. Sel. Cas. (Dowling) 437.

24 *In re Gaol Clothing* (1830) N.S.W. Sel. Cas. (Dowling) 211, 214.

25 'Foundations of the freedom of the press in Australia - The inaugural Australian Press Council address', 20 November 2002, at http://www.agd.nsw.gov.au/sc/sc.nsf/pages/spigelman_201102 .

26 N.S.W. Sel. Cas. (Dowling) xi.

27 N.S.W. Sel. Cas. (Dowling) xxix.

28 For a short history, see eg 'A finding guide to British legal sources in Firestone Library', Princeton University, Princeton, New Jersey, http://infoshare1.princeton.edu/online/guide/british.html .

29 In 1521, as a reward for attacking Lutheran ideas, Pope Leo X conferred the title of *fidei defensor* (defender of the faith) on Henry VIII. In the United Kingdom, the monarch retains the title, not so here: see the Schedule to the *Royal Style and Titles Act 1973 (Cth)*.

30 N.S.W. Sel. Cas. (Dowling) 991.

31 N.S.W. Sel. Cas. (Dowling) 1018.

32 J M Bennett's series, 'Lives of the Australian chief justices', includes both. The series is published by The Federation Press, for which see www.federationpress.com.au .

33 See Spigelman CJ's forward, N.S.W. Sel. Cas. (Dowling) v.

34 *Garcia v National Australian Bank Ltd* (1998) 194 CLR 395, [17].

35 Bennett & Haxton, op cit, page 149.

36 (1844) N.S.W. Sel. Cas. (Dowling) 273.

37 As *R v Hodges and Lynch* (1844) 1 Legge 201.

38 Legge's other contribution to Australia was as a soldier; he reached the rank of Lieutenant-General. See generally www.unsw.adfa.edu.au/~rmallett/Generals/legge.html.

39 (1944) 44 SR(NSW) 333.

40 At 343.

41 At 345.

42 See at 338-340.

43 Cf at 347.

44 N.S.W. Sel. Cas. (Dowling) xxxiii-xxxv.