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‘EQUITY’S DARLING’ AND THE BURWOOD EJECTMENT CASE: A TURNING POINT IN COLONIAL AUSTRALIAN LAW

Abstract: *The Burwood Ejectment case arose when the ad hoc executor and trustee of a will in early colonial Sydney sold off Burwood Estate to meet the testator’s debts, after receiving a court order empowering him to do so. Twenty years later, the testator’s de facto wife and children successfully voided the sale. The purchaser was ejected, notwithstanding the fact that he was a bona fide purchaser for value without notice. The decision undermined confidence in security of transactions in the Colony and created a political furore and ongoing disputes. It is suggested that the case was a contributing factor to the creation of the Judge in Equity in New South Wales and illustrates broader issues with security of title and the political and legal organisation of early colonial Australia.*

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I INTRODUCTION

In the current day, New South Wales is regarded as a bastion of Equity, but it was not always so. In 1832, in *Doe on the demise of Harris v Riley*,¹ (‘the Burwood Ejectment case’) it was found that no equitable jurisdiction had been conferred upon a civil court until the creation of the Supreme Court of Civil Judicature of New South Wales in 1814. The bona fide purchaser for value without notice was ejected from the property, twenty years after he had purchased it, because the trustee was not validly appointed; the court had no power to award the sale and the court had not consulted the beneficiaries of the will. This case, and the other disputes which flowed from it over the next eight years, were contributing factors to the decision of the Legislative Council to create a Judge in Equity.² They may also have contributed to attempts to ensure greater security of title, a pervasive problem across the Colony of New South Wales.

The Burwood Ejectment case exposes deeper social, political, and legal issues. It underlines the haphazard administration of early Colonial New South Wales: non-legally trained judges, lack of currency, poor records of land grants, and conflict between free settlers, convicts, emancipists, traders, and law enforcement. Part I sets out the history leading to the dispute, including the background of parties involved in the will, the way in which the Rum Rebellion contributed to the trustees’ failure to properly administer the will, the sale of the Burwood Estate, and the events which led the beneficiaries of the will to seek to void the sale of the land. Part II discusses the Burwood Ejectment case itself, and the reasons the court gave for voiding the transfer. Part III discusses the aftermath of the Burwood Ejectment case, including further legal cases arising from it, and the ongoing political controversy which contributed to the decision to enact the *Administration of Justice Act* in 1840.

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¹ *Doe on the demise of Harris v Riley* [1832] NSWSupC 76 (Supreme Court of New South Wales, Forbes CJ, Stephen and Dowling JJ, 18 November 1832) reported in Dowling, *Proceedings of the Supreme Court*, Vol 78, Archives Office of New South Wales, 2/3261 (‘*Doe dem Harris v Riley*’). Available at the Macquarie Colonial Case Law site at

<http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1832/doe_dem_harris_v_riley/> (online at 7 April 2022). Page references are taken from the online version.

² *Administration of Justice Act 1840* (NSW) s 20.

II THE HISTORY AND BACKGROUND

The case involved the last will and testament of Captain Thomas Rowley ('Captain Rowley'), an adjutant and then lieutenant of the New South Wales Corps.³

A *The background to the will of Thomas Rowley*

Captain Rowley arrived in Sydney in 1792 on the Fourth Fleet, on the *Pitt*. As an officer, Captain Rowley was assigned two convicts as servants, nineteen-year-old Elizabeth Selwyn (known as 'Betsey')⁴ and twenty-year-old Simeon Lord,⁵ both transported for theft. Captain Rowley's wife had died during the voyage, and it seems he formed a relationship with Selwyn either during the voyage or shortly after they arrived in Australia. She was listed as his 'housekeeper' but bore him five children: Isabella *b.* 1792, Thomas *b.* 1794, John *b.* 1797, Mary *b.* 1800 and Eliza *b.* 1804.⁶ Lord initially traded for Captain Rowley but proved so skilled that he was emancipated early. After his emancipation, Lord became a wealthy trader, and an auctioneer, entrepreneur, magistrate, and serial litigant.⁷

Early colonial Australia suffered from a shortage of currency,⁸ and a complex bartering system arose to deal with payment (centred around food, clothing, and alcohol). Convicts and lower ranking military personnel were often paid in goods, rather than money; the prized payment was rum.⁹ The New South Wales Corps controlled trade in the early days of the Colony, which led to their nickname, 'the Rum Corps', and officers gained positions of power, privilege, and wealth as result.¹⁰ By the early 1800s, however, the trading monopoly of the officers was broken by competition from civilian merchants (both free and emancipist). Lord was the most successful of the emancipist traders.¹¹ However, this was at odds with what the Colonial government saw as the main purpose of Australia: running a penal colony. Governor Hunter¹²

³ *Australian Dictionary of Biography* (online at 7 April 2022) BH Fletcher, 'Rowley, Thomas (1747–1806)' <<https://adb.anu.edu.au/biography/rowley-thomas-2614/text3605>>.

⁴ *People Australia, National Centre of Biography* (online at 7 April 2022) 'Rowley, Elizabeth (Betsey) (1773–1843)' <<https://peopleaustralia.anu.edu.au/biography/rowley-elizabeth-betsey-25627/text33935>>.

⁵ *Australian Dictionary of Biography* (online at 7 April 2022) DR Hainsworth, 'Lord, Simeon (1771–1840)' <<https://adb.anu.edu.au/biography/lord-simeon-2371/text3115>>.

⁶ The authors are descended from Selwyn's fifth child, Eliza Rowley. The first four children were baptised, with Captain Rowley named as their father. No record of Eliza's baptism exists. There may have been reasons for this. DNA analysis indicates that the authors (and many other descendants Eliza Rowley) are, in fact, genetically related to descendants of Simeon Lord. It is unclear whether anyone at the time realised that Eliza was Lord's child. Captain Rowley acknowledged Eliza as his legitimate child in his will, although he never married Selwyn.

⁷ Kercher, B, *Debt, Seduction and Other Disasters: The Birth of Civil Law in Convict New South Wales* (Federation Press, 1996) 16: Kercher notes that Lord was responsible for an extraordinary number of Court of Appeal and Privy Council cases, apparently aimed at delaying payment.

⁸ The First Fleet had £300 in English currency (held by Captain Arthur Phillip) and coins brought by passengers (including English guineas, shillings and pence, Spanish dollars, Indian rupees, and Dutch guilders). It was intended that officers would be paid in goods and provisions, and free settlers would be self-sufficient. See Royal Australian Mint, 'Currency in Early Settlement Fact Sheet' (undated) <https://www.ramint.gov.au/sites/default/files/currency_in_early_settlement_fact_sheet.pdf>

⁹ Kercher, n 7, 144: payment in rum was rare, but desirable.

¹⁰ Castles, A, *An Australian Legal History* (LBC, 1982) 38–39.

¹¹ 'Simeon Lord: A Merchant Prince of Botany Bay' (1944) 30(3) *Royal Australian Historical Society, Journal and proceedings* 3.

¹² *Australian Dictionary of Biography* (online at 7 April 2022) JJ Auchmuty, 'Hunter, John (1737–1821)' <<https://adb.anu.edu.au/biography/hunter-john-2213/text2873>>.

(1795–1800) and Governor King¹³ (1800–1806) had unsuccessfully tried to control the traders and the rum trade but had faced stiff opposition.

On 27 February 1805, in his will, Captain Rowley devised all his property to Major George Johnston¹⁴ and Dr John Harris,¹⁵ in trust ‘to pay, satisfy & discharge all his just debts and the expenses of his funeral, and after payment & satisfaction thereof’ and the remainder to be held ‘in trust for the benefit of his 5 natural children, & their mother Elizabeth Selwyn in the proportions therein mentioned.’¹⁶ Johnston and Harris were Captain Rowley’s executors and trustees, and appointed guardians of the five Rowley children.

Captain Rowley died of consumption on 27 May 1806, aged about 56.¹⁷ As was common for officers of the New South Wales Corps,¹⁸ he had been granted a large amount of land (240 acres) near current day Newtown and Camperdown, on which he established ‘Kingston Farm’. He also had 95 acres of land in current day Chipping Norton, 700 acres of land in current day Holsworthy, and 750 acres of land in current day Burwood (‘the Burwood Estate’). Captain Rowley’s estate was rich in illiquid assets, but he died with substantial debts. Debt appears to have been a persistent problem in early settler Australia, as the later history of the Rowley children shows.

B *The executors of the will foment a military coup*

Unfortunately for Selwyn and the Rowley children, the two executors, Johnston and Harris, did not turn their attention to the administration of Rowley’s will, as they were heavily involved in Australia’s only military coup (‘the Rum Rebellion’).

Two months after Captain Rowley’s death, a new Governor, William Bligh,¹⁹ arrived in Sydney, intending to close down private enterprise and reestablish New South Wales as a penal colony. Bligh began by replacing most of the Colony’s officials (many from the New South Wales Corps) with his own appointments. Johnston, who had become the commander of the New South Wales Corps in 1804, was so unhappy that, in October 1807, he wrote to the military secretary of the Duke of York, asking him to intervene. In his letter, Johnston complained that Bligh had interfered ‘in the interior management of the Corps by selecting and ordering both officers and men on various duties without my knowledge; his abusing and confining the soldiers without the smallest provocation and without ever consulting me as their commanding officer; and again, his casting the most unreserved and opprobrious censure on the Corps at different times in company at Government House.’²⁰

¹³ *Australian Dictionary of Biography* (online at 7 April 2022) AGL Shaw, ‘King, Philip Gidley (1758–1808)’ <<https://adb.anu.edu.au/biography/king-philip-gidley-2309/text2991>>.

¹⁴ *Australian Dictionary of Biography* (online at 7 April 2022) AT Yarwood, ‘Johnston, George (1764–1823)’ <<https://adb.anu.edu.au/biography/johnston-george-2277/text2925>>.

¹⁵ *Australian Dictionary of Biography* (online 7 April 2022) BH Fletcher, ‘King, Philip Gidley (1758–1808)’ <<https://adb.anu.edu.au/biography/harris-john-2164/text2773>>.

¹⁶ Taken from *Doe dem Harris v Riley* [1832] NSWSupC 76, n 1, 61.

¹⁷ ‘Death’, *The Sydney Gazette and New South Wales Advertiser* (1 June 1806) 2.

¹⁸ S Christensen, P O’Connor, W Duncan and R Ashcroft, ‘Early land grants and reservations: any lessons from the Queensland experience for the sustainability challenge to land ownership’ (2008) 15 *JCULR* 44, 45–51 give a history of such grants.

¹⁹ *Australian Dictionary of Biography* (online at 7 April 2022) AGL Shaw, ‘Bligh, William (1754–1817)’ <<https://adb.anu.edu.au/biography/bligh-william-1797/text2037>>.

²⁰ Major Johnston to Lieutenant-Colonel Gordon, 8 October 1807, *Historical Records of New South Wales* (‘HRNSW’) I/VI, 652.

Bligh also clashed with the other executor and trustee, Harris, who had become a central figure in Governor King's efforts to curtail the rum trade.²¹ In May 1807, Bligh dismissed Harris from his posts as a naval officer and magistrate. Harris had become estranged from his military colleagues because of his role in controlling rum trading, but Bligh's actions drove him back into sympathy with them.

Bligh got local traders offside. He imprisoned three emancipist traders—Lord, and his business partners Henry Kable²² and James Underwood²³—for a month and fined them £100 each for sending him a letter 'couched in improper terms.'

Bligh's most serious conflict was with John Macarthur,²⁴ a former officer of the New South Wales Corps, who had used his position as Paymaster and Inspector of Government Works to become one of the biggest landowners and richest men in the Colony. By 1806, Macarthur had resigned his commission with the Corps, but maintained strong links with them.

On 14 February 1807 Bligh banned illicit stills, and forbade the bartering of spirits for grain, labour, food, or any other goods, with harsh penalties for contraventions. In March 1807, Bligh discovered that Macarthur had imported stills to Australia, and ordered them returned to England. Macarthur did not protest then, but later, in October 1807, when when Bligh sent a naval officer to seize the stills, Macarthur successfully sued the naval officer for wrongful seizure of his property in the civil courts.

The next sign of conflict arose when Macarthur appealed to Bligh over a court decision. By this time, private promissory notes were the dominant means of payment in early New South Wales.²⁵ The English pound sterling was the basic money of account, but was tied to products, particularly wheat and stock, which effectively became currencies.²⁶ The practice was to divide the sterling value of the promissory note by the current selling price of a bushel of wheat as fixed by the general orders, and make the note out for the corresponding number of bushels. In January 1806, the price of wheat at the Hawkesbury had been fixed at 9s. 3d. per bushel by general order. But the Hawkesbury area was severely affected by floods in March 1806, and the wheat crops were ruined. In December 1806, the government fixed the price at 13s. 9d by general order. By June 1807, the private price of wheat was 28s per bushel.²⁷

Macarthur held a promissory note given by Andrew Thompson,²⁸ set to the price of wheat before the flood, in which Thompson had promised to pay '99 bushells storeable wheat' to 'Thomas Rickerby or bearer.' Macarthur had received the note from Thomas Rickerby as part payment for breeding ewes. Macarthur sued in the Court of Civil Jurisdiction²⁹ for specific

²¹ Fletcher, n 15.

²² *Australian Dictionary of Biography* (online at 8 April 2022) DR Hainsworth, 'Kable, Henry (1763–1846)' <<https://adb.anu.edu.au/biography/kable-henry-2285/text2941>>.

²³ *Australian Dictionary of Biography* (online at 8 April 2022) DR Hainsworth, 'Underwood, James (1771–1844)' <<https://adb.anu.edu.au/biography/underwood-james-2751/text3895>>.

²⁴ *Australian Dictionary of Biography* (online 7 April 2022) Margaret Steven, 'Macarthur, John (1767–1834)' <<https://adb.anu.edu.au/biography/macarthur-john-2390/text3153>>.

²⁵ Kercher, n 7, 131–42; Frank Decker, 'Bills, notes and money in early New South Wales, 1788–1822' (2011) 18(1) *Financial History Review* 71.

²⁶ See Kercher, n 7, 143–45.

²⁷ Watson, F, 'Introduction', *Historical Records of Australia* ('HRA') I/VI, xvii.

²⁸ *Australian Dictionary of Biography* (online 9 April 2022) JV Byrnes, 'Thompson, Andrew (1773–1810)' <<https://adb.anu.edu.au/biography/thompson-andrew-2728/text3847>>.

²⁹ Formed by *New South Wales Act 1823*, 4 Geo IV c 96 (Imp) s 18.

performance of the contract, arguing that it entitled him to 99 bushels of wheat as stipulated. The Court was comprised of a Judge-Advocate and two ‘fit and proper’ residents of the Colony. It had a wide civil jurisdiction over all pleas concerning land, debt, contract, and trespass, but it also possessed powers to grant probate on wills and issue letters of administration. Importantly, no distinction was made between law and equity.

Before the 1806 floods, it would have cost Thompson £34 10s to deliver 99 bushels of wheat, whereas by November 1806 (the time of the trial) it would have cost Thompson £341 10s.³⁰ Judge-Advocate Atkins, Thomas Moore, and Henry Fulton rejected Macarthur’s arguments,³¹ holding that the note represented a money value, not a particular amount of wheat. After Bligh dismissed Macarthur’s appeal in July 1807 without a hearing, Macarthur was forced to accept less than 99 bushels in payment.³²

The animosity deepened after Bligh threatened to remove Macarthur from his land. The Privy Council in London had promised Macarthur a huge grant of land at Cowpastures (current day Camden), upon which he planned to develop the colony’s nascent wool industry. Captain Rowley had been one of the first in Australia to keep merino sheep,³³ but unlike Macarthur, he had not realised their potential for wool production.³⁴ Captain Rowley had had a large herd of sheep the year before he died,³⁵ but the Rowley children had none by 1818 and 1819.³⁶

The final straw came when Bligh charged Macarthur with an offence. The captain and crew of the *Parramatta*, a trading ship part-owned by Macarthur, were forced to land contrary to regulations, after Macarthur abandoned the ship to avoid paying bond for a convict who had absconded during the voyage. Macarthur was arrested and released on bail of £1000. Macarthur immediately demanded that Judge-Advocate Atkins repay a debt he’d owed Macarthur for fifteen years. Atkins, a non-lawyer, was notorious for his poor legal knowledge, irresolution, drunkenness, and failure to pay debts.³⁷ Bligh and Atkins relied heavily on legal advice from George Crossley,³⁸ a former lawyer who had been transported for perjury, because there were no free settler lawyers in the Colony.

The Court of Criminal Jurisdiction was comprised of Judge-Advocate Atkins, and six military officers, who were supposed to confer over criminal verdicts.³⁹ However, when the court met on 25 January 1808, the officers assigned to Macarthur’s trial (all members of the New South Wales Corps) refused to recognise the Judge-Advocate’s authority, or to swear him in, and the

³⁰ Figures taken from Byrnes, n 28.

³¹ *Macarthur v Thompson* [1806] NSWKR 3, [1806] NSWSupC 3 (Court of Civil Jurisdiction, Atkins JA, 27 October–4 November 1806) Available at <http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1806/macarthur_v_thompson_1806_nswkr_3_1806_nswsupc_3/> (accessed 8 April 2022). See Kercher, n 7, 148–49.

³² Today, damages are measured at date of breach, although Australian courts can depart from this if the justice of the case requires it: *Johnson v Perez* (1988) 166 CLR 351.

³³ Fletcher, BH, *Landed Enterprise and penal society* (Sydney University Press, 1976) 72–73.

³⁴ Fletcher, n 3.

³⁵ HRA I/IV, n 27, 604–05 (519 sheep).

³⁶ New South Wales Government, Secretary to the Governor, *Population Musters: New South Wales Mainland (1811–1819)* NRS 1260 [4/1225].

³⁷ *Australian Dictionary of Biography* (online at 7 April 2022) JM Bennett, ‘Atkins, Richard (1745–1820)’ <<https://adb.anu.edu.au/biography/atkins-richard-1723/text23945>>.

³⁸ *Australian Dictionary of Biography* (online at 7 April 2022) KG Allars, ‘Crossley, George (1749–1823)’ <<https://adb.anu.edu.au/biography/crossley-george-1938/text2317>>.

³⁹ Castles, n 10, 47.

trial could not be completed.⁴⁰ Macarthur abused Atkins for failing to pay his debts, and also challenged his authority.⁴¹ Upon Atkins' and Crossley's recommendation, Bligh charged the officers with treason (a capital offence).

A group of men, including Johnston, Macarthur, and Harris, had been waiting for a reason to remove Bligh from office. On 26 January 1808, Johnston led officers and men of the New South Wales Corps to remove Bligh from office. They carried a petition, signed by Macarthur, five other free settlers, and S. (Simeon) Lord, imploring Johnston to arrest Bligh on the basis that 'every man's property, liberty, and life is endangered.'⁴² Bligh was arrested, and the Colony was placed under military rule, with Johnston appointing himself as Lieutenant-Governor.⁴³ Military rule ended when Lachlan Macquarie⁴⁴ was appointed the fifth Governor of New South Wales in 1810.

Although Harris was reappointed to the magistracy by Johnston, he clashed with the new regime, and on 5 April 1808, Johnston dismissed Harris, and ordered him to London to present the rebel case to the British government.⁴⁵ Subsequently Johnston and Macarthur set sail for England on 31 March 1809 to defend their actions. Johnston was court martialled on 3 April 1811 and convicted of mutiny. He was cashiered from the army, a lenient sentence in the circumstances.⁴⁶ It was generally believed that he had been heavily influenced by Macarthur.⁴⁷ He returned to New South Wales in October 1812. Harris also gave evidence at Johnston's court martial and returned to New South Wales in February 1814.⁴⁸ Macarthur was forbidden to return to Australia until 1817.⁴⁹

Neither Johnston nor Harris was focused upon administering Captain Rowley's will or caring for his children. Indeed, they were not in New South Wales when Selwyn was pursued by Captain Rowley's creditors.

C *Thomas Moore sells the Burwood Estate*

Selwyn appears to have petitioned Governor Macquarie for help.⁵⁰ On 14 March 1812, an announcement appeared in the *Sydney Gazette*:

Being duly appointed by his Excellency the Governor to manage the Estate and Effects of the late Thomas Rowley, Esq. during the further absence of George Johnston and John Harris Esquires, I do hereby require that all Accounts against the said Estate be

⁴⁰ The Trial of John Macarthur (Colonial Secretary's Papers), 25 January 1806, HRNSW, I/IV, n 20, 422–25.

⁴¹ The Trial of John Macarthur (Colonial Secretary's Papers), 25 January 1806, HRNSW, I/IV, n 20, 425–27. Atkins remained insolvent until his death on 21 November 1820: Bennett, n 37. Drunkenness and insolvency were the norm for court officials in early New South Wales: Kercher, n 7, 20.

⁴² John Macarthur and others to Major Johnston, 26 January 1806, HRNSW, I/IV, n 20, 434.

⁴³ Bligh was held from 26 January 1808 to 20 February 1809, whereupon he escaped to a ship called the *Porpoise* until January 1810.

⁴⁴ *Australian Dictionary of Biography* (online at 7 April 2022) ND McLachlan, 'Macquarie, Lachlan (1762–1824)' <<https://adb.anu.edu.au/biography/macquarie-lachlan-2419/text3211>>.

⁴⁵ Fletcher, n 15.

⁴⁶ Bartrum, *Proceedings of a General Court-Martial held at Chelsea Hospital for the Trial of Lieut.-Col. Geo. Johnston* (Sherwood, Neely and Jones, 1811). Extracts available at <<https://gutenberg.net.au/ebooks13/1300731h.html#ch-24>> (online at 7 April 2022).

⁴⁷ Yarwood, n 14.

⁴⁸ Fletcher, n 15.

⁴⁹ Steven, n 24.

⁵⁰ *Doe dem Harris v Riley* [1832] NSWSupC 76, n 1.

furnished to me ... on or before the 10th of April proximo, in order that an Arrangement may be made....

THOMAS MOORE

Liverpool, March 10, 1812.⁵¹

Thomas Moore,⁵² a friend of Macquarie, agreed to look after the affairs of Selwyn and the Rowley children. To meet Captain Rowley's debts, Moore decided to sell the Burwood Estate.

By then, Ellis Bent,⁵³ a lawyer, was Judge-Advocate of the Court of Civil Jurisdiction. On 21 July 1812, Moore obtained an order from the Court confirming that he could sell the Burwood Estate.⁵⁴ On 5 September 1812, *The Sydney Gazette* announced:

The valuable estate of Burwood, the property of the late Captain Rowley, consisting of 750 acres opposite the Parramatta Road, was bought to the hammer and purchased for £520.⁵⁵

The purchaser, Alexander Riley,⁵⁶ was a pastoralist, trader, and free settler. There the matter rested for twenty years.

D *The surviving Rowley children get into financial strife*

The Rowley children constantly struggled with money. The fact that their mother was a former convict impacted upon their social status, particularly after 1821. Their spouses were also descended from convicts, or of low social status. By the late 1820s and early 1830s, the four surviving Rowley children and their spouses were in extreme financial difficulties (Isabella had died in 1808). All the Rowley sons or sons-in-law had been declared insolvent, and two had spent time in debtors' prison.⁵⁷

Thomas Rowley junior farmed the 700-acre property at Holsworthy. He mortgaged it to Thomas Moore for £120 in 1824,⁵⁸ and for £367 6s 4d in 1827.⁵⁹ He was sued by many debtors.⁶⁰ In 1828, to stop his property being sequestered and sold, he 'sold' his property and

⁵¹ 'Notice', *The Sydney Gazette and New South Wales Advertiser* (14 March 1812) 2.

⁵² *Australian Dictionary of Biography* (online at 7 April 2022) ML Loane, 'Moore, Thomas (1762–1840)' <<https://adb.anu.edu.au/biography/moore-thomas-2476/text3325>>.

⁵³ *Australian Dictionary of Biography* (online at 7 April 2022) CH Currey, 'Bent, Ellis (1783–1815)' <<https://adb.anu.edu.au/biography/bent-ellis-1772/text1985>>.

⁵⁴ *Doe dem Harris v Riley* [1832] NSWSupC 76, n 1.

⁵⁵ 'Sydney Sitting Magistrate for the ensuing Week, S. Lord, Esq,' *The Sydney Gazette and New South Wales Advertiser* (5 September 1812) 2.

⁵⁶ *Australian Dictionary of Biography* (online at 7 April 2022) Jill Conway, 'Riley, Alexander (1778–1833)' <<https://adb.anu.edu.au/biography/riley-alexander-2591/text3555>>.

⁵⁷ Kercher, n 7, Ch 8 describes early Australian insolvency law.

⁵⁸ *Mortgage by Demise*, from Thomas Rowley to Thomas Moore (at 8 September 1824) (copy on file with authors).

⁵⁹ *Mortgage*, from Thomas Rowley to Thomas Moore (at 1 October 1827) (copy on file with authors).

⁶⁰ See eg, 'Campbell v Rowley', *The Australian* (5 September 1827) 2; 'Howe v Rowley', *Sydney Gazette and New South Wales Advertiser* (23 May 1828) 1; 'Aspinall & Co v Rowley', *Sydney Gazette and New South Wales Advertiser* (1 October 1828) 1; 'In the matter of Thomas Rowley', *Sydney Gazette and New South Wales Advertiser* (17 December 1828) 3.

stock to his mother-in-law, Catherine Clarkson.⁶¹ He was declared insolvent on 17 December 1828,⁶² and spent time in debtor's prison.⁶³

John Rowley gave up farming, and in 1826, he had taken over his late father-in-law's pub, *The Hope*, in Liverpool. He was also declared insolvent on 17 December 1828.⁶⁴

Mary Rowley married John Lucas,⁶⁵ the son of two convicts, in 1817. In 1822, Lucas built a flour mill on Harris Creek, and in 1825, he erected a second mill at Woronora. By 1827, the mill had burned down, and he became a builder, in partnership with his brother William. He and his brother's estate were declared insolvent on 28 September 1828,⁶⁶ after they were unable to fulfil a contract to erect a courthouse at Liverpool.

Eliza Rowley married Henry Sparrow Briggs, a free settler, in 1826. They farmed near Liverpool. Henry Briggs was declared insolvent on 11 June 1827,⁶⁷ and sent to debtors' prison. By mid-1828, the Briggs moved back to the 100-acre remnant of Kingston Farm with Selwyn. Most of the land around Kingston Farm had been sold to pay off debts. By the beginning of 1830, Kingston Farm had been rented out, and the Briggs were farming in the Hunter Valley.

The Rowley children and their spouses were desperate for money. In 1830, they took drastic legal action. They decided to get Burwood Estate back.

III THE BURWOOD EJECTMENT CASE

In 1832, *Doe dem Harris v. Riley* came before Forbes CJ, Stephen and Dowling JJ of the New South Wales Supreme Court. Selwyn and the Rowley children were represented by William Charles Wentworth,⁶⁸ a man of many talents: an explorer, author, barrister, landowner, and politician. But after Governor Macquarie left office in 1821, the social position of former convicts or those descended from convicts worsened. Wentworth's parents were unmarried convicts. The Exclusives, the faction in power at that time, were determined to maintain a divide between free people and convicts and their offspring, and petitioned Colonial authorities to bar Emancipists from political participation. Wentworth led the Emancipist party, which sought equal rights for ex-convicts and their descendants, including trial by jury and representative democracy.⁶⁹ The Burwood Ejectment case was not only about property and a way out of insolvency for the Rowley children. Wentworth was making a political point by arguing for a convict's children.

⁶¹ *Bill of Sale*, from Thomas Rowley to Catherine Clarkson (at 1 September 1827); *Deed of Trust*, from Thomas Rowley to Catherine Clarkson (at 1 September 1827); *Indentures of Lease and Release*, from Thomas and Catherine Rowley to Catherine Clarkson (at 1 July 1828) (copies on file with authors). 'Government Notices', *The Sydney Gazette and New South Wales Advertiser* (23 July 1828) 3.

⁶² 'Government Notices', *The Sydney Gazette and New South Wales Advertiser* (19 December 1828) 4.

⁶³ *Neely v Rowley* [1829] NSWSupC 83; (1828) *Dowling's Select Cases* 607 (Supreme Court of New South Wales, 19 December 1829). Available at

<https://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1829/neely_v_rowley/> (online at 10 April 2022)

⁶⁴ 'Government Notices', *The Sydney Gazette and New South Wales Advertiser* (19 December 1828) 4.

⁶⁵ *People Australia, National Centre of Biography* (online at 14 April 2022) 'Lucas, John (1796–1875)' <<https://peopleaustralia.anu.edu.au/biography/lucas-john-25625/text33934>>.

⁶⁶ See 'Government Notices', *The Sydney Gazette and New South Wales Advertiser* (17 September 1828) 1.

⁶⁷ See 'Government Notices', *The Sydney Gazette and New South Wales Advertiser* (11 June 1827) 1.

⁶⁸ *Australian Dictionary of Biography* (online at 7 April 2022) Michael Persse, 'Wentworth, William Charles (1790–1872)' <<https://adb.anu.edu.au/biography/wentworth-william-charles-2782/text3961>>.

⁶⁹ Castles, n 10, 125–27.

The Supreme Court observed that the sale to Riley of the Burwood Estate was ‘bonâ fide and for valuable consideration.’⁷⁰ However, the first question was whether Governor Macquarie had had the power to remove Johnston and Harris as trustees, and substitute Moore. The Court conceded that Governor Macquarie ‘had at that time a jurisdiction in such matters, similar to that of the Lord High Chancellor of England.’⁷¹ The Court found that the Lord Chancellor of England could substitute new trustees where ‘trustees resign, never having acted - are dead, - are guilty of misconduct, or go away to parts beyond seas, with an expressed intention never to return.’⁷² When Macquarie replaced the trustees, it was unclear whether Johnston and Harris had expressed an intention to permanently leave Australia⁷³ (in the event, they had returned). There was an implicit criticism of all parties involved:

As observed before the trust to Johnstone & Harris, was of a personal & very special & a delicate nature namely the guardianship & care of his infant natural children, and therefore a case of strong necessity must have been made out before a mere stranger to the testator could have been substituted.⁷⁴

Even if Governor Macquarie had the power to substitute Moore as trustee, the Supreme Court found that the Court of Civil Jurisdiction could not approve the sale of the property:

That Court [the Court of Civil Jurisdiction] was little more than a court of Requests, having only a summary jurisdiction only actions & suits at law as the terms of its creation; & the course of its proceeding incontestibly [sic] shew. There is a Parliamentary recognition of this, in the 49. G. 4. c 96. s. 18. [*New South Wales Act 1823* (Imp)] in which the legislature recognizes its acts so far only as it has it has a lawful jurisdiction. It clearly had no jurisdiction in Equity, and had no authority to decree such a sale.⁷⁵

No equitable jurisdiction had been conferred upon a civil court until the creation of the Supreme Court of Civil Judicature of New South Wales in 1814,⁷⁶ and hence the Court of Civil Jurisdiction had no power to make decisions regarding the administration of a trust, as trusts are within equity’s original jurisdiction.

Even if the court had jurisdiction, the Court found that the decision had been made improperly, because Selwyn and Rowley’s children had not been before the court.⁷⁷ Consequently, the Court decided in favour of Selwyn and the Rowley children:

Making every fair & reasonable intendment to support the legality of this transaction, we feel ourselves bound in a court of law to hold that the sale of the estate in question under the decretal order of the Court of the Civil Jurisdiction is not valid in the law, & consequently judgment must be given for the lessors of the Plf.

⁷⁰ *Doe dem Harris v Riley* [1832] NSWSupC 76, n 1, 67.

⁷¹ *Doe dem Harris v Riley* [1832] NSWSupC 76, n 1, 68a.

⁷² *Doe dem Harris v Riley* [1832] NSWSupC 76, n 1, 68a.

⁷³ *Doe dem Harris v Riley* [1832] NSWSupC 76, n 1, 68a.

⁷⁴ *Doe dem Harris v Riley* [1832] NSWSupC 76, n 1, 68a–68b.

⁷⁵ *Doe dem Harris v Riley* [1832] NSWSupC 76, n 1, 68b.

⁷⁶ Created by *Charter of Justice of New South Wales 1814* (UK) (‘Second Charter of Justice’).

⁷⁷ *Doe dem Harris v Riley* [1832] NSWSupC 76, n 1, 68c.

Whether a court of Equity upon a full disclosure of all the circumstances of the case, would afford the deft any relief is another matter, but in the present state of this case, being constrained to dispose of it according to the strict rules of law, we have no alternative but to give the Plf judgment according to law.⁷⁸

One is left with the sense that the court was frustrated by this result but felt bound to apply the law as it stood at that time.

When a transaction is rescinded at common law, title reverts immediately in the rescinding party upon election,⁷⁹ as in this case. The Court's judgment suggests that title was not validly held by Moore, and hence the maxim '*nemo dat quod non habet*' applied.⁸⁰ However, if this dispute had taken place in England in 1832, the sale would not have been rescinded at common law, because complete *restitutio in integrum* is necessary (i.e. property must be returned in *exactly* the state it was conveyed). The land had been occupied, and substantial improvements made to it, rendering complete *restitutio in intergrum* impossible.⁸¹

One of the authors has imagined what might have happened under modern Australian law.⁸² Presuming the land was general law title, and that no subsequent rights had arisen to defeat their right, Selwyn and the Rowley children arguably possessed an equitable right to rescind, or a constructive trust (perhaps for misapplication of trust property). Riley would have retained legal title to the Burwood Estate. Although Riley was a bona fide purchaser for value without notice (generally a defence in equity),⁸³ because the property was misapplied trust property, Riley might have been subject to a constructive trust.⁸⁴ However, if the sale was rescinded in equity, adjustments would be made to ensure 'practical justice' was achieved.⁸⁵ Selwyn and the Rowley children would have been entitled to the property and its fair rental value, Riley would have been entitled to the costs of improvements to the property,⁸⁶ and the purchase price and interest. Had Selwyn and the Rowley children been unable to make counter-restitution, rescission would have been unavailable.⁸⁷ In terms of bars to relief, delay, however lengthy, is rarely enough to bar rescission or other equitable remedies,⁸⁸ but if Selwyn had acquiesced in the use of the funds from the sale to pay off debts, she might have affirmed the transaction.

If Riley had held the land under Torrens title (which was not developed until 1858) the position would have been even simpler. An unexercised proprietary power to rescind (or 'mere equity') is fragile,⁸⁹ and a fully vested equitable interest does not arise until election occurs.⁹⁰ It is unclear whether a mere personal power to rescind is caveatable.⁹¹ However, even if Selwyn

⁷⁸ *Doe dem Harris v Riley* [1832] NSWSupC 76, n 1, 68e.

⁷⁹ *Car & Universal Finance Ltd v Caldwell* [1965] 1 QB 525.

⁸⁰ 'No one can give what they do not have'. See Chambers, R, *An Introduction to Property Law in Australia* (LBC, 4th ed, 2019) [24.10].

⁸¹ *Hunt v Silk* (1804) 5 East 449, 102 ER 1142. See later, *Blackburn v Smith* (1848) 2 Ex 782, 154 ER 707.

⁸² See Barnett, K and Harder, S, *Remedies in Australian Private Law* (CUP, 2nd ed, 2018) Ch 18.

⁸³ Chambers, n 80, [25.30].

⁸⁴ *Re Stapleford Colliery Co* (1880) 14 Ch D 432, 445.

⁸⁵ *Alati v Kruger* (1955) 94 CLR 216.

⁸⁶ *Brown v Smitt* (1924) 34 CLR 160, 165 (Knox CJ, Gavan Duffy and Starke JJ).

⁸⁷ *Maguire v Makaronis* (1997) 188 CLR 449.

⁸⁸ *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221, 239–40. Substantial delay alone was not enough in *Burroughes v Abbott* [1922] Ch 86 (12-year delay) and *Weld v Petre* [1929] 1 Ch 33 (26-year delay).

⁸⁹ *Latec Investments Ltd v Hotel Terrigal Pty Ltd* (1965) 113 CLR 265. See Elise Bant, 'Trusts, Powers and Liens: An Exercise in Ground Clearing' (2009) 3(3) *Journal of Equity* 286.

⁹⁰ *Daly v Sydney Stock Exchange* (1986) 160 CLR 371, 388–90 (Brennan J).

⁹¹ Barnett and Harder, n 82, [19.23].

and the Rowley children had a constructive trust arising when the trust property was misapplied, the registered proprietor of Torrens land obtains indefeasible title free of any prior unregistered interests,⁹² unless certain exceptions are made out. While equity provides greater protection to bona fide purchasers for value without notice than common law, transfers are still vulnerable, because of the wide definition of ‘notice’.⁹³ Torrens himself seems to have been inspired to develop the ‘system of title by registration’⁹⁴ after an incident in which his friend had been deprived of title by the Court of Chancery.⁹⁵ Unless Selwyn and the Rowley children had caveated their prior interest before Riley obtained the property, or could establish an exception to indefeasibility (including notice, fraud or the *in personam* exception, all of which seem unlikely on the facts), Riley would have title free of any claim.

As Dorsett has outlined, twenty years prior to the institution of the Torrens system, the New South Wales government sought to solve the issue of uncertain or conflicting claims by a different means.⁹⁶ Lack of security of title was so widespread that, in 1833, the Court of Claims was established, with Commissioners appointed to determine in whom title to land should be vested.⁹⁷ The process involved producing to the Court and publicising a description of the land, with supporting evidence as to title, with any counter claimant to come forward within three months, or their claim was barred and extinguished. Primacy was given to actual occupation and possession.⁹⁸

IV THE AFTERMATH OF THE BURWOOD EJECTMENT CASE

Meanwhile, in 1832, the media expressed immediate concern about the Burwood Ejectment case. *The Tasmanian* reported from Van Diemen’s Land:

We perceive by the Sydney papers that Mr Riley is likely to lose his beautiful estate on the Parramatta Road, and that too after having expended a considerable sum thereon. We suspect it arises from the circumstances of his having bought it without the concurrence of the heir at law ... Mr Riley, we suppose, will in law find some defendant or other to repay him for the very large sum he expended on the estate, unless the rents he had received be held in equitable equivalent.⁹⁹

The newspaper’s prediction of further legal action was prescient.

⁹² *Land Titles Act 1925* (ACT) s 58; *Real Property Act 1900* (NSW) s 42; *Land Title Act 2000* (NT) ss 188, 189; *Land Title Act 1994* (Qld) ss 184, 185; *Real Property Act 1886* (SA) s 69; *Land Titles Act 1980* (Tas) ss 40, 41; *Transfer of Land Act 1958* (Vic) ss 42, 43; *Transfer of Land Act 1893* (WA) s 68.

⁹³ Chambers, n 80, [25.50]–[25.80].

⁹⁴ *Breskvar v Wall* (1971) 126 CLR 376, 385 (Barwick CJ).

⁹⁵ P Moerlin Fox, ‘The Story behind the Torrens System’ (1950) 23 *ALJ* 489, 489–90.

⁹⁶ Shaunnagh Dorsett, ‘The Court of Claims and the resolution of informal land claims in New South Wales 1833–1835’ (2014) 4 *Property Law Review* 5, 5–6.

⁹⁷ *Ibid*, 10–11. Created by *An Act for Appointing and Empowering Commissioners to Examine and Report upon Claims to Land under the Great Seal of the Colony of New South Wales*, 4 Wm IV No 9 (1833) (NSW). The second iteration, created by *An Act for Appointing and Empowering Commissioners to Examine and Report upon Claims to Land under the Great Seal of the Colony of New South Wales*, 5 Wm IV No 21 (1835) (NSW), determined disputes until 1922.

⁹⁸ Dorsett, n 96, 11.

⁹⁹ ‘Domestic Intelligence’, *The Tasmanian* (21 December 1832) 5.

A *The Rowley children sell the Burwood Estate and sue for rent*

Once regained by the Rowley children, the Burwood Estate was subdivided into four portions. Each of the Rowley children received 213 acres, apart from John Rowley, who received only 100 acres, but his portion included ‘Burwood Villa’, the house built by Alexander Riley.¹⁰⁰

Three Rowley children put parts of their land up for sale on 1 May 1833. Thomas Rowley, the most cash-strapped, offered his entire 213 acres. John Lucas, Mary’s husband, offered 56 acres, and Henry Sparrow Briggs, Eliza’s husband, offered 100 acres. They subdivided the land into areas suitable for small farms. Later, in 1855, the Sydney-Parramatta Railway passed through Burwood, transforming it into a commuter suburb.¹⁰¹ The subsequent owners would have profited handsomely by subdividing it and selling it.

Then, the Rowley children sued Riley for rent he’d received from tenants of the Burwood Estate after he’d returned to England in 1817. They were victorious again. Forbes CJ, Dowling and Burton JJ found that Riley had trespassed on land belonging to the Rowley children, and hence the Rowley children were entitled to ‘waive the tort’ and sue in assumpsit for the mesne profits arising from Riley’s wrongful use of the land.¹⁰² ‘Mesne profits’ are awarded when the defendant wrongfully withholds possession of the land from the plaintiff.¹⁰³

B *Riley’s estate sues Moore*

Riley was unable to return to Australia and died in London on 17 November 1833. His executors sued Thomas Moore, the *ad hoc* trustee of Captain Rowley’s estate. Unfortunately for Moore, the deed of sale had contained a clause guaranteeing possession ‘to the said Alexander Riley, his heirs and assigns, for ever,’ notwithstanding any claims by Rowley’s executors or devisees. Moore attempted to argue that the intention was not to give absolute title, and the initial action was non-suited in 1836.¹⁰⁴ In 1837, Riley’s executors sued Moore again.¹⁰⁵ The deed of sale had been drawn up by Crossley, the same former lawyer who had advised Bligh and Atkins. Moore said that Crossley had fraudulently inserted the indemnifying clause and told him that he ran no risk in signing the contract. At trial before Burton J, a special jury returned a verdict that Moore had breached the covenant and was liable for damages of £5,391. Burton J reduced the damages to £2,536. Initially, Riley’s estate refused this, but the next day, on 31 March 1837, they accepted the reduced amount.

¹⁰⁰ Dunlop, E, *Harvest of Years: The Story of Burwood 1794–1974* (Wentworth Press, 1974, 2010) 26–27 (with diagrams of the subdivision).

¹⁰¹ *Ibid.*, 35–36.

¹⁰² *Harris v Riley* [1833] NSWSupC 113 (Supreme Court of New South Wales, Forbes CJ, Dowling and Burton JJ, 29 June 1883) reported in *The Sydney Herald* (1 July 1833). Available at <http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1833/harris_v_riley/> (accessed 9 April 2022).

¹⁰³ See eg, *Lollis v Loulatzis* [2007] VSC 547.

¹⁰⁴ *Jones v Moore* [1836] NSWSupC 18 (Supreme Court of New South Wales, Dowling J and two Assessors, 12 March 1836) reported in *The Sydney Herald*, 17 March 1836. Available at <http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1836/jones_v_moore/> (online at 9 April 2022).

¹⁰⁵ *Jones v Moore* [1837] NSWSupC 19 (Supreme Court of New South Wales, Burton J and a special jury, 20 March 1837) reported in *The Sydney Herald*, 23 March 1837. Available at <http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1837/jones_v_moore/> (online at 9 April 2022).

C *Moore petitions the government for compensation*

After judgment was awarded against Moore, he petitioned Governor Richard Bourke for compensation, on the basis that he had incurred the loss simply by carrying out Governor Macquarie's directions. Bourke ceased as Governor on 5 December 1837 and was replaced by Sir George Gipps on 24 February 1838.

In August 1839, Governor Gipps addressed the New South Wales Legislative Council regarding Moore's request for compensation, as reported in *The Sydney Herald*.¹⁰⁶ Gipps stated a considerable hesitation in agreeing to Moore's request. The Lords of the Treasury had refused to admit Mr Moore's claim and pointed out that Moore had given a guarantee which was not required.¹⁰⁷ Gipps noted that the practice of government of the Colony of New South Wales was very different to other colonies:

...for many years after the first settlement of the Colony, and even for many years after that in which Governor Macquarie laid the appointment, the powers of the Governor of New South Wales were very undefined, and the practice of Government of necessity widely different from that of the Government of any other Colony ever established by Great Britain; that the Courts of Law then existing in the Colonies were themselves Anomalies; that the orders of the Governor constituted in fact the law of the Colony, and were recognized as such by the Judges; that the Judges themselves frequently applied to the Governor to issue orders, which they enforced even in matters of Criminal Justice, and notwithstanding that such orders were sometimes issued in the Military Order Book; that the very deed which gave the Burwood Estate to Captain Rowley has been since considered an invalid one, and a doubt raised whether an action of ejectment could properly have been maintained on it; and lastly, that as every or any act of the early Governors of New South Wales, can be set aside by the decision of the present Supreme Court, and the parties damaged by such decision can come to this Council, and claim compensation, the consequences, in a pecuniary point of view, may be most serious to the Colony. When the invalidity was discovered of all the grants of land which had been issued by the first six or seven Governors of the Colony, a very proper remedy was applied by the passing of the 6th Wm. IV No. 16.¹⁰⁸ Why a similar measure was not resorted to, to give equal validity to other acts of the same Governors ... I, of course, cannot determine; but it is evident, that if such a course had been adopted, the proceedings in this case would have been stopped and the parties in possession of the Burwood Estate would not have been ejected by others, whose title to it rested only on a legal technicality.¹⁰⁹

Gipps had no doubt as to who was responsible for this mess: 'the trustees under Mr Rowley's will, who, after accepting the trust, neglected and abandoned it.'¹¹⁰ He observed that Macquarie held the Great Seal of the Colony and acted as Chancellor while he was Governor, and accordingly, Gipps believed he had the power to replace Johnston and Harris as trustees. Moore had 'acted uprightly and honourably and did no more under it [the trust], than the original

¹⁰⁶ 'Minutes: Addressed by the Governor to the Members of the Legislative Council, on presenting to them Papers connected with the claims of Mr. Moore, and Mr. Busby', *The Sydney Herald* (26 August 1839) 2.

¹⁰⁷ 'Minutes', n 106, 2.

¹⁰⁸ *Validity of Grants Act 1836*, 6 Wm IV c 16 (NSW).

¹⁰⁹ 'Minutes', n 106, 2.

¹¹⁰ 'Minutes', n 106, 2.

trustees ought to have done, had they not abandoned their trust.¹¹¹ Gipps thought that the Legislature should have validated Macquarie's appointment of Moore as a trustee, 'thereby preventing the parties who were the bona fide purchasers and proprietors of the Burwood Estate, from being ejected; instead of waiting until they had been ejected, and then giving them compensation of the public funds of the Colony.'¹¹² There was concern about opening 'the doors of the Council to a flood of claims, the amount of which is utterly impossible calculate.'¹¹³

Others were also worried, as an 1839 editorial in *The Sydney Herald* demonstrates:

To make the free inhabitants of this Colony answerable for the misdoings of General Macquarie when he was Governor of a Penal Settlement, appears to us so very absurd, that we could never have believed it possible that it would have been attempted had we not seen it.

...

We are unable to see upon what grounds the Lords of the Treasury think that Mr Moore is entitled to compensation out of the revenue of this Colony. When the act was committed by which Mr. Moore was damnified, this Colony was essentially a Penal Settlement, and almost entirely supported from the British revenue, and we cannot see upon what shadow of pretence the free inhabitants of the Colony of the present day should be called upon to pay Mr. Moore any sum that may be due to him as compensation.¹¹⁴

The editorial demanded that the Council resolve that the compensation could not be paid for any act done before the existence of the Legislative Council,¹¹⁵ reflecting the continuing demographic shift in New South Wales: while 37.7% of the population had been convicts in 1837, by 1847, only 3.2% were convicts.¹¹⁶

The government attempted to deal with problems associated with land title through the *Registration of Deeds Act 1825* (NSW), and by establishing the Court of Claims, but the system was still very imperfect.¹¹⁷ An opinion piece in 1839 indicated the broader problems:

The very easy mode by which at one period possession was obtained of the most valuable species of property in New South Wales, and the loose manner in which the Records were at that time kept, are likely soon to be the means of convincing the government and the occupants of town property, that great care and attention ought to be on all occasions paid to any transaction connected with real property. At one period, we believe, it was not unusual for persons to obtain a town allotment upon a mere verbal application to the Governor, and should His Excellency have happened to give a verbal answer in favour of the application, the party felt perfectly satisfied, and without any written authority, took possession of the ground, which he may have described, or endeavoured to describe, and accordingly made improvements. ...

¹¹¹ 'Minutes', n 106, 2.

¹¹² 'Minutes', n 106, 2.

¹¹³ 'Minutes', n 106, 2.

¹¹⁴ 'Domestic Intelligence Governor Macquarie', *The Sydney Herald* (23 August 1839) 2.

¹¹⁵ 'Domestic Intelligence', n 114, 2.

¹¹⁶ Castles, n 10, 153.

¹¹⁷ See Kercher, n 7, 122–29.

...

At this day many valuable pieces of land in the town of Sydney are held without the slightest trace of primary title, and the pending cases at the suit of representatives of the late Admiral Bligh show the careless manner in which Records were heretofore kept, and the great loss, (in some cases ruin,) which will now be sustained by occupants under defective title.

...

The loss and injury which will accrue extends far beyond the present possessors, for those who may have heretofore sold the land will now be looked to for a return of the purchase money, and all damages sustained. In some cases, the Solicitors who prepared the deeds will be held responsible for all loss; but, in other instances, where the parties have no one to look to but the government, we humbly think that the officer who misled them, by giving possession of that which had been formerly given to another,—should be bound, personally to indemnify the unfortunate sufferers. ... It is much to be regretted, that numerous law suits are likely to arise in New South Wales, under similar circumstances, and all occasioned by the careless manner in which the records respecting land, were formerly kept¹¹⁸

The opinion piece noted that Moore's claim was of particular concern as a precedent.

On 22 September 1840, the Legislative Council of New South Wales discussed Moore's claim. *The Sydney Herald* reported that it was decided that Moore should be compensated for £2,536 (7 Ayes and 4 Noes) and that 'Mr. Berry ... commented very severely upon the conduct of the young Rowleys in the transaction.'¹¹⁹ In fact, Alexander Berry¹²⁰ was so vehement that John Rowley threatened to sue him for libel when the full speech was published.

D *John Rowley's libel action against The Colonist*

On 24 September 1840, *The Colonist* published a story entitled 'A Novel Monument', in which they reproduced Berry's comments regarding the Rowley children:

On Tuesday Mr Berry signalled himself in Council by giving a description of the sort of "monumental obelisk" which he should like to see erected to the memory of Mr. Moore, of Liverpool, when that highly respectable benefactor of the Church of England and endorser of her cures and livings shall have been gathered to his fathers in dust. Mr Berry would have it an obelisk; on one side he would have graved, "Thomas Moore, an honest man;"—on another side he would have a full, true, and particular history of the account of the case from beginning to end;—on the third side he would have a poor man thrusting a lot of frozen vipers, with human faces, to represent "the venomous breed of the Rowleys," and afterwards revived by the genial warmth stinging the poor hedger to death. Mr Berry did not say what he would have on the fourth side, but we would suggest that on it should be graven the names of the most honourable members

¹¹⁸ From a Correspondent, 'Titles to Town Lands', *The Australasian Chronicle* (27 August 1839) 1.

¹¹⁹ 'Legislative Council', *Supplement to The Sydney Herald* (25 September 1840) 1.

¹²⁰ *Australian Dictionary of Biography* (online at 7 April 2022) TM Perry, 'Berry, Alexander (1781–1873)' <<https://adb.anu.edu.au/biography/berry-alexander-1773/text1987>>.

who consented to the vote with Mr Berry's name at the head of the list with a full, true, and particular report of his speech to the Council on the occasion, in order to transmit to posterity a memorial of the manner in which the honest legislators for this colony dispose of the public funds in violation of every principle of justice towards the colony itself.¹²¹

John Rowley threatened an action in libel against *The Colonist*, prompting repetition of the allegedly libellous statements, which, the newspaper pointed out, were not made by it, but by Berry. The statements were hence given more publicity, a risk in defamation proceedings to this day. On 3 October 1840, *The Sydney Gazette* reported a rumour that John Rowley had dropped proceedings against *The Colonist* and was considering bringing an action against Berry.¹²² On 7 October 1840, James Macarthur, also a member of the Legislative Council and John Rowley's friend, attempted to defend his reputation, but *The Sydney Herald* reported that Berry replied that he would only apologise if Macarthur 'did not consider Mr Rowley had acted with ingratitude'.¹²³ Nothing further occurred, perhaps because Berry's statements were covered by parliamentary privilege, or because John Rowley realised he was bringing attention to the libel. The cascade of litigation flowing from the Burwood Ejectment case was over.

E *The fate of the Rowley children*

Even so, the acquisition of the Burwood Estate did not save the Rowley children from their financial difficulties.

A mortgagee foreclosed on the mortgage over Thomas Rowley junior's farm in June 1841,¹²⁴ and on 30 November 1842, he was pronounced insolvent. He was in and out of the Court of Insolvency for the next 13 years, and eventually lost the land at Holsworthy.¹²⁵

John Rowley subdivided part of the Burwood Estate in February 1842 and offered 50 lots for sale.¹²⁶ He put Burwood Villa on the market in October 1842,¹²⁷ but it was too late. He was declared insolvent on 5 December 1842,¹²⁸ and the trustees in bankruptcy sold off all his assets.¹²⁹ He became a Rate Collector for Sydney City Council in 1843, but was sacked in disgrace in July 1849,¹³⁰ after it was discovered that he had stolen £149 worth of rates. He avoided prosecution because his son George (a lawyer) paid back the money.¹³¹ He was again declared insolvent in September 1859 and moved to country New South Wales.¹³²

¹²¹ 'A Novel Monument', *The Colonist* (24 September 1840) 3.

¹²² 'Rumour – Libel Case', *The Sydney Gazette and New South Wales Advertiser* (3 October 1840) 2.

¹²³ 'Legislative Council', *The Sydney Herald* (7 October 1840) 2.

¹²⁴ 'Law Intelligence: *John Malcolm v Thomas Rowley*', *The Sydney Herald* (31 July 1841) 2. Thomas Rowley junior paid back the mortgages to Thomas Moore.

¹²⁵ Court of Insolvency files of Thomas Rowley, Farmer, Holsworthy, NRS-13654-1-[2/8764]-1084, <https://search.records.nsw.gov.au/permalink/f/1ebnd11/ADLIB_RNSW111289201>. See 'In Insolvency', *New South Wales Government Gazette*, No 120, 8 August 1856, 2164.

¹²⁶ 'Abstract of Sales by Auction', *The Sydney Morning Herald* (7 March 1842) 2.

¹²⁷ 'Handsome Verandah Cottage, Garden, and Orchard, Beautifully Situated at Burwood', *The Sydney Morning Herald* (13 October 1842) 4.

¹²⁸ 'In Insolvency', New South Wales, *New South Wales Government Gazette*, No 98, 9 December 1842, 1827.

¹²⁹ Court of Insolvency files of John Rowley, Farmer, Burwood, NRS-13654-1-[2/8717]-571, <https://search.records.nsw.gov.au/permalink/f/1ebnd11/ADLIB_RNSW111313994>.

¹³⁰ 'John Rowley', *The Sydney Morning Herald* (23 July 1849) 2.

¹³¹ 'In Insolvency', *New South Wales Government Gazette*, No 21, 14 March 1845, 290.

¹³² Court of Insolvency files of John Rowley, Gentleman, Sydney, NRS-13654-1-[2/8961]-4340.

John Lucas, Mary's husband, avoided being declared insolvent again, but in June 1851, he and Mary were successfully ejected from most of their land by a mortgagee.¹³³

By 1839, Henry Sparrow Briggs, Eliza's husband, was sued by creditors. He attempted (unsuccessfully) to sell Kingston Farm, Captain Rowley's property.¹³⁴ Briggs was declared insolvent in March 1845,¹³⁵ and in April 1849, he was said to be 'dead'.¹³⁶ Suddenly, in February 1853, Briggs reappeared in newspapers, alive and well.¹³⁷ In 1856, he became the District Registrar for the St George District of the newly established New South Wales Registry of Births, Deaths and Marriages,¹³⁸ and ran a dairy farm. Briggs died in 1866, but his estate was not wound up until 1884,¹³⁹ when creditors were paid one shilling in the pound.¹⁴⁰ The Briggs family then sold the last portion of Captain Rowley's land in March 1885.¹⁴¹

F *The ramifications of the Burwood Ejectment case*

It is suggested that the Burwood Ejectment case, and the accompanying disputes, had an impact on Australian law. On 16 October 1840, the New South Wales Legislative Council passed the *Administration of Justice Act 1840* (NSW). Section 20 provided:

Provided always and be it enacted That it shall be lawful for the Governor of New South Wales for the time being to nominate and appoint from time to time either the Chief Justice or if he shall decline such appointment then one of the Puisne Judges to sit and hear and determine without the assistance of the other Judges or either of them all causes and matters at any time depending in the said Supreme Court in Equity and coming on to be heard and decided at Sydney and every decree or order of such Chief Justice or of the Judge so appointed shall in any such cause or matter (unless appealed from in the manner hereinafter provided) be as valid effectual and binding to all intents and purposes as if such decree or order had been pronounced and made by the full Court.

On 17 March 1840, Dowling CJ, the first Judge in Equity, was appointed.¹⁴² As Dowling J, he had sat on the Burwood Ejectment case. Now there was no doubt: a judge on the New South Wales Supreme Court would administer Equity and bona fide purchasers for value without notice ('Equity's darling') would be protected.

¹³³ 'Law Intelligence', *The Sydney Morning Herald* (10 June 1851) 2.

¹³⁴ 'The Village of Kingston', *The Colonist* (31 December 1840) 1.

¹³⁵ 'Rowley's Defalcation', *The Sydney Morning Herald* (27 November 1849) 3. See

City of Sydney Archives, 'John Rowley' <<https://archives.cityofsydney.nsw.gov.au/nodes/view/1870232>>.

¹³⁶ 'Domestic Intelligence', *The Sydney Morning Herald* (20 April 1849) 2; 'Sydney News', *Maitland Mercury and Hunter River General Advertiser* (21 April 1849) 2.

¹³⁷ 'Horse-Stealing', *Empire* (22 February 1853) 2; 'Married', *Sydney Morning Herald* (6 December 1853).

¹³⁸ 'District Registrars', *New South Wales Government Gazette*, No 51, 28 March 1856, 1029, 1030.

¹³⁹ 'In Insolvency', *New South Wales Government Gazette*, No 547, 28 October 1884, 7263.

¹⁴⁰ 'In Insolvency', *New South Wales Government Gazette*, No 428, 26 August 1884, 5793.

¹⁴¹ 'Property Sales', *The Sydney Morning Herald* (28 March 1885) 8: 'portion of West Kingston estate subdivision, formerly known as Briggs' paddock, Newtown.'

¹⁴² Castles, n 10, 194; Mark Leeming, 'The Primary Judge in Equity' (2016) 90 *ALJ* 783, 785–86.

V CONCLUSION

This article had its genesis in research into family history,¹⁴³ but we have discovered that the Burwood Ejectment case presents a fascinating tale of politics, property, and law. Several things stand out. First, the legal administration of the Penal Colony of New South Wales was haphazard. It is extraordinary to realise that cases were decided by non-lawyers for some decades.

Secondly, tensions existed between military officers and colonial administrators, free settlers and convicts or descendants of convicts, and commercially minded individuals and colonial administrators. There was no agreement on the purpose of the Colony: to discipline convicts, or to build a network of trade and industry? While sometimes the commercially minded agreed—both Lord and Macarthur signed the petition against Governor Bligh—the deep division between former convicts and their descendants and free settlers lasted generations.

Thirdly, the lack of a clear currency (and the ingenious measures people took to get around this), the prevalence of insolvency, and the constant financial difficulties which afflicted many people in the Colony of New South Wales are extraordinary and startling.¹⁴⁴ It is also remarkable how often parties resorted to litigation to resolve disputes.¹⁴⁵

Fourthly, there were immense problems with scanty records of land ownership and lack of security of title in the early days of New South Wales. Understandably, the Burwood Ejectment case sent fear into the hearts of landowners in the Colony: one could be a bona fide purchaser for value of property, possess it for twenty years, and have that title voided. It is also interesting to contemplate that Australia developed the Torrens system of land registration, first in 1858 in South Australia,¹⁴⁶ and adopted in New South Wales in 1863.¹⁴⁷ As noted earlier, Selwyn and the Rowley children would not have an enforceable right under a Torrens registration system. It may be that the echoes of disputes such as the Burwood Ejectment case continued to resonate in the minds of legislators.

¹⁴³ See above n 6.

¹⁴⁴ Even Dowling had financial problems: see *Australian Dictionary of Biography* (online at 9 April 2022) CH Currey, 'Dowling, Sir James (1787–1844)' <<https://adb.anu.edu.au/biography/dowling-sir-james-1989/text2421>>.

¹⁴⁵ See Kercher, n 7, 92–94 for figures demonstrating the explosion of litigation from 1799 to 1814.

¹⁴⁶ *Real Property Act 1858* (SA).

¹⁴⁷ *Real Property Act 1862* (NSW).