

The Price of Protest

Press and Judiciary in 1870¹

Geoffrey Bolton

Henry Vincent was always a hard, irascible man, his temper soured by Peninsular War wounds and years of authority as superintendent of the Rottnest penal settlement, and his anger deepened as virility faded. After turning seventy his behaviour became increasingly trying. His eccentricities included cooking mutton chops in a tea-kettle and trying to make a pudding in a colander. For some days he convinced himself that Queen Victoria was about to visit Fremantle. He roared and ranted; he smashed china and sometimes carried a loaded pistol; he accused his wife and daughters of sexual misconduct with their friends and neighbours.² Such a domestic tyrant could not overlook the pleasures of making and remaking his will, and towards the end of 1867 he determined to leave everything to one of his sons, the eldest of six adult children aged between 28 and eighteen. Of the few legally qualified inhabitants of Fremantle at that time he chose Henry Wells Young as his adviser.

Young was an ex-convict, one of the small group of professional men among the transportees to Western Australia between 1850 and 1868. Born in 1833, the son of a land surveyor, he entered a solicitor's office at the age of fifteen and had been in practice for a number of years when in 1862 he was sentenced in the Central Criminal Court to twenty years' transportation for forging a power of attorney. Arriving at Fremantle on the *Clyde* in May 1863 he gained his ticket of leave in December 1865 and tried a variety of trades in Fremantle. In turn he was a butcher, a tobacco merchant, and an accountant. He was also secretary and librarian of the Fremantle Literary Institute.³ Although he left a wife and three children in England he married again in March 1867 at the Perth Congregational

-
- 1 I should like to acknowledge the participants of the 1994 Historiography seminar at Edith Cowan University for discussing the paper with me. I would also like to thank Jane McGillivray for her word processing assistance.
 - 2 Details reported in the case *Vincent v. Vincent*; *Herald*, 6 August 1870; *Inquirer*, 10 August 1870.
 - 3 R. Erickson, *The Bicentennial Dictionary of Western Australians*, vol.IV, Nedlands, 1988, p.3414.

Church. His wife was a 21-year-old widow, Mary Ann Thompson, with a small daughter from a previous marriage. She had migrated to Western Australia a year earlier to join her mother and stepfather, a private in the Pensioner Guards. In the eyes of at least one contemporary newspaper Young had placed himself in a position of comfort and respectability through perseverance and industry.⁴ But his standing as a solicitor was dubious, and he was worried about the controversial potential of Henry Vincent's will. He was alarmed at Vincent's frame of mind, and later said that in fourteen or fifteen years of legal experience in England he had never known a testator in such a condition. He thought it wise to seek support from some authoritative source.

In 1867 the legal profession in Western Australia was tiny. At its apex was the Chief Justice, who was the only judge in the colony. A man of great propriety, Archibald Burt came of an old legal family who had practised for several generations in the West Indies, and he himself had held office there before coming to establish the Western Australian Supreme Court in 1861. A severe, formal man in his late fifties with a strong sense of duty, Burt was aware of the peculiar pressures on the legal system in a convict colony. He had never practised in an environment where the freedom of the press was seen as a factor outweighing the need to maintain the majesty of the law. Nor was there a faction in the legal profession to challenge his views. The leading practitioners, such as the attorney-general George Frederick Stone and the crown solicitor, George Walpole Leake, were colonists from Western Australia's origins in 1829 and members of Perth's small official circle. Their handful of professional colleagues were like-minded. In 1867 the colony was only just starting to produce a few promising youngsters, graduates of Bishop Hale's school such as Stephen Henry Parker and the Chief Justice's son, Septimus Burt, who were reading articles as a preliminary to a legal career and who might in time bring fresh perspectives to the practice of law in Western Australia.

In January 1868 Young took Vincent to consult with the attorney-general, George Frederick Stone. Stone had known Vincent for many years. In the 1830s, when the young Stone had been sheriff of Perth, Vincent was one of his staff. During the interview, although Vincent had shown some signs of confusion, mixing up the names of his two sons, he behaved well enough for Stone to decide that he was capable of signing a valid will, and this was done. If Stone had doubts about Vincent's state of mind these were apparently overridden by the good nature of one old Western Australian towards another. But in the following months Vincent's condition deteriorated, and he had been certified of unsound mind some months before his death in May 1869. Naturally the rest of the family contested a will leaving everything to the eldest son. Eventually on 3 August 1870 the court case appeared before Chief Justice Burt. George Stone was called as a witness on behalf of the eldest son, who wanted to establish Vincent's soundness of mind at the time of his making his will. His own son, Edward Stone, was counsel for the eldest son. The rest of the family was represented by

4 *Herald*, 13 August 1870.

the Crown Solicitor, the able but erratic George Walpole Leake, with his future son-in-law, the 24-year-old Stephen Henry Parker as junior counsel. Parker was regarded as one of the most promising young men in the colony. At Bishop Hale's school he had been star pupil, outshining contemporaries such as Septimus Burt and the solid miller's son, John Forrest, now crossing the Nullarbor on his first major expedition. But Parker was no mere swot. Grandson of a respected York pioneer, he was the most dashing of the colony's gentleman riders and an able cricketer: the pick of the colonial-bred generation, apparently destined for local eminence. In 1870 he was a very new legal practitioner with no experience outside Western Australia.

The case lasted three days. George Frederick Stone testified that in his view Vincent was competent to make his will. Young was called as a witness for the defence to contradict this view. It was hard for a ticket-of-leave man thus to confront Western Australia's senior lawyer. One newspaper report describes Young's evidence as confused and rambling, but another gives an apparently full and coherent account, from which it appeared that Young said he told Stone that Vincent was not competent to make a will.⁵ But if he believed that, he should not have taken any part in helping Vincent to draw up a will; and to make matters worse he tactlessly named the respectable citizens with whom Vincent in his frenzy accused his wife and daughters of misconduct. Burt was not impressed with his evidence. In his summing up he directed the jury to pay little attention to it, and he spoke sternly to Young. But others besides Young had testified to Vincent's erratic behaviour, and the jury was unable to agree. Eventually Burt had to discharge the case without a verdict, leaving the Vincent family to arrive at an out-of-court settlement.

There the matter might have rested, but on Saturday, 6 August as Young was having a meal at home with his wife and small children, two policemen arrived who informed him that his ticket-of-leave was revoked and he must go instantly to Fremantle Prison. No charge was preferred against him, but he was returned to penal servitude; a daunting prospect, since he had served only three years of a twenty-year sentence. Worse followed. Distraught but spirited, Mary Ann Young went to Stephen Henry Parker and besought his help. Parker's chivalry was aroused at the plight of the young wife and small children bereft of their breadwinner. Invoking *Habeas Corpus* he applied to the Comptroller-General of the Convict Establishment, Henry Wakeford, for access to the prisoner Young. Wakeford replied that Young did not want an interview with his lawyer. Parker called at the prison but was refused admission. Wakeford was telling the truth because it had been strongly hinted to Young that he would stand a chance of early release if he made no fuss. But Parker's blood was up, and he determined to take legal proceedings against Wakeford.⁶

Naturally the local press paid attention. In the second half of 1870 Western Australia supported no fewer than four newspapers, although the white adult

5 *Perth Gazette*, 5 August 1870; *Inquirer*, 10 August 1870.

6 *Inquirer*, 19 October 1870.

population was no more than 14,158 of whom at least 20 percent were unable to read and the majority of males ex-convicts or convicts. Three of the newspapers were published weekly. The longest established, the *Perth Gazette*, had been owned and edited since 1848 by Arthur Shenton, a member of a thriving Perth merchant family. He liked to think of himself as more independent-minded and critical of the local Establishment than his main competitor, the *Inquirer*, controlled since 1847 by Edmund Stirling, in recent years with the help of his sons Edmund and Fred. However the most pointed criticisms of the status quo came from the *Herald*, established in Fremantle by a trio of ex-convicts, James Pearce and the former clergymen William Beresford and James Roe. Founded in 1867, the *Herald* was soon loathed in the circles who frequented Government House, who saw it as an unsettling influence on a population preparing to vote in October 1870 for the election of Western Australia's first Legislative Council with a representative majority, albeit on a franchise restricted to property-owning males. In 1870 the *Herald* acquired a competitor in Fremantle, the *Express*, which with some optimism offered itself as a daily.

In August 1870 the *Herald* made the running, sensitive to the interests of ex-convicts and alarmed at the revocation of Young's ticket-of-leave. Such a step, according to the *Herald*, was probably illegal and certainly based on falsehoods, and how could justice be done in Western Australia if *Habeas Corpus* had no force in Western Australia? Any one of the colony's numerous emancipists might find himself in the same plight through the malice of the powerful. A full statement of the case would be forwarded by the next outgoing mail to an eminent legal firm in London, with instructions to submit it for the opinion of the law officers of the Crown. 'If we have preferred unfounded, malicious, or vexatious accusations we know the consequences', trumpeted the *Herald*, 'and are prepared to abide by them.'⁷

In blaming the malice of the powerful, the *Herald* was hinting that the initiative for Young's arrest lay with 'an influential gentleman'⁸ on the opposite side in Vincent's case; clearly a reference to George Frederick Stone, but there is no evidence to implicate him. Twenty-five years later W.B. Kimberly heard that the warrant was issued because of something Young had written reflecting on the management of Fremantle prison.⁹ But another explanation emerges from the despatch written a few months later by Governor Frederick Weld explaining the affair to the Colonial Office in London.¹⁰ According to Weld, Young's ticket-of-leave was revoked in consequence of his evidence in the Vincent case showing that he had drawn up and witnessed a will for somebody he thought insane. Once the *Herald* began agitating for Young's release it became necessary to keep Young in prison as proof that the authorities would not be swayed by ex-convict

7 *Herald*, 20 August 1870.

8 *Ibid.*, 13 August 1870.

9 W.B. Kimberly, *History of West Australia*, Ballarat, 1897.

10 Weld to Kimberly, 26 January 1871, WAA Acc 390: Governor's Despatches, 14 November 1868-25, April 1871.

pressure. He was obliged to extend Young's sentence, wrote Weld:

In order to make it evident in the interest of general discipline that his incarceration was prolonged, not abridged by outside clamour.

I have been actuated in my conduct in this matter simply by a desire to protect public morality and convict discipline against outside pressure, and to maintain the independence, dignity, and position of the Supreme Court and of the representative of the Crown menaced and threatened by the Convict organ in the press and its followers.¹¹

The *Herald* might have been flattered to realise that its campaign had such an effect on official thinking. Parker, however, apparently unaware that Young's time behind bars was being prolonged as a response to public protest, persisted with his lawsuit. Delay occurred because in September 1870 Chief Justice Burt's wife was dying, and it was not until 17 October that Parker's action against the Comptroller-General, Wakeford, came before the Bench.

Burt's verdict went totally against Parker. Particularly, he castigated Parker for the use of hearsay in his submission. Either from lack of familiarity with the law of evidence or from disregard of its elementary rules, he said, Parker had erred; and he rubbed it in by implying that Young would have been released but for the excessive agitation by his friends and his counsel. 'The Court is forced to the conclusion that Mr Parker allowed his zeal to outstrip his discretion'.¹² For framing an affidavit against Wakeford contrary to the law of evidence Burt fined Parker twenty-five pounds. Parker was incensed. In his wrath he wrote a letter to the *Inquirer* pointing out that Wakeford's testimony included hearsay no less than his, and concluding: 'From all this I have learned one thing - that what is sauce for the Goose in *not* always sauce for the Gander'.¹³ The letter arrived shortly before the newspaper's deadline, and apparently without giving much thought to the consequences the *Inquirer* published it. Two days later the *Perth Gazette*, for once making common cause with its rival, editorialised as follows:

so far from its being considered that the fine inflicted on Mr Parker is justified by his conduct, it is looked upon by all classes, from the highest to the lowest, as being extremely undeserved and indefensible, so much so that within a few hours afterwards a subscription to pay the fine was inaugurated, which is rapidly being filled ...¹⁴

Nor did popular agitation end there. The next issue of the *Inquirer* carried an editorial urging the appointment of a second judge. Burt's decision, it said, 'has been more generally condemned than any public act that has occurred in our time'.¹⁵ On the front page was a lengthy advertisement announcing a fund to

11 *Ibid.*

12 *Inquirer*, 19 October 1870

13 *Ibid.*

14 *Perth Gazette*, 21 October 1870.

15 *Inquirer*, 26 October 1870.

inquire into the right to trial before punishment:

Under the action now in review no ticket-of-leave holder is safe in entering the witness-box because he does so in peril of the example that any influential man interested in his evidence may, by complaint to the Comptroller-General, have him returned to the Convict prison without any trial.¹⁶

An appeal was set up for a 'Fund to inquire into Right to Trial before Punishment'. The convenor and honorary secretary pro. tem. was one John McGibbon, himself an emancipist merchant who had become a leading figure in the colony's timber industry. Clearly a significant groundswell of public opinion was rallying to the cause, not only from ex-convicts who identified with Young's plight but also from many respectable old colonists who felt that Parker had been treated harshly. Only the *Herald* was uncharacteristically restrained in its reactions, perhaps aware that its ex-convict editors had already sailed close enough to the wind.

Their restraint was wise. On 2 November the Stirling brothers from the *Inquirer* and Arthur Shenton of the *Perth Gazette* were brought before the Supreme Court on charges of publishing a gross and scandalous libel on the Supreme Court. The Stirlings (who were represented by Edward Stone) threw themselves on the mercy of the Bench, stating that Parker's letter, having arrived shortly before the deadline for publication, had slipped past the editorial eye accidentally, but Chief Justice Burt was not to be mollified. They had committed a gross impropriety, he said, with no mitigating circumstances. Arthur Shenton, who represented himself without counsel was bolder. He said he felt an honest conviction that the *Perth Gazette* article contained nothing beyond fair and legitimate comment on a matter of public interest. Burt was unmoved. In his summing up he took due note of the difficulty that, as the sole judge in Western Australia he might be seen as failing to exercise proper impartiality:

A Judge must (such is the fallibility of human constitution) when dealing with an offence of this nature present himself as an avenger of personal wrong ... but suffering from recent affliction, he had never felt so free from such baneful influences.

However painful, he must do his duty and punish contempt of Court:

The trust of your Supreme Court in this colony would be a farce and a snare, were this painful duty not fully recognised by your fallible Judge ... Sad indeed would be the fate of this country when judges should administer justice under fear of the lash of the press.¹⁷

He sentenced the Stirlings each to one month's gaol and Arthur Shenton, for his unrepentant attitude, to two month's gaol and a fine of one hundred pounds.

16 *Ibid.*

17 *Express*, 3 November 1870; *Inquirer*, 9 November 1870. A slightly different version is given by *Perth Gazette*, 4 November 1870.

Within the next day the Stirlings and Shenton were persuaded to publish abject letters of apology and their gaol sentences were remitted, although Shenton still had to pay his fine. Parker was for the moment beyond the reach of the law. He had gone to his family's property at York to participate in the electioneering for the Legislative Council and to attend the local race meeting; an interesting reminder of how the link between race-meetings and politics which was so marked a feature of British provincial society in the eighteenth century survived long into the Victorian era in such remote outposts of Empire as Western Australia. On his return he too was fined and required to publish an apologetic letter, stating that 'my conduct both as a member of the legal profession, and as an individual member of the community, was most unbecoming, and more especially, as I did so in hasty and unmeasured terms, through the medium of a public newspaper'.¹⁸

It took longer for the controversy to die down. The *Herald* was sufficiently intimidated to content itself with dumb insolence, publishing a blank quarter-column as its only comment on the trial.¹⁹ The *Perth Gazette* published an essay on the liberty of the subject of such studied ambiguity that its meaning is hard to make out.²⁰ Weld and Burt were undeniably successful in muzzling Press criticism of judicial decisions. When the new Legislative Council assembled in December, however, its members - who, be it remembered, represented not the radical emancipist elements of society, but instead all came from leading landowning and mercantile families - expressed their concern about the principles involved in the case by passing a resolution requiring that a ticket-of-leave man could be sent back to prison only after hearing before two justices of the peace. The motion passed by eight votes to five, the minority consisting entirely of the official members of the Council. Barlee, the Colonial Secretary, tried to ridicule the limitation of the governor's powers of discretion, denouncing the motion as 'class legislation', but the motion was sponsored by solid citizens such as James Drummond of Toodyay and James Lee Steere, and seems to have represented articulate public opinion fairly.²¹ Emboldened, Shenton asked for the remission of his fine, but was instead informed that if he did not pay immediately his property would be sequestered to meet his liabilities.²² Within two months he was dead, his end hastened according to his widow by the unmerited disgrace of a gaol sentence.²³ Parker, too, attempted to keep the issue alive by appealing to the British government, but it was all in vain.

Governor Weld and Chief Justice Burt were not conscious of having acted tyrannically. They conscientiously believed that in a colony of Western

18 *Inquirer*, 7 December 1870.

19 *Herald*, 5 November 1870.

20 *Perth Gazette*, 18 November 1870.

21 *Ibid.*, 30 December 1870.

22 *Ibid.*, 13 January 1871.

23 *Ibid.*, 17 March 1871.

Australia's peculiar social character with a very high proportion of convicts and ex-convicts, no challenge to the institutions of authority could be safely tolerated. Western Australia was still an isolated garrison whose inhabitants were acutely aware of their isolation. It was barely three years since the transportation of Fenian convicts to the Swan River had aroused considerable panic among respectable citizens fearful that Irish-American privateers might descend on Fremantle to rescue their compatriots; and within Western Australia itself a fear of crime and bushranging was seldom absent.²⁴ In a time of transition when the colony was taking its first steps towards a form of parliamentary government, it was especially necessary to discourage troublemakers. Parker's agitation had the excuse of youth and idealism, but he could not go unrebuked. Young had to learn through experience that the campaigning of lawyers and journalists would merely lengthen his stay in Fremantle Prison, whereas absolute obedience to the authorities would be rewarded with mercy. As Weld wrote to the Secretary of State for Colonies: 'my only doubt is whether I did not exercise an undue leniency in his case on account of his family'.²⁵

Yet a number of unresolved questions remain. George Frederick Stone's role is ambiguous. In the 19th century and well into the 20th century Western Australia was the sort of tightly-knit small community where personal patronage counted for a good deal. In witnessing Vincent's will Stone was behaving as an old colonist with authority doing a favour for another old colonist who had a claim on his goodwill. In this transaction Young was the outsider, the intruder, not just because he was a ticket-of-leave man, but because he was a newcomer who had not consolidated his local reputation. Given the keen rivalry between Fremantle and Perth at that time, Young's Fremantle identity may have made him even more of an outsider, especially if he was perceived as having connexions with the *Herald* coterie. The question of Burt's Caribbean background may also be significant. A man who had reached adult years before the abolition of slavery in the West Indies, and who would have read about the Jamaica rising as recently as 1865, would have firm views about social control and might not make fine distinctions between an ex-slave society and an ex-convict society. On the other hand Weld had recently been a sheep farmer in New Zealand, and premier in a representative parliament in 1864-65. He might have been expected to side with the pastoralists and property-owners who questioned the arbitrary use of government authority. Instead, Weld stood with Burt as a champion of imperial authority. Precisely because Parker symbolised the upstart spirit of colonial youth and came from a landowning background it was necessary that he should be checked.

The Burt-Parker confrontation had its effect on the press. During the next twenty years neither the *Inquirer* nor the *Perth Gazette* (or their successors, the

24 See C.T. Stannage, *The People of Perth*, Nedlands: 1981, pp.150-1. See also G.C. Bolton 'The Fenians are coming, the fenians are coming ...', *Studies in Western Australian History* IV, 1982, pp.62-67.

25 Weld to Kimberly, 26 January 1871.

Daily News and *West Australian*) carried their criticisms of government policy beyond safe limits. Even the *Herald* grew milder in its rhetoric. (The *Express* apparently did not survive beyond the end of 1870). A Geraldton paper of the 1880s, the *Victorian Express*, was bolder, but it was not until the 1890s with the coming of goldfields journalists from the eastern colonies that Perth and Fremantle readers were able to buy disrespectful newspapers whose writers pulled no punches in their criticisms of the status quo. By that time the ruling group in Western Australia had grown accustomed to exercising an authority based on a culture of underlying consensus among the articulate. Subsequent historians have not lingered over the Burt-Parker contretemps. W.B. Kimberly commented that the episode 'excited intense and widespread criticism, and the result, at least, was regretted for very many years'.²⁶ In 1924 J.S. Battye included the controversy in his *History* but without explaining its background, so that Burt's conduct seemed simply the result of arbitrary whim.²⁷ He missed the importance of the episode as a setback to emancipist self-assertion and a reinforcement of the power of Western Australia's official hierarchy as convict transportation drew to a close.

Young did not long survive his accidental rendezvous with history. After his release from gaol he failed to re-establish himself. His wife died in 1872, and the following July, while staying at the house of friends, he went to bed one night, swallowed sixteen times the lethal dose of chloral, and was found dead in the morning. His supporter, John McGibbon, went bankrupt in 1874 after a venture into pearling. Despite occasional urging for the appointment of a second member to the Supreme Court Bench, Burt continued as Western Australia's only judge for the rest of his life. He was knighted in 1874 and died in 1879. Stephen Henry Parker went on to an impressive career in politics as a young man. He was a member of the Legislative Council for Perth, several times mayor, and leader of the campaign for responsible government in the 1880s. After a bankruptcy in 1888 he lost much of his dash, yielded the chance of becoming the colony's first premier to John Forrest without a struggle, and in the early years on the 20th century finished up as himself chief justice and a knight. His style was never as magisterial as Burt's. As for Henry Vincent, the cause of all the trouble, belated recognition came oddly. In 1994 when the city of Perth was divided into three smaller local authorities, the area encompassing the inner northern suburbs was called 'Vincent' in honour of his family.

26 Kimberly, p.245.

27 J.S. Battye, *Western Australia*, Oxford, Oxford University Press, 1942, pp.302-3.