

Australia's first litigants

By Ian Temby QC

Henry and Susannah

Henry Cabell was convicted of burglary on 1 February 1783, when he was 19 or 20 years old. He and two others, his father (also Henry Cabell) and Abraham Carman, had broken into a shop and stolen a haunch of pork, a leg of lamb, a brass saucepan, a feather mattress, blankets, sugar, soap and sundry other items. All three were sentenced to death, and the two older men were hanged. His sentence was commuted to transportation to the American colonies for 14 years.

Susannah Holmes had earlier been convicted on a charge of theft, from the home of Jabez Taylor, where she worked as a servant. She was sentenced to death, but the judge recommended a reprieve, which was granted. Her sentence was also commuted to transportation to America for 14 years.

Henry and Susannah probably met for the first time in Norwich Gaol. Meet they certainly did, as Susannah was delivered of a child on 17 February 1786, he was christened Henry, and the older Henry was always acknowledged as his father.

The three of them remained in custody, while the authorities decided what to do in consequence of loss of the American colonies. By early 1787, a decision had been made to set up a new colony at Botany Bay, and Sir Arthur Phillip RN received instructions from the king on 23 April 1787 and his commission as governor four days later. At that time there were four women being held at Norwich Gaol awaiting transportation, and as the new settlement needed females, it was decided that three of them including Susannah should be sent. The fourth was too old and left behind. So was Henry: male prisoners were in plentiful supply, and he was not chosen.

Plymouth to Australia

When the time was approaching for the Botany Bay fleet to depart, the three women and little Henry were taken to board the *Charlotte*, accompanied by a turnkey named John Simpson. As he had no papers for the child, the ship would not receive the child and Simpson had to bring him back to shore leaving Susannah on the ship. These distressing circumstances caused him to travel by coach from Plymouth to London to wait upon the home secretary, Lord Sydney. Perhaps surprisingly, Simpson managed to gain an audience and returned to Plymouth with written directions from Sydney's private secretary that both mother and child were to go to Australia, on the *Friendship* (a hospital ship) and that Henry Kable (the older) was also to go to that place on that ship.

Certain newspapers became aware of and wrote up this romantic tale, Lady Cadogan took up a public subscription, and £20 was raised and spent on items which the family could use in Australia. They were entrusted to Rev. Richard Johnson who in turn gave them to the master of the *Alexander*, a man named Sinclair.

The voyage took 36 weeks, and for the greater part of it Henry,



The *Charlotte*, at Portsmouth, prior to departure in May 1787.

Susannah and child Kable were on the same vessel. However, because certain of the women convicts on the *Friendship* behaved in a manner which outraged morality, even at sea and for the time, all of them were taken off the *Friendship*. They were replaced by livestock, and taken to other ships. Susannah and her child arrived in Sydney Cove on the *Charlotte*. Some time after that it was discovered the parcel of goods which was supposed to be the Cabells' was missing – perhaps stolen, perhaps lost, or perhaps thrown overboard by somebody who thought felons should not be encouraged to rise above their station.

The first civil case

There were early criminal cases. To give but one example, in the words of the judge-advocate, David Collins:

The month of May opened with the trial, conviction and execution of James Bennett, a youth of 17 years of age, for breaking open a tent belonging to the *Charlotte* transport, and stealing thereout property above the value of five shillings. He confessed that he had often merited death before he committed the crime for which he was then about to suffer, and that a love of idleness and bad connexions had been his ruin. He was executed immediately on receiving his sentence, in the hope of making a greater impression on the convicts than if it had been delayed for a day or two.

The first civil case in the new colony was commenced by Henry Cable and Susannah Cable on 1 July 1788. (They generally called themselves Kable after he was pardoned some years later, and the spelling was sometimes Keable, but in the proceedings, *Cable* appears). They petitioned the judge-advocate to have Sinclair, master of the *Alexander*, appear to show cause why their goods 'which were collected and bought at the expence of many charitable disposed persons for the use of the said Henry Cable, his wife and child' and shipped on the *Alexander* were not 'duly

and truly delivered in that ample and beneficial a manner as is customary in the delivering of goods. And also humbly prays you will on default of the parcel not being forthcoming take and use such lawfull and legal means for the recover or value thereof, as your honour shall think most expedient’.

It is interesting to note that each of Henry and Susannah signed the petition by subscribing a mark, that is to say a cross. It is also interesting, and may be significant, that after formalities the petition commenced in this way:

Whereas Henry Cable and his wife, ~~new settlers of this place~~, had before they left England a certain parcel ...

Commentators on the case have opined that the words were struck out because of their misleading nature, and nothing inserted in their stead because an honest word to use in lieu would have been ‘convicts’ which would have brought the law of attainder into operation: received doctrine was that those sentenced to death for a felony ceased to exist in law so they could neither sue nor hold property until pardoned. Probably this was known to Collins, although he was a military man, not a lawyer. It may be that judgment was given in knowledge that the attainder operating upon each of the plaintiffs existed but ought to be ignored as more than half of those belonging to the new colony were convicts.

According to *Blackstone’s Commentaries on the Laws of England*, I, 107:

... if an uninhabited country was discovered and planted by English subjects, all the English laws then in being, which are the birth-right of every subject, are immediately then in force. But this must be understood with very many and very great restrictions. Such colonies carry with them only so much of the English law, as is applicable to their own situation and the condition of an infant colony; ... What shall be admitted and what rejected, at what times, and under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature, subject to the revision and control of the king in council ...

It is known that Collins had *Blackstone* with him in Sydney.

The court comprised Collins as judge-advocate, the Rev. Richard Johnson and John White, the Surgeon-General. On 1 July, the court issued a warrant under the hand and seal of the judge-advocate, directed to the provost-marshal, commanding him to bring Sinclair before the court the following day. On 2 July, the matter was stood over until 5 July, when the provost-marshal did as the warrant instructed. According to the records, Sinclair ‘joined issue on the business’, evidence was given by the first mate of the *Alexander*, a steward of that ship, and John Hunter, the captain of the *Sirius*, after which the court ‘found a verdict for the plaintiff, to the value stated by him in the complaint’, that is to say £15. Kercher, ‘Debt, Seduction and Other Disasters’, at xix, was surely right in saying:

This was a great victory for the two illiterate convicts, who managed

to overcome the restrictions of English law, the military tone of the colony and the court, and the vast legal and social gulf between them and Sinclair. In its first case, the civil court had implicitly declared that New South Wales was to be subject to the rule of law, rather than being administered in an arbitrary or military way. The decision showed that the law was represented in the penal colony not only by punishment through exile, the lash and the gallows, but also by enforceable rights which were available even to those at the bottom of the social heap. It was a local version of law, however, one which was not recognised officially in England. There was not a town or a courthouse at Sydney Cove in July 1788, not even a bridge across the Tank Stream, but there was already a functioning legal system to resolve civil legal disputes.

Who put the Cabells up to it? Who wrote out the petition? To what extent was the governor an acquiescing party? The answers to these questions cannot be provided with confidence, but it seems likely Rev. Johnson played an important role. He had placed the parcel of goods with Sinclair, and not being a military or naval man may well have been offended by the attitude displayed by Sinclair to loss of the goods. But if this surmise is right, the fact Johnson sat as a member of the court must give rise to disquiet. It seems obvious the plaintiffs had one or more friends in high places: it often helps.

Prosperity, decline

Henry Cabell and Susannah Holmes were married, at Sydney Cove, on 10 February 1788, in a group wedding. This was the first wedding ceremony in the new colony. They had 11 children, only one of whom died in infancy. The second child, Dianna, commonly called Dinah, was the second white person born in Australia. The fourth child, James, was born on 19 August 1793, and murdered by Malay pirates in the Malacca Straits in 1809 or 1810. According to the online edition of the *Australian Dictionary of Biography*, Henry Jnr. and James were mariners, commanding vessels owned wholly or in part by their father. This seems improbable in the case of James, as at the time of his death he was only 16 or 17: would a youth of that age have been entrusted with command of even a small trading vessel?

Henry Kable, as he was known from the mid-1790s to the end of his long life, was appointed by the governor as an overseer, then a constable and nightwatchman, and later chief constable, being dismissed on 25 May 1802 for misbehaviour after being convicted for breaching port regulations and illegally buying and importing pigs from a visiting ship. He became a publican – his first hotel, The Ramping Horse, was opened in 1798 – a merchant and a ship owner. Kable went into partnership, first with the boat builder James Underwood and later with him and Simeon Lord, a trader. Lord, Kable & Underwood were involved in whaling, sealing, sandalwood and other trading both wholesale and retail. Lord withdrew in 1808 and Underwood split from Kable in the following year. Shortly beforehand Kable disposed much of his

property to his oldest son, Henry. In February 1810, he announced that such son had taken over the entire management of his Sydney affairs, and in the following year he moved to Windsor where he operated a store and brewery. The divestiture seems to have been a good move, as a judgment of more than £12,000 – a fabulous sum – was awarded to Lord against Kable in 1811. Kable Snr. did remarkably well for a man who was functionally illiterate, but he did know how to add up a column of figures.

Kable was granted farms at Petersham Hill in 1794 and 1795, and bought out several others in the vicinity shortly after land was granted to them. By 1809, he also held five farming lots in the Hawkesbury region, and 300 acres at the Cowpastures, together with real estate in Sydney. At one time the family were housed in northern George Street, on the site on which the Regent Hotel was later built: (the hotel restaurant Kable's is named after him).

Susannah Kable died on 8 November 1825, at the age of 63. Henry lived on until 16 March 1846, and was buried at Windsor. It may not be a matter of dishonour that Governor Bligh imprisoned him and others for a month, and fined each £100, for sending Bligh a letter 'couched in improper terms'. But the records show that Kable was a highly litigious man, and he seems to have been not very nice.

A personal note

When I was young, living in Perth, our family was regaled from time to time about a lineal ancestor who was on the First Fleet as a convict, having been a highwayman, sentenced to death, but instead sent to Sydney in chains. We were told he fathered a child by another convict, they were to be sent to different places, and that the chaplain of the fleet hired a horse to ride to London, where he spoke with the secretary of state for the colonies, who said he did not care where they went, but all three were to go together. Also that the former highwayman – we had the name, Henry Kable – prospered so mightily he must have been a remittance man. The fact he managed to impregnate a fellow convict was a matter of some pride, but more so the fact that he carried Governor Phillip ashore at Sydney Cove. That was and is the family legend.

Much of this, while not nonsense, is exaggerated to the point of error. But there may be something in the last contention. Dinah Teale (nee Kable) died in 1855, and her death was marked in the local Hawkesbury newspaper by a story, which read:

DEATH OF THE OLDEST WHITE AUSTRALIAN

On Friday last, Mrs. Dinah Teale, widow of the late John Teale, Miller, of Windsor, died at her residence in Macquarie Street. Mrs. Teale was the second white person born in Australia and the first to live to maturity.

Mrs. Teale's father, the late Henry Kable, was the first man of Governor Phillip's party to set foot ashore at Sydney in the name of the British Government.

As others have pointed out, there must have been people still living in 1855, including First Fleeters, who might have had cause to dispute the claim, but nobody seems to have done so.

Finally in what is effectively a personal postscript, I live with my family in a house in Kensington Road, Summer Hill which we discovered, after we had moved in, is on land which was granted to a couple of soldiers in 1795 and within days transferred to Kable. He also owned the land on which the Summer Hill railway station is situated, and from which I catch the train to work.

