Judge John Walpole Willis (1793-1877)

By Philip Selth OAM

John Walpole Willis (1793-1877) has had a bad press. He was a judge on courts in three countries - Upper Canada, British Guiana, and of the colonies of New South Wales and Port Phillip - and managed to get himself dismissed from two and unwanted in all three. Few judges anywhere have divided opinion so strongly.

The Sydney paper *The Australian* in March 1838 declared Willis 'a very wrong headed man'; his colleague Chief Justice Dowling wrote that some people thought Willis 'cracked'. Manning Clark wrote that 'the slightest suspicion of a challenge to his authority or an outrage to his vanity was followed by a rush of blood to the head and a display of hysterical rage'. Dr John Bennett has described Willis as 'high-handed, egotistical and "over-speaking"', with a short temper and 'warped … personal judgment'.

This is the popular image of Judge Willis, which has been taught to generations of history and law students. However, it is not a balanced picture of this judge. Fortunately for Willis, there is, albeit belatedly, a court of appeal. On this bench sat Max Bonnell, a senior Sydney solicitor who specialises in commercial litigation and international arbitration. His judgment on the case will be cited for many years to come.

As Bonnell shows us in his eminently readable *I like a clamour: John Walpole Willis, Colonial Judge, Reconsidered,*[1] Willis's failings 'were so dramatic, so public, so thoroughly self-inflicted' that they have entirely shaped his legacy. But, and it is a very big and important *but*:

> Willis served as a judge in three unstable societies, each in a delicate state of transition, and in every one he made important, brave decisions in which he insisted that the protection of the rule of law extended to everyone.

Expelled from Charterhouse in January 1809 for having participated in a 'riot' on the school's Founder's Day, Willis was admitted to Gray's Inn November 1811, and was called to the bar in November 1816. He practised as an equity lawyer, and wrote legal texts to embellish his reputation and supplement his income. Willis's concern for his reputation and status in society was to be a constant theme in his life.

In April 1827 Willis managed to get himself appointed by Viscount Goderich a judge of the Court of King's Bench in Upper Canada. He went there on the understanding that he would have responsibility for a new equitable jurisdiction. That didn't happen, mainly because the province was effectively controlled by a small group of influential men known as the Family Compact. Showing his usual lack of political judgment, Willis fell out with Lieutenant-Governor Sir Peregrine Maitland, the colony's legal officers and the Family Compact. In one contentious matter where Attorney-General JB Robinson and Solicitor-General Henry Boulton appeared in a civil matter, Willis told them that:

> A Man cannot, and ought not, in the Administration of Justice, to be engaged on one Side To-day and the other Side To-morrow, whether these services are rendered to a private Individual or to the Public. If a Man, under such Circumstances, does not suspect himself, others will suspect him.

While the principle was impeccable, in the circumstances of the time it was impracticable- and attacking the province's two legal officers in open court unconducive to a harmonious working relationship.

Chief Justice William Campbell left Upper Canada in April 1828. Willis lobbied to replace him. Willis's relationship with the other judge, Levius Sherwood, was 'poisonous'. Willis, on the opening of the 1828 Trinity Term, read a lengthy opinion that held the court could not sit in banco with only two judges. (If that were right, and Willis may well have been correct, a vast proportion of the court's decisions since 1794 were invalid.) Willis always insisted he would never deviate from the letter of the law, but one wonders if he would have prepared this opinion had he been allowed to establish his equity court. But what cannot be questioned is Willis's independence - which cost him dearly. He was removed from office. Maitland wrote to William Huskisson, secretary of state for war and the colonies, telling him of his action, complaining of Willis's 'Want of good Feeling and of sound Discretion' and argued that he had 'manifested a Disposition and adopted a Course of Conduct, utterly incompatible with his Situation as a Judge'. (In a delightful aside, Bonnell tell us that Huskisson died after being run over by Robert Stephenson's *Rocket*, becoming the first known victim of any railway accident.)

Willis campaigned for his reinstatement. The Privy Council held against him. Parliament was deaf to his petitions, and the Colonial Office regarded his incessant barrage of correspondence as a nuisance. His marriage failed. However, Viscount Goderich,

back as secretary of state for war and the colonies after a brief stint as prime minister, perhaps because he had wrongly encouraged Willis to believe an equitable jurisdiction would be created in Upper Canada, in 1831 appointed Willis a judge of the Court of Criminal and Civil Justice in British Guiana. Willis had no choice but to accept the appointment. Goderich told Willis that while his 'personal honour & integrity' were 'clear from reproach', he had to learn from his time in Upper Canada and 'not endanger the substance of justice by too pertinacious an adherence to mere forms, or too punctilious an assertion of you on personal or official capacity', and above all to abstain from all correspondence, public or private, 'upon subjects connected with the Political or Judicial affairs of the Colony'.

British Guiana, too, was effectively controlled by a group of settlers, the sugar planters. Administrative decisions were made by the Court of Policy, comprised of five government officials and five planters (each of whom qualified by owning at least 25 slaves). In the criminal court, the three appointed judges sat beside three 'assessors' appointed from the ranks of planters, and a verdict of guilty could be reached only by a clear majority. The assessors did not find against planters ill-treating their slaves. Willis had more success in reducing the backlog in the civil court.

In Upper Canada, Willis had quarrelled with the local elite and failed to endear himself to the Colonial Office. In British Guiana, he seems to have made a concerted effort to pursue the opposite course. As part of his campaign to build support in England, Willis sent gifts of the local flora and fauna to people such as Robert Hay, the permanent under-secretary of the Colonial Office and to the 13th Earl of Derby, father of Lord Stanley, a future prime minister.

In May 1835 Willis became acting chief justice, and thus a member of the Court of Policy. Almost immediately Willis angered Lieutenant Governor Smythe and alienated any supporters he may have had in England over a dispute concerning the refusal by the manager of a plantation who confined two apprentices to the stocks for lengthy periods to pay the fine imposed by a special justice for his having done so. Willis released the manager pending his appeal. The lieutenant governor saw this as Willis favouring the planters over the government. Willis's apparent tolerance of persons being held in the stocks especially irritated secretary of state for war and the colonies, Baron Glenelg. This put an end to Willis's chances of being appointed chief justice. Claiming to be too ill to continue on the court, Willis returned to England to lobby for another appointment - and to remarry. Surprisingly, in April 1837 he was offered a position as puisne judge of the Supreme Court of New South Wales. The vacancy had arisen following the retirement of Chief Justice Francis Forbes. Willis arrived in Sydney in November 1837.

Willis's colleagues on the bench were Chief Justice James Dowling and Justice William Burton, who thoroughly disliked each other. The three judges cooperated with each other only so long as it took for them to prepare a lengthy letter to Lord Glenelg complaining about the level of their salaries, seeking assurances that their rank would be respected, and that they would be given pensions. In January 1838, while Dowling was absent from Sydney on holiday, Willis and Burton announced that they proposed to introduce a rule of court 'to exclude all persons who have been convicted of felony or misdemeanour from being engaged as clerks in the offices of the solicitors of the court'. Willis always believed that legal practitioners should be of unimpeachable character, and there was public concern about 'the extreme debauchery and entire want of respectability' of many of the colony's solicitors and clerks, but acting in the chief justice's absence was, as Bonnell puts it, 'simply insolent'.

Predictably, Willis was unhappy that the Supreme Court was empowered to deal with both common law and equity claims. But at the beginning he was busy with the criminal list. He 'approached his cases diligently, thoroughly and fairly', although not helped by the fact that at times witnesses were drunk – he committed one to the cells for a month. The tensions on the bench flared up when the court began to hear civil matters. 'It was never enough for Willis to express dissent; he always needed to do so in terms that left no-one in any doubt as to his low opinion of his colleagues on the bench'. Willis suggested to Dowling that he resign for being in breach of the Charter of Justice's prohibition on judges holding 'any other office or place of profit': Dowling, as had Forbes, acted as the judge commissary in the Vice-Admiral's Court, and was entitled to claim fees, although he refused to do so. These and other spats led to lengthy correspondence with Governor Gipps and the Colonial Office. Willis lobbied for a pension and early retirement.

Nor was the profession immune from Willis's intemperate outburst. The press reported that Willis repeatedly interrupted counsel, 'sometimes sneeringly, sometimes pettishly, and always debatingly'. His officiousness at times interfered with the fair dispensation of justices - such as the morning he came on the bench at ten o'clock, called on the first case before he had sat down, and struck out nine case within two and a half minutes while counsel and the parties were still coming into the courtroom. But Willis found in favour of Bob Nichols, the first native-born Australian to be admitted as a solicitor, when a magistrate questioned his right to appear in the Quarter Sessions after the King in Council assented to a rule separating the colony's lawyers into barristers and solicitors. Dowling and Willis found for Nichols, with Stephen dissenting - but Dowling then changed his mind, and without telling Willis, sent a letter

Philip Selth OAM, 'Judge John Walpole Willis.'

to Governor Gipps advising that Nichols had no standing to appear in the Quarter Sessions. Willis was furious. There was a shouting match in the judges' robing room when Willis accused Dowling of supressing the truth in his not telling Gipps of his dissent in the Nichols matter. The long-suffering Dowling formally complained to Gipps.

In October 1840, the Legislative Council passed the Administration of Justice Act, which among other things, provided for a Supreme Court in Equity. All Willis had to do was to keep quiet and the Equity position would be his. He could not help himself, and in a 'charge to the jury' at the opening of the court's criminal sessions not only disagreed with the chief justice's concerns with provisions of the newly enacted Census Act, but accused him of misunderstanding the law. As Bonnell writes: 'A more calculating strategist would have taken every opportunity to ingratiate himself with the chief justice, but this was not in Willis's nature. Instead he adopted the counterproductive approach of insisting that, since he was surrounded by ineptitude, he alone was suitable for the appointment'. Dowling had himself appointed the Equity judge.

Clearly, Dowling and Willis were not going to work together on the bench. But the Administration of Justice Act provided a way out - it had created a resident judge in Port Phillip, to which Willis was happy to be appointed. Dowling was more than happy to see him go to Port Phillip, 'where I pray he may stick and that I may never see his face again'.

Willis believed that, in Port Phillip, he had jurisdiction 'equal in rank and power within its limits' to that of the Supreme Court in Sydney, and that he was not bound by decisions of the Sydney judges. Conflict with his judicial brethren was inevitable. Willis soon fell out with the legal profession. 'Some of Melbourne's barristers were scarcely competent; a few of the solicitors were downright rogues.' He insisted they appear punctual in court, prepared, and only charge reasonable fees. Yet on too many occasions Willis was 'unfair, pedantic and arbitrary. And he had his own, often very unhelpful, ideas about the obligations of lawyers to act as gentlemen'.

In Upper Canada and British Guiana, and now in Melbourne, Willis generally allowed the press considerable freedom to express views that were unpopular with the government. But he was immensely sensitive to criticism of himself. It became commonplace for the editors of Melbourne's newspapers to be summoned before Willis to be given the benefit of his views on articles critical of him.

In July 1841, the Aboriginal man Bonjon became involved in an argument with Yammowing, a Gulidjan man, and settled the matter by shooting Yammowing in the head. Bonjon came before Willis charged with murder. Whether the Supreme Court could try one Indigenous man for a crime committed against another was the critical issue in the case. The Sydney judges had said 'Yes' in earlier cases, but Willis said that he did not consider himself 'bound by the opinion of either Mr Chief Justice Forbes, Mr Justice Burton or Mr Chief Justice Dowling in the present case'. Willis's jurisdictional ruling, Bonnell tells us, was a 'careful demolition of the *terra nullus* fallacy, and its acknowledgment that the Indigenous people were entitled to govern themselves by their own laws and customs, which by law survived colonisation, articulated 150 years before the High Court reached very similar conclusions in *Mabo v Queensland (No. 2)*'. The decision was not motivated by a genuinely sympathetic attitude towards the Aboriginal people, but rather a conscientious and principled application of the law, coupled with a desire to show his superiority over his Sydney judicial brothers. It was a humane, enlightened and progressive judgment, 'yet also one conceived in ambition and spite'. The Crown prosecutor dropped the charges against Bonjon, who was quietly released.

Overall, however, Indigenous Australians received unfair, and cruelly unsympathetic treatment in Willis's court. In his opinion, when Aborigines and colonialists were accused of crimes against each other, English law prevailed. (Willis had been a member of the full court that, in December 1838, dismissed an appeal against the conviction of seven men involved in the Myall Creek massacre.[2]) In December 1941 Willis tried five Aborigines, represented by Redmond Barry, charged with murdering two whalers. (The future Justice Barry would preside over Ned Kelly's trial for murder.) The evidence was largely circumstantial, and Willis's lengthy address to the jury extraordinarily prejudicial. Found guilty, the three women defendants (who included the now well-known Truganini) were discharged into the care of George Augustus Robinson, the protector of Aborigines; the two men were sentenced to death. They were hung in a gruesomely botched public execution, the first held in Melbourne. They were not the only Aboriginal people executed in 1842 after a trial

before Willis. But on rare occasions Willis acted with a greater sense of fairness towards Aboriginal people, such as his support for the appointment of a standing counsel for Aboriginals, as has been made in Sydney. (Barry was appointed standing counsel for Aborigines in January 1942.)

In a charge to the jury at the opening of the law term in October 1942, Willis launched a series of attacks on the colony's administrators (Superintendent Charles La Trobe and the district's sub-treasurer, William Lonsdale) and the Sydney judges. He published his address in the form of a pamphlet dedicated to the secretary of state, Lord Stanley. He held that the newly enacted Melbourne Corporation Act was invalid, because the governor 'had infringed upon the royal prerogative in promulgating and bringing it into operation before the royal assent was obtained'. Thus, the newly elected town council was not legally in existence. Willis passed the buck to his Sydney brethren for their decision.

Willis wanted to return to England - but on a pension. La Trobe, Gipps, his judicial brethren and a large part of the population of Port Phillip wanted him gone. Willis now provided Gipps with the answer. Willis denied a rumour that he had lent a substantial amount of money to William Kerr, the editor of the *Port Phillip Patriot*, the implication being that Willis was seeking to influence the manner on which the newspaper reported on his conduct in office. But in early December a mortgage arrived for processing in the Supreme Court registry in Sydney to secure a loan of £1200 at an extortionate interest rate of 20 % per annum, made by Willis to the *Patriot's* owner, John Pascoe Fawkner. The Executive Council decided against suspending Willis, because it could not be said he entirely lacked the confidence of the community, and if he were to be removed with no replacement Port Phillip would have no judge. Gipps' attempts to delegate the decision for removal to the Colonial Office failed. Willis vigorously defended himself to the Colonial Office. Willis now held the legislation incorporating Melbourne was invalid, and continued to attack Lonsdale. A petition from 18 magistrates, endorsed by La Trobe and the Crown prosecutor, James Croke, called for Willis's dismissal. Dowling advised Gipps that he had the power to remove Willis under the Colonial Leave of Absence Act - and that it was unnecessary to allow Willis to respond. Both decisions were later held by the attorney-general and the solicitor-general in England to be incorrect in law.

On 17 June 1843 Gipps sent to La Trobe 'a writ of Amotion removing Mr Willis from the office of a Judge in New South Wales'. Willis returned to England and sought to have the Colonial Office reverse Gipps' decision. Again, he would go quietly if given a pension. He appealed to the Privy Council. The Judicial Committee found that Gipps did have the power to remove Willis, but that he should have been given an opportunity to be heard before the amotion. Willis was awarded neither costs nor compensation – nor were reasons given for the decision. On 21 September 1846 Queen Victoria signed the warrant that formally terminated Willis's appointment. Willis did eventually receive his pay up until that date. He continued to agitate, unsuccessfully, for the Privy Council to give its reasons, and to receive a pension.

In August 1852 Willis's father-in-law died, leaving him a life time interest in a large, profitable estate. He was appointed to the largely ceremonial position of a deputy lieutenant of the County of Worcestershire and a justice of the peace. He performed these duties seriously and without any of the anger that was a defining feature of his judicial career. He died at the age of 84 on 10 September 1877.

The great strength in Bonnell's *I like a clamour* is the way in which he shows us that Willis's strengths and talents were every bit as significant as his weaknesses and failings. They defy easy classification.

He was an incorruptible, highly-principled bigot; an independent, courageous, rebellious spirit who craved acceptance by the establishment; a judge who counselled forbearance and forgiveness but bristled at the slightest hint of an insult. He was unquestionably, a fine intellectual lawyer; undoubtedly, he was blinkered by vanity and self-importance.

In an age when there was a tacit expectation that a colonial judge would support his administration, Willis embarked on a quixotic mission to entrench the principle of judicial independence. His reward was to be dismissed twice, and denied the pension that might have been bestowed upon a more compliant man.

Regrettably, there are few biographies of Australian judges, and not all are of a high standard. If only there were more like Max Bonnell's *I like a clamour*.

Endnotes

1 Max Bonnell, *I like A Clamour: John Walpole Willis, Colonial Judge, Reconsidered*, The Federation Press, Sydney, 2017, $89.95.

2 Mark Tedeschi, *Murder at Myall Creek*, Sydney, 2016, pp. 177-178.