New Zealand's Lost Cases Project

In the matter of Lloyd, a prisoner in the common Goal of Wellington

17 February 1844

Supreme Court, Wellington, Chapman J

Key words: Supreme Court; debt; repugnancy; English laws; constitutional law; disallowance

Main source: *New Zealand Gazette and Wellington Spectator*, 24 February 1844

Additional source: "Supreme court; sittings in Banco; motions, arguments & judgements", 1844, MS-0411/014, Hocken Library, Dunedin, pp.31-38.

The newspaper report is generally consistent with Chapman's notes, and is used as the text of the judgment below.

Counsel: Arthur Todd Holroyd for Lloyd, Hugh Ross for Bolcoutt and Stokes.

Significance: In *Lloyd*, Chapman J confirmed that the public announcement that an ordinance had been disallowed by the imperial government could not have any impact on the ordinance's legal status. Some formal proclamation of disallowance was necessary. The attempt to have a debtor released from custody based on a speech by the Governor referring to the disallowance therefore failed. The background to the case illustrates several important elements of the administrative review of colonial ordinances by the British government, the use of the repugnancy principle, the scope of the governor's prerogative powers, and the relationship between political communication and formal proclamations in a Crown colony.

Lloyd had lost a civil debt action to Boulcott in October 1843. Lloyd owed £83 15s to Boulcott on a bill of exchange. There was no appearance for Lloyd at that hearing, and it appears at some point, Boulcott had Lloyd imprisoned for being in default. The imprisonment appears to have been under the Supreme Court Ordinance 1841. Lloyd would have been placed in the custody of the Sheriff. Actions to enforce debt were a standard part of colonial legal and commercial activity.

By February 1844, Lloyd had hired counsel, Mr Holyrod. The February application sought to have Lloyd released from custody. On 9 January 1844, the Governor had addressed the opening of the Legislative Council in Auckland. He had informed them that the Supreme Court ordinance had been disallowed by the British government, and indicated that a replacement ordinance would be placed before the Council during that session. The replacement law, the Supreme Court Ordinance 1844, was duly passed (and received the governor's assent) on 13 January 1844. The new ordinance did not appear in the Wellington press until 17 February 1844, the day Chapman gave his decision. It is not clear how Holyrod learnt of the disallowance, but Chapman noted that it was well known.

Chapman J held that disallowance did not take effect until there was a formal public notification, either by proclamation or public notice in the gazette, or in a public newspaper where no gazette existed. Such a proclamation had legal effect. This last point shows the way colonial constitutional law could raise wider constitutional questions. Proclamations were usually seen as having no legal force of their own. Here, however, Chapman appears to accept that a gubernatorial decree could suspend an ordinance, as it brought the Queen-in-Council's decision into local effect.

Chapman treated the governor's prerogative power was coextensive with the power of appointment under the statute; it did not matter that ordinance governed the appointment of a sheriff, because the governor had an alternative (and "higher") authority through his prerogative powers. However, he avoided making a clear finding on this point, suggesting that the continuation clause in the 1844 ordinance was sufficient to give the Sherriff authority to act.

Further information: See D. Ward, "Repugnancy, Prerogative Authority, and the Disallowance of Colonial Laws. A case note on *In the matter of Lloyd* (1844)", forthcoming *VULWR*, 2010

Transcript of the decision

New Zealand Gazette and Wellington Spectator, 24 February 1844.

Holroyd[1] had obtained a rule Nisi, calling upon Joseph Boulcott and Robert Stokes[2], (the plaintiffs in the case of Boulcott v. Lloyd)[3] to shew cause why the defendant Lloyd[4] should not be discharged out of custody, on the ground that the Supreme Court ordinance of 1841, (Session 11, No. 1) was disallowed on the 9th January, 1844, and that as the present Supreme Court Ordinance did not pass till the 13th January, the Sheriff's authority ceased for some days ; and that consequently the subsequent detention is wrongful. Ross now shewed cause against the rule. He filed an affidavit setting forth that he had searched the Gazette and could find no notification of disallowance, and he contended that there was no proof of disallowance sufficient to satisfy the Court. As to the cessation of the office of the Sheriff, he contended that the Governor has the power to appoint Sheriffs under the Charter and Royal instructions.

Holroyd, in support of the rule, contended that if the Sheriff's authority ceased but for an instant the subsequent imprisonment was wrongful, and the prisoner must be discharged. He relied on the formal announcement in the Governor's speech that the Supreme Court Ordinance was disallowed. But if otherwise, the new ordinance repeals the old, and as no Sheriff has since been appointed there is no authority for detaining the prisoner. The 27th (the continuing) clause of the Supreme Court Ordinance is not sufficient.[5] It continues proceedings but does not continue officers. The act transferring the equity business of the Exchequer to the Court of Chancery was careful on this point. (He quoted 3 and 4, Vic, c. 42, sec. 2 and 3, and 5 Vic.)[6] The laws made here must not be repugnant to the laws of England. Imprisonment is now perpetual, which is repugnant.

On Saturday, 17th February, Chapman, J., Cuv: adv : vuit, gave judgement [sic] as follows:

This case comes before the Court in the form of a motion to make absolute a rule calling on Joseph Boulcott and Robert Stokes, to show cause why John Lloyd now a prisoner for debt, at their suit, in the common gaol of Wellington, should not be discharged out of custody,- on the ground that the Supreme Court Ordinance of 1841, (sess. 2, No. 1.) was disallowed some days before the passing of the Supreme Court Ordinance of the present session, and that the Sheriff's authority having ceased by such disallowance, the subsequent detention of the prisoner is wrongful. The words of the affidavit on which the rule was granted are as follows:

"And this deponent is informed and believes that the Ordinance under which the late Supreme Court was constituted, has been disallowed, and that from the time of such disallowance being published or announced in New Zealand aforesaid, on or before the 9th day of January 1844, the office of the said Sheriff ceased to exist, and from the said 9th day of January, until the 13th day of January 1844, no Court existed in this colony, having authority to direct, or order, or continue, the imprisonment for an indefinite period of any debtor in this colony."

In shewing cause against the rule, the solicitor for Messrs. Boulcott and Stokes, has filed an affidavit stating that he has searched the Government Gazette, and that he is unable to find any notification of the disallowance of the Supreme Court Ordinance of 1841, and that to the best of his belief no such disallowance has been made.

The only fact relied on by the learned counsel who supported the rule to establish the disallowance of the Ordinance, is that his Excellency the Governor in his speech on the meeting of the Legislative Council on the 9th January last, is reported to have announced, that her Majesty had been pleased to disallow the Ordinance in question. Of this announcement, the Court can take no notice whatever; and had the applicant even fortified his case with an exemplified or attested copy of his Excellency's speech, the Court could not have taken judicial notice of it for the purpose contemplated— namely, that of repealing a law. The only legal mode of disallowing an Ordinance is by proclamation, or public notice in the official Gazette when there is one, or in some other public newspaper when there is not. Such proclamation or notice then forms part of the law of the land, and the Court is bound to take the same notice of it as of an Ordinance. The learned Counsel has appealed, or referred in some way or other, to my private knowledge: he must be well aware that if I had any private knowledge, I could not use it here. In relation to this matter, as a Judge of this Court, I can look to no other source of information other than the Gazette. But in fact I know nothing beyond what all the world may know. It had been known for some time that the disallowance of the. Ordinance had been determined on by her Majesty; we are entitled to take his Excellency's speech as an expression of that intention; but that is not enough; the actual disallowance can only take effect, from the date of the notification, or the date therein specified; and mischievous indeed would be the consequence were the disallowance of a law to relate back to a period antecedent to the date of the notice, or were some less formal mode of erasing an Ordinance from the statute book to creep into practice.

Up to this point, therefore, the applicant has scarcely placed himself in Court, and. as the affidavits go no further, the Court ought strictly to stop here. The learned counsel might indeed have been, stopped when he travelled out of the affidavit, but as no objection was raised on the other side, the Court did not interfere, being most anxious that the applicant, circumstanced as he is, and perhaps trying the question for many others, should have the benefit of every suggestion

the ingenuity of his counsel could supply. At the same time it should be observed, that the practise of departing from the grounds set out in the affidavit is extremely irregular, and cannot be encouraged," as it is calculated to take the other party by surprise — a course which may sometimes be productive of inconvenience and even hardship.

In addition to the grounds specified in the affidavit, it is urged that, even if the Ordinance of 1841 were not disallowed on the 9th of January, it was virtually repealed on ' the 13th, and that his Excellency not having appointed the Sheriff a-new, there is now no Sheriff, and that on that ground the detention of the prisoner is still wrongful. It is true that in both the Supreme Court Ordinances, the Governor is authorized to appoint Sheriffs, but his Excellency has other authority for appointing them, of which authority nothing but her Majesty's pleasure can deprive him. In virtue of this authority, Sheriffs have been appointed for all purposes for which they are necessary. Assuming, then, for our present purpose, the repeal of the Ordinance of 1841, all that is required of or entrusted to the Sheriff by the Supreme Court Ordinance, or any other Ordinance, or by the- rules of this Court, may be lawfully done by such Sheriffs, especially when aided by the continuing clause of the said Ordinance (sec. 27) of the present session, which I think sufficient for the purpose of this case.

The Court is not called upon, in this place, to determine how far the Supreme Court Ordinance of 1841 (which is not repealed in words) is virtually repealed by that of the present session; for whether repealed or not repealed, on the grounds already stated, the rule must be discharged. Rule discharged with costs.

For further information, contact Damen Ward

---

[1] Arthur Todd Holroyd, 1806-1887, arrived in Wellington in 1843. http://adbonline.anu.edu.au/biogs/A040463b.htm

[2] Robert Stokes (c. 1810-1880) was the proprietor of the *New Zealand Gazette and Wellington Spectator*. Stokes Valley is named after the family. Stokes was also employed as a New Zealand Company surveyor. Joseph Boulcott was a merchant on Te Aro flat. His father, John Boulcott, was a director of the New Zealand Company. Joseph's brother, Almon, later farmed in the Hutt Valley; a military stockade built on the farm was attacked by Te Mamaku's troops in May 1846. Ian Wards, *The Shadow of the Land,* Wellington, 1968, 266-7.

[3] *New Zealand Gazette and Wellington Spectator,* 3 October 1843.

[4] John Lloyd was a baker and confectioner of Lambton Quay; *New Zealand Colonist*, 3 February 1843. Lloyd is the only man of that name in the Wellington jurors roll in 1845; *New Zealand Spectator*, 8 February 1845.

[5] Section 27, Supreme Court Ordinance 1844 provided "All proceedings which have been commenced in the Supreme Court under the authority of the Supreme Court Ordiance, session II, No. 1, and which are still pending and incomplete, shall continue in as full force and effect as if the same had been commenced under the authority hereof".

[6] 3 & 4 Vic, c. 42 is the Poor Law Commissioners Act 1840. It may have been intended to refer to Court of Chancery Act 1840, 3 & 4 Vic, c. 94. The other reference is to Court of Chancery Act 1842, 5 Vic c. 103.