

CHAPTER 5

The court case

We have already read quite a lot about those who originally lived in Rushcutters Bay and it is interesting to note that several of them were in some way involved in a court case which James Underwood brought against Robert Cooper and Francis Ewin Forbes in 1824, but it was not decided until 1836.

As already mentioned in the previous chapters, the above-named three had been granted 100 acres for the building of a gin distillery and, according to James Underwood's letter to the Colonial Secretary, of which you will hear later, the three men agreed to select 3 acres each of the land for the purpose of building a dwelling on it and the arrangement was that each one was to lease his three acres from the other two.

James Underwood had selected where the 100 acres be situated and it had stretched roughly from where the Paddington Post Office now stands to Jersey Road. Robert Cooper selected his three acres where "Juniper Hall" stands today and some distance down the hill and he commenced the building shortly after they were granted the land. It was apparently mutually agreed that Francis Forbes was to have his three acres to the east of Robert Cooper's and James Underwood's lot was to be to the west of both, all lands being measured from South Head Road (Oxford Street) in a northerly direction.

In an endeavour to find out why the case had not been decided for 12 years, a search was made through records in the State Archives, where early Court case results should be on file. Nothing was found, but there was a gap in the 1824 records and Archives officers answered the question about the lack of records for the period by saying: "Apparently they did not survive". Not to be beaten by this setback of not being able to find the result of the hearing in 1824, approach was made to find the outcome of

the 1836 case through the Registrar-General's Department, as no doubt the judge adjudicating on that case would have been able to refer to the previous case result and would make a ruling in view of all the evidence to hand. His decision as to who should own the land being disputed would show whether the Plaintiff or the two Accused were in the right.

The initial search in the Registrar-General's Department produced the actual joint grant of 100 acres by the Governor, Lieutenant-General Ralph Darling to Robert Cooper, James Underwood and Francis Ewin Forbes. The document stated this grant had been promised by Governor Sir Thomas Brisbane on the Fourth day of November, 1823, but the actual grant was not formally drawn up until 19th October, 1831. Incidentally the grant of 100 acres shown in the actual grant form become "100 acres (more or less)" in later forms and still later became "97 acres (less 3 acres upon which the Dwelling House of the said Robert Cooper called "Juniper Hall" is built and which three acres are enclosed by a Stone Wall").

One can only assume the case was not settled in 1824 because Francis Forbes supported Robert Cooper's claim for an additional 3 acres, saying Cooper could have the original 3 acres originally allocated to Forbes, but, as there is nothing in writing to substantiate this, no ruling was given at the hearing. (If this reasoning does not seem clear, please read James Underwood's letter to the Colonial Secretary, Sir Frederick Goulburn which follows and then re-read this paragraph.)

Twelve years later two letters in the hands of two other gentlemen came to light i.e. a letter which Cooper had written to John Oxley (Surveyor-General) dated June 1824 and the above-mentioned letter that James Underwood had addressed to the Colonial Secretary dated 20th June, 1824, but these letters were in the possession of 2 other gentlemen - not the addressees! The two gentlemen concerned were Henry Halloran and James Raymond and they were summoned to appear in the Supreme Court on 25th April, 1836, also another gentleman, Willoughby James Dowling, who was to attest

to the authenticity of the handwriting of Robert Cooper and James Underwood.

Following are:

- (a) The notification to the three gentlemen to attend the court on 25th April, 1836.
- (b) Copy of the letter written by James Underwood to the Colonial Secretary, Sir Frederick Goulburn on 20th June, 1824.

It is interesting to note Francis Forbes Esq. is shown on the Summons to Appear as the Chief Justice and John Gurner signed the Summons as Chief Clerk of the Supreme Court. It is also very interesting to note that no specific time is stated for them to appear at the Court.

Obviously James Underwood's version of the happenings must have been correct for the Court ruled all were to pay Ten Shillings each on 18th June, 1836 and as proof of the verdict being given in Underwood's favour, "all 97 acres (except the 3 acres on which Robert Cooper's house was built)" were leased by James Underwood to a Mr. Parry Long on 30th November 1839.

The Summons to appear in Court was worded as under (Reference v) -
"WILLIAM THE FOURTH BY THE GRACE OF GOD OF THE UNITED KINGDOM OF GREAT BRITAIN AND IRELAND, KING DEFENDER OF THE FAITH TO HENRY HALLORAN, JAMES RAYMOND AND WILLOUGHBY JAMES DOWLING:

GREETINGS -

FOR CERTAIN CAUSES OFFERED BEFORE US IN OUR SUPREME COURT ENJOIN YOU THAT LAYING ALL OTHER MATTERS ASIDE AND NOTWITHSTANDING ANY OTHER EXCUSE YOU PERSONALLY APPEAR BEFORE US IN OUR SUPREME COURT ON THE 25TH DAY OF APRIL INSTANT WHERESOEVER WE SHOULD THEN BE TO ANSWER CONCERNING THESE THINGS WHICH SHALL BE THEN AND THERE OBJECTED TO YOU AND TO DO FURTHER AND RECEIVE WHAT OUR SAID COURT SHALL HAVE CONSIDERED IN THE BEHALF AND THIS YOU MAY IN NO WISE

OMIT UNDER THE PENALTY OF ONE HUNDRED POUNDS AND HAVE THERE THIS WRIT

WITNESS THE HONOURABLE FRANCIS FORBES ESQ. OUR CHIEF JUSTICE AT SYDNEY NEW SOUTH WALES THIS SIXTEENTH DAY OF APRIL IN THE SIXTH YEAR OF OUR REIGN.

(Signed) JOHN GURNER
CHIEF CLERK OF THE SUPREME COURT.

STIPULATING:

HENRY HALLORAN WAS TO PRODUCE A LETTER DIRECTED BY THE DEFENDANT ROBERT COOPER TO JOHN OXLEY DATED IN JUNE 1824 AND FOR JAMES RAYMOND TO PRODUCE A LETTER DATED 22ND JUNE 1924 DIRECTED BY THE COMPLAINANT JAMES UNDERWOOD TO FREDERICK GOULBURN THEN COLONIAL SECRETARY AND FOR WILLOUGHBY JAMES DOWLING TO TESTIFY THE HANDWRITING OF THE PARTIES IN THE CASE OF JAMES UNDERWOOD AGAINST ROBERT COOPER AND FRANCIS EWIN FORBES.

(Signed) JAS NORTON
DEFENDANT'S SOLICITOR

16th April, 1836"

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22nd June 1824

Sir Frederick Goulburn Esq. (Reference w)
Colonial Secretary,
etc. etc. etc.

As the sole proprietor of the Sydney Distillery, I now take this liberty of laying before you the circumstances under which the sole right and title to that property became vested in me and the imposition to which I am exposed under a representation of the sanction of your authority.

As soon as Messrs. F.E. Forbes and Robert Cooper had obtained the sanction of His Excellency to distill from Sugar under certain restrictions, they proposed to me to join them in the establishment of a Distillery, having has such an Establishment in contemplation with the late Mr. Robert Jenkins and for which we had provided the

apparatus now belonging to the Sydney Distillery, I readily consented to the proposal of Messrs. Forbes and Cooper in pursuance of which Articles of Partnership were drawn up, entered into between Messrs. Robert Cooper, James Underwood and Francis Ewin Forbes stating "that whereas His Excellency the Governor had been pleased to grant One Hundred Acres of Land being and situated in Rushcutting Bay for the establishment of a Sydney Distillery the said One Hundred Acres of Land so granted was the joint property of Messrs. Robert Cooper, James Underwood and Francis Ewin Forbes.

The One Hundred Acres of Land so granted to Messrs. Cooper, Underwood and Forbes was never until now disputed to be the joint property of Messrs. Cooper, Underwood and Forbes and was selected at my suggestion and measured by Mr. Harper, the Deputy Chief Surveyor in the presence of all the co-partners, but, Sir, it was proposed and agreed to between the partners that each should lease to the other three Acres from the One Hundred Acres so granted, for the purpose of each erecting a private Dwelling house of his own thereupon. Mr. Robert Cooper made his selection of three Acres where his intended dwelling house now stands. Mr. Francis Ewin Forbes was to have had Three Acres on the East of Mr. Robert Cooper's allotment and myself three Acres on the West, but neither Mr. Forbes nor myself have as yet occupied any.

On the Twenty-sixth Day of March last Mr. Francis Ewin Forbes' right, share, title and Interest in the Sydney Distillery was sold by the Provost Marshall and the same was purchased by me at such Public Sale for Seven Hundred Pounds of which money I have paid the Provost Marshall by way of deposit and the remainder I am willing to pay on his securing to me Mr. Francis Ewin Forbes' one third right, title and Interest in particular, that is to say in the land as well as Buildings, Apparatus, etc.

Since the time I purchased Mr. Francis Ewin Forbes' share, unfortunately Mr. Robert Cooper and myself have had various disagreements in the management of the Concerns of the Sydney Distillery which have been settled and determined by a submission

of the existing differences to the final Award and determination of Messrs. Edward Ray and White, Melville, Winder who have directed that the co-partnership entered into between Messrs. Robert Cooper, James Underwood and Francis Ewin Forbes on the first day of April, 1823 shall be dissolved and that Mr. James Underwood shall pay to Mr. Robert Cooper the sum of One thousand six hundred and forty pounds and ten shillings for the one-third right, share, title and Interest of him the said Robert Cooper and that the said Robert Cooper shall legally transfer, make over and give in charge to the said James Underwood his One-third right, share, title and Interest in all the Lands, Tenements and Hereditaments etc. belonging to the said Sydney Distillery.

Under the foregoing circumstances, I have required a transfer from Mr. Robert Cooper agreeable to the terms of the Award made by Messrs. Riley and Winder but he now, for the first time, objects that by your consent and authority he is privileged to retain possession of the land being closest to the spot where he has erected his dwelling and Mr. West's boundary near the New Gaol from the One hundred acres granted by His Excellency to the Sydney Distillery.

Mr. Robert Cooper has taken the liberty of making use of your name (and I have reason to believe without your authority) which upon this occasion is of that serious a nature as to require you the author of so great an Act of Injustice but, supposing that you may have given your consent to what Mr. Robert Cooper has pleased to consider and act as your Authority, I beg to state:

1st. That on the first Establishment of the Sydney Distillery and on my entering into it as a partner I consider myself entitled to one-third share of the One hundred Acres being described as the Land granted by His Excellency to the Sydney Distillery and on my entering into it as a partner, I consider myself entitled to one third share of the One hundred Acres being described as the Land granted by His Excellency to the Sydney

Distillery and the Co-partnership Deed is a sufficient proof of this fact.

2nd. I can prove that Mr. Cooper never claimed more than three Acres as his proportion of Land to be leased to him by Mr. Francis Ewin Forbes and myself for the purpose already mentioned and which he has my free consent to retain in his possession.

3rd. That when I purchased Mr. Francis Ewin Forbes' share, right and Interest in the Sydney Distillery, one third of the One hundred Acres granted by His Excellency to the Sydney Distillery was included in such purchase made by me.

4th. That agreeable to the Award of Messrs. Riley and Winder I am to have quiet and peaceable possession of Mr. Robert Copper's one third share, right, title and Interest on the One hundred Acres so granted by His Excellency.

If under these circumstances Government will depart from their Original Grant and allow Mr. Robert Cooper more than the three Acres which I am willing he shall have, I must consider myself aggrieved by being compelled to give up what by the Co-partnership deed, my extensive outlay of Capital on Account of the Concern, by my right of purchase of Mr. Francis Ewin Forbes' share, by my right of purchase of Mr. Robert Cooper's share and by my right of having Three Acres to the West of Mr. Robert Cooper's alignment, all which neither Justice, right Law or Equity require of me, besides which being deprived of that part of the One hundred Acres (which in itself will be sufficient for the future use of a Concern that has now cost me upwards of Seven Thousand Pounds) will be advantageous for the use of keeping stock and other properties.

In concluding this communication I must apologize for the length unto which I have been obliged to give details of the various circumstances from which you could form a true Idea of my Grievances and, having the utmost confidence in your

impartial determination, I submit the matter to your consideration and await the result.

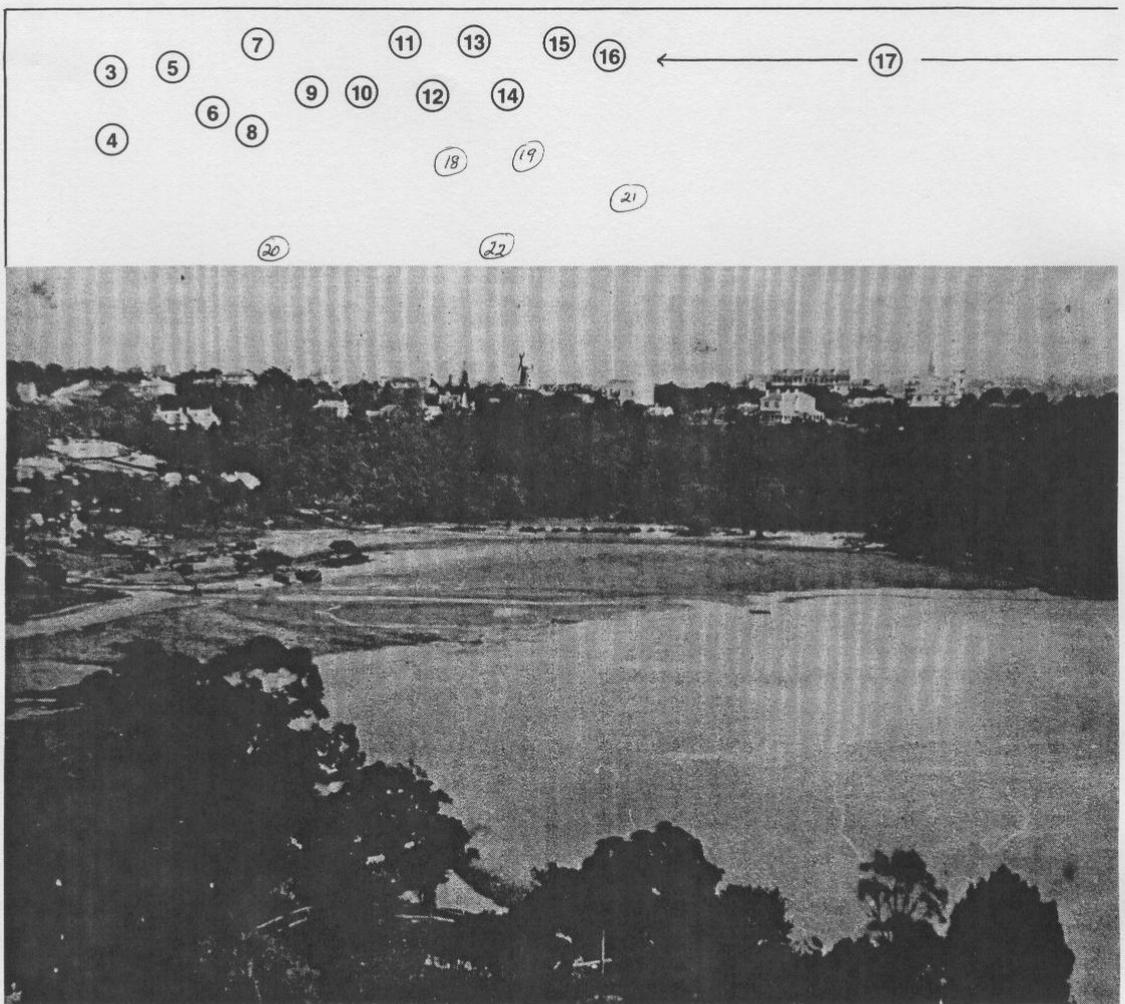
I have the honour to be

Sir

Your most obedient and humble servant,

(signed) J. Underwood

No. 92 George Street,
SYDNEY.



Rushcutters Bay Circa 1891, courtesy Mitchell Library. By this time the Church and the Royal Hotel would have been built. The Church could be to the left of Bradley Hall, and the hotel the building to the left of 'Olive Bank Villa'. The numbers on the photograph represent an approximate location of the various buildings identified below: (1) James Underwood's second home; (2) The Distillery; (3) School and Grounds; (4) Land cleared for Five Ways Shopping Centre and Hotel; (5) 'Duxford'; (6) 'Bradley Hall' (two identical buildings); (7) possibly Police Station in Jersey Road; (8) 'Olive Bank Villa'; (9) 'Elfred'; (10) Servants' quarters and Stables 'Engehurst'; (11) 'Juniper Hall'; (12) 'Engehurst'; (13) Town Hall Clock and Tower; (14) 'Flinton'; (15) Gordon's Mill; (16) Barracks; (17) all buildings to right in Darlinghurst; (18) Underwood's first home; (19) site of 'Glen Ayr'; (20) site of 'Deepdene'; (21) site of 'The Terraces'; (22) Site of 'Lohort'; (actual houses obscured by trees).