

WALTER HARDING

Sacred to the Memory of Walter Harding, late Chief Justice of Natal. Died April 19th, 1874. Aged 62. (Inscription on tombstone.)

In a secluded portion of the Military Cemetery at Fort Napier, Pietermaritzburg, amidst the graves of numerous British soldiers who died in Natal, high ranking officers and privates alike, lies the grave of Walter Harding, the last resting place of one of the pioneers of Natal, and one who made a lasting mark on the small colony during a large portion of the nineteenth century.

This article is an attempt to bring Walter Harding, the man, into correct perspective in relation to his day, and also to assess his achievements in the sphere in which he lived.

Little is known of the place or date of birth of Walter Harding and the present writer has searched unavailingly for information. As will be seen later there was some confusion at the time of his death about his correct age. But it is certain that Walter Harding was the son of William Walter Harding (1782-1831) and Eliza Herrick (1793-1866).¹

William Walter Harding purchased an ensigncy in the 20th Regiment of Foot in 1800, and also promotion to the rank of Lieutenant (25-6-1803) and Captain (12-10-1809) and took part in the Allied campaign against Napoleon, doing service in Egypt and Spain.²

In November 1811 William Harding transferred to the Cape Corps and retired from the army in June 1819 by selling his commission.³ This sale caused some comment at the time and it has since come to light that the sale of Harding's commission had been strongly urged by the then Governor at the Cape, Lord Charles Somerset.⁴

Soon after his retirement from the army, William Harding obtained the post of Deputy Landdrost at Cradock, but he soon relinquished the post on account of bad health. He thereafter held the posts of Resident Magistrate, Beaufort West (1-1-1828), Justice of the Peace at Graaff-Reinet (19-6-1828), Resident Magistrate, Swellendam (10-12-1828), Justice of the Peace, Swellendam (28-2-1829) and Resident Magistrate and Justice of the Peace at Uitenhage, at which latter place he died on 27-3-1831.⁵

Two years before the death of his father, Walter Harding received the appointment of Clerk to the first puisne judge at the Cape, Justice Menzies, and thus commenced a lifelong career of association with the law.⁶ In the next year Harding was appointed Registrar of the Cape Circuit Court, and in

1. The writer is indebted to Mr. Peter Crail of Cape Town for information in connection with Walter Harding's forebears. See in this connection Death Notice No. 2373, of Eliza Herrick, filed 25-1-1866.

2. British Army Lists.

3. *ibid.*

4. *Records of the Cape Colony*, Theal, v. 15 p. 225. See also the *South African Commercial Advertiser*, 31-5-1826.

5. *South African Commercial Advertiser*, 13-4-1831, obituary signed by "S".

6. *Natal Witness*, 21-4-1874, and information from Cape Archives.

1833 he acted as Secretary to the Land Board.⁷

Walter Harding's next appointment was yet another link in a chain of circumstance which led him to the highest judicial post in the Colony of Natal. This appointment came in 1836, when he was directed to prepare a *precis* from the records of the Supreme Court of the Cape Colony of all criminal trials from the year 1736. It would appear that this *precis* was required so that the Judges at the Cape might have a better understanding of the development of Roman-Dutch Law.

As soon as this analysis was completed Walter Harding set about the greater, and more important task, of collecting and publishing the laws which were then in force in the Cape Colony.

It was the original intention to complete the work in two volumes, but the concurrent introduction of new measures by the Cape Colony authorities gradually increased the scope of the undertaking. Eventually Walter Harding's compilation, "Cape of Good Hope Proclamations from 1806 to 1825 as Now in Force and Unrepealed, and the Ordinances Passed in Council", ran to four rather large volumes aggregating more than two thousand pages. The fourth and final volume was entitled "Ordinances Enacted by the Legislative Council of the Cape of Good Hope, 1845-1847."⁸

There can be no doubt but that the knowledge gained through the compilation of these works gave Walter Harding a thorough working knowledge of the law as it then stood, and this very probably accounts for his choice by the Cape government for a post in Natal when firm British rule was finally established there.

In the interim, however, he gained additional practical experience as Clerk of the Peace at Swellendam. It is apparent that the Hardings as a family had a love for this small town, and during his early years of service in Natal Walter Harding made two unsuccessful applications to transfer there.⁹

In 1842 British military government was set up at Port Natal and in May 1844 Natal became a dependency under the British Crown. On the 22nd of November 1845 an Executive Council was nominated by the Governor of the Cape, and this Executive Council was to consist of the Lieutenant-Governor, the Officer Commanding the Forces, the Secretary to Government, the Surveyor-General and the Crown Prosecutor.

Although he had had absolutely no legal training, Walter Harding was appointed as Crown Prosecutor and he proceeded to Natal on the same vessel as the Lieutenant-Governor, Martin West, who had been Civil Commissioner at Grahamstown. It is clear that the two men became firm friends and a strong bond remained between them (despite clearly expressed differences of opinion such as are evidenced in the minutes of the Natal Executive Council) until the death of West in August 1848. Many legal books which were obviously the property of Martin West but which later passed to

7. *ibid.*

8. *South African Bibliography*, S. Mendelssohn, Vol. 1, pp. 682-3.

9. One instance contained in G.H. 635, No. 33.



Walter Harding have been discovered in the Natal Archives.

In the new colony of Natal there was an acute shortage of men capable of administering affairs of government and, possibly more important, there was a decided lack of public funds with which to pay public servants. The device of multiple posts was thus resorted to, often with rather astonishing results. In July 1846 two magisterial districts were created in Natal, those of Pietermaritzburg and Durban, and it was to these two posts that Harding was appointed, holding a sort of dual authority and acting as magistrate in two separate areas at one and the same time.¹⁰

It will be remembered that Harding had proceeded to Natal as Crown Prosecutor, and thus arose the anomalous position of one man being, at the same time, both public prosecutor and Magistrate. Surely a unique state of affairs!

This was not all, however, for the infant administration sought an Auditor for its accounts (such as they were) and — Walter Harding was given the post! But this state of affairs did not continue for long, and other suitable men were soon found for the various posts held by Walter Harding. No doubt, much to his relief.

For Walter Harding 1847 was a most eventful year. Towards the end of winter the news filtered through to the capital of the colony, that all was not well in the Klip River (Ladysmith) area where, it was rumoured, the trekkers had entered into some sort of an agreement with the Zulu Chief, Panda. It appeared that the Klip River Boers, under the leadership of A. Spies, had purchased some territory from the Zulu Chief, that Panda had guaranteed them protection, and that the Klip River inhabitants had declared themselves to be independent of British rule.¹¹

The Lieutenant-Governor, in an unusually stern mood, proposed the despatch of a force to the Klip River to settle the matter. But Harding urged a cautious attitude, and pointed out that Natal's shaky financial position just would not be able to bear any such foray, which, in any event, was likely to be unsuccessful in its purpose. Instead he urged a full enquiry into the circumstances. West was agreeable to an enquiry at the seat of government, Pietermaritzburg, but Harding urged that this would be unjust, and suggested that the enquiry be held on the spot, and he carried the majority of the Executive Council with him in this proposal despite the recorded opposition of the Lieutenant-Governor who bowed to the majority opinion and decided that he would "employ the Honorable the Crown Prosecutor, who is also Resident Magistrate, on that duty, and that the Diplomatic Agent (Theophilus Shepstone) would be instructed to accompany Mr. Harding".¹²

The enquiry which was held at the Klip River throws a great deal of light upon Walter Harding's character and vividly illustrates his understanding of the feelings of the trekker and farmer in Natal. He conducted

10. *To the Shores of Natal*, T. V. Bulpin, p. 137.

11. E.C. 2, pp. 31-33, Executive Council Meeting of 8-9-1847. See also *S.A. Archival Records*, Natal No. 2, pp. 10-11.

12. *S.A. Archival Records*, Natal No. 2, p. 11.

election. The writer of this article has been unable to trace confirmation of these statements and any clarification of these assertions would be most interesting^{16a}.

During 1856 Natal was granted a new constitution by Royal Charter. This instrument did away with the old Legislative Council of 1848 and replaced it with a new one which was to be a body with an elective majority.¹⁷

The grant of Representative government (as it was thought to be) brought with it a desire in Natal for an improvement of the judicial system. Until then the highest judicial official in the colony had been the Recorder, and appeals had been directed to the Supreme Court of the Cape Colony. It was widely stated in Natal that the system of a single Judge was detrimental to the proper administration of justice and it was felt that the higher political status of the colony warranted long-sought improvements.

The Supreme Court of Natal was thus established in 1857, the main provision of the legislation being that the Recorder should be replaced by a panel of judges (three) which, it was stated, would secure the better administration of justice and make trials more impartial. At this time there was a great deal of newspaper speculation as to who would be appointed Chief Justice, but there seems to have been little surprise at the appointment of Walter Harding to that important office.

Viewed in the light of modern standards the appointment was an exceptional one, for here was a man who had had little or no legal training and who was now at the apex of the judicial administration of a fast-growing colony. This peculiar situation had been partly met by Ordinance No. 14 of 1845 which had permitted Harding, who was not a member of the legal profession, to act as an advocate. It was probably felt, however, that Harding's experience as Crown Prosecutor had been wide and that he had acquitted himself very well despite his lack of legal qualifications. It should be remembered that as Crown Prosecutor Walter Harding had not only to direct public prosecutions, but also had to give legal advice to the Natal Executive Council. The records of this body bear witness to his strong influence over executive affairs before his appointment to the Chief Justiceship.

While the appointment of Harding as Chief Justice excited little comment in Natal, there was indeed some eyebrow-lifting at his retention of his seat on the Executive Council notwithstanding his new position as the chief

16a. *Editorial Note.* A confidential communication to Sir Henry Barkly from the Lieutenant-Governor of Natal, Robert Keate, touched on the possibility of Walter Harding's candidature in the presidential election of the Transvaal, 1871-72. However, after the Keate award of 1871, an English-speaking candidate would have been unacceptable in the South African Republic. In certain quarters Harding was seen as the "Trojan Horse". It was with a feeling of disappointment that a Downing Street official noted in 1871: "Harding not proposed after all". (*Vide F. A. van Jaarsveld: Die Transvaalse Presidentsverkiezing van 1871-72 in Tydskrif vir Wetenskap en Kuns, April 1957, p. 39*). The references to Harding are to be found in C.O. 48/459, Barkly to Kimberley, 2-1-1872, annexure Keate to Barkly, 7-12-1872 and C.O. 48/461, D. 74, Barkly to Kimberley, 1-7-1872, minute, and *De Zuid-Afrikaan*, 20-1-1872, correspondent in Potchefstroom.

17. The Royal Charter, Museum, Natal Archives.

judicial officer in the Colony.

The *Natal Mercury's* criticism was: "Mr. Harding's colonial experience and vigour of character may render his presence in the Executive Council useful, but we think it a dangerous, if not unconstitutional, departure to invest a judge with political functions. We are aware that the Chief Justice of the Cape is *ex officio* President of the Upper House of the Cape Parliament, but he is NOT a member of the Executive Council."¹⁸

And so Harding was placed in yet another anomalous position — as it seems to us. In the early years he had been Prosecutor and Magistrate, and now he was Judge and Politician. Harding's new combination of roles was a most peculiar one. In the Court Room he had to decide on the legal intricacies of murder cases and in the secrecy of the Executive Council he had to discuss his own work from a more practical and political standpoint.

All this notwithstanding, Walter Harding remained on the Executive Council until his death in 1874 and exerted an appreciable influence on political development in Natal. The records of the Executive Council show that he was by no means a nonentity in that august body which deliberated on high affairs of state.

The new Natal Supreme Court commenced its duties in May 1858 and Chief Justice Harding was initially assisted by senior puisne judge Connor, an ex-Chief Justice of the Gold Coast and a great exponent of Roman-Dutch Law, and puisne judge H. Lushington Phillips, who seemed to lack the patience required of a judge but who was tremendously popular in Natal because of his sporting accomplishments. (Incidentally, Phillips was organiser of an annual ploughing contest in Natal farming circles!)

Soon after its creation and its first sitting the new Supreme Court in Natal was faced with a peculiar crisis which bears recapitulation because it illustrates the peculiar position of the Chief Justice vis-a-vis the Executive Council.

Justice Phillips came into collision with Lieutenant-Governor John Scott and was promptly suspended from office. There was an immediate outcry from the people of Natal and it was alleged that newly won judicial rights were in jeopardy. The Executive Council was divided on the issue and it was eventually decided to appeal to the Secretary of State for the Colonies in London for a ruling. The Secretary of State ruled that the Lieutenant-Governor had no power to suspend a duly appointed judge. It is noteworthy that, in this particular instance, the Chief Justice (as a member of the Executive Council) was silent on the issue; this is possibly a reflection of the awkward position in which Harding found himself.¹⁹

The "Supreme Court" of Natal was a high-sounding name but reality belied its nomenclature. The *Natal Mercury* of the 26th May 1859 reported the impressions of a visitor. "On Friday I sauntered into the antique dungeon, which is politely called the 'Court House' "²⁰

18. *Natal Mercury*, 13-5-1858.

19. E.C. 6, p. 138.

20. *Natal Mercury*, 26-5-1859.

But what the court lacked in architectural splendour it made up in inner flamboyancy. The report of the newspaper continues thus: "I found that a native was undergoing trial for the murder of his niece. The judge on the bench was the Chief Justice himself, attired in medieval robes of pink and blue silk. I can really imagine that Justice so superbly arrayed must have a very imposing effect upon the native mind!"²¹

Despite various impediments, such as inadequate accommodation, the Supreme Court under the wing of Walter Harding seemed to function very smoothly. It is to the credit of Walter Harding that he did not shrink from pronouncements which might possibly have brought him the marked displeasure of the people of Natal. His judgments portray his character and it is for this reason that it is now intended to give a few illustrations of his work.

In 1858 the question arose as to whether the Royal Charter of 1856, granting Natal a partly elective Legislative Council had, in fact, given Natal Representative Government. Lieutenant-Governor Scott was of the opinion that this was *not* the case, but the members of the Council who had been elected, and the public at large, insisted that the form of Natal's government was Representative. The matter was brought before the Supreme Court and Walter Harding ruled that Natal was a Crown Colony and properly so called. He based his judgment on the fact that several clauses of the colonial regulations conformed to the rules applicable to a Crown Colony and he pointed out that there remained a London audit of the Natal accounts. A colony with Representative government, he pointed out, had to have its own final audit. It then appeared that it had been the *intention* of the British government to grant Representative government but that some of the formalities had been overlooked. These formalities were hastily adjusted and Natal became a colony with a *de facto* and a *de jure* Representative government.²²

Yet another important decision was given by Harding in regard to the Royal Charter of 1856, this time not in open court but in the Executive Council. The Royal Charter of 1856 specifically put aside, as far as Natal was concerned, any restrictions based on race, and in 1863 three members of the Executive Council contended that a native possessed of the requisite property qualification was entitled to be registered as a voter. This was not the view of Walter Harding who held that the Charter did not, and was not intended to, apply to natives. His standpoint in this respect is yet another indication of his basic colonial outlook which, possibly, brought him into official disfavour, for it was clear that, although possibly more deserving than others, Harding was systematically overlooked when it came to the bestowal of Honours by the Queen, although he had several times been recommended for them by the authorities in Natal.

A case in somewhat lighter vein, in which Chief Justice Harding was faced with a ticklish problem, was one in which his judicial colleagues were involved. The case is surely unique in the history of South African law

21. *ibid.*

22. S.C. 1-5-1858.

and thus bears repetition.

Justice Connor, it appears, had purchased a piece of land in Pietermaritzburg and a dispute arose between him and the municipality as to the rates which were payable. The case went to the Supreme Court and Justice Connor appeared in his private capacity to put his case. For the Municipality Michael Gallwey, the then Attorney-General in Natal, appeared in his private capacity. On the Bench sat Chief Justice Harding and Judge Phillips. The two learned judges could not agree on the judgment and it was only some hard arguing by Justice Phillips which enabled the court to come to a decision — in favour of Justice Connor!²³

Less light-hearted was Chief Justice Harding's ruling of 1868 in the celebrated "Dean of Pietermaritzburg" case. The case arose through a long-drawn out dispute between Bishop Colenso of the Natal diocese and the Dean of Pietermaritzburg as to the rightful trustees of St. Peter's Church in the Natal capital. Controversy had raged in the colony for many years on this issue which was eventually brought before the Supreme Court.

The details of the case are not relevant here, but the situation may be summed up by saying that the judges were faced with an intricate problem of church doctrine and government. After long consideration Harding granted trusteeship of the Cathedral to Dr. Colenso. In this judgment Justice Connor dissented and the case was carried to the Privy Council on appeal and the original decision was eventually confirmed by that body.

The Chief Justice went further and gave judgment to the effect that the Dean was to be "outlawed" and to be in "perpetual contempt of court". This pronouncement caused great dissatisfaction among the supporters of the Dean, and there were many of them in the capital, and it would seem that Walter Harding fell somewhat out of public favour. His decision had been a difficult one and it is to his credit that he did not pander in the least to public opinion.²⁴

By and large, however, it is true that Walter Harding was content to leave the real leadership of the Natal Supreme Court to Justice Connor, who was to succeed Harding on the latter's death.

A study of Walter Harding's more important judgments leads one inevitably to the conclusion that he did not profess to be a man of the Law Book. He quoted authorities sparingly and seemed to disdain "recourse to any elastic interpretations of the law".²⁵ His critics berated him on this particular point and on his death the *Natal Colonist* wrote: "His judgments partook of the coarseness of his mortal and physical fibre, being characterised generally by the robustness of his commonsense, rather than by adherence to Law; he had been heard to advise practitioners in his courts to burn their books — and not being governed by fixed principles (his judgments) were not always consistent with themselves or one another."²⁶ The *Natal Colonist* went on to point out that on one occasion Chief Justice Harding had had to

23. *Portrait of a Colony*, A. F. Hattersley, p. 132.

24. *Life of James Green*, A. T. Wirgman, Vol. 2, p. 69.

25. *Natal Witness*, 21-4-1874.

26. *Natal Colonist*, 21-4-1874.

be reprimanded because he had decided to alter a decision he had given after it had already been recorded.²⁷ The *Natal Mercury* commented that Harding had had a desire to decide cases on equitable principles rather than on legal quibbles, and that his judgments were usually based upon common sense.²⁸ Generally speaking, however, it can be said that Walter Harding left no special mark upon the advance of the Natal colonial law.

Harding, like many judges, seems to have been very partial to the quip in its right place and it is apparent that the townfolk of Pietermaritzburg were often to be heard saying "Have you heard the latest Harding joke?" More often than not, however, the sentences he imposed upon proved criminals were no jest, for where guilt was clear he was unhesitating and severe.

And it would seem, too, that he was not always the very soul of patience. Again quoting from the *Natal Colonist*: "His experience was singularly wide and calculated to foster that self-reliance which was the chief characteristic of the man. He was a man of rather strong powers of mind and body than of any delicacy of refinement. He was almost of herculean frame, rough in manners and incapable of making allowances for people not endowed with the same powers of endurance as himself."²⁹

Walter Harding lacked many of the social graces usually required of a Chief Justice and generally lacked that personal dignity which is usually essential for the holder of such a post. When the time came for his retirement from his post he was entitled to a handsome pension of £900, but he was, nevertheless, prepared to bargain with the Legislative Council to remain on in his post at an enhanced salary. By many of his contemporaries this was taken as an example of his lack of delicacy and "sensitive conscientiousness".

Despite these deficiencies Walter Harding was a power to be reckoned with, because of his experience (he had held almost every important post in Natal except that of Lieutenant-Governor); his knowledge of the administration of the colony of Natal was second only to that of Theophilus Shepstone, who, at the time of Harding's death, was the oldest officer of the Natal public service); his position (on the Executive Council) made him an influential man and also the fact that during the absence from the colony of Lieutenant-Governors, and there were many such occasions, he had virtually held the reigns of office. It was said, with much truth, that no man in Natal was as frequently consulted by those who needed advice as he.

It is by no means clear just how old Walter Harding was at the time of his death. Obituary notices differ on this point. The *Natal Mercury* gives his age as 65 years, while the *Natal Colonist* quotes the figure of 61.³⁰ This estimate is supported by the *Natal Witness* which states that

27. *ibid.*

28. *Natal Mercury*, 22-4-1874.

29. *Natal Colonist*, 21-4-1874.

30. *Natal Mercury*, 22-4-1874.

the inscription on the coffin plate indicated that he was "in his 61st year"³¹ It will be remembered, however, that the tombstone gives his age as 62.

Harding's family was away on holiday in England at the time of his death(one of his daughters had married Arthur Mesham, Registrar of the Supreme Court of Natal). But his funeral was a large one, indeed, one report stated that it was the largest ever held in Maritzburg. All businesses were closed and flags flew at half-mast. The funeral was a semi-military one, and the funeral procession was headed by the Maritzburg Rifles. The burial ceremony was, appropriately enough, conducted by the Bishop of Natal.

Thus passed from the scene one who had indeed spent the greater part of his life in the service of Natal.

B. Leverton.

31. *Natal Witness*, 21-4-1874.

(Note: All references are to records in the Natal Archives.)