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Farewell Ceremony For The Honourable Justice John Bryson

**THE SUPREME COURT
OF NEW SOUTH WALES
BANCO COURT**

**SPIGELMAN CJ
AND THE JUDGES
OF
THE SUPREME
COURT**

**Wednesday 28
February 2007**

**FAREWELL CEREMONY FOR
THE HONOURABLE JUSTICE JOHN BRYSON
UPON THE OCCASION OF HIS RETIREMENT AS A JUDGE
OF THE SUPREME COURT OF NEW SOUTH WALES**

1 **SPIGELMAN CJ:** Almost 21 years ago your Honour was sworn in as a judge of this Court. You sat in the Equity Division for about 18 years and in the Court of Appeal for three years. This is a record of service to the administration of justice that few can equal. It is fitting that so many of us are gathered here today to honour it.

2 Being in your Honour's presence has always been, even from the bar table on the losing side, a delight of the first order. Appearing before you was always a pleasure. However, what transformed pleasure into delight was your Honour's personal style – in essence, a black letter lawyer with élan – which style was, quite simply, inimitable, in the strict sense that it defies imitation.

3 Your Honour has an inexhaustible supply of arcane anecdote, informed by a wide ranging intellectual curiosity, a keen eye for the ribald and the ridiculous and a fascination, bordering at times on the world weary, for human fallibility.

4 Everyone in this room has relished your Honour's mode of expression: cliché free, pregnant with insight, deliciously unpredictable, devoid of malice, uncluttered by excessive verbiage, manifesting a love of language and exuberantly sprinkled with wit – that form of humour which illuminates the truth. Often your expression was self-consciously old fashioned. However, as the English essayist, drama critic, caricaturist and parodist Max Beerbohm once put it: "To be outmoded is to be a classic, if one has written well." You are a classic.

5 For those of us who have had the pleasure of interacting with you frequently, we enjoyed examples of your facility with words on a daily basis. You are, so far as I am aware, the only judge of this Court, perhaps of any Australian court, who has ever had the privilege of a personal column in the journal of the Bar Association. Entitled "Brysonalia", the column set out quotable quotes from your early cases. Regrettably, your Honour's prolific output of such quotes has, by and large, not been recorded. On this occasion I wish to place two examples from my time at the bar on the record.

6 I once attended a conference on "Law and Literature" at a time when, from my ignorance, I thought that this sphere of discourse had something to do with "literature" rather than, in the post modernist fashion, a preoccupation with something called "texts".

7 I was sitting next to your Honour during an address by a feminist scholar – it was early days in the process of gender sensitising lawyers. The scholar announced to the assembled audience that it was essential that in the future all lawyers should be "femocrats". Immediately, your Honour put your head in your hands and said: "How can she mix those Latin and Greek roots like that? The correct word, if any, is 'gynaecrat'."

8 I give one other example of your Honour's style. An issue arose in a case as to whether or not certain water licences fell within the extent of the security under a mortgage of rural properties. I handed to your Honour an extract from the 9th edition of the English text Fisher & Lightwood on *Mortgages* which stated, without citation of any authority, that "all incidental rights ... will follow the security" [1]. I then handed to your Honour an unreported judgment of your brother Mr Justice Young, who quoted that sentence and applied it to conclude that a licence for an abattoir was within the mortgage[2]. Finally, I handed to your Honour the 10th edition of Fisher & Lightwood on *Mortgages* which contained exactly the same sentence but, on this occasion, had a footnote attached to the words "all incidental rights", namely a reference to the unreported judgment of Mr Justice Young[3].

9 Your Honour inspected each of the three documents, looked up and said: "This is going to be very difficult to stop".

10 Your principal contribution to this Court is, of course, in the judgments you have delivered over some 21 years. According to a computer search you have sat on about 2,600 cases. They cover the full range of equity jurisprudence in this State and, in recent years, the even broader range of the civil appellate jurisdiction.

11 You brought to the judicial task a profound understanding of, and empathy for, the role of legal practitioners, which you had acquired over many years of practice both as a solicitor and as a barrister. You were always aware that matters are not always as they appear to be, particularly by the time a dispute reaches an appellate court.

12 Your Honour's insight in that respect was no doubt informed by your role as instructing solicitor for the State Crown, appearing for the GIO, in the classic case of *Jones v Dunkel* when the High Court, somewhat scornfully, commented on the failure of counsel to call or explain the absence of the defendant and crucial witness, being the truck driver accused of negligent driving. You maintain to this day that the High Court should have taken into account the possibility that there may have been such an explanation that could not have been safely adduced before a jury. Indeed there was. In that case, it was difficult to explain to the jury that had to decide whether the defendant had been driving negligently, that he could not be called as a witness, because he was in prison interstate having been convicted on a charge of culpable driving causing death.

13 Your Honour always approached each individual case without preconceptions and with a willingness to hear the facts and arguments as they evolved in the course of a traditional common law trial.

14 Those appearing before you never had a sense that you had already formed a view or that you intended to determine the matter in accordance with some pre-existing philosophy of the law, let alone any pre-existing social philosophy. Your focus was always on what the law and the facts required in the individual case. This approach made your Honour frustratingly difficult to predict in prospect. No one left your Honour's court without the complete conviction that they had had a fair hearing according to law.

15 In words with which you may agree and in a style not dissimilar to your own, Max Beerbohm, the foremost drama critic of his day, expressed a preference for attending trials over the theatre and, whilst preferring the Kings Bench, said this of Chancery cases:

"There is a certain intellectual pleasure in hearing a mass of facts subtly wrangled over. The mind derives therefrom something of the satisfaction that the eye has in watching acrobats in a music hall. One wonders at the ingenuity, the agility, the perfect training. Like acrobats, these Chancery lawyers are a relief from the average troupe of actors and actresses, by reason of their exquisite alertness, their thorough mastery (seemingly exquisite and thorough, at any rate, to the dazzled layman). And they have a further advantage in their material. The facts they deal with are usually dull, but seldom so dull as facts become through the fancies of the average playwright. It is seldom that an evening in a theatre can be so pleasantly and profitably spent as a day in a Chancery court." [4]

16 Your Honour also always evinced a great love for the theatre of the law, albeit with a more discerning eye for the verbal and tactical gymnastics of counsel.

17 Your Honour's long service as a judge of the Equity Division has meant that your Honour's judgments cover the entire range of that diverse jurisdiction. You have delivered judgments on patents and trademarks, company takeovers, special investigators, disclaimers by liquidators, the disqualification of company directors, the validity of meetings, the efficacy of a deed of charge, the interpretation of contracts, the incidents of a joint venture, the interpretation of wills, the fiduciary obligations of solicitors and partners, the law of landlord and tenant, the role of equitable rights under the Torrens system, the interpretation of superannuation trust deeds, the law of estoppel by convention, the rights of patients to access their medical records, the requirements for the admission of documents into evidence, too many permutations of Family Provision Act conflicts to mention and numerous other matters covering the full panoply of equity jurisprudence.

18 Your Honour brought to the appellate process your long experience as a trial judge and emphasised the respect required of an appellate court for judicial discretion. However, your elevation was accompanied by a noticeable restriction on your Honour's usual list of conversation topics. We all lost the benefit of your running commentary on the inadequacies of the Court of Appeal.

19 This appointment broadened your Honour's caseload: returning to an early practice with personal injury law, where your Honour displayed a compassion for plaintiffs that few had predicted. In your three years on the Court you delivered judgments of significance on such matters as the law of defamation, the liability of public authorities and the law of fiduciaries, notably observations about the threat to proper principle occasioned by the restitution industry.

20 "Designation of a relationship as fiduciary", you said, "is not a signal for exercise of judicial bounty"[5]. No one else has put it quite like that.

21 In similar style, your Honour rejected the proposition that it was negligent for two parents to go to sleep at midnight on the basis that it was not reasonably foreseeable that the guests at their teenage son's party would attempt to reignite a barbeque at 2.00am and proceed to douse it in methylated spirits. Your Honour produced the definitive judgment on what was reasonably foreseeable conduct by teenage males in such circumstances. You identified as foreseeable: "Horseplay, leapfrogging, dancing on tables, swinging on tree branches and arm wrestling"[6] but not throwing metho on a barbeque.

22 I know that all the judges of the Court and the profession as a whole are grateful that your contribution is to continue. I could not be more pleased personally that your Honour has agreed to return as an acting judge of the Court, to sit both at first instance and on appeal. Your continued presence will maintain the strength of this Court.

23 As is reasonably well known, I have more than a passing interest in legal history. I have, accordingly, particularly appreciated our own exchanges on historical matters. Your Honour's breadth and depth of knowledge in this regard is awe inspiring. You are able to summon from your prodigious memory a broad range of anecdote and information about British and Australian legal history, usually replete with full quotation.

24 In this, as in so many respects, the entertainment and educational value of interaction with your Honour has always been of the highest order. Inevitably, in the future, that interaction will be less frequent, albeit not absent. Insofar as it is reduced I, like all your colleagues, will miss, to that extent, the way that your joy for language, for history and for the law has enriched all of our lives.

25 **MR M SLATTERY QC, PRESIDENT, NEW SOUTH WALES BAR ASSOCIATION:** On behalf of the New South Wales Bar I farewell your Honour from the bench of this Court and thank your Honour for your years of dedicated service to the law in this State.

26 The retirement of any member of this bench resembles the passing of an age. Everything will be just that little bit different after you are gone. In your Honour's case the change will be keenly felt because of your Honour's rigorous intellectual life and unique sense of humour. Your Honour's contribution to the law in this State started as a solicitor and a barrister.

27 After a time at Allen Allen & Hemsley your Honour came to the Bar in 1966. You soon became a much loved member of the tenth floor of Wentworth Chambers where Ken Hall, one of the great clerks of that era, helped launch your practice. With your Honour's typical modesty as a junior you could

never quite understand in those days why your services were always so much in demand by senior counsel. You had a practice with an essentially equity flavour but, as with all great advocates, you did everything that came your way.

28 Despite the success of your junior practice it is said that it took the Honourable Trevor Morling to overcome your natural modesty and persuade you to take silk after twenty years in 1986. As senior counsel you blossomed. Your own special combination of inexorable legal logic and care for your clients placed you much in demand, so much in demand that solicitors could not always get you. Your Honour was then appointed to this bench in 1988.

29 Your Honour loved the Bar. When you left your Honour was heard to say, "It's such a good life. Don't tell too many people. They'll all want to do it." Your Honour further explained, "It's the last refuge of the true eccentric." Your own life on the bench perhaps proves that the bench too has one or two eccentrics.

30 Once your Honour went to the bench it was very obvious that you greatly valued the work of the Bar before you in court and your long-standing personal friendships with individual members of the Bar. All the same, your fondness for the life that you had left always exhibited a healthy scepticism. Some years ago your Honour travelled to France. Rather thoughtfully you sent a postcard to a former Bar colleague. The postcard depicted in close up the medieval gargoyles facing out from the roof of Notre Dame Cathedral in Paris. On the card you simply wrote "Thinking of you always."

31 Your Honour brought many things to the bench. Special among them is your sense of humour. To remember your Honour's judicial humour is to capture an instant in one's own life. Your Honour's humour is the humour of the moment, this often a moment of insight into all human pretension and absurdity. Your Honour's remarks are captured and fondly remembered and then savoured by the profession in joint reminiscences for years. These moments often celebrate your Honour's deep sense of humility. One such moment is forever remembered by one senior counsel who was appearing before your Honour in an interlocutory application in chambers some years ago. All counsel were ushered into your Honour's chambers. Seated, your Honour commenced to read the court file. It took some time. Counsel remained standing for a period. One of them then said, "Does your Honour mind if we sit down?" To this your Honour said, "Feel free. You can kneel if you wish." As if that wasn't enough your Honour then added, "But I shouldn't offer you those temptations."

32 No one can really quite classify your humour. It is droll. It is mordant, it is dry, but above all it shows a unique appreciation of the incongruous - a quality probably essential to all judicial life. Shortly after you came to the bench and when Justice McColl was editor of Bar News when she was at the Bar your judicial sayings were spread through a special column, as the Chief Justice has said, entitled "Brysonalia".

33 Your Honour has a rich intellectual life which does not just reside outside the law. It is constantly on display in the rich humanity of your judgments and is seamlessly connected with your professional work as a judge. To many of us your Honour's interest in the first and second crusades and the hundred years war would appear to have only a distant relevance to the Monday companies list over which you presided so successfully for years. To your Honour these were essential background to assist in a proper understanding of the modern corporate and business mind.

34 On the bench your Honour has always been a model of judicial gravitas and reserve. No one has the slightest idea of what your politics are although you have never been heard to propound any radical views. Behind the scenes there is much which is simply impromptu in your Honour's approach to life. This should not perhaps be a complete surprise in one with such a deep love of poetry as your Honour. To make a point to your judicial colleagues you will occasionally pull out a little black book and from it recite an apt piece of verse or put on your Soviet Air Force cap and act out the issue. Your judgments, too, have long shown the same playfulness with language. In *National Australia Bank Limited v Italo Australian Club Limited*, decided in your first year on the bench, your Honour said this about the conduct of the then State Rail Authority:

"In pursuing this opportunity to obtain rental revenue the SRA took little notice of the signals displayed by persons not on its staff and proceeded on iron rails to a timetable and a destination known only to itself."

35 Yet again in *Gosper v Gosper*, a *Family Provision Act* proceeding, your Honour observed of the testator that, "His life would furnish new scenes for The Rakes Progress by Hogarth." Without insult to the family here your Honour clearly conveys the coded communication, "The testator was a rotter."

36 In another matter, *Moon v James*, your Honour described the defendant's personality and place in the family hierarchy without giving any offence by saying, "There would be few debates in which the defendant would prevail and few minds he could ever overbear or persuade."

37 Your Honour's love of language occasionally led you into drafting judgments with rather longish paragraphs and sentences peppered with semi colons. Last year this provoked one of your fellow judges to offer to give you the Bret Walker Award for complex syntax.

38 Your interests also embrace the great questions of philosophy - about what is and what is logically possible. If any of us too have ever tried to imagine the possibility of a universe in which equity judges led a calm, measured and balanced life then of necessity your Honour would be in it. You exemplify that in everything you do. Two years ago you holidayed in the Galapagos Islands. Last year you went walking in the Bay of Fires in northern Tasmania.

39 There are many differences between equity and common law judges. Some of these are more obvious than others. One of these is their luncheon habits. By long tradition common laws judges have held a Monday judges' lunch. In equity things were always different. It is not a widely publicised fact but when your Honour was first appointed to the equity division regular judges' picnics were initiated at Lane Cove National Park. For your Honour this represented a unique problem: How would you be able to keep the general public away whilst you all discussed the rule in *Dearle and Hall*? Your Honour solved the problem by making up a sign which has been placed ever since in front of these picnics. The rest of the time it sits in your Honour's chambers. With your Honour's signature genius for metaphor the writing you crafted onto it simply says, "Dried Fruits Conference."

40 This type of judicial strategy doesn't always work. A few years ago your Honour checked into a hotel for a judges' conference in Melbourne. When asked at the desk why you were visiting the State you rather guardedly explained, "I'm here for the dried fruits conference." Overhearing this, a woman guest next to you said excitedly, "How delightful. My husband grew up in Mildura. We've always wanted to see a dried fruits conference."

41 Your Honour's taste in signs is even more exotic than this. One in your chambers taken from the nineteenth century German poet and philosopher, Friedrich Schiller, presents a special mystery and reveals your delicious sense of incongruous ambiguity. Written in German it reads, "Mitt der dummheit kampfen gotter selbst vergebens." The German translates literally as "The very gods themselves struggle with stupidity." This principle is becoming so useful in modern judicial practice that I understand that the Law Reform Commission is considering writing it into the *Civil Procedure Act*.

42 To many at the Bar your Honour's very courtroom image as a judge is shared with your long-serving and loyal associate, Carolle d'Argent, who joined you barely three months after you were appointed to this Court and has been with you ever since. Your personal concern for the welfare of Carolle and that of all your tipstaves over the years is very well known. At least one of your tipstaves, Natalie Obrart, has come to the Bar. Inspired by you, others too have progressed through the law. As with all the treasured parts of your Honour's life there is a special brand of your humour reserved just for them.

43 About seven or eight years ago Justice Einstein and a number of judges of the Court became interested in acquiring Dragon voice activated software for dictating judgments. Whilst your Honour is no Luddite you had a firm view about the effect that this development was likely to have on your own much loved staff. When asked by a fellow judge, "Why aren't you taking up the new voice software?" you simply said in an unreconstructed moment, "Why should I get a dragon when the one that I've got does such a great job?"

44 Your Honour sat in all the various work that equity practice can provide. From specific performance suits to trusts and public law your Honour took pleasure in mastering the full range of work in the division, producing detailed and well reasoned judgments which developed the law in every field. Although the corporations list was not seen as your natural habitat when you first went to the bench you made a significant contribution to the law of takeovers and schemes of arrangement. You brought

your sensitive understanding of human nature to the immense number of Family Provision matters that you adjudicated.

45 Your Honour always felt the challenge of trying to bring order into the law. Some years after Walton's Stores and Maher was decided by the High Court your Honour tried to map out the entire law of estoppel to attempt to find some order in it. Your Honour later confessed that you couldn't. At about the same time you could often be heard reminding counsel who were seeking to amend process to add a plea of estoppel: "It is not yet compulsory to include an allegation of estoppel in every pleading".

46 Your Honour was utterly unflappable on the bench. Much of your work was in property law and occasionally that required your Honour to go on circuit. When he was at the Bar Justice Harrison and I conducted a property case before your Honour at the Local Court house in Temora. The court went to Temora so a proud and elderly defendant did not have to travel to Sydney. The case was memorable for your Honour's patient resignation in the face of adversity. Whenever either bench or Bar asked this defendant a difficult question the response came back from the old man, "What would you know, you aren't 90 yet." Your Honour didn't flinch.

47 It could never be thought that your Honour's good nature meant that your Honour would not be absolutely firm when required. Your Honour has sent the Sheriff to arrest parties in contempt of the Court's orders but even when being firm your Honour's style was unique. Once faced with a persistent questioner at the bar table your Honour ruled, "I reject that question". When it was repeated your Honour immediately said, "No, I've told you I reject that question". When counsel had a third go your Honour simply said, "If you ask that question again I'll leave the bench."

48 Your Honour's appointment to the Court of Appeal in 2003 was itself a celebration of your judicial achievements. You were quite amused by the fact that at the age of sixty-seven you had become the oldest ever appointment to the Court of Appeal. Your Honour has the prodigious capacity for work which so typifies this bench. You became as hard-working a member of that Court as you were in the Equity Division. A rather out of date judicial handbook in this State advises that in their last weeks on the bench retiring judges should stay off the bench and confine themselves to quiet administration and judgment writing. We can infer what your Honour thinks of this advice. Your Honour took a motions list yesterday and is involved in handing down a judgment today.

49 Your judicial style and sense of humour all adjusted themselves to your new way of life on Appeal. Being deprived of live witnesses barely altered your outlook but your experience as a puisne judge gave you a healthy resistance to the temptation to interfere with interlocutory or discretionary decisions of trial judges.

50 More difficult though was the subject of your accommodation in the Court of Appeal. You now occupy the chambers once used by the Honourable Roderick Pitt Meagher when he was on the bench. No one can remember who had them before that. When Justice Meagher was in residence the chambers displayed some of the cluttered ambiance of a Persian Bazaar. There is something about this set of chambers. On taking over your Honour erected a prominent warning sign that is perhaps your Honour's judgment upon all its known occupants. In large letters the sign simply reads "Tact Free Zone". So far it has been difficult to find any permanent successor to your Honour for this room.

51 The Bar wishes you well in retirement. We hope that in the next few years you will be able to get to the odd dried fruits conference. You have much to look forward to in the years to come. After all, the evidence called before you strongly suggests that when you get to ninety at last you will know everything that matters.

52 **MR G DUNLEVY, PRESIDENT, THE LAW SOCIETY OF NEW SOUTH WALES:** It is a great honour to join with distinguished members of the bench, the Bar and the community this morning to mark your Honour's retirement from the judiciary and to celebrate your outstanding legal career.

53 Just over twenty years ago, in May 1986, your Honour's family, friends and colleagues gathered in this very Court to celebrate your appointment as a judge of the Supreme Court of New South Wales.

54 At the time your Honour modestly apologised for being quite a dull subject for speech makers, having done "very little of colour or interest."

55 In preparing for today's speech, speaking to solicitors who have come before your Honour and those who worked with you in your many legal manifestations over the years, this has been found to be very far from the truth.

56 As we have heard, your Honour grew up in the inner west of Sydney before it was a real estate hot spot for young professionals such as solicitors.

57 Upon leaving school your Honour juggled full-time work in the Public Service with part-time lectures at Sydney University.

58 During these formative years I am told that your Honour was not only honing your legal knowledge, skills and experience, your unique, dry and often "cheeky" sense of humour was also beginning to flourish and to infiltrate the legal circles of Sydney.

59 Your Honour continued on to pursue what can only be described as a well-rounded legal career. In the words of one colleague, "He left no legal avenue unexplored".

60 Your Honour worked across courts and jurisdictions. You worked in government, public and the private sectors across areas of litigation and a variety of specialisations and you held positions as a clerk, solicitor, barrister, judge, mentor, confidante, adviser, husband, father and friend.

61 If one wanted to demonstrate the breadth of possibilities a career in the law can offer one would simply reference your Honour's resume but despite your resume, your rank and robes, people still refer to your Honour as a "lawyer's lawyer" and a true "man of the people".

62 Your Honour has helped to educate the legal profession by giving up your time to present seminars on issues relevant to litigation and mediation. You have remained focused on serving the community and the law and in doing so have done justice both in and to this honourable Court.

63 So, far from lacking colour and interest, your Honour, I find that you are a speech maker's dream. Your career has been characterised by humour, passion, commitment, camaraderie and the pursuit of justice and your success is based on a well balanced mix of talent, ability and good old fashioned hard work. These are certainly the ingredients for a colourful speech and for a truly fulfilling life.

64 Your Honour, if I may conclude by once again referencing your swearing-in speech of 1986, you noted that you had run no marathons and climbed no mountains, published no learning and composed no songs. Retirement will surely give you space and time needed to pursue these interests so the solicitors of New South Wales look very much forward to undertaking the Sydney Marathon in September this year. We also look forward to the premiere of the first ever Brysonian Concerto.

65 Your Honour, on behalf of the nearly 21,000 solicitors of the State of New South Wales I would like to humbly extend our gratitude for the contribution which you have made and the dedication which you have shown to our profession. Not only will we miss the rigour and honesty you brought to the bench but also the sparkle of your wit and the relentlessness of your intellect. Your retirement will leave a considerable void in the judiciary but your legacy will be long and fondly remembered.

66 On behalf of the solicitors of New South Wales I convey our best wishes to you and your family and join with you in celebrating your retirement.

67 **BRYSON JA:** Chief Justice, I thank you for this occasion of ceremony and I thank those who have been so kind as to attend and Mr Slattery and Mr Dunlevy who have made such kind observations and, indeed, such searching enquiries and have found such generous things to say.

68 There are many friends and supporters here and I thank them also. Foremost is my wife, Edwina, who shared my life throughout almost all my career. I'm happy also to see our four daughters, our sons-in-law, our seven grandchildren, my sister Jennifer and my brother Peter and others close to me. All will now see more of me.

69 My father taught me wide-ranging reading of history, my mother taught me poetry; neither is a

career. I have had good fortune in my career, which has taken a course which was once common but has become quite uncommon. I decided to work towards the Bar when I entered high school aged 11, although I had little idea what barristers did. It was more attractive than the alternatives set before me which were teaching and the Presbyterian clergy. A part of my good fortune has been to attend Fort Street Boys' High School. My education was free, secular and compulsory, high principles, and I'm grateful. This was my only patrimony and it proved sufficient. I came into the legal world without introductions or friends, well-placed uncles or such advantages. I found a bounty of warm friends and helpers and I tried to repay by being helpful to beginners from time to time.

70 I began working in the State Public Service in January 1954 when I was 16. Except for short holidays I've been working for my living at all times since then. All my university study was part-time and when I hear of those who lived in college and achieved high distinctions and left with the warm favour of Professor Shatwell an inner voice says to me "as well they might."

71 I first worked on the site of this court building in the Department of the Attorney General and Justice as assistant record clerk doing very humble things, and took the opportunity to read all the Ministers' letters in and out to get some idea of how the community was governed. I attended lectures in the mornings and evenings at the Law School in Phillip Street. There was no possibility of leisure or time for reflection.

72 Next year I was assistant staff clerk and became adept in calculating recreation leave balances. I proceeded to the State Crown Solicitor's office. While my contemporaries were acquiring culture and wisdom in academe, examining the unexamined life and distributing the undistributed middle, I was attending taxations of costs before Mr Deputy Prothonotary Cyril Herbert, a taxing experience in at least two senses, in multiples of six shillings and eight pence with typewriting at one shilling per folio of 72 words. Without any training I was given responsibility for managing litigation, scores of very large and very small law suits and almost all about motor accidents. This was a strange task to give to an untrained undergraduate aged 18 but I learnt a lot of practicalities in a short time. I read a lot of medical reports and files about injuries, minor to catastrophic, when I was 18 and 19 and this gave me habits of caution and a profound sympathy for disability.

73 I travelled the State by steam train to instruct counsel before District Courts at remote places before impatient judges who plainly yearned for home. There were no funds for air travel. District Court judges in that age ranged very widely in ability, from polite scholar gentlemen with learning to grace any court to those who entered court at 10.00am purple with fury and stayed that way all day. Over several years from 1956 I often instructed Kenneth Gee in cases in Wollongong District Court before a judge whose personality was as difficult as any I've encountered. I classify that judge, long dead, as a perverse genius. Ken Gee showed me the appropriate conduct of a barrister in difficult situations. I believe that he is here today.

74 I also had the management of some appeals, including High Court appeals, Commissioner for Railways and Scott about the action *Per Quod Servitium Armisit*, now utterly forgotten, and *Jones v Dunkel* whose fame continues. I've heard *Jones v Dunkel* misquoted every week of my appellate career. We lost three to two and we had Dixon on our side.

75 My academic career did not flourish, nor did I spend time running four minute miles or whacking leather on willow. I attended to earning my living. No professor ever saw any use for me. My feelings for most of them were reciprocal but I greatly admired Benjafield, Parsons, Stone and a philosophy lecturer called Ilmar Tamello who was obviously trying to teach me something important, although I could never find out what it was.

76 I also had some splendid lecturers from the Bar, superbly Bob Hope and Ken Jacobs. Most Law School academic staff in that age displayed disdain for part-time students, while I wondered that they found employment of any kind. By passing Admission Board examinations as well as university examinations I was admitted to the Bar in November 1959. Edwina was there and Ken Gee moved my admission. I finally satisfied the professors and graduated not long after that. A needless Alexandrine ends the song, that, like a wounded snake, drags its slow length along.

77 I mainly learnt law by doing it but I read some marvellous books on the way. Justice Hutley told various people that I learnt law from Tidd's Practice, which was commended by Uriah Heep to David Copperfield, "He's a great writer, that Master Tidd." The fact is, however, I have never read Tidd's Practice. The first law book I ever read was Henry Maine's Ancient Law which I bought from Tim

Studdert in 1954 with a job lot of first year text books he'd just finished with, I think I paid him ten pounds. Of all the people now associated with the Court Justice Studdert is the one I've known the longest. Henry Maine showed me the interaction of legal rules with the workings and development of human society within cultures, and interested me in learning some law which was closer to life's practicalities than the law Henry Maine dealt with. I have always looked at law from the perspective of its history, and during quiet periods early at the Bar I read Holdsworth's History of English Law, much of it twice over.

78 I left the government service at the end of 1959 and worked in two very different law offices, a small family firm doing the legal work of ordinary suburbanites to whom every expenditure was a challenge, and several years in the litigation mill of Allen Allen & Hemsley where the clients were large corporations from Australia and overseas, banks, charities, churches and schools, which were pillars of society governed by partners of the firm. This introduced me to the big end of town and large scale litigation, hearings that lasted months and years.

79 I actually embarked on practice at the Bar in February 1966, the day before the Commonwealth Government called in all the money and burnt it. I plodded steadily on doing a great amount of work which was very important to all concerned but unspectacular to those not involved. My work at the Bar drew me a certain distance into constitutional law, a fascinating and fluent subject, more unregulated and difficult to predict the closer it is examined. Constitutional cases tend to start at the top, so less than most other fields is constitutional law polished in the appellate process. I encountered the arcane recesses of s92 and s90, Excise. I saw something of the electoral and senate litigation of the Whitlam era. Some advice which I joined with McHugh QC in giving to the State about its legislative powers appears to have won me a modest place in history as it is mentioned in Anne Twomey's Chameleon Crown. To my mind the advice then given was as obvious and unremarkable as anything I have ever set my name to, yet the historian found it interesting.

80 I had one or two brushes with history through membership of the Tenth Floor of Wentworth Chambers. Adulation rang out at our dinner to celebrate the appointment of Sir John Kerr as Governor General. Sir John Kerr and the then Prime Minister had both practised on the Tenth Floor. The Prime Minister spoke well. While ladling butter from alternate tubs Stubbs butters Judkins, Judkins butters Stubbs.

81 Late in my bar career I had many cases about professional duty, a long series of disaster stories in which my clients diverted trust accounts, built dams which fell over, buildings the facades of which collapsed in the street, put houses on the wrong block and gave the wrong horse pills to racehorses which promptly laid down and died. The expression in the trade was "became recumbent." I was happy to leave this for the Equity Division. There are only 10,001 equity suits and when 18 years had passed I had heard them all and I was able to find my way through them with no great difficulty. In my career I have given many judgments, 56 volumes like this one, about 25,000 pages. I don't think they will trouble posterity a great deal. W H Auden described the poet on the great day of judgment:

82 "God may reduce you to tears of shame on judgment day, reciting by heart the poems you would have written had your life been good."

83 I suppose judges are given a law report with the judgments they should have written. My defence is that I wrote them as well as I could in the circumstances.

84 At 67 I was the oldest person ever to have been appointed to the Court of Appeal. I had to revisit law which I had not looked at for a while. It was challenging but amenable to hard work, energy and application. Appeals brought me back to personal injuries litigation with which I had had so much to do in an earlier era. The juries had vanished, changing everything. I find litigation about personal injuries very harrowing, the impact on lives and feelings is so profound. I hope it's true that negligence law makes people more careful in their behaviour. The thought that this may be true has assisted me. On the Court of Appeal I think of myself with T S Eliot:

"No, I am not Prince Hamlet, nor was meant to be, am an attendant lord, one that will do to swell a progress, start a scene or two, advise the prince; no doubt an easy tool, deferential, glad to be of use, politic, cautious and meticulous, full of high sentence but a bit obtuse."

85 Those of you who know it may finish the passage if you think it's appropriate.

86 As I said when I was sworn in, little I have done has been spectacular. I have continued in that line, left the mountains unclimbed and rivers unswum. I have not hammered out judgments for the instruction of posterity, discerned any overarching principles or bothered posterity with insights into law and society, written text books, served on lofty commissions. I don't tutoye Archbishops or make causerie with Vice Chancellors, never so much as confer a degree. There has really been nothing for it but to get up early and go to work every day.

87 I find legal work very laborious. I have never written with facility. My object has been to produce work conforming to the current authorities with appropriate attention to the arguments put forward. It has not been my object to display originality or brilliance, but to come to grips with and resolve what the litigants understood to be their controversy and their problem, work of good artisanal quality, to be the good of which the best is mysteriously the enemy. Judges make law but it has not been my object to make any. There are many judges and the chaos if more than a few of them made some law is alarming. I know that the mood, the approach and the outcome change greatly with generational changes and I have seen much of this transformation. The Court and the law have made immense transforming journeys while I have been observing them. I have not been happy with all legal rules, and I think of the *Evidence Act* 1995 as a late work of the committee which designed the camel.

88 I first had some colleagues of whom I was slightly awestruck and I mention Hope and Glass and Needham. There are others I forebear to name as they are still with us, people significantly older than I schooled in the old practice before 1972. That pleading system had a high value which has not been destroyed by my perception that the present system is a better one.

89 I know I don't always talk generously about others. I know I may have given offence on occasion by sacrificing civility in the interests of a sharply turned phrase. I apologise to any who have suffered in this way but I cannot help myself. I have always found it difficult to think generously about my contemporaries. It is easy to reduce people of one's own age to the human scale, but as time has passed there are more and more people on the Court and at the Bar who are far younger than I and I found it easier to perceive and admire high ability, which to my observation is abounding in the legal world in Sydney. The careers of people much younger than I who are joining the Court now fill me with optimism.

90 I value my opportunity to serve the community according to the judicial oath which has guided my life and work for over 20 years. I have tried to respect the confidence which the community reposed in me to take this part in its government. Without just disposition of controversies there would be very little public order. Justice under law is my way of contributing to the peace and order of the community and seeking the commendation which a high authority gave to peacemakers. My admiration for the Court as an institution and for its members as my colleagues is profound. As I did at the Bar, I have always found on the bench colleagues to admire, who think and work with disconcerting speed and facility. I have never been involved in any conflicts, quarrels or arguments with any member of the Court which have descended to a personal level. The spirit in which its members approach their duties has always seemed to me to conform to the ideals of the institution; high purpose and scholarly ideals tempered with good humour and humane attitude. An aphorism says "no human institution looks good from the inside." This is not true of the Supreme Court.

91 Then I must say how well motivated and effective the Court's staff are; almost everybody who works here in any capacity has shown that they value the opportunity to make the Court work well in the interests of justice and the interests of the community. I've hardly ever known anyone who did less than their best. I've been particularly well served by tipstaves and researchers and most of all by my associate, Carolle d'Argent, who has been with me for almost all my appointment. She's told me what I should do, what I should not do, what I have left undone and the order in which I should write the unwritten. Without her attention to practicalities while my mind has been lost in the abstractions, I may not have sustained this office for as long as I have.

92 For everything there is a season and a time to every purpose under heaven, a time to keep and a time to cast away. I have spent over 20 years here. It's two days since I turned seventy. It's time to go.

END NOTES

[1] Fisher & Lightwood's *Law of Mortgages* 9th ed London Butterworths 1977 at p37.

[2] *Daniels v Pynbland Pty Ltd* NSW Supreme Court, unreported, 12 April 1985.

[3] Fisher & Lightwood's *Law of Mortgages* 10th ed London Butterworths 1988 p57 fn(m).

[4] Max Beerbohm *Yet Again*, William Heinemann, London, 1951, "Dulcedo Judicorum", pp275-276 accessible at <http://www.worldwideschool.org>.

[5] *Blythe v Northwood* [2005] 63 NSWLR 531 at [211].

[6] *Parissis v Bourke* [2004] NSWCA 373 at [52].