OPENING OF LAW TERM JUDGES' DINNER
SUPREME COURT OF NEW SOUTH WALES
31 January 2008

Introduction

1. When inviting me to speak this evening, the Chief Justice made two points. The first was that he saw my remarks as contributing to an understanding of the Supreme Court's history. His second point, which tells you something about the Chief Justice's idea of history as an intellectual discipline, was that I should bring my stiletto with me. The stiletto was not, I gathered, for use on my companions at this dinner, but on the reputations of your predecessors. Through excessive use in earlier days or lack of use in recent times, the stiletto is not as sharp as it once was and for that I apologise.

Sir Frederick Jordan

2. As a law student, I worked in the old cramped Supreme Court Library, often along with Bob Ellicott, in preference to the Law School Library. Sir Frederick Jordan was Chief Justice at that time. He had been Lecturer at Sydney University Law School, not only in Equity but also in company law, bankruptcy, probate, divorce and admiralty law. His Chapters on Equity were for many decades the most authoritative exposition of Equity in NSW. But his outstanding reputation as Chief Justice rested mainly on his judgments on the common law and statute for, in those days, Equity appeals generally went direct to the High Court rather than through the Full Court.[1]

3. My main recollection of him as Chief Justice was when I attended the hearing in the Full Court of an application for prohibition by Cousens, a well-known Sydney radio broadcaster, who had been charged with high treason for aiding and assisting Japan in World War II. The argument presented by J.W. Smyth, then a junior counsel and later the leading advocate at the NSW Bar, was that the courts of the State had no jurisdiction to try a case of treason committed outside the State. Sir Frederick, like Sir John Latham in the High Court, reminded me of an ascetic schoolmaster. He attended to Smyth's argument with an air of mild disdain and asked Smyth why he thought it necessary to take the Court "crabwise" through the facts. The application was refused.[2]

4. Sir Frederick kept a notebook in which he listed a series of fundamental propositions along with the supporting authorities. Rumour had it that the notebook fell into the hands of his Associate K.E. ("Barney") Walsh, a Rugby Union halfback and a member of the Bar who practised in the lower courts. The notebook was lost to posterity. One characteristic of the Jordan judgments was that occasionally the cases cited did not support the proposition stated. For this we can blame the notebook.

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[1] In Sir Frederick's time, NSW had outstanding Equity judges including Sir John Harvey (Sir Frederick's life-long friend) and Mr Justice Reginald Long Innes.
[2] *Ex parte Cousens re Blacket* (1946) 47 SR(NSW) 145.

5. It has been suggested that Sir Owen Dixon's reference to Sir Frederick's peculiar views on federalism[3] was based on Sir Frederick's judgment in *Ex parte Sinderberry*[4] which was overruled by the High Court.[5] There, Sir Frederick, in holding reg. 15 of the National Security (Manpower) Regulations to be *ultra vires* the Act and the defence power, said that the regulations would

> "if valid, reduce the population of Australia to a state of serfdom more abject than any which obtained since the middle ages".

Latham CJ and McTiernan J, in upholding the regulations, pointed out that they were copied from the United Kingdom Emergency Powers legislation.[6] Although Sir Frederick's view was extreme, it was not a peculiar view about federalism.

6. Sir Frederick's judgments, particularly on the wartime National Security legislation, demonstrated his commitment to due process, the rule of law and the protection of civil liberty, *Reid v Sinderberry* being a notable example. In 1943, Sir Frederick contributed a short note to the *Law Quarterly Review*,[7] pointing out that the High Court decision in *Lloyd v Wallach*[8] supported the majority view in the controversial decision of the House of Lords in *Liversidge v Anderson*.[9] Sir Frederick relied on *Lloyd v Wallach* in decisions on the validity of the National Security legislation.[10] On the *Liversidge v Anderson* question, as distinct from the validity question, the *Lloyd v Wallach* judgments were not altogether convincing and it is surprising that, in the light of his views on liberty of the individual, Sir Frederick thought it worthwhile to bring *Lloyd v Wallach* to the attention of the LQR without further comment.

7. The flavour of Sir Frederick's views about federalism may be detected from his curious diagrammatic sketch of constitutional powers in *Ex parte King re University of Sydney*, his treatment there of State powers when unaffected by Commonwealth powers as "reserved powers" and his treatment of Commonwealth powers as "special powers".[11] These expressions confirm reported views that he had a "States rights" mindset. It may be that the Dixon reference was to that mindset.

Early recollections of the Supreme Court

8. My first professional experience of the Supreme Court began in the days when I was an articled clerk with Clayton Utz and instructed counsel. In one case, our country principal acted for a gentleman (I think he was a bookmaker) who was "warned off" by

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[3] Sir Owen Dixon's speech on his retirement as Chief Justice of the High Court (1964) 110 CLR viii-xiii.
[4] (1944) 44 SR(NSW) 263.
[5] *Reid v Sinderberry* (1944) 68 CLR 504. esp. at 510-511.
[6] Ibid at 510.
[7] (1943) 59 LQR 7.
[8] (1915) 20 CLR 299.
[9] [1942] AC 206.
[10] *Ex parte King re The University of Sydney* (1943) 44 SR(NSW) 19 at 29. see also *Ex parte Walsh* (1942) 42 SR(NSW) 125 at 128-129.
[11] (1943) 44 SR(NSW) at 26-27 (where the validity of the National Security (University Commission) Regulations were in question; they authorised the Director-General of Security to determine the number of students that might be enrolled in any faculty or course).

the Northern Rivers Jockey Club at Grafton Racecourse for some form of unbecoming conduct. His conduct became the subject of an adverse piece in the local newspaper *The Examiner*. He sued the paper for defamation. A well-known identity, Vindin Blood, was Chairman of the Jockey Club and of *The Examiner* board of directors. We instructed Mr W.R. (Bill) Dovey QC, one of the leading advocates of the day, to lead for the plaintiff. Bill Dovey was a tall, formidable, dominating figure with a personality to match and had a deep, rich, resonant voice. He had been a schoolteacher who, like most people who know Latin, had a fine command of English, including the vernacular. He was the father of Margaret Whitlam and of young Bill who became a Family Court judge. In conference, he told us that a man who is "warned off" a racecourse is regarded as a "pariah", a word which he kept repeating, using the resonance of his voice to full advantage. He was one of the old jury advocates who would make use of the conference to rehearse key passages of his address to the jury.

9. On the day fixed for trial before a judge and jury in the Supreme Court, as we entered the Court, Bill recognised Vindin Blood sitting on the seats on the verandah at the King Street entrance. He bowled up to Vindin and said to him in a voice which could be heard throughout the CBD:

"Vindin, old fellow, we're going to empty the shitcan right over your head".

Within an hour, the case was settled on favourable terms.

10. My direct association with the Supreme Court began with my appointment in 1950 as Associate to David Roper, who was Chief Judge in Equity, and had Chambers and a large courtroom at the rear of the Hyde Park Barracks. Mr Justice Bernard Sugerman who also sat in Equity and as well in the Land and Valuation Court, had Chambers and a court room in the area which is now occupied by the restaurant known as Hyde Park Barracks Café.

11. The Equity judges were rather isolated from the common law engine-room of the Supreme Court in King Street. This isolation was reinforced by the jurisdictional divide. Until the Supreme Court Act 1970 was introduced, NSW was a pre-Judicature Act museum piece. Sir Kenneth Jacobs correctly described the 1970 Act as "The Great Leap Forward to 1875". The pre-Judicature limits of equitable jurisdiction were arcane and not readily ascertainable. Indeed, they were only ascertainable by reference to the old cases and practice books such as Daniell's Chancery Practice, no legal publisher regarding it as worthwhile to publish for such a limited market as NSW. In those days, we were dependent on legal books published by English publishers, except for practice books, annotated editions of statutes and texts on the Constitution. Much of the knowledge of these arcane equity points resided in the bosoms of a few members of the Bar. Because these points could be raised on a demurrer *ore tenus*, without advance notice to one's opponent at the beginning of a hearing of an application for an interlocutory injunction, there was plenty of scope for ambush. One of the casualties of the 1970 Act was the demise of the demurrer.[12]

[12] The demurrer still survives in the High Court.

12. Because I had friends who were associates in King Street, I saw more of the associates and tipstaves there than otherwise would have been the case, including Bartlett who began his career as a tipstaff with Nicholas J (Henrik's grandfather) and ended it with Sir Laurence Street.[13] Bartlett said that, when acting as a relieving tipstaff for Sir Frederick, he brought in a dissenting judgment of Sir Colin Davidson, the well-regarded senior puisne judge, Sir Frederick inquired "Is it a concurring judgment?" When Bartlett answered "No", Sir Frederick simply said "Take it away and file it with the papers".

13. Many years later, when I joined the High Court, Sir Garfield Barwick appeared to take a similar attitude to the judgments of his colleagues. In subsequent cases, when their judgments were relied upon in argument, he seemed genuinely astonished to discover what they had said.

14. To return, however, to David Roper. He had a fine mind and wrote lean, succinct judgments. He made few notes in his notebook. But when I removed the notebook at the conclusion of a hearing, there would be a sheet of paper on which the Judge had written mathematical calculations. His abiding interest was mathematics. His mathematical ability had brought him under notice in an inquiry into State taxation in the 1930s. He had a reserved personality and kept his associate at a distance, though at times he would talk frankly about counsel – generally identifying their shortcomings – and legal issues. When he did so, I felt that he immediately regretted having done so. The picture painted in *The Forgotten Memoir of John Knox*[14] of the relationship between Justice McReynolds of the US Supreme Court and his clerk Knox in 1936 conveys in an exaggerated way the elements of such a relationship. Although David Roper knew Sir Owen Dixon well, he told me that he had heard Frank Gavan Duffy argue a case in the High Court and thought that he was the finest advocate he had ever heard. You will recall that Dixon said of Gavan Duffy

> "If ever there was a man who could make bricks without straw in open court it was Sir Frank Gavan Duffy".[15]

This quality is not exhibited in Sir Frank's High Court judgments. But, after all, the making of bricks without straw is not a quality you expect in a High Court Justice. The Dixon biography suggests that Sir Frank did not make many bricks with straw.[16]

15. Bernard Sugerman was an extremely good lawyer. He had been a leading QC. His intellect was not matched by his skills as an advocate and, in the High Court, Starke J was unremittingly hostile to him. "Mr Sugerman, when will you cease pursuing your peregrinations around the orb of irrelevance?" was typical of Starke J's interventions during Sugerman's arguments in the High Court.

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[13] Bartlett also acted as tipstaff to Sir Kenneth Street and Sir Leslie Herron.
[14] (eds) Dennis J. Hutchinson, David J. Garrow, The University of Chicago Press, 2002.
[15] Dixon, "Upon Retiring from the Office of Chief Justice", Ayres, *Owen Dixon*, The Miegunyah Press, 2003, p. 18.
[16] Ayres, ibid at 57, refers to his "undistinguished record" and quotes the Dixon diaries as saying "he never liked sitting on the bench and he did as little as he thought necessary".

16. When Sugerman was appointed to the Arbitration Court, an appointment which preceded his appointment to the Supreme Court, it was reputed that Starke, on reading of the appointment in the morning newspaper, remarked that an additional appointment to the High Court would be required to cope with the flood of work that would result from all the erroneous judgments Sugerman would deliver. Starke was a very good lawyer in his early days as a High Court Justice but Sugerman was a more sophisticated and subtle lawyer than Starke. Barwick rightly said that Starke lived in a black and white legal world. He resented those who threw a web of complexity over the absolute propositions to which he subscribed. With Sugerman, every proposition was hedged about with carefully thought out qualifications.

17. Shortly after I came to the Bar, I was briefed with Bill Dovey and Gough Whitlam for the Crown in the prosecution of witnesses in the Royal Commission into the Liquor Industry conducted by Justice A.V. Maxwell ("Old Victor") for false swearing. Bill Dovey had been counsel assisting the Commission. I was briefed because Gough had entered on his Parliamentary career and the State Crown wanted someone to research some bizarre legal points, one of them being that the Commissioner was invalidly appointed in that he had not been appointed, as the statute required, under the Great Seal of NSW. In fact he had been appointed under the Public Seal of NSW. No one could find the Great Seal. Barwick appeared for Doyle Mallett, the licensee of Gearin's Hotel at Katoomba, and Abe Saffron. The trial judge and Full Court rejected the argument presented by Barwick on the ground that the reference to the Great Seal was a reference to the Public Seal.[17]

18. Old Victor was a man of great charm off the Bench but on the Bench he was noted for his sharp mind and acid tongue. Both were given full rein in the Commission. One of the victims was Barwick's brother who was a publican. In his address to the jury in one of the trials Barwick castigated Old Victor and said:

> "You might well think that the only resemblance between this Commission and a court of justice began and ended with the furniture in the courtroom in which the Commissioner sat."

19. When Bill Dovey became a Supreme Court judge, he came under fire from the publishers of the *Daily Mirror* for the time he spent at AJC Committee meetings in normal court sitting hours. His response was to say of the *Daily Mirror* in a subsequent case that no self-respecting citizen would wipe his boots with such a rag.

20. I appeared before him, when he was a Divorce Judge, mainly to argue property settlement questions. On these issues, he was impeccable - he accepted my submissions.

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[17] See *Saffron v Delaney* (1953) 53 SR (NSW) 80. (The Full Court held that the requirement in the Supreme Court and Circuit Courts Act 1900 (NSW) that judges be appointed under the Great Seal did not indicate a different seal from the Public Seal of NSW. The requirement in the Royal Commissions Act 1923-1924 (NSW) regulating the appointment of Royal Commissioners was in precisely the same terms.) Special leave to appeal to the High Court was refused on a constitutional ground: *Saffron v The Queen* (1953) 88 CLR 523.

Justice Asprey and Justice Else Mitchell

21. Two judges with whom I had read and worked closely were Ken Asprey and Rae Else-Mitchell. They were different personalities and did not like each other. Cynics said that they were both right and for completely convincing reasons. They were frequently briefed by Clayton Utz. So I often instructed them. One of the attractions of the old Denman Chambers was that Asprey's secretary was Pat McQueen to whose charms I succumbed. She worked also for Gordon Wallace. My frequent visits to the Chambers led to the inmates calling me "Mr McQueen". We married subsequently while I was associate to Roper.

22. Asprey was larger than life. He was generally referred to as "Aspro Jack" or by some of us as "The Grand Cham".[18] Conferences with him invariably involved stories of his endless successes, whether it be in the courts as a deadly cross-examiner, or on the cricket field as opening bat for Sydney University 1st XI or as an astute adviser to captains of industry and financial entrepreneurs. There was a character in one of Henry Cecil's novels about the legal profession in England, a senior junior by the name of Gillingham, who resembled Asprey in every respect but one – he was not opening bat for Sydney University. Working with Asprey was always great fun. He had a conspiracy theory for every case. Among those who read with him were Frank Hutley (he and Asprey would have been completely incompatible), Ken Jacobs, Tom Hughes and Gordon Samuels. Asprey was extremely generous in acknowledging to the instructing solicitor the contribution to the case made by his junior.

23. I knew all his stories. Indeed, I would have said that I knew them word for word but for Asprey's prodigious capacity to reinvent them as he re-told them. This capacity for reinvention led occasionally to an uncharacteristic uncertainty about the details of the story on which he had embarked. Then there would be a pause in mid-flight, so to speak, as he regrouped. On one such occasion, Mrs Cole, Pat's Chinese successor as secretary, who knew the latest version of each story, punctuated the silence by saying, "And then, Mr Asprey, you said …", taking up where he had left off. "Thank you, Mrs Cole, thank you" responded Asprey with elaborate courtesy. And thanks certainly were due to Mrs Cole because she had not been present on the occasion in question. Her knowledge of the incident was vicarious, derived solely from her employer's constant repetition of the story.

24. The accounts of the Grand Cham's triumphant cross-examinations were enhanced by Spy's famous image of F.E. Smith, a copy of which hung on the wall immediately behind and above Asprey's head as he sat at his desk. These accounts generally featured the words "When I rose to cross-examine, the witness went white with terror". Sometimes, as he uttered these words, he actually rose from his chair, making the most of his height and imposing figure and replacing the vision of F.E. Smith with that of his Antipodean counterpart.

[18] "Cham", a obsolete form of the *Khan*, formerly applied to the Emperor of China. Smollett in a letter to John Wilkes, 16 March 1759 (in *Boswell)* refers to Samuel Johnson as "that great Cham of literature" (see the *Oxford Companion to English Literature*, 4th ed, 1969 reprint p. 156).

25. Asprey spent an inordinate amount of time devising his cross-examination of a witness, especially the opening questions. He led me in a divorce case in which we appeared for the petitioner wife against the husband, a doctor, who, she alleged, was having an affair with a Miss Mellifont, a name which at once conjures up visions of Restoration comedy and the licentious world of King Charles II, the Merry Monarch in the 1660s. After much cogitation, Asprey decided that his opening question would be, as in fact it was:

"Doctor, you are a man with a very gross sexual appetite?"

To Asprey's and to my surprise, the doctor's answer was a robust and enthusiastic "Yes". This answer undercut much of the devastating cross-examination which was planned to follow.

26. Asprey took what was then an unusual approach to the interpretation of contracts, applying a contractual equivalent of the testator's armchair rule, a view of which Roper CJ in Eq. was critical. Asprey believed in a strong contextual approach which was by no means consistent with the literal or "plain meaning" rule that was then in vogue. Asprey was vindicated years later when Lord Wilberforce and subsequently Lord Hoffman emphasised the importance of the contextual approach to contract interpretation against a wider panorama or matrix of surrounding circumstances. The strong emphasis on the contextual approach to interpretation generally is one of the defining changes in judge-made law in the last half-century.

27. Not surprisingly, there were some doubts about Asprey's capacity to succeed as a judge. But his judicial performance was exemplary, resulting in his elevation to the Court of Appeal. He was at heart an actor and he acted the part of both a trial judge and an appellate judge splendidly. He was keenly interested in the stage, musical comedy and films. He had acted for American film and entertainment interests when he was with Minter Simpson before he was admitted to the Bar. He was related to the Aspreys of London, the jewellers.

28. As an appellate judge, he was a vigorous advocate of his point of view. On one occasion when another judge, I think it was Sugerman, withdrew a draft judgment agreeing with Asprey and circulated a judgment coming to the opposite conclusion, Asprey said to me

"the wretched fellow has changed his mind",

as if to assert that to change one's mind in pursuit of the correct answer was a sin beyond redemption.

29. Else Mitchell was a lawyer not an advocate. He was, with Nigel Bowen, a joint editor of the *Australian Law Journal*. They succeeded Bernard Sugerman as editor. The three of them were responsible for the Journal achieving a very high reputation. Else Mitchell's strength was in equity, property, company and constitutional law. He was knowledgeable in the intricacies of equitable jurisdiction and expert in hire-purchase agreements, bills of sale and insolvency. He had a remarkable, indeed a photographic memory, which enabled him to identify a case by reference to the volume and the page

number in the CLRs. He also had a quick and nimble mind which led some people to regard him as a youthful prodigy. His range of interests and the number of offices he held were quite extraordinary, as his entry in *Who's Who in Australia* reveals. He lectured in Australian Constitutional Law at Sydney University and was a prolific writer on a wide variety of topics, including historical as well as legal topics.[19] He was Chairman of the Commonwealth Grants Commission for 15 years.

30. He was Deputy Chancellor of Macquarie University when Barwick was Chancellor. He appeared in a number of constitutional cases in the High Court and the Privy Council. He was a Supreme Court Judge for 16 years and a Judge of the Land and Valuation Court. He would have been better placed on a Federal Court, had one existed then. My early success in *Davison v The Queen* was due to a brief which I inherited from Else-Mitchell. It was a constitutional case in which the High Court held a provision of the Bankruptcy Act invalid.[20]

Later recollections of the Supreme Court

31. The judge before whom I appeared most frequently was Charles McLelland, CJ in Eq, the father of Malcolm McLelland. Charles McLelland had taught Company Law at the Law School. He was a highly regarded judge, noted for his good humour and wit. It was a pleasure to appear in his court. For some time the court reporter assigned to his court was Doug McClelland who became an ALP senator and later was Minister for the Media in the Whitlam government, as the Chief Justice will recall only too well. His son is the present federal Attorney-General. It was a pity that Malcolm retired early. He was a fine lawyer and judge who would have done credit to the High Court had he been appointed to that Court, a point made by Tom Hughes in 2006.

32. Another Equity judge was Fred ("Funnel Web") Myers. His complex personality became the stuff of legend. He had a hunted look and an almost entirely destructive mind, forever bent on exposing flaws in argument, with a seeming determination to savage errant trustees and solicitors. I doubt if many solicitor trustees emerged unscathed from his hostile scrutiny. Although he had a good knowledge of the law, he was prone to error. His propensity to error was largely due to his puritanical view of the world.

33. In *Kades v Kades*,[21] a custody case in which he was reversed by the Full Court in a majority decision (with Evatt CJ presiding and Sugerman dissenting) which was upheld in the High Court and the Privy Council, he had awarded custody of a 7 year old daughter to the father, an American tax lawyer, on the ground that the mother, who had been in her youth the model for Atlantic Ethyl,[22] was unfit to have custody. In argument in the High Court, Dixon said that the criticism of the trial judge was that he failed to understand sympathetically the case the mother was trying to make. In fact, Fred had misunderstood

[19] He was the author of texts on Hire Purchase Law (4 editions) and Land Tax Law (jointly).
[20] *Davison v The Queen* (1954) 90 CLR 353.
[21] (1961) 35 ALJR 251.
[22] Atlantic was a brand of petrol which had an additive known as ethylene. Atlantic's advertising featured a handsome female head with flowing blonde tresses.

the evidence and wrongly attributed fault to the mother where no fault could attach. The judgment of the High Court, obviously written by Dixon, shows why he was not only an outstanding lawyer but why he was also a great judge. It is a simple judgment on a simple issue, not involving a significant question of law. Yet it exhibits a depth of human understanding and is utterly convincing. For my part, I doubt that special leave would have been granted by the High Court but for questions raised about Evatt CJ's participation in the case. His rambling judgment was a rather exaggerated vindication of the mother.

34. I thought I handled Fred Myers rather well but I was no match for Michael Helsham who years later became CJ in Eq. Michael oozed deference from every pore. Fred became putty in his hands. Fred, who was a purist in matters of punctilio, was obsessed with the discourtesy of members of the Bar. On one occasion, in Chambers, he said to me:

> "Mason, do you realise that on Friday [which was motion day], some counsel telephone my associate and ask him to tell me that they are part heard in a magistrate's court in the suburbs and that they won't be available until after lunch?"

I could scarcely believe that any counsel would risk antagonising Fred in this way.

35. Shortly after this conversation, I had a case against Michael in Fred's motion list. Michael said to me that he was part heard in Newtown court and asked me to apologise to Fred and have the case stood down until 12 o'clock. Fred acceded to this request, but with some discontent, saying that he was surprised that, of all counsel, Mr Helsham should make such a request. I thought that this contretemps would play out to my advantage.

36. But I was quite wrong. I had seriously underestimated Michael. He went into his Rev. Obediah Slope mode. He made a long, abject, grovelling apology to Fred who concluded that he had been unfair to Michael in his earlier comment to me. My suspicion was that Fred's sense of guilt stemmed from a conviction that I had not done enough to put Michael's position in a more favourable light. So what had been a position of advantage rapidly degenerated into a position of disadvantage.

37. Tom Hughes correctly made the point that Michael employed the clever and, in my view, quite legitimate tactic of enlisting Fred's aid by drawing attention to possible weaknesses in his case which attracted Fred's "miniscule" willingness to assist counsel. Tom said that the tactic was "not much admired". Perhaps so. But its success was much envied. There were others who resorted to a similar tactic. In Fred's eyes, they were mere counterfeiters.

38. Charles McLelland was more disposed to grant relief than Fred who was inclined to be parsimonious in making orders under the TFM Act.[23] As applications were set

[23] The Testators Family Maintenance and Guardianship of Infants Act 1916 (NSW). As Asprey remarked, newly appointed judges were meagre in making awards under that Act, while more senior judges exhibited greater generosity.

down in turn for hearing before the two Equity judges, knowledgeable counsel would advise solicitors filing applications on behalf of applicants not to file until an application was to be set down before McLelland. This practice led to clerks waiting in the Equity office until an opportunity to file before McLelland arose. Eventually, the Court put an end to this notorious practice by divorcing setting down from filing.

39. Martin Hardie, who had been a leading counsel, also sat from time to time in Equity and local government matters. He was a good judge who was elevated to the Court of Appeal. He had a strange accent – best described as sibilant strangulated Oxford colonial – which was probably the product of elocution lessons. Although a good judge, he did something quite odd in a local government appeal in which a critical issue was the absorption capacity of the land the subject of a development application. Experts gave conflicting evidence as to the rate at which water poured into holes excavated in the land was absorbed. Without informing the parties or their representatives, Hardie conducted his own tests one night. Knowing his eager enthusiasm to solve problems, I was not surprised. He resolved the conflict of evidence without ever mentioning his extra-curricular nocturnal activity.

40. By the time I commenced to practise at the Bar, the character of Equity work had begun to change. Although the interpretation of wills and the administration of estates were still an important aspect of the Court's work, making provision for life estates and other forms of entailed estate became unfashionable. The move away from testamentary provisions of this kind gained greater momentum when death duty (now a thing of the past) was imposed on the termination of a life estate. This development coincided with a greater recognition that the injunction and the declaration were appropriate remedies in contract and public law.

41. Nigel Bowen was federal Attorney-General when I was Solicitor-General. I had appeared with him and against him when he was at the Bar. He was an outstanding lawyer, especially in tax and intellectual property, and working with him was most enjoyable. He was Chief Judge in Equity before he became Chief Justice of the Federal Court in which capacity he was largely responsible for its early success. He was very unfortunate not to be appointed to the High Court when I was appointed. He was the member for Parramatta, then, as now, a swinging seat and Prime Minister McMahon was not prepared to let him go. As it happened, Nigel won the seat in the 1972 election but Gough Whitlam won the election.

42. Sir Cyril Walsh was an extremely good but rather unfashionable lawyer who became a Judge of the Court, later of the Court of Appeal and subsequently of the High Court. He had a fine, disciplined mind, had won the University Medal in Philosophy and Law and was greatly admired by the Bar. I sat with him for a short time on the Court of Appeal and on the High Court where he was a good friend of Sir Harry Gibbs. They shared a similar approach to judicial work. Walsh had one unusual characteristic. He was unwilling to discuss a judgment after argument concluded until he had thought the case through and arrived at his final conclusion. He evidently thought that, by expressing a tentative view, he might compromise his impartial judgment. Barwick and Walsh had

been fellow floor members in Chalfont Chambers and Barwick thought highly of him, though as a judge Walsh was more in the Gibbs mould than the Barwick mould.

43. I sat on the Court of Appeal and the High Court with Sir Kenneth Jacobs. He was an excellent lawyer, who had imagination and understanding that went beyond the letter of the law. An Equity judge, he ultimately became President of the Court of Appeal and a High Court Justice. He has been a very close personal friend for about 50 years. For that reason, apart from saying that it was a pity that illness caused him to retire early from the High Court, I shall say no more about him. He is now 90 years old, has recently completed and passed a 3 year course in Ancient History at London Univerity and that I hope to see him in London in about 6 weeks time.

44. Ken Manning, R.L. Taylor, R.G. Reynolds and Phil Allen were all fellow members of the 7th Floor of Wentworth Chambers who became Judges of the Court. They were united in their antagonism to Clive Evatt senior who generally managed to outmanoeuvre them in jury cases. Ken Manning, an expert in insolvency and commercial law, was a very good all-round lawyer. He sat on the Court of Appeal and was mentioned as a candidate for appointment to the High Court[24] but his later career was marred by ill-health.

45. Taylor was a rugged, blunt common law counsel with a strong personality who was equally as forthright when a judge. As a silk, he was a leader in the real sense of the term. As a judge he was reputed to be idiosyncratic. He was Chairman of a Royal Commission into the controversial conviction of a man named Thomas for murder in New Zealand. He took a strong view that it was a case of wrongful conviction and that police officers had wrongly planted evidence to ensure Thomas's conviction. This view was expressed in blunt terms during the inquiry and in the report. Taylor also appeared on television and described the police actions as "indecent". This led to an attack on the inquiry and the report on the ground of bias and denial of natural justice. The case went to the New Zealand Court of Appeal where the challenge failed.[25]

46. I recall a defamation case which came before the Court of Appeal shortly after I was appointed to it. Sugerman was presiding. The application presented by Clive Evatt senior was for an expedited hearing. When Sugerman asked "What are the grounds?", Evatt replied "The trial judge went wrong 97 times – we have 97 grounds of appeal". When Sugerman incautiously remarked that the judge could not have gone wrong 97 times, Evatt responded "When I tell you the name of the judge, you won't say that – it was Mr Justice Taylor". Evatt went on to say that they had more than 100 grounds of appeal but, out of respect for the judge, they had reduced the number of grounds to 97. Needless to say, the application was dismissed.

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[24] *The Oxford Companion to the High Court*, 2001, p. 26.

[25] *Re Royal Commission on the Thomas Case* [1982] 1 NZLR 252 at 264 (where it was said that the case on alleged bias was "finely balanced and has caused us anxiety". The judgment is unusual in that it lists in an appendix the statements made by members of the commission which were relied upon as evidence of bias).

47. Ray Reynolds was a very good and under-rated counsel. He had a fund of wonderful anecdotes and was an excellent mimic. He ultimately became a Judge of Appeal. He was Chairman of the NSW Law Reform Commission and played a part in finalising the Supreme Court Act of 1970.

48. Another well-known counsel, who became a Divorce judge and must be numbered as a Clive Evatt antagonist was Tony Larkins who frequently appeared in defamation cases for the Consolidated Press (Packer) companies. A flamboyant counsel, with a colourful turn of phrase, he was a raconteur and wit but, as a wit, not quite the equal to his brother Bill, a doctor, who was Secretary of the AMA (NSW) Branch, and to Sir Alan Taylor who was a judge of the Supreme Court for just under 3 months before he was appointed to the High Court in 1952. Taylor described one of the Evatt brothers who became Commissioner for Stamp Duties as "the white sheep of the family".

49. There were many fine judges on the Supreme Court over the years. They included Keith Ferguson who was universally liked and respected, Arthur Rath who had a speech impediment and was a very good lawyer, as was Bob Hope who was elevated to the Court of Appeal and was under consideration for appointment to the High Court.[26] Bob Hope was Chancellor of Wollongong University, Chairman of the Law Reform Commission and the Heritage Council. He conducted a number of public inquiries, including an inquiry into ASIO.

50. Tom Hughes and Jack Slattery have spoke of Sir Kenneth Street and Sir Leslie Herron who was Chief Justice when the Court of Appeal was set up and of the tensions which existed at that time. Gordon Wallace engineered the establishment of the Court of Appeal through his influence with Ken McCaw, the then Liberal Attorney-General. I certainly don't agree with Jack Slattery when he says that the opposition was to Gordon Wallace and not to the setting up of the Court of Appeal. The fact is that whenever a Court of Appeal has been established, be it NSW, Queensland or Victoria, there has been strong opposition on the part of a number of judges for obvious reasons to the establishment of the Court, though that opposition has been directed particularly against judges who have promoted themselves for appointment to the Court. And, in NSW, it was natural that Gordon Wallace was a principal target of opposition. Barwick was no supporter of the Court of Appeal. In judgments he referred dismissively to it as "the Court of Appeal Division of the Supreme Court"

51. There was criticism on the part of some Supreme Court judges when some of their number accepted appointment as an Acting Justice of Appeal (AJA). One such judge against whom some criticism was directed, quite unjustly, was Athol Moffitt, who later became a permanent member and President of the Court of Appeal.

52. Gordon Wallace had won the Sword of Honour at Duntroon. He was not well-liked by his contemporaries at the Bar, perhaps because he changed his name from "Isaacs" to "Wallace", "Wallace" being his mother's maiden name. However, I always got on very well with him. He had melting brown eyes – Pat insisted that I make this

[26] *The Oxford Companion to the High Court*, 2001, p. 26.

point. At the level of the Supreme Court he was a very successful counsel, though rather below the level of Barwick, Taylor and Kitto. In the High Court, it was a different story, because there he suffered from a sense of inferiority. He was not the equal of Sugerman as a lawyer, though he was a good all round counsel.[27]

53. I had little doubt that Wallace and J.D. Holmes played a part in my appointment to that Court three years after its creation. I knew J.D. Holmes from my days as a student when he was lecturer in Constitutional Law and to him I owe my early interest in that subject. I was briefed with him quite frequently over the years. By the time he was appointed to the Supreme Court and two months later to the Court of Appeal his health was beginning to fail and he lacked the energy to make the contribution expected of him. But he was a wise old owl or, perhaps, more accurately, a cunning old fox.

54. Despite the tensions that existed at that time, I encountered nothing but friendship from all members of the Supreme Court. My Chambers were close to Chambers occupied by Barney Collins who always volunteered to sit in the defamation cases. Generally speaking, he left everything to the jury with consequences that had to be sorted out on appeal. He was a regular visitor to my chambers. He liked nothing more than a good yarn. He was a keen fisherman in the West Head region of Broken Bay. On one occasion he made an extraordinary catch – it was a human head. I don't think its owner was ever identified.

55. Shortly before I was appointed to the High Court, John Kerr was appointed Chief Justice. He had been a Judge of the Commonwealth Industrial Court and the Supreme Court of the ACT and before that a leading QC with an extensive practice in industrial relations, personal injury cases and public law. He had intellectual interests as well as an interest in politics, public affairs and administration. He appeared frequently with Harold Glass or Hal Wootten as his junior. Both became highly regarded Judges of the Supreme Court, Glass becoming a Judge of Appeal. Glass had been a fine counsel with an excellent capacity to express himself. I had known Kerr for many years. We became close friends when I became Solicitor-General. I had appeared with him and once against him at the Bar. In the short time he was Chief Justice before he became Governor-General, he reformed the Supreme Court's administration.

56. The Supreme Court era of which I have spoken was essentially the pre-Judicature Act Supreme Court in which appeals could be taken from a decision of single Equity judge direct to the High Court (generally heard by a bench consisting of three Justices). It was also the Supreme Court era which preceded the establishment of the Federal Court in 1975 and later the Family Court, an era in which matters of federal jurisdiction were handled by the Supreme Court and the High Court in its original jurisdiction. The restructuring of the federal judicature and federal jurisdiction at that time had a profound impact on the Supreme Court and the High Court. But for the restructuring, the Supreme Court would be much larger than it is today. This restructuring resulted in the demise of the automatic removal of *inter se* questions under s. 40A of the Judiciary Act 1903 (Cth)

[27] He was mentioned in 1958 as a possible appointment to the High Court: see *The Oxford Companion to the High Court*, 2001, p. 26.

from the Supreme Court into the High Court and its replacement by the s. 78B notice. Unfortunately, we are still bedevilled by the arid intricacies of federal jurisdiction. Of all constitutional reforms, a national uniform court system would be a major achievement.

Conclusion

57. I have not spoken of judges who were more or less my contemporaries lest I excite them to reply in kind, even if, in some cases, from the grave. But I should record my last official connexion with the Supreme Court. It was the day after I took up office in the High Court. A State public servant arrived in my High Court Chambers and demanded the return of my gold pass. I duly complied with this request. *Sic transit gloria.*