Chief justices in anecdote and fable

The Hon John P Bryson QC records some folklore of the New South Wales Bar as he remembers it from long ago. He invites others to supplement, correct, or challenge him in *Bar News*, as appropriate.

Sir Owen Dixon

I saw Sir Owen Dixon CJ in court several times. During one week in November 1958 he heard two appeals which I had the management of, although I was young, inexperienced and untrained and had no appreciation that I was seeing the High Court in a golden age. These hearings competed for my attention with preparation for annual examinations. No wonder the professors thought so little of me. The judges accompanying Dixon on the bench in *Jones v Dunkel* (1958–1959) 101 CLR 298 and *Commissioner for Railways v Scott* (1958–1959) 102 CLR 392 were stellar company. I do not suppose that the High Court has ever been stronger. *Jones v Dunkel* has followed me all my life. Of all High Court decisions, it is the one most often cited inappropriately, often with groundless assertions about the witness supposedly being 'in the camp' of one side or another with no evidential basis for putting him in a tent or asserting what he could have said. The High Court did not speak about the camp. *Commissioner for Railways v Scott* was a medieval relic, almost unheard of for half a century until it re-emerged in *Barclay v Penberthy* (2012) 246 CLR 258 and lives again. Dixon dissented and upheld our argument in both, which was consolation of a kind.

I greatly regret that splendid opportunities to observe Dixon came and passed when I did not know how splendid they were, as with Fullagar, Kitto, Taylor, Menzies and Windeyer JJ. Managing appeals and instructing counsel in these appeals were far beyond my understanding or ability, and I cannot perceive what my employers thought they were doing, or thought I was doing. Dixon has been splendidly served, particularly by himself in his huge contribution to the Commonwealth Law Reports for well over three decades (and earlier in the VLR), and in speeches and addresses collected as Jesting Pilate (Law Book Company Limited, 1965) which no real lawyer has omitted to read. Edited selections from Dixon's judgments were published by The Law Book Company in 1973, but a brief introduction to his judicial work. He has been well served without adulation by his biographer Philip Ayres (Owen Dixon, The Miegunyah Press Melbourne, 2003.)

I have recollections of a quiet man, slight in build and quiet in speech, presiding and controlling without seeming to do so, not assertive and not needing to be. He was accorded unqualified respect by all in the courtroom, among them counsel and judges. From time to time he would make quiet interventions in argument which immediately held the attention of all and controlled the next turn of debate. Throughout the hearings there were no indications of feelings, strong or otherwise. Intellectuality was the atmosphere. No voices were raised and no frowns crossed foreheads. At one point Dixon illustrated his thoughts in Ancient Greek and gave a further exposition when counsel seemed not to understand. The Greek reappeared at 102 CLR 400 in his remarkably digressive dissenting judgment, which is still lost on me. I know, from people who argued High Court cases in those days, that the scene was not always as calm as I saw it. Other judges, particularly Kitto J, sometimes tested counsel very severely.

I did not ever see any case before Dixon where the Constitution was discussed. There must have been another occasion when I was present for a motion list of leave applications; not so frequent then when many appeals did not require leave. John Flood Nagle then a junior, later Nagle J, asked to adjourn his application to obtain some further affidavits from the Northern Territory. Dixon quietly said that half the judges present (I think there were four) had already decided to grant leave, and offered Nagle the opportunity to persuade another, which he readily and successfully took.

Sir Garfield Barwick

In my early law school years Sir Garfield Barwick was fully engaged in practice at the head of the bar. He was phenomenally energetic and busy, doing the hardest cases involving the largest amounts of work and, quite often, the least prepossessing clients, distinguished only by their wealth. Barwick had an array of strengths: preternatural energy, profound legal knowledge, an astonishingly lengthy working day, gifts for forceful advocacy and persuasiveness. The work he did was very varied, the common threads being importance and difficulty. He did not, as many barristers and not a few silks do, emulate the manufacturers of sausages, for whom each product is very like the others. He did not ever turn up in the kind of routine business in which I was employed: personal injury claims involving repetitive fact situations, irreverently known as 'meat and grease' or 'finger and toe' cases. So I never saw him perform in court, although the air was full of stories of his latest exploit.

Then in 1958 he was suddenly gone into politics and rising rapidly, to be attorney general and later minister for external affairs. He appeared to be going far, with the caveat that R G Menzies (who had earlier suffered much from rivals) liked ministers to be talented, but if excessively talented they were headed off in some other direction. As attorney general Barwick had a large part in the Commonwealth's entry into the law of marriage and matrimonial causes, significantly extending

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and rationalising the grounds for divorce. He also had a large part in giving some reality to legislation against restrictive trade practices. In their time these were large reforms, but they were eclipsed by much more extensive reforms under Whitlam. In External Affairs he utterly reversed Australia's policy towards West New Guinea and its then owner the Netherlands, and steered Australia towards supporting elaborate measures which saw that territory transferred to Indonesia, which had as little claim to it as the Dutch had had. He was immensely proud of this highly expedient turn. In retrospect it brings to mind the Munich Conference: peace in our time at great expense to someone else.

Then, in 1964, Dixon CJ retired and Barwick became chief justice of Australia: a very suitable appointment and also an exemplar of Menzies' way with possible rivals. I would count Barwick among Australia's great chief justices, but not on account of his manners. Rather than add to his praises I will mention one or two sour notes. His courtroom manner was not the urbane brutality I mention elsewhere; the urbanity was missing. To form an idea of his appearance in court you should perhaps study his portrait in the Bar Common Room by Walter Pigeon ('WEP'), a portrait of savage honesty. Or for more insight, read Shelley's poem Ozymandias for the wrinkled lip and sneer of cold command. There was no Socratic Dialogue. His interventions in argument could be raucous, abrupt, conclusive and dismissive: not at all the High Court's style that I had seen. As recurringly happens in appeals, excessive judicial zeal in support of one view obstructs the endeavours of counsel who is trying to put that view fully to minds not yet convinced, and reinforces the adverse dispositions of judges whose thoughts are tending the other way. I heard him say, to senior counsel opposing us: 'That's the sort of submission a journalist would write.' In the context of a Constitutional law argument, this was quite an insult. Counsel replied with firm dignity: 'I can assure your Honour that no journalist did write it.' This exchange with our opponent did not do us any good. Barwick controlled the courtroom and the course of argument with dominance, and more scholarly and perhaps more judicial members of the court sat quietly and awaited the time to speak in their judgments, which did not always reflect the apparent course of argument. Barwick possessed an ascendancy over the intellectual tools available to those who write judgments, and could imbue the reasons he offered for any outcome with apparent apostolic conviction. A particularly large black spot obscured the commissioner for taxation, who could be sure of a rough time, and of at least one dissent should he succeed.

Barwick managed the court's list himself, and seemed to follow a policy of not giving anybody a great deal of notice of when a case was to come on. Cases could be called on with a day's notice, sometimes less, and in one case in which I had been involved but no longer was, the parties in Sydney were told mid-morning that the case would be heard in Perth on the following day; and it was. I could never understand why it was difficult to arrange lists two or three weeks in advance. It seemed to me that Barwick was indifferent to other people's convenience and arrangements and did not respect them; or perhaps enjoyed annoying people. In truth much more than convenience was involved. Fair process requires reasonable notice. Barristers who suffered under his arrangements did better when they came to run courts themselves.

Not all my recollections of Barwick are adverse. In the seventies I trailed at the end of queues of counsel appearing for the State of New South Wales in Constitutional cases and some other High Court business. It was very much an Age of Centralism (and perhaps all ages are), but several times we achieved the minor success of a dissent by Barwick CJ.

On one occasion I found myself attending Barwick in his chambers with my opponent to obtain a consent order; simple enough in principle but sometimes viewed in the High Court as a challenge to judicial ingenuity. Not so in this case. The consent order was made without demur, but not until both counsel had been detained for an hour of reminiscence of Barwick's successes at the bar. He explained, not briefly, the dilemma of setting his fee at a sufficiently high sum to requite his contribution to a favourable outcome and to the repulse of other possibilities, while balancing fee justice to himself with the injury imposed on the public interest by counsel of lesser talent who regarded what he was charging as in some way an indication of what it was suitable for them to charge. There was no rational basis for their seeing any such indication in view of the disparity of talents. There was no element of humour or self-mockery in this. He was re-living the agony of his earlier dilemma. With difficulty I maintained a grave facial expression while listening to this.

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My worst High Court day was spent as junior to Edwin Lusher QC, himself a most forceful advocate with no soft vocal tones, seeking to uphold damages for negligence to the dependents of a deceased train passenger whose own conduct had been astonishingly dangerous. Contributory negligence was not a defence and the award was grounded on some small failing by railway staff. From an early moment Barwick revealed a strong sense of outrage that there had been such an award, and engaged Lusher as if his advocacy of such a case was markedly delinquent. Both were forceful in manner and both moved quickly to the shouting stage, simultaneously and not responsively. There was no control. The presiding judge was in a rage, not a speechless rage, and leading counsel the same. I thought to myself that in two minutes Lusher would be expelled from the courtroom and the case would be mine, and began composing my thoughts on what I could say. Slowly it dawned on me that the other four judges lacked all expression. They sat like their grandsires cut in alabaster and did not support Barwick at all. If Barwick attempted to discipline or expel Lusher then the other four would have overruled him. Lusher had worked this out long before I had – and Barwick had too. The crisis did not come. The shouting match was the storm before the calm; the argument proceeded to conclusion on a more rational basis and judgment was reserved. When judgment came the majority was four to one in our favour.

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Sir Frederick Jordan

I missed Sir Frederick Jordan CJ, who died on 4 November 1949 while I was in high school. He was the subject of many anecdotes, mostly harsh, about his cold manner, overwhelming personality and general lack of human sympathy. It wasn't the whole story about him, as can be seen from the address given on 1 February 2007 by the Hon J P Slattery AO QC, published on the Supreme Court's website. Slattery knew Jordan closely as his associate and friend and is a far better source than I. Anecdotes about Jordan were to the effect that he was cold and terse in the company of lawyers. 'Frigidaire Freddie' could be relied on to dampen any occasion with a few well frozen words, but had another life and personality altogether in the company of poets, artists and litterateurs who haunted Rowe Street, now a pitiable back lane but once very animated. I did not ever see Jordan but heard anecdotes about him, many of them rather cruel: that his practice had been very narrow and that when he became chief justice people who practised at common law did not know who he was. He proved to have a profound knowledge of the law, and crafted many judgments of great force and authority across the breadth of the work of the full court. The *State Reports* of his time in the 1930s and '40s are luminous.

One story was to the effect that he had wide literary tastes and sometimes diverted himself by reading ancient Greek authors. When Milner Stephen J died in his chambers early one evening in 1939 after summing up to a jury and sending them out to consider their verdict, Stephen's associate rushed around to the chief justice's chambers, knocked on the door and stumbled in, saying 'Chief justice, chief justice, Mr Justice Stephen just fell down dead and the jury want to bring back their verdict!' Jordan laid down his Greek text, reached to the shelf behind him for his copy of Roscoe's Nisi Prius, leafed through a few pages, pointed his finger to a passage and said to the associate 'You may take a verdict'. He closed Roscoe and restored it to the shelf, and resumed reading his Greek text. This was taken to indicate a lack of warm feeling for Milner Stephen J.

Sir Maurice Byers

Byers was an associate at the court at a time when Sir Frederick Jordan was chief justice. Jordan was a meticulous compiler of case law and authorities, and punctuated his judgments with strings of case references, all in point and driving home his conclusion with their accumulated weight. These case references were taken from a leather-bound book, which he had hand-written over some decades. As valuable as *Prospero's Book*, he kept it close to hand and shared it with no-one. His law school notes in this style must have been based on this collection. Bar folklore was that when Jordan died his widow gave the book to his then associate, who was great at rugby but did not know the book's value, so that it was lost to learning, drowned deeper than ever did plummet sound.

Sir Kenneth Street

When I first saw the Supreme Court in 1955 Sir Kenneth Street was its chief justice. He held that office from 1950 until 27 January 1960. Earlier he had been a puisne judge of the court and became chief justice after Jordan CJ died. Earlier still, he had been a judge of the Court of Industrial Arbitration from 1927, so he held judicial office for 32 years. He was appointed to the Supreme Court in 1931, and his father Sir Philip Street was then chief justice, as he had been since 1925. That father and son should be members of the same court at the same time is probably historically rare.

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There were many problems for the court while Street was its chief justice. The court expanded rapidly: by twelve judges in 1950 and twenty-two in 1960 when he retired. The buildings and court rooms were antique and altogether inadequate. They were nineteenth century structures, some in the former convict barracks and the guard-house to the barracks, a building converted to court rooms and chambers after being designed as the registrar general's office, not designed to the purpose. Some were temporary wooden structures erected before and during the First World War. Gradually more court rooms were built, piecemeal and inconveniently spread around: two in Wentworth Chambers in 1958; six in Hospital Road about 1962; about three at 225 Macquarie Street perhaps about 1965; five or six far away down Phillip Street, now the Industrial Court but then for Matrimonial Causes in about 1970 or so. Planning begun in the 1920s for the court to have a new building of its own produced nothing until 1978 when the court gained its present building in an architectural style not inappropriately called New Brutalism. In 1955 the delay between completion of pleadings and trial by jury at common law was 48 months, by which time the plaintiff had recovered if he was going to recover, or died if he was going to die. Perhaps there was some efficiency in that. Interest was not an element in the assessment of personal injury damages. Common law business was a shambles. The great delays in trials perhaps explain the expansion of the court, but the delays cleared very slowly, over several decades.

I saw Sir Kenneth Street on the bench quite a few times in appeals. He presided in the full court when I was first admitted to the bar in December 1959. Judicial style and manner have altered in the intervening half-century. In the present age judges seem prepared to admit that they are human, whereas earlier most aimed to project calm gravity unalloyed by human feeling, while for those who revealed any emotion, the emotion revealed almost always was fury; occasionally disdain. Sir Kenneth was the picture of dignity and gravity. There were no moments of levity. He appeared rather tall and always spoke and comported himself with appropriate judicial gravity, as became chief justices in the ideals of those times: reserve, dignity and lofty distance, not conveying a sense of engagement with counsel in shared examination of the problems of the case.

The bar or those less reverent gave Street the soubriquet 'Abdul a Bul Bul,' claiming that he looked or behaved like an Eastern Potentate. To me this seemed rather far-drawn. He presided in the full court and in criminal appeals and I did not know him to do any other judicial work. The full court almost always sat in the Old Banco Court in St James Road, which was much too small and cramped for the numbers of people who had to be there, and for the amount of business and its high importance.

Sir Kenneth Street's wife Lady Jessie Street was at least as famous as he, and had a very active public career in her own right. If this small detail about Sir Kenneth Street suggests that he had a radical streak, there was no trace of it in his judicial deportment or in his decisions. He appeared the picture of orthodoxy as chief justice and I think the same should be said of his judgments.

Once, he gave judgment in a criminal appeal while I waited for some other business to be reached. In a manner long passed he said to the appellant in a tone of cold command: 'Stand up, Mendoza.' The appellant, who was seated in a small pen which served as the dock in the Banco Court, rose to her feet and stood while he gave the court's reasons and order, which ended badly for her but did not detain her on her feet for very long. As far as I know, this cold distance is a thing of the past, even in criminal cases. The Dock has gone. In many courtrooms it was surrounded by a fence of spear-headed iron raiIs, where the accused were sequestered throughout, evident culprits and obviously the centre of hostile attention: the physical expression of unfair process. Sir Garfield Barwick's disapproval was a large part of the Dock's disappearance.

Dr Herbert Vere Evatt

In 1960 Dr Herbert Vere Evatt was the successor as chief justice to Sir Kenneth Street, to the surprise of many. He remained chief justice for two and a half inglorious years. He was usually referred to as 'The Doc' or as 'Bert.' At that time I was working for a firm, learning how to do conveyancing work using the old system, with its unfathomable antique complexities. Every lawyer should, at least for a year or two, get a foothold in the economic realities of real people who buy ordinary houses with sparse resources and to see how their world and their money go around. This is a better school of life than takeovers, IPOs and Heath-Robinson tax-avoidance devices. I did not see Dr Evatt on the bench. The first rumours were of a new order for new trials. The jury was right, no matter what, so no new trial. Later rumours were of conflicts within the court. Other judges did not want to sit with the Doc, would not sit with

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the Doc, or left him locked in his chambers and sat without him while he fulminated about applying for prerogative writs, to whom I know not. Everybody who took part in this died without publishing the true story, so we will not know it. Certainly I never did. His successor was Sir Leslie Herron, then the longest-serving judge. No-one was entitled to be aggrieved by his appointment.

Sir Leslie Herron

Sir Leslie Herron was a new type of chief justice to me: far less aloof and less scholarly in manner than K W Street CJ, and than Dixon CJ. Herron was a modern person. He did not project remoteness (if that is possible) and could be more clearly recognised by all as another human being. His face revealed his enjoyment of life. He had much experience as a common law judge and in appeals over the previous 22 years. Outside the courtroom he could be bluff and hearty, especially when speaking after dinner, occasionally telling unexpectedly ribald stories and jokes. Hearers were aghast. He may have picked up some of these in his lifelong interest in rugby. For a long time he was president (or some such office) of the rugby union and was its public face. In truth he was a learned lawyer and worked conscientiously as a judge, although his appearance did not project this. As chief justice he usually sat in the full court, as he long had, but each year conducted the Circuit Court at Grafton, two weeks' sittings interrupted by the Spring Race Meeting in the weekend there. On the occasions when I saw him presiding in court he was quite decorous, without the gravity and distance I had earlier seen in chief justices. To some degree he would engage in debate, and counsel could know the drift of his thinking and address that.

Jerrold Cripps once tested Herron's tolerance by some behaviour which expressed undue nonchalance for counsel before the full court. R M Hope QC was asked to write an entry for himself for Who's Who and asked Cripps what he should say were his recreations. Cripps, mindful of the writings of Nancy Mitford, said Hope should say horseback riding (and not horse riding, a non-U expression.) Hope demurred and Cripps said: 'If you put in horseback riding I will wear sunglasses in the full court. If you put in croquet I will take a seeing-eye dog.' Hope laughed this off, but months later Cripps found that Hope's entry in the new Who's Who nominated his recreation as horseback riding (and not croquet.) Cripps felt committed to the dare and wore his shades on his next appearance before Herron and the full court. For a while there was no remark, and then Herron, who sensed the joke in all this, said: 'Mr Cripps, the court hopes that there is nothing seriously wrong with your eyes.' Cripps replied: 'I can assure the court that there is nothing seriously wrong with my eyes' and was committed to retaining his sunglasses to protect his imputed mild conjunctivitis for the rest of the proceedings, mercifully short.

Herron CJ had to deal with hard feelings among his judges associated with the creation of the Court of Appeal, which some resented as devaluing those who were not to sit there, whereas before all judges were qualified to sit on the full court (but there was usually a smaller circle who actually did). Conflicts like these were not scenes in which Herron would have cared to take part and they must have caused him pain, especially as they were intractable. He liked to see problems solved. Some felt that in principle judges should not be promoted, that judges should not be advanced in precedence over others or appointed to new senior positions. One or two who seemed very suitable for the Court of Appeal may have declined appointment on these principles. More greatly resented were the choices of judges of appeal, as some appointments greatly disturbed earlier precedence, notably the president, Wallace J who gained precedence over all the new judges of appeal and about ten other colleagues, not all of whom took it well. Rumours flew about judges refusing to speak to Wallace P and to others, even refusing to share a robing room or enter the courtroom by the same door. But no-one ever told me who they were who were carrying on in these ways. Rumour said that there were similar flares when Moffitt J became a judge of appeal in 1970, asseverated when he became president in 1974. Again, no-one made his opposition public. Those involved encountered their destinies and no-one since, to my knowledge, has carried on in such ways: a dreadful example to be avoided and not followed. I did not encounter any serious conflict of personalities or even a full-blooded exchange of insults while I served on the court, so the past sadness may have improved manners no end. In my time the attitude was: hear the cases, do your duty, fear God and honour the queen, and no-one wanted to be involved in agonies about precedence.

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I once heard Herron in full flight after dinner relate his first meeting with Ed Clark, known as Mr Ed, an old friend and political supporter whom President Johnson had appointed ambassador to Australia, perhaps thinking that the duties were not demanding. As well as being the everyday name of the ambassador, 'Mr Ed' was the name of a talking horse in a television series then popular. Mr Ed was well versed in Texas law and politics but had no claims to be a diplomat except that the United states had appointed him to be one. Mr Ed was present with Herron at the top table, and spoke after him. Herron told how Mr Ed had paid a formal call on the chief justice, as new ambassadors then did, and had opened the conversation by saying: 'Howdy, chief justice, Y' ole' Grass Fly!' Herron replied in kind, I forget how. The two got on famously, with similarities in their personalities and no really serious business to discuss. Later Mr Ed spoke in warm commendation of Herron, and said: 'You could go to the well with him!' which he explained as meaning that he was a suitable companion if there were hostile Indians about.

Herron CJ retired in May 1972 and was succeeded by Sir John Kerr, who served only for two years. To my mind he was one of the most suitable for that office whom I have seen. The pity of it that he did not stop there, that more was offered to him when he had reached the height of most lawyers' ambitions! The word is 'nimiety': Shakespeare should have dealt with this. Kerr had superb ability as a barrister, reinforced by commanding courtroom presence, clear and authoritative manner of speech and careful attention to his appearance, up to a splendid mane of snow-white hair, which must have required much attention and maintenance, some of it out of a bottle. As always with barristers of apparently effortless ability, he worked on preparation with intensity and for endless hours. His bar career was interrupted by some years' service during the war in the Australian Army's somewhat mysterious Directorate of Research headed by the somewhat mysterious Alf Conlon. This was followed by planning for and participation in restoration of civil government in Papua and New Guinea and establishing the Australian School of Pacific Administration, which trained government staff for Australia's overseas territories. He was skilled at establishing and conducting organisations and took leading parts in many, including this Bar Association: not a common ability for barristers for whom work is intensely a personal and individual responsibility. In his resumed bar career he had great successes in conflicts in federal industrial courts over the affairs of unions and their elections of officers, with (to abbreviate greatly) the effect that some important and large unions were able to have fair elections conducted by Commonwealth electoral officers, enabling their members to elect officers associated with the Labor Party and not the Communist Party. This won Kerr much praise and support, and some enemies. Kerr also had huge success as a jury advocate in personal injury claims by injured workers and in motor accident cases. His conduct of jury cases was superb, in a field where many were less conspicuously talented. Very often

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he was at the head of a team comprising James McClelland ('Diamond Jim') and the firm he headed, and Harold Glass as his junior counsel: a combination of ability, experience and industry which few could equal and few could defeat. Kerr and Glass spent much of the 1960s together at the top of this tree. Glass sometimes spoke of this period as 'the Nello Gravy Train.' Then suddenly and surprisingly in 1966 Kerr was appointed a federal judge, of the Commonwealth Industrial Court and the Supreme Court of the Australian Capital Territory, an apparently incomprehensible step intended as a brief interval before appointment to a planned new court which after a decade of delay became the Federal Court of Australia. The new court long remained a plan only, and Kerr was stranded in Canberra until he was appointed chief justice in 1972. I will not now write more about him: his later career does not always bring out the best in one's readers.

After Kerr I encounter the rule *de vivis nil nisi bonum*.