Anecdotes and fables of the judges of the 'fifties

The Hon J P Bryson QC

Else-Mitchell

Rae Else-Mitchell was a judge of the Supreme Court from 1958 to 1974. He was tall, a handsome man with a powerful frame, a powerful intellect and a powerful self-regard.

I first encountered him when he lectured on Australian Constitution law in my second law school year in 1955. The principal subject of Constitutional law then was the freedom of interstate trade under Constitution section 92. Section 92 cases closely succeeded each other in the High Court, bewildering to a student new to the law and remaining bewildering after years of study, until their bewildering incertitudes were swept away by *Cole v Whitfield* in 1988. State legislative schemes pursued mercantilist isolation and protection of producers against competition from other states. Often these were enforced by marketing boards which brought intrusive, uncommercial bureaucracies into the details of primary production and distribution. For some reason dried fruit reappeared in Constitutional law time and time again. Public opinion strongly supported these measures on the view that, say, sale north of the Murray of milk produced in Victoria was profoundly unfair, obviously so. These measures were flatly contrary to Constitution section 92. At the Commonwealth level mercantilist ideas protected primary producers, manufacturers and all who spoke in aggrieved tones against the knavish tricks of foreign producers. Unlike the states the Commonwealth was armed with duties, excise and bounties. The total effect was extraordinarily unlike the Australian economy today.

The doctrines of the High Court expounding section 92 were weirdly strange and remote from its language: even more so, the doctrines of the Privy Council. Beneath the mercantilist undercurrent was a socialist undercurrent in which section 92 was regarded as a bulwark defending capitalism. This inspired possibly the strangest passage in Australian jurisprudence, observations of the Privy Council at 79 CLR 640–641 worthy of Orwell's dystopia. No one can ever have known what their Lordships were talking about: that less is not more, but in some circumstances nothing may be everything.

Else-Mitchell's lectures expounded the whole Constitution lightly and dealt mainly with the section 92 cases then being fought over state schemes to impede transport of goods by road taxes and to funnel traffic to state-owned railways (which, incidentally, could not cope). Else-Mitchell was engaged professionally in these contests, and freely expressed his disdain or contempt for views adverse to his briefs. For me this was an early encounter with a strongly-engaged source of instruction.

In his university years Else-Mitchell had been well recognised as a Coming Man, a Man of the Left. He was widely known and widely admired for his superb ability and immediate grasp, which won honours and prizes. He was a vigorous and adventurous bushwalker, dangerously breaking new ground in the Blue Mountains well beyond Mount Solitary, on the margin between bushwalking and exploration. He rose rapidly in the large bureaucracy of the war effort, and became secretary of the Commonwealth Rationing Commission when aged thirty. He soon became a powerful figure at the bar, and organised his own chambers, Oxford Chambers, with only one or two other barristers. He took silk in 1955 and was one of the bar's leaders, frequently appearing in the High Court where, to me and others, it seemed his destiny lay.

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Else-Mitchell caused surprise in 1958 by going to the Supreme Court, where in his first years he usually sat in common-law causes. Wherever he was, in the courtroom or anywhere else, he was the dominant person present and events revolved around him. His disdain was no less lofty than his physique and his tone often conveyed more asperity than his words expressed. When hearing cases the just outcome often presented itself to his mind early and with certitude, and from then on all debate was mere exasperation to him. He was able to communicate to counsel, and often did, that their talents were disappointingly unequal to the business in hand and that the claims they made on his attention were undue. I do not know whether he sat on criminal trials, where there is some call for patience and forbearance and there is something for the jury to do. He did not progress as he felt appropriate to take much part in hearing appeals, and was not included in the initial appointments to the Court of Appeal: he resented its creation and opposed it with vigour, and was never a member of that court. As a participant he was a direct and important source for Michael Kirby's important history published at (2008) 30 *Sydney Law Review* 177: see page 200 note 79. With clear recollection after almost forty years he poured details and a full vial of wrath into the historian's ear, re-enacting the great crime in *Hamlet* to good effect for history. He became a judge of the Land and Valuation Court and heard most of its work, principally valuation on

resumption and rating appeals, and the slowly-dying Crown Lands Acts: his own small conquered province, distant from colleagues and subjected to limited appellate power. Sometimes he heard Equity business in related controversies. With no difficulty he attained dominance in the law special to his court, enhancing his ascendancy and his disdain for counsel. In a resumption claim he would call on counsel for the reference to the resumed property in the street directory, and proceed there and inspect the property as soon as could be arranged, and later events in the proceedings were visibly tiresome to him. He sat there for some years, attended by a small bar who knew his ways and had learnt to operate in the limited terrain available, with occasional unfortunate appearances by the less adept, such as myself.

In the Whitlam years he went off to shake other spheres, and for almost fifteen years he had Olympian disposition of the finances and fates of mendicant states in the Commonwealth Grants Commission: how much is fair for this state and for that and what does the state really need, not unlike the Rationing Commission. The resumption cases went to judges with readier accessibility to evidence and argument.

Else-Mitchell's activities and talents would overfill several ordinary lifetimes. He held many public offices and received many honours and distinctions. His interests were very wide, and related to history, public administration and the welfare and affairs of the public in many ways. He brought his energy and ability to bear on many organisations, usually from the chair. Those who wish to write generous appraisals have much material, and readers can readily find generous appraisals elsewhere. While his ability shone in the court room as elsewhere, his sour impatience made an even stronger impression on the bar. Superb ability is not enough.

Kinsella and his tipstaff, Captain Adams

Edward Parnell Kinsella was appointed to the Supreme Court on 18 January 1950 and retired on 9 June 1963. Kinsella J was a tall man, and his deportment embodied a classic concept of a grave and serious judge. The manner of his walk expressed his gravity, and he was described by the bar as a one-man procession. He had a lofty aristocratic manner, austere and dignified, careful in speech and clear in diction.

There were never moments of lightness in a hearing before him. His gravity was never broken by a smile, and only occasionally broken by a brief expression of disapproval. In his courtroom the atmosphere was cold, decorum prevailed and counsel whose behaviour in other places may have been rather theatrical assumed a gravity which distantly shadowed that of the judge. He spoke 'for the printer' in language that could have been printed without revision. Everything Kinsella J said was clear but not vernacular, and no slang or vogue words crept into his summing-up to the jury. Many jurymen would not have been accustomed to so elevated a tone, and so may have found what he said a little difficult to follow. He almost always sat hearing common-law trials with juries and in criminal business. He may also have heard some commercial causes. He did not hear many appeals and his work did not leave much impression in the law reports. In my understanding however he was very little challenged by appeals.

When Kinsella J held the Circuit Court at Bathurst he first attended a church service and afterwards processed across the square to the courthouse, wearing his judicial robe and long wig, preceded by his tipstaff in his long black coat and ribbons bearing the white staff, in a procession of two persons only. The tipstaff's deportment and gravity matched those of the judge.

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Kinsella J became a witness himself when he went walking with a lawyer friend in Hyde Park one lunch time, and crossed the road in Chancery Square between Hyde Park and Hyde Park Barracks. He did not cross in the marked foot crossing. There were tramlines in the middle of the road, and the claims on a pedestrian's attention included taking care not to trip on the tramlines. A motorist managed to knock down Kinsella J's companion who was standing beside him in the middle of the road waiting for traffic to clear. The injured companion sued for damages and must have felt that he had a splendid witness, as the judge was immediately beside him and saw the whole affair. However, some hapless counsel had the duty of defending the claim, which involved cross-examining the judge with attempted ferocity to suggest that his observation was defective, he was really looking at something else, he had not really seen anything, the true facts were entirely different and so forth: a Micawber cross-examination, something may turn up. The judge resisted this onslaught with cold dignity and complete

success. I do not know who cross-examining counsel was, but this brief cannot have helped his career.

There were juries in almost all common-law trials. On a rare occasion when the jury was dispensed with Kinsella J awarded damages to a man who had been injured in a motor accident. Part of the plaintiff's claim was that he was less able to travel and take advantage of his right to visit his children in the weekends, influence their lives and enjoy their company; and that this sounded in damages as part of his loss of enjoyment of life. Kinsella J said that it had been accepted that loss of the ability to hear and enjoy chamber music was a ground for damages for loss of enjoyment of life, and the loss of enjoyment of the company of the plaintiff's children was analogous. I suppose that this was what the plaintiff wanted to hear, but it sounded lacking in warmth and sympathy.

The jury could be dispensed with only with the consent of both parties, and bar folklore was that no injured plaintiff should ever consent to trial by judge alone. The thinking was that he would not get a sympathetic hearing; whereas insurance companies wanted their cases to be heard by the judge alone, but could never get plaintiffs to agree. After 1966 changes began which increased, in several stages, the number of cases heard by a single judge, and a common-law jury eventually became very rare. At times in this era I heard a somewhat different story, when insurance companies complained that no judge would ever make a finding that the insured had deliberately set his own house on fire, and looked about for ways to get a jury in fire claims.

John Adams MC and Bar was Kinsella J's tipstaff for about ten years and was a notable figure himself. His invariable manner was one of severe dignity, as was that of the judge. Adams was well-known and respected, and usually spoken of as Captain Adams. He served in the AIF throughout the First World War and was severely wounded. Kinsella also served in the AIF throughout the war, and the two were lieutenants in the 54th Batallion at the same time. It seems certain that they knew each other then. There were many people still in practice and on the bench who had served in the Great War, and several senior lawyers pointed Adams out to me and told me of his Military Cross and Bar. Adams always wore a long coat, then a tipstaff's uniform, with his many ribbons won on war service, most notably the ribbons of the Military Cross and Bar and oak leaves awarded when mentioned in dispatches. To win the Military Cross twice and return home was no mean feat.

Adams first appeared as tipstaff in the *Law Almanac* for 1951, and it seems that he was Kinsella's first Tipstaff. Adams continued to appear in the *Almanac* as tipstaff to Kinsella J until he was shown in the 1960 *Almanac* as tipstaff to Collins J. Kinsella J had other tipstaves and retired in 1963. Adams continued to be shown as tipstaff to Collins J until 1967 when Adams was 77 years old. I infer that Adams then retired, as after then Collins J had another tipstaff.

John Henry McClemens

John Henry McClemens, usually spoken of as Jock, was a judge of the Supreme Court from 1951 to 1975, a long time during which he carried a huge burden of trial work, an unending train of jury trials which required and received his close application and left little mark in law reports. He sat where his experience, interests and abilities lay, in common law civil trials and in criminal trials and appeals. He was a most humane man, and the impact of injuries on workers and road users, and of crimes on victims engaged his emotions profoundly. He was essentially kindly. He found severity difficult, but could manage it when duty required. He did not conform with the traditional manner of urbane brutality, which Sir Maurice Byers attributed to the Supreme Court. Urbane, distant, aloof, unengaged, intellectual: he was none of these, and his feelings and his being were clearly engaged in giving justice.

McClemens must have been a very effective jury advocate, although I did not see him in those days. He had easy and full communication with the common man, the man on the Bondi tram and also on the jury, spoke his language and thought his thoughts; and he analysed claims of justice in his way. His analysis of negligence questions and of claims for damages was more emotional than intellectual: not inappropriately, as both call for decision outside syllogism. He had little patience with any remotely technical argument, and when it was argued that a time bar applied and the writ was issued too late I heard him respond: 'Do you mean it's a windfall for the insurance company?'

McClemens resembled a chubby rubicund middle-aged teddy bear, the resemblance enhanced by the shape of his ears. When

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his attention was not engaged he wore the benign indifferent expression which old masters paint on the faces of cherubs. During a hearing the current states of his thoughts passed across his face like a moving film: approval, sympathy or sorrow could be seen at once. He was aware and sensitive for the feelings of persons in the courtroom, including those whom most would think had no claim for sympathy. Sometimes, but not often, his feelings got the better of him and he engaged in wrangles with counsel whose conduct disappointed him, by ranging the periphery and not engaging with the nub of the case which the jury needed to grasp. I particularly remember a shouting match between McClemens J and Athol Moffitt QC which erupted, it seemed out of nothing, on a hot summer afternoon in Newcastle, both shouting without control until the judge rose and left. Counsel proceeded to the judge's chambers and after a while calm returned and the hearing proceeded without undue event.

My only criminal trial before McClemens seemed to me to end badly, but my client accepted that his ten-year sentence was just. He seemed to be of the same understanding as the judge. I indirectly trod on his toes in *Cheetham v McGeechan* [1971] 2 NSWLR 222 when I took regulations entitling a prisoner to remission of sentence into Equity under a recently extended power to make declaratory orders. LW Street J declared that the prisoner had the entitlement, and reputedly thirteen black sheep in like case were released that afternoon. It drifted back to me indirectly that McClemens had complained to the chief justice about this intrusion on Common Law business.

McClemens conducted the Royal Commission of Inquiry into the Callan Park Mental Hospital, which took most of 1961. Callan Park had been the source of controversies and complaints for generations. McClemens gave patient careful hearings to people to whom it had seemed that no-one would listen or give any attention. He made searching detailed investigations of many specific complaints about the conduct of staff and events affecting patients, and the inquiry disclosed generally the deficiencies in the mental hospital system. It was a total review of the role and problems of mental hospital care. During and after the inquiry there were large changes in personnel and administration. Mental health administration and mental hospitals have since been through several more convulsions, reforms and changes of direction, always remaining a Vale of Tears.

It is probably too much to say of any judge that the profession and the public loved him, but it should be said that they had warm feelings towards this warm and industrious human being.

Sir William Owen and Justice Myers

Sir William Francis Langer Owen was a judge of the Supreme Court from 1937 until 1961, and was elevated to the High Court where he served until he died in 1972. He was in appearance and demeanour the model of a judge of an old school, ever solemn and serious in manner and very learned, without any flourishes in expression or behaviour. After sitting in Equity when first appointed, he became one of the strengths of the full court which heard appellate business at common law and in equity, and sat on many appeals to the Court of Criminal Appeal. The usual course for many years was for the court to comprise KW Street C J, Owen J and Herron J. He was one of the judges of the Royal Commission on Espionage, with Philp J from Queensland and Ligertwood J from South Australia. The challenges to the commission included antics and defiance from Dr HV Evatt who felt deep involvement in the interest of the commission in the activities of people who were or had been on Evatt's staff. Evatt conducted himself to serve the maxim 'If you don't run it, wreck it,' to a point where the commissioners would not allow him to continue to appear.

For all his solemnity, bar folklore told that Owen had returned from the Western Front in 1919 and so behaved while staying at the Kosciusko Chalet (then the only accommodation on the ski fields) that he and a raucous friend were expelled in the small hours and left to their own devices without anywhere to stay.

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They drove down to Cooma and in the early dawn they crept up to the circus camp, fired off their pistols and stampeded the elephants.

Eventually Owen was appointed to the High Court. He felt that at this point he was free to commence an equity suit against his neighbour to redress long-held grievances over the right of way next to his house. While a judge of the court which would hear the suit, he had not regarded this as appropriate. One evening soon after his elevation Owen arrived unannounced at the home of Mr Justice Frederick George Myers, an Equity judge, accompanied by his counsel and solicitor, and received a welcome full of expressions of friendship and congratulation, as part of which Myers dredged in his pocket and produced a small key with which he unlocked his cabinet, and produced whisky. This was not the direction in which Owen wished to go, and he diffidently broke it to Myers that the call was not social and that he wanted an interlocutory injunction to stop his neighbour obstructing the right of way. Myers' manner altered at once to extreme formality; the key was produced again and the cabinet was locked. He took his seat with great solemnity and attended while counsel read out the affidavits, as counsel then knew they should do, and put the reasons for the injunction. Myers listened with solemn patience, and then said, in the politest way, 'I can't give you an injunction, Bill, because you have been guilty of laches. You should have started this case years ago.' His mood reverted to the welcoming and convivial, the key and the whisky appeared again, but the high mood of the earlier welcome could not be brought back.

Mr Justice Myers was a judge of the Supreme Court from 1953 until he retired in 1971. For some years he sat at Common Law and in criminal trials, where he was in no way comfortable, and from about 1960 he sat in Equity and Probate. He was an exacting judge, with an approach to business which was entirely unaccommodating to practicality or to anything else. He brought a full stock of learning to bear on discerning difficulties which had not occurred to anyone else, difficulties often enough on which their apparent beneficiaries did not wish to rely, for fear of what might be attributed to them on appeal. There was no breadth in his concept of relevance; the relevance of every question was tested on a close reading of the pleadings and his readings of pleadings were exacting. His approach to proposed amendments was openly hostile. It was not uncommon for him to rule that an amendment was to be allowed on terms that all the opponent's costs of the proceedings up to the time of the amendment were to be paid by the amending party, and this could lead to rejection of the terms and dogged pursuit of justice on the original pleading. While expounding an obscure difficulty or pronouncing an adverse ruling he would wear an inappropriate beaming smile. His manner and approach earned him the soubriquet 'Funnelweb,' reflecting the suddenness and unpredictability of his incursions.

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Those who had known Myers before elevation said that his earlier personality had been altogether different, a barrister with a great stock of learning, who was pleasant company and helpful to any colleague who sought his aid. He was admired for his service in the army in New Guinea as a staff officer, in the course of which he was said to have walked across the Owen Stanley Range, carrying a bottle of whisky in his pack which was used to bring the American staff officer with whom he had to deal around to an amenable frame of mind. As he had a disability, a club foot, the walk was not an easy thing to do, and he would not have been open to criticism if he had stayed out of the army. The change of personality and the emergence of the Funnelweb surprised those who had known him earlier.