SIR EDWARD MCTIERNAN - A CENTENARY REFLECTION

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1 INTO THE WORLD OF 1892

Year by eventful year, a century has passed since the birth of Edward Aloysius McTiernan on 16 February 1892 at Glen Innes, New South Wales. The second of two children of Patrick McTiernan, police constable, and Isabella McTiernan (née Diamond) came into a world on the brink of great political and legal changes. His life virtually spanned the whole history to date of the Commonwealth of Australia. It saw mighty wars, great scientific and social changes and the apogee and fall of the British Empire. Instructive it is to reflect upon the world he entered and the controversies which were agitating Australia and the mother country at a time young Edward was born.

A year before his birth, an event was to take place which affected the course of his life. In 1890, provision was first made for the payment of members of Parliament elected at the next general election in the colony of New South Wales. With this development, in January 1890, the Trades and Labor Council decided to field candidates for the election. Plans were made to form Labor Electoral Leagues in every constituency. The first such League was formed in Balmain in March 1891.[1] In July, the Premier, Henry Parkes went to the people. In their first election, the Leagues contested 48 seats. They won 35. They then held the balance of power between the Free Traders, led by Parkes, and the Protectionists, led by George Dibbs. The Parkes Government resigned on 19 October 1891. Dibbs became Premier. The leadership of the Free Trade opposition passed to George Reid. In January 1892, the Second Annual General Conference of the Labor Electoral Leagues met in the euphoria of its recent electoral triumph. The Leagues chose Joseph Cook to be their first leader, although there were already divisions amongst the representatives over the issues of free trade or protection. Labor was no sooner born than factions formed within it. Yet those early stalwarts could scarcely have imagined the future which lay before the political movement which they established. It would come, by the time of McTiernan's death, to command the treasury benches in the national Parliament and in all but two of the other legislatures in Australia.

That national Parliament was still an idea in the minds of the Federalists. In 1885, an Imperial Act had set up the Federal Council of Australasia.[2] The Council lacked executive power and any provision for raising independent revenue. Henry Parkes saw it as an obstacle to a true federation. Concern about the defence of the Australasian colonies was also beginning to agitate Whitehall. With the Canadian Constitution behind them,[3] the Imperial politicians were in a mood to look more sympathetically upon proposals for an Australian Federation, if only the colonists could agree amongst themselves.

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1 R McMullin, *The Light on the Hill: The Australian Labor Party 1891- 1991* (1991).

2 Federal Council of Australasia Act 1885 (Imp).

3 British North America Act 1867 (Imp). In 1981 this statute was renamed The Constitution Act 1867.

On 24 October 1889, at Tenterfield, New South Wales, Henry Parkes made a stirring speech in which he called for the replacement of the Federal Council with a strong national Parliament having full control over all matters concerning Australasia as a whole. In the result, in February 1890, a meeting in Melbourne of the leaders of the Australian colonies, together with two representatives from New Zealand, discussed Parkes's proposals. They agreed to call a convention in the following year. This convention met in March 1891 in Sydney. It was the first National Australasian Convention. It comprised 46 delegates from all Colonial Parliaments in Australasia. It met in the Chamber of the Legislative Council of New South Wales, the oldest elected body of the colonies. The first draft of an Australian Federal Constitution was agreed. The principal draftsman was Samuel Griffith, the Queensland Premier. He did most to shape the draft which the High Court, yet to be created, was to expound and in which he, and later McTiernan, were to serve.

Parkes's loss of office in 1891 in New South Wales appeared to set back the Federal cause. How much of this news reached Constable McTiernan and his family in Glen Innes can only be a matter of speculation. Parkes was replaced by Edmond Barton as the new "leader" of the Federal Movement. In August 1894, George Reid, now Premier, of New South Wales, called for a second Federal Convention. This took place in 1897. It led to a third session in Melbourne in 1898 and to referendums throughout Australia in that and the following year. In June 1900, on the request of the Australian colonies, the Australian Constitution Act was passed by the Imperial Parliament.[4] Queen Victoria gave her royal assent on 9 July 1900. The Commonwealth of Australia came into being on 1 January 1901. The young Edward McTiernan, not 8 years old, was to play a part in its Parliament and in the Federal Supreme Court for which the Constitution provided.[5]

In Britain the events of far away Antipodean colonies were less pressing than other concerns closer to home. In 1886 the Prime Minister, William Ewart Gladstone had introduced a Home Rule Bill for Ireland. He declared that Britain's treatment of Ireland was a "broad and black blot" upon its record:

> Ireland stands at your bar, expectant, hopeful, almost suppliant .... She asks a blessed oblivion of the past, and in that oblivion our interest is deeper than even hers.... Think, I beseech you, think well, think wisely, think, not for the moment but for the years that are to come, before you reject this Bill.[6]

But reject it they did. It was thrown out of the House of Commons by 343 votes to 313. The Queen was asked to dissolve Parliament immediately. The election campaign which followed was fought with unequalled bitterness. The Conservative leader, Lord Salisbury, who had suggested that some people - "hottentots and hindoos" - were incapable of self government, was pressed on the entitlement of the Irish to different treatment.[7] But the final results of the election gave 316 Conservatives and 78 Liberal Unionists a huge majority over 191 Gladstonian Liberals and 85 Irish Nationalists. Rural England had voted against Irish reform. Gladstone resigned, to the profound relief of the Queen. She urged him not to encourage the Irish to expect that they would ever have Home Rule as that was "now impossible".[8] Impossible is a word that should rarely be

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4 Commonwealth of Australia Constitution Act 1900 (Imp).
5 *Ibid* s 71.
6 See E Magnus, *Gladstone* (1963) 357.
7 *Ibid* 358.
8 *Ibid* 354.

written in history.

Ireland's travails in the United Kingdom continued into the 1890s. Gladstone's hopes depended upon the Liberal Irish alliance. In 1890 Charles Stewart Parnell was cited as co-respondent in a divorce suit. Parnell declined to resign. In the circumstances of the time this was a mortal blow to the friends of the cause of Irish Home Rule in Britain. Parnell married his lover in June 1891. He died, heartbroken, in October of that year.

An election was called in the middle of 1892. Gladstone emerged victorious to form his fourth Administration. He went to Osborne on 15 August 1892 to kiss the hand of the Queen. She consigned him to a bedroom where he found a cheap print of his old adversary Disraeli.[9] It was during this administration that Gladstone warned the Queen "on his own responsibility" of the "growing danger of a class war".[10] He contended that the evils in British society had been aggravated largely "by the prolongation and intensity of the Irish controversy". This time the Home Rule Bill secured its majority in the Commons in April 1893. But the Lords rejected it by a crushing majority of 419 to 41. It was said that not a dog barked from John O'Groats to Land's End. Britain was bored with Ireland. The subject was exhausted. In due course, Gladstone resigned. How differently the history of the British Isles might have been if his determined efforts to secure Home Rule had then succeeded. Instead, a canker of bitterness was to last. It has not yet been removed. It helped shape the experience of the young Edward McTiernan, growing in far away Australia but of Irish stock, and ever proud of it.

2 THE EARLY YEARS

Edward McTiernan grew up in Metz, later called Hillgrove - a small town in the New England region of New South Wales. It was a goldmining town. Its three thousand souls were in the care of his father, the constable. The McTiernan family had originated from Heapstown, in County Sligo Ireland. They would certainly have followed Gladstone's determined efforts to secure Home Rule for Ireland and to address the "black blot" which British rule had left. To escape that blot and its economic consequences most of the McTiernan family had migrated to Boston in the United States of America. However, Patrick, already a constable in Crown service, secured employment with the New South Wales Police. He migrated to Australia as a bachelor. But soon after his arrival he married Isabella Diamond, also an Irish immigrant. Mrs McTiernan was a pious Catholic woman who taught the catechism at the local church school.

By all accounts, Metz was a law abiding town. The McTiernan boys might have sunk into the mining service without trace. But just before the turn of the century, an event occurred which was profoundly to affect Edward McTiernan's life. He fell off the verandah of the cottage in which his family lived and from which his father provided law and order to unreluctant Metz townsfolk. As a result of that fall, the young McTiernan broke his left arm. It never set perfectly. It always retained a weakness. Constable McTiernan realised that there would be little future for a boy incapable of hard physical work in a mining town. The fall was thus one of the reasons which propelled the small Irish Australian family to head south for Sydney. They set up their home in Leichhardt, an inner suburb.

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9 *Ibid* 399.
10 *Ibid* 405.

The fall was later to have an even more profound effect on Edward McTiernan's life. When in 1914 the Great War broke out, he was quick to volunteer for the Australian Imperial Force (AIF). His difficulty in loading the rifle with efficiency led to his medical exemption from military service. But for that fall from the verandah, he once told me,[11] he suspected that he would have been under the mud of the Somme, with so many friends of the AIF who fought there for King and Country. Anyone who has visited the Australian War Memorials and graveyards of Northern France will understand the poignant likelihood of this speculation.

Settled in Leichhardt, Edward McTiernan was sent to the Christian Brothers' School at Lewisham. Later he attended the Marist Brothers' School at Darlinghurst. That school, until its recent closure, boasted the Edward McTiernan Prize. When it was closed, it was amalgamated in an associated school run by the Marist order in Canberra. It continues its association with Edward McTiernan. To it, his widow committed a number of memorabilia of the famous student of the early days of the century.

In 1908 Edward McTiernan matriculated from the school at Darlinghurst. He had little prospect of entering the University, despite the promise he had shown as a school child. It was not until 1912 that legislation provided support for children of working class families to attend the Sydney University.[12] At that time there was also little hope that the young McTiernan would secure employment in the large commercial houses of Sydney. These were times of strong sectarian prejudice. Commerce was largely dominated by Protestants who boasted of the work ethic as if they had invented it. The best hope for the young Edward was the Public Service.

On his father's suggestion, he sat the examinations for entrance into the State and Federal Public Services. He won entrance to both. Although an officer of the State Police, his father advised that he accept appointment to the Federal Service because, he predicted, it was likely to grow in size and importance. Little could Patrick McTiernan have realised the impact which his promising son would have upon the decisions which would reinforce, with legal effect, his own instinctual prognostications.[13]

Edward McTiernan therefore began his long association with Federal Government in Australia. He was employed as a junior clerk by the Customs Department. They sent him to a job at the Victoria Barracks in Sydney. With his small wages, he enrolled as an evening student in the Faculty of Arts of Sydney University. At the University he came under the influence of Professor George Arnold Wood who taught him history. Wood was a liberal. He had criticised Australian involvement in the "imperial" Boer War. His criticism was accepted by the receptive McTiernan.

In 1910, the Labor Party won a clear majority at the Federal Election. For the

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11 Many of the details on Sir Edward McTiernan's life here recorded were told to the writer on the occasion of Sir Edward's 90th birthday in February 1982. See M D Kirby, "Sir Edward Aloysius McTiernan, 1892 - 1990 - Parliamentarian and Judge" (1990) 64 ALJ 320. The author gratefully acknowledges access to the forthcoming biography of Sir Edward McTiernan by K Buckley, to be published by the Law Foundation of New South Wales.

12 Bursary Endowment Act 1912 (NSW) (now repealed - Statute Law Miscellaneous Provisions Act 1989 No 89).

13 See *eg South Australia v The Commonwealth (Uniform Tax* case) (1942) 65 CLR 373; *Victoria v Commonwealth (Second Uniform Tax* case) (1957) 99 CLR 575. See also *Victoria v Commonwealth and Hayden (Australian Assistance Plan* case) (1975) 134 CLR 338.

second time, Andrew Fisher, the Labor leader, took office as Prime Minister of Australia. This time, Labor had a working majority. It established, for the first time, its claim to be one of the two principal forces in Australian politics. Labor held its majority until June 1913 when Joseph Cook formed a Government with the majority of one. His Government remained in office when War was declared in August 1914. But within a month, in a general election, the Fisher Government was returned with sweeping victories. Those victories soon turned to acrimonious disputes. W M Hughes became Prime Minister, in succession to Fisher. In 1915 he set upon efforts to persuade Australians to the cause of conscription to fight in the European war. The Roman Catholic Coadjutor Archbishop of Melbourne, Dr Daniel Mannix, addressed huge church gatherings in September 1916. He expressed a critical Irish perspective of conscription. Labor, which had been substantially built upon the support of Irish working people, fell into bitter division. In October 1916 a national referendum to permit the conscription of Australian men for overseas military service was narrowly defeated. Hughes and twenty three supporters left the Labor Government. They formed a new Coalition government which proposed a second conscription referendum. This too was defeated in December 1917 with an even larger majority against the proposal.

The young McTiernan observed these debates closely. He lined up behind Mannix and the majority of Labor supporters in opposition to conscription. Most young lawyers of the time were Empire loyalists. It was a rough introduction to the world of politics for these were times of fierce passions. With a war proceeding in which many Australians were being killed, embrace of opposition to conscription was often presented as disloyalty to the country and even worse.

After completion of his Arts degree, McTiernan studied law, graduating in 1915. At graduation he was awarded First Class Honours, an academic tribute to his diligence and to his intellectual abilities. Graduating in the same class was Mr Kenneth Whistler Street, later to be Chief Justice of New South Wales.

During his law studies, McTiernan had obtained a position as a junior clerk in the well established firm of solicitors, Sly & Russell. He had no connections with the firm. As he told it to me, he was walking along George Street when a large brass solicitors' plate caught his eye. He approached the firm and was ushered into the presence of William Charles Schroder. Doubtless impressed by the young man's excellent academic results, Schroder gave him a corner desk. McTiernan began his lifetime association with the busy world of legal Sydney.

It was Schroder who secured for McTiernan a position at Allen Allen and Hemsley, even then one of the largest firms of solicitors in Sydney. Norman Cowper, a partner of the firm, was approached one fateful day by Mr Justice Rich of the High Court. Rich was looking for an Associate to whom would be paid the princely sum of six pounds per week. Rich's son had enlisted in the AIF and had been killed in France. He made it plain that he would not accept an applicant who had declined to serve King and Country. McTiernan fitted the bill perfectly. He was young. His academic results were outstanding. He had volunteered. Rich took him on. For the first time, in 1916, Edward McTiernan entered the world of the High Court of Australia. In 1916, Sir Samuel Griffith was still Chief Justice. Sir Edmund Barton, father of Federation was still there. Isaac Isaacs, Henry Bournes Higgins, Frank Gavan Duffy, Charles Powers and George Rich made up a distinguished court. McTiernan came to know them all. Indeed, at time of his death in 1990, he had known every one of the Justices of the High Court (and

served with most) save for Richard O'Connor who had died in 1912.[14] He had a treasury of recollections of these formidable legal spirits. Most of them were happy memories. Effortlessly McTiernan would talk of them in his later years, as if they still walked the corridors on the way to the court room of the High Court. For McTiernan, they were still alive, their strong personalities vividly etched in his recall. His detailed recollection of them could cause their ghosts to walk.

3 PARLIAMENTARY YEARS

Edward McTiernan had joined the political Labor League in 1911. During the conscription referendums he had opposed the proposals. He never made a secret of such opposition. At the time the opinion of a fledgling barrister would not have counted for much. Roman Catholics predominated in the League. Their opposition to the proposals for compulsory conscription for overseas imperial war service were reinforced as the news came in from Ireland of the savage suppression of the Easter Rebellion in Dublin, in 1916, which the British regarded as a wicked stab in the back at a time of peril.

McTiernan, during his service with Mr Justice Rich, had been called to the New South Wales Bar. His admission was moved by George Flannery KC, in whose chambers he subsequently took his place. From the start, McTiernan saw an opening in politics. Though only twenty eight years of age, he stood for election at the General State Election in New South Wales in 1920. The Nationalists were divided. The Labor interests won a narrow victory. Twenty five of the forty three Labor members of Parliament were Catholics. One of them was the young McTiernan, elected for the constituency of the Western Suburbs. John Storey became the Premier and remained so until October 1921 when he died and was replaced by James Dooley.

McTiernan was commissioned to be Attorney-General. He was, at the time, the youngest man in Australian history to receive appointment as the First Law Officer.[15] Within a short time he demonstrated the measure of determination and persistence which would later come through his long years as a judge. One of the first acts was to pilot through Parliament a measure to secure the readmission to legal practice of Mr R D Meagher, a Sydney solicitor whose name had earlier been removed from the roll. The legal profession was virtually unanimous in its opposition to Mr Meagher's restoration. Meagher was a prominent man on the Labor side of politics. He was Speaker of Parliament and was also to become Lord Mayor of Sydney. The Bill passed. Meagher was to be the solicitor in many notable cases of interest to the Labor Party. He was to brief both McTiernan, and the young and brilliant H V Evatt.[16]

Another initiative of McTiernan's involved the healing of a wound which had resulted from the incarceration of twelve members of the organisation International Workers of the World (IWW). They had been charged during the War with conspiracy. McTiernan established a Royal Commission under Mr Justice Ewing of the Supreme Court of Tasmania. As a result of Ewing's report, ten of the "conspirators" were released in 1920. The remaining two followed shortly afterwards.

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14 See (1912) 15 CLR (vii).

15 Noted (1990) 168 CLR (v).

16 See Legal Practitioners' (Amendment) Act 1920 (NSW) (now repealed). See also *Incorporated Law Institute of New South Wales v Meagher* (1909) 9 CLR 655.

McTiernan also established a Profiteering Court. Concern about the misuse of market power was mixed with anger and disappointment of returned men coming back to economic difficulties in Australia after the end of the War. The Profiteering Court was never very successful. In this time of market economics, it seems an odd idea. In the context of the Australian love affair with compulsory industrial conciliation and arbitration, it was not so strange to Australians of 1920. McTiernan also established the Land and Valuation Court and secured the passing of the Fair Rents Act to protect returned servicemen.

As Attorney-General, McTiernan was often required to confront the sectarian bitterness of the time. His well known association with Dr Mannix, by now Catholic Archbishop of Melbourne, brought upon his head much spleen from conservative politicians. They were ever ready to denounce the controversial Archbishop and those who associated with him. Sir George Fuller, the leader of the Opposition, drew to the attention of Parliament the attendance of the Attorney-General at a luncheon given in May 1920 to welcome Dr Mannix at the Sydney Town Hall. He said:

> We know that at the gathering the toast of 'The King' was omitted, and that Dr Mannix, who had been delivering speeches in Melbourne before he came to Sydney was guilty of utterances of a most disloyal character to the country and the Empire.... At this gathering.... the Attorney-General was amongst the speakers and he referred to this rebel in our midst.... Two ministers of the Crown who have sworn allegiance to the King ought to have been severely reprimanded by the Premier and put out of the Ministry....[17]

According to Sir George, the venturesome Attorney-General had told the reception:

> it would be a very difficult task for the Prime Minister to carry out his threat to deport the Archbishop. I venture to say he is Australia's greatest citizen. He is an Australian institution.[18]

McTiernan stood by the controversial Irish bishop whose calls for Irish independence were probably no stronger than those made earlier by Gladstone. They were a severe irritant to the conservative political forces in Australia at that time. Yet McTiernan stood true to his beliefs and to his origins.

In March 1922 at a general election in New South Wales, Labor lost seven seats. The Dooley government fell. George Fuller became the Premier. McTiernan was re-elected but consigned to the opposition benches. He saw this political setback as an opportunity to further his profession in the law. In Parliament he was quick to take up legal causes. The Hansard Record shows him speaking on many issues of concern to civil liberties. He opposed enlargement of criminal summary proceedings and reduction of the availability of jury trial. He spoke for the abolition of the death penalty. He opposed the sectarian measures pressed forward to provide a new crime of impugning a lawful marriage. This crime was a Protestant response to the Papal *ne temere* decree. This had declared that no marriage, including one between a Catholic and non-Catholic, was valid in the eyes of the Church unless conducted in the presence of a Catholic priest. For

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[17] NSW Parl Deb (Legislative Assembly) 10 October 1920, 123. In his maiden speech to the House, lasting 2 hours, McTiernan begged his parliamentary colleagues to "look kindly on my deficiencies". See NSW Parl Deb (Legislative Assembly) 18 August 1920, 277. He admitted that he had not "acquired the parliamentary laugh or the parliamentary method of saying "hear, hear". Exceptionally, he was interrupted by an unnamed Hon Member who declared "you are the biggest capitalist in the House!" *Ibid* 278.

[18] McTiernan, quoted by Sir George Fuller, NSW Parl Deb (Legislative Assembly) 31 October 1921, 97.

Protestants and secularists this was too much. McTiernan described the Bill to create a new crime as "pure unadulterated communism".[19] As Buckley had suggested, nobody was likely to be persuaded that the Nationalist Government under Sir George Fuller was "communist".[20] This and other events of the time illustrate the serious blight of sectarianism which infected politics in Australia at this time.

In May 1925, Labor won government again in New South Wales under its new leader J T Lang. McTiernan was back on the Treasury benches. Lang chose him to be Attorney-General to the chagrin of H V Evatt who had also come into Parliament in the election. These were turbulent times. Lang was determined to pilot through a number of important measures of social reform. They included provision for widows' pensions and child endowment. But perhaps the most enduring reform was the passage of the legislation for workers' compensation in 1926.[21] That Act of the Lang Government endured for almost the duration of McTiernan's life.[22] In its day, it was seen as a radical reforming statute. Later reformists lamented the fact that the original imagination which had inspired the 1926 Act was not to endure as it settled into its long operation.[23]

During this term of government, McTiernan also introduced a Bill for the abolition of capital punishment. Although this passed the Lower House it did not secure passage through the Council. Even more critical for the Labor Government was the rejection by the Council of the moves of the Premier to abolish the Upper House. Striking difficulty in his efforts to achieve this end with the Governor, Sir Dudley de Chair, Lang sent Attorney-General McTiernan to London. His mission was to persuade the British authorities to convince the Governor of his duty to accept the advice of his elected ministers. McTiernan found London caught up in the middle of serious industrial unrest. Little time could be found for the Law Officer of a government in state of a far away dominion. McTiernan took the opportunity to visit County Sligo to see the land of his ancestors. On his return to London he was "duchessed" in the way only an imperial Britain could do. He returned to Australia. His words of praise for the British Government scarcely commended him to the Labor newspapers. McTiernan's ascent in the social scale paralleled these international experiences. In Opposition, he had moved with his family from Leichhardt to Haberfield. Now in Government again, and a barrister seemingly with a substantial career ahead of him, he moved to Strathfield. He was only to move once more, to Warrawee in the leafy northern suburbs of Sydney where he lived during most of his service on the High Court.

As Attorney-General, McTiernan appeared in the High Court in a case involving a misguided effort to raise taxes by a halfpenny tax on newspapers. The Court rejected the tax, declaring it to be an excise.[24] By 1927, in a successful move to secure an early dissolution of Parliament, J T Lang resigned. He was recommissioned upon the basis that he would retain only William McKell and John Baddeley in his new ministry. McTiernan saw the writing on

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19 NSW Parl Deb (Legislative Assembly), 24 July 1934, 603.

20 See K Buckley *supra* n 11, n 18.

21 Workers' Compensation Act 1926 (NSW).

22 The Act was repealed by the Workers Compensation Act 1987 (NSW).

23 See M D Kirby, "Alfred Theodore Conybeare 1902-1979, Compensation Judge" (1992) 66 ALJ 276.

24 *John Fairfax & Sons Ltd v New South Wales* (1927) 39 CLR 139. With McTiernan appeared Flannery K C, E M Mitchell K C and Robert Menzies.

the wall. He was out of favour with Lang. He did not even renominate in the State election called for October 1927. The election saw Labor lose its slim majority. Thomas Bavin replaced Lang as Premier. Lang was not to return to Government until October 1930. McTiernan returned to full time practice as a barrister. As a tribute to his earlier academic success, the University of Sydney invited him to be Challis Lecturer in Roman Law.

McTiernan's period of Parliamentary service was not yet over. His life as a barrister did not fully consume him; nor were his political interests yet finally slaked. A federal election of October 1929 provided him with an opportunity to enter the federal Parliament. E G Theodore was looking for a good safe middle class candidate to offer in the Labor cause for the Sydney seat of Parkes. This stable middle class electorate, around Croydon in Sydney's western suburbs, attracted McTiernan. A campaign was mounted for him by the first group of Labor lawyers: friends and colleagues of his. Most were Catholic lawyers who supported a moderately reformist Labor Party with the kinds of policies which McTiernan advocated.

McTiernan won the seat of Parkes handsomely. It was a seat which was to boast many famous members. Les Haylen was later to hold it. Later still, Tom Hughes won it for the Coalition parties supported by a group of lawyers who campaigned for him, as McTiernan's friends had done thirty years earlier.

McTiernan's period as member for Parkes was short and inconspicuous. The Hansard shows him in occasional clashes with J G Latham, member for Kooyong, the leading King's Counsel from Melbourne who was soon to be his colleague in the High Court. But it was McTiernan's colleagues in the Caucus of the Labor Party who were soon to translate him from Parliament to the "least dangerous branch" of the federal government.

4 THE HIGH COURT

The Labor Party in Government was led by John Scullin. He was an extremely cautious man, more concerned than his opponents were about the slightest charge of making political appointments. The resignation of Mr Justice Powers in July 1929 from the High Court left a vacancy unfilled at the election which brought the Scullin Government to office. In March 1930, Sir Adrian Knox, the Chief Justice, resigned affording the new Labor Government the rare opportunity to appoint two Justices. Isaacs was promptly promoted to Chief Justice. The two puisne positions remained. Scullin flirted with the idea of reducing the size of the Court to five justices in the interests of economy.[25] The *Sydney Morning Herald* in December 1930 reported:

> Single Judges sat to hear cases on only 29 days compared with 71 days in 1929 and 45 in 1928. The number of days on which the Full Court sat to hear cases was much smaller in the last two years than in 1927 and 1928.[26]

So there was little pressure of work to fill the two vacancies. Their importance to the program of a Labor Government was not perceived by the cautious Scullin.

In December 1930, the Prime Minister and the Attorney-General, F Brennan, were absent in London. McTiernan's time had come. The Labor caucus in Canberra resolved to appoint two justices to the vacant seats. There was a strong

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[25] J M Bennett, *Keystone of the Federal Arch - A Historical Memoir of the High Court of Australia to 1980* (1980) 51.

[26] *Ibid.*

lobby for Dr H V Evatt KC. He was young. But his intellectual credentials appeared impeccable. He had appeared in numerous leading cases in the High Court. His scholarly work and university distinction, not to say his allegiance to the Labor Party, made him an obvious choice.

But within the Caucus, a group of members would not agree to Evatt's appointment unless it were balanced by the more temperate McTiernan. Ultimately, two vacancies being available, the decision was made. Scullin received a telegram. Desperately, by wire, he sought to dissuade his colleagues from the appointments. But they went before the Federal Executive Council and were duly made. There was nothing anyone could do about it, save by constitutional removal. Herbert Vere Evatt KC, at 36, became the youngest man ever elevated to the High Court. The Honourable Edward Aloysius McTiernan, 38, was appointed as from the following day, 20 December 1930.[27] It was McTiernan who bore the brunt of the professional criticism which broke out on the announcement of the two appointments. The thrust of the criticism was that McTiernan lacked the distinction to deserve office in the country's highest court and that his only apparent claim to the office was faithful service to the Labor Party. Bar Associations and Law Societies around the country shunned him and Evatt. Typical was the South Australian Law Society. It voiced its opinion that Justices should not be appointed for their political opinions but only for outstanding legal reputation. As if in anger for the appointment, the Labor Party lost the seat of Parkes at the by-election to fill the vacancy left by McTiernan's retirement.

Much of the criticism ventured against McTiernan was based upon the fact that he had never taken silk. This was the least significant of his disqualifications. Other justices before (Sir Hayden Starke) and since (Sir Cyril Walsh) had never before judicial appointment received that commission. But there is no doubt that the criticism stung McTiernan, a sensitive man. It lead to anxieties which fuelled the ambivalent relationship he enjoyed with Evatt. A clever man of humble origins, McTiernan was hurt by the opprobrium heaped on him by the close knit, conservative legal profession with whom he was henceforth to spend his life. Still a bachelor, shy by nature and with only a small circle of close friends, his retreat into the judicial monastery reinforced the introspection and other-worldliness which had been noted during his time in politics. Although many Irish migrants and their families had participated in Labor politics, and most of them were Catholic, McTiernan was decidedly and noticeably so. He filled his private life with his associations in the Church. Before his appointment to the High Court, in 1928, he had taken an active part in the Eucharistic Congress held in Sydney in that year. For his loyalty and devotion to the Church, he was awarded a high Papal honour. So he was very visibly a Catholic public man. In the largely Protestant environment of the High Court and of the legal profession, this fact added somewhat to his isolation. And now he was cut off from many of the co-religionists and friends in the Labor Party who had sustained him to this point in his life. He was one of the founders of the Red Mass which, every year, opens the Law Term in Sydney. Faithfully, he would lead the Judges of Federal and State Courts into St Mary's Cathedral. He was also one of the founders of the St Thomas More Society. On one occasion he addressed its members on the 1926 Workers' Compensation Act of which he was inordinately proud.

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[27] The difference of a day rankled. See (1930) 44 CLR (iv).

Soon after Edward McTiernan arrived at the High Court, Sir Isaac Isaacs was appointed, in an equal flurry of controversy, to be the first Australian born Governor General. Rumours spread that Evatt would be appointed in his place to the central seat. Many believed that Evatt would have made a more stimulating Chief Justice than did Sir Frank Gavan Duffy, who succeeded Isaacs.[28] But now Duffy, Evatt and McTiernan provided a core of opinion in the Court which promised fair to the advance of federal power and to the sympathetic resolution of disputes of concern to working men and women in Australia. The early cases in which McTiernan sat saw him quite frequently in concurrence with Duffy and Evatt.

In 1931 there came to the Court an appeal by the Labor Attorney-General for New South Wales against a decision of the Supreme Court of that State concerning Mr Lang's latest effort to abolish the Legislative Council.[29] Evatt could not participate because he had earlier been briefed in the proceedings. The majority of the High Court (Rich, Starke and Dixon JJ) affirmed the Supreme Court. Chief Justice Duffy and McTiernan dissented. McTiernan's judgment is a closely reasoned piece, assertive of the powers of the New South Wales Parliament, in succession to the Parliament at Westminster:

> The gravity of the issues of law to be decided is emphasised by briefly noting the consequences which will flow from the success or failure of this appeal.[30]

An appeal to the Privy Council affirmed the High Court majority.[31]

Much more controversial, however, was the stand McTiernan took in the *State Garnishee* case. The case concerned the validity of the Financial Agreements Enforcement Act 1932 (Cth). That Act, passed in the difficult economic and political circumstances of the time by the Lyons Government, was said by J T Lang's Government to strip New South Wales of the "sovereign" power to appropriate, control and expend its own revenue; to enable the Commonwealth to appropriate revenues of State contrary to the will of the Parliament of that State; to impair the officers of the State in discharging the powers and functions imposed on them by legislation of the State; to enable the Commonwealth to destroy the capacity of officials lawfully appointed by the State to perform their functions and to deprive the State of the power to discharge its functions, including its exclusive functions. These were the issues as seen by Evatt.[32]

On this occasion, Evatt could participate, and he did. Chief Justice Duffy agreed with Evatt's view. They proposed that the Federal legislation be declared unconstitutional. The same majority lined up against that view proposing that the Federal legislation be held valid. This time, McTiernan, instead of providing the equaliser which would have afforded the Chief Justice the vital casting vote, aligned his opinion with the majority.[33] On 21 April 1932, with Rich, Starke and Dixon JJ, McTiernan upheld the federal Act as a valid exercise of the legislative powers of the federal Parliament.[34]

In later proceedings, consistent with the respect for the Australian solution for such constitutional questions, McTiernan joined all of the Justices save Evatt in

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28 J M Bennett, *supra* n 25, 53.

29 *A-G NSW v Trethowan* (1931) 44 CLR 394. The saga continues to this time. See *Bignold v Dickson* (1991) 23 NSWLR 683.

30 *A-G NSW v Trethowan* (1931) 44 CLR 394, 433.

31 See (1932) 47 CLR 97.

32 *New South Wales v Commonwealth (No 2)* (1932) 46 CLR 235, 240.

33 *New South Wales v Commonwealth* (1932) 46 CLR 155.

34 *Ibid* 227.

refusing a certificate under s 74 of the Constitution to permit New South Wales to take the closely divided judgment to the Privy Council. For Evatt the case warranted such an exceptional certificate:

> No case in which a certificate was refused resembles the present case in its importance. Having reached the conclusion that the present case not only justifies, but imperatively calls for, a decision from the highest legal tribunal in the Empire, it is my duty to say so.[35]

McTiernan was a more consistent centralist and Australian nationalist. He was also defensive of the key position of the High Court of Australia in determining the allocation of powers.

> It [the High Court] is the tribunal specially created by the united will of the Australian people, as a Federal Court and as a national Court. It has very special functions in relation to the powers, rights and obligations springing from the Constitution.... Since the foundation of the Court, a certificate has been granted in one case only ....
>
> It is ... necessary that finality in the determination of the question of the validity of the Act should not be delayed by granting a certificate....
>
> The application should be refused.[36]

The decision, so vital to the financial, constitutional but also political position of the Lang Government of New South Wales was a bombshell. From that day on, Lang refused to speak to McTiernan if ever they should meet together on a public occasion. He regarded McTiernan's decision as a betrayal. McTiernan acknowledged the slights but said that he "forgave" Lang for them.

Judges in difficult cases have choices. Nowhere more open ended are those choices than in constitutional cases where brief words of great generality must be given meaning. To the Labor supporters who had put McTiernan on the High Court, his inability to come to the same conclusion as the Chief Justice and Evatt seemed puzzling. To McTiernan, it was part of the judicial office and of the independence of judges under the law. Who knows to what extent the slights of 1930 played a part, even unconscious, in his determination to demonstrate quickly the independence of the politicians who, allegedly alone, put him in his place on the High Court? Who knows to what extent his desire to distance himself from Evatt, in a very public way, influenced, even unconsciously, his approach to the issues of the *State Garnishee* case? In a sense, that approach was wholly consistent with an attitude McTiernan was to adopt in the long years that followed. Consistently, he tended to favour an expansive view of the powers of the federal Parliament. According to Professor Sawer, the reaction in Labor circles was a deep sense of disappointment that their appointee had proved so impervious to their interests, and so quickly.[37]

During the 1930s, McTiernan joined in many joint decisions with Evatt; but more still with Dixon. He admired Dixon, whilst often finding his prose obscure. When Duffy was replaced by Latham in October 1935, there began the long and vital interval of the Latham Court which saw Australia out of the depression, through the Second War and into the busy times of post-war reconstruction.

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35 *New South Wales v Commonwealth (No 2)* (1932) 46 CLR 235, 242. *Cf* McTiernan's deference to English House of Lords authority as late as 1943. See *Piro v W Foster & Co Ltd* (1943) 68 CLR 313, 336. These were not unusual sentiments for the time. See also Griffith CJ's remarks (1919) 26 CLR (vi).

36 *New South Wales v Commonwealth (No 2)* (1932) 46 CLR 235, 243 quoting *Commonwealth v New South Wales* (1923) 32 CLR 200, 209.

37 G Sawer, *Australian Federalism in the Courts* (1967) 67.

Material now available reveals what an unhappy place the High Court was during the 1930s. Squabbles were legion. There was a lingering resentment, particularly on Evatt's part, about the way in which, as he saw it, Duffy had been forced off the bench by "a combination which included one member of the present court".[38]

Duffy's successor, Latham, inherited a file full of the constant vexation which Mr Justice Starke, in particular, inflicted on the Chief in relation to travelling expenses.[39] During the financial crisis which pressed upon the Court during the early period of McTiernan's service, allowances were cut and railway passes abolished. Rich complained that Evatt and McTiernan had consented to this "robbery" because, as former State Ministers, they enjoyed "gold passes" for free travel which survived the abolition of the Court's passes.[40] The most difficult member of the Court, Starke, never accepted the appointments of Evatt and McTiernan. An Associate has recounted a tale from that time which McTiernan repeated. Starke, passing McTiernan and his tipstaff in the corridor of the High Court would greet the tipstaff volubly, ignoring entirely the judge. This behaviour appears consistent with the contemporaneous evidence of Starke's letters to Latham after the latter was appointed Chief Justice. His usual description of Evatt and McTiernan was "the parrots". He charged them with blindly "parroting" the opinions of Dixon whose dominance of the Court Starke resented deeply:

> I am quite convinced that Evatt pays no attention to the facts and is merely a parrot.... It is gravely detrimental to the High Court and its independence that whenever a grave difference of opinion is disclosed, the "parrots" always reaches (sic) the same conclusion as Dixon.[41]

Latham replied that Dixon was aware of his influence and found it "disagreeable". But Starke rejected this interpretation:

> I blame him [Dixon] a good deal for he angles for their support and shepherds them into the proper cage as he thinks fit.[42]

Evatt, formidable and himself capable of equal vituperation, was willing to respond in kind. McTiernan, a much gentler personality, absorbed these hurts with rare complaint. When Starke refused to sit on some of the circuits of the High Court, Latham had to depend heavily upon Dixon and McTiernan to ensure that the published sitting schedule of the court was maintained. Only on one recorded occasion did McTiernan raise an objection and then in deferential terms.[43]

Immediately before and during the Second World War, justices of the High Court took on extra-judicial responsibility. Latham as Minister to Japan; Dixon as Minister to Washington and later Kashmir. McTiernan was also asked by Evatt (who by this time had resigned his seat on the court and was federal Attorney-General) to conduct an inquiry into the alleged falsification of records in connection with aircraft production.[44] The outcome of his inquiry is unknown

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38 H V Evatt to J G Latham, 12 October 1939, cited C Lloyd, "Not Peace but a Sword ! - The High Court under J.G. Latham" (1987) 11 Adel L Rev 175, 181.

39 C Lloyd, *supra* n 37, 180.

40 *Id.*

41 H E Starke to J G Latham, 22 February 1937 and 2 December 1938 quoted C Lloyd, *supra* n 37, 181.

42 *Id*, Letter of 2 December 1938.

43 E A McTiernan to J G Latham about 1937/8, quoted C Lloyd, *supra* n 37, 180.

44 Noted K Buckley, *supra* n 11. The appointment is found in Australian Archives A4 32 SP 109/3.

as it was subject to war time censorship.

Following the War, over opposition of R G Menzies, Evatt moved to increase the bench of the High Court to restore the number of justices to seven. Their number had been reduced in 1933 to six as an economy measure. With new numbers, Labor scarcely took the opportunity to stack the court with its supporters - or even with mildly radical lawyers. The Government appointed Sir William Webb, Chief Justice of Queensland to the court. Webb had no political association with the Labor Party. He turned out, like Dudley Williams also appointed from the Supreme Court of New South Wales to replace Evatt, to be conservative and highly traditionalist. With Duffy and Evatt gone, McTiernan was left as the only justice with a philosophical inclination to the causes dear to the Labor Party. As the scalograms of academic observers confirm, McTiernan was with a very high measure of consistency, usually favourable to the advance of federal power. Through his decisions, McTiernan emerges on what may be called the "left" scale of the judges who served with him. His decisions were the least "pro employer" in industrial accident compensation cases. They were the most "pro accused" in criminal appeals. They were the least "pro laissez faire" in cases under s 92 of the constitution. Next to Mr Justice Windeyer, his decisions were the least "pro defendant" in road accident cases. Yet in applications to review government decisions by the constitutional prerogative writs, his judgments were the most sympathetic to government and least supportive of the applicant challenging the benevolent state.[45]

McTiernan was not always in dissent. During the years of the Second World War the High Court, doubtless reflecting the peril of the time, adopted a generally expansive view of the defence power and indeed of federal power generally. With the end of the War, the bold moves of the Chifley Government were contested. By now often in dissent, McTiernan consistently supported the wide view of the powers of federal Parliament.[46] The greatest of these test cases came in the *Banking* case.[47] Latham and McTiernan alone supported the constitutional validity of the nationalisation measure upholding the federal power. How ironical it is today to see the successors in government to the Chifley Administration in the forefront of the moves to "privatise" banking - even to the point of selling shares in the Commonwealth Bank in the centenary year of the Labor Party which established it.

McTiernan's opposition to communism was undoubted. But he aligned himself with the majority in striking down the Communist Party Dissolution Act 1950 (Cth), the political centre piece of the restored Menzies Government.[48] Latham alone held out in support of federal power. The referendum which followed this notable decision saw Evatt in his finest hour: defending the constitution as a charter of a free and tolerant people living in a community which accepted a high measure of diversity of opinion. Perhaps the older

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45 A R Blackshield, "Quantitative Analysis: The High Court of Australia 1964-1969" (1972) 3 Law Asia 13-21.

46 See *eg* A-*G for Victoria v Commonwealth (Pharmaceutical Benefits* case) (1945) 71 CLR 237, 273; *Lord Mayor, Councillors and Citizens of the City of Melbourne v Commonwealth* (1947) 74 CLR 31, 85.

47 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 391.

48 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 205. For earlier cases in which McTiernan J had also evidenced a libertarian inclination, see *eg The King v Wilson; Ex parte Kisch* (1934) 52 CLR 234, 247. But it was not uniform. See *eg The King v Sharkey* (1949) 79 CLR 121, 157. See also M D Kirby, "H.V. Evatt, the Anti-Communist Referendum and Liberty in Australia" (1991) 7 Aust Bar Rev 93, 104.

McTiernan saw in the legislation against communists - disadvantaging them for their allegiance and opinions not for their actions - reflections of earlier laws and attitudes against Catholics and other vulnerable minorities.

Sectarianism did not entirely die in the 1920s. It showed its unhappy face with the split of the Australian Labor Party and the creation of the Anti-Communist Labor Party and later the Democratic Labor Party in the 1950s and 1960s. Remnants of it can still be seen in the Australian political debates. The worst of it appears behind us. But McTiernan, brought up to feel it keenly, did not entirely escape sectarian attitudes as I shall show.

5 HONOURS AND RETIREMENT

In 1948 Mr Justice McTiernan, 56 married Kathleen Lloyd. By every account she is a resourceful lady. One Associate even said that she could have concluded the Second World War if General Eisenhower had not been available. Perhaps the diffident and courtly McTiernan felt the need for such a daily influence in his life. That life had been left empty in 1945 when his father, Patrick, had died. Before Patrick McTiernan's death, the High Court judge was in constant communication with him. He was a dutiful son.

Upon the return of the Menzies Government in 1951 McTiernan was offered a knighthood by Mr Menzies. The Order offered was of the British Empire. In the past, the justices of the High Court had usually been elevated within the more prestigious Order of St Michael and St George. Urged on by colleagues lower in the line, McTiernan begged to query Menzies' offer. The reply indicated the limited number of KCMG's available. KBE's provided no such difficulty. So McTiernan accepted. This faithful son of Ireland and of the Church became Sir Edward. After him it became a normal incident of the office of the Justices of the High Court during Coalition governments to be offered, and to accept, appointment as a Knight of the Order of the British Empire. It remained so during the Fraser Government, Sir Daryl Dawson being the last of the justices so honoured.

In 1963 Sir Edward was sworn of the Privy Council. He thus became entitled to the honorific of "the Right Honourable". He sat in the Privy Council in 1972, taking a long journey around the world which Lady McTiernan organised. He insisted on being accompanied, even into the first class cabin of the plane, by his Associate. Reluctantly, the federal authorities agreed. The Appeal Cases for 1973 record one appeal in which he sat in the Judicial Committee. It was an appeal from Hong Kong. Lord Wilberforce presided. The advice of their Lordships was given by Lord Pearson. In it, reliance was had on a decision of the Privy Council in which their Lordship's preferred a West Indian decision to one of the High Court of Australia in which McTiernan had joined.[49]

McTiernan generally kept his Associate, or law clerk, for a year or eighteen months. The qualifications for that office were simple. The candidate needed to be Roman Catholic, male, of Irish descent and preferably with an interest in Labor politics. McTiernan had severed his personal links with Labor politicians. But he kept a keen eye on political developments. He liked to discuss them with his Associate. On most days it was his practice to eat in his chambers with his Associate. They would together consume the meal which Lady McTiernan had

[49] See *Edwards v The Queen* [1973] AC 648 (PC). The Australian decision not followed was *The Queen v Howe* (1958) 100 CLR 448 where McTiernan J had concurred with Dixon J (1958) 100 CLR 448, 464.

prepared for them. Having no children of his own, the parade of Associates became part of McTiernan's family. Traditionally, an Associate would eat at home with the McTiernans at least once a week at the large house in Warrawee adjoining conveniently, a Catholic chapel. He was devout in his religious devotions: attending Mass on the Sabbath and on the feast days.

Many expected Sir Edward McTiernan to retire upon the election of the Whitlam Government in 1972. Throughout those long years of dissent and judgments ever briefer, it was frequently said amongst law students that "Eddie" was keeping a seat warm for the next Labor Government, out of loyalty to his origins. So it had been when Menzies returned to office. Within weeks Hayden Starke and George Rich resigned. Their resignations made way for the appointments of Justices Fullagar and Kitto. But McTiernan had few interests outside the law. Perhaps he saw no one more suitable to take his place. Perhaps nobody suggested that he should resign. Perhaps by 1972 he was more truly devoted to a judiciary above politics to render unthinkable the thought of resignation for the advantage of the Labor Party. Perhaps he expected the Whitlam Government to hold office longer than it did. Perhaps he was taken by surprise when the Whitlam Government lost office. Perhaps it was because another member of the court was consistently urging him, during the Whitlam Government, that he should not retire. Whatever the reason, he was still there when the Fraser administration came to power.

Indeed, McTiernan would probably have been there until his death but for an accident which occurred in the Windsor Hotel in Melbourne in 1976. There was a plague of crickets in Melbourne at the time. McTiernan was going to the bathroom in the large room which he and Lady McTiernan regularly occupied at the Windsor Hotel when he saw a cricket on the carpet. He overbalanced as he tried to hit it with a rolled up newspaper. He broke his hip. The mending took a long time. When he was ultimately mobile again, Chief Justice Barwick declined to alter the accommodation of the High Court to provide for a judge in a wheelchair. It would cost too much. And although "Gar" and "Edward" had enjoyed a good personal relationship, the Chief doubtless sensing an opportunity to fill the post with someone younger and closer to his own world view, eventually persuaded McTiernan to retire. The retirement was gazetted on 12 September 1976. It closed the longest term of office served by an Australian judge - 46 years. It surpassed the term of 36 years served by Justice William Douglas of the Supreme Court of the United States of America.

One consequence of the long service was the fact that, in his age, Sir Edward was frail. His hands trembled in company with his voice. Yet his mind remained fairly clear to the end. On the bench he could be distracted. The fine quavering voice would often be difficult for counsel to understand. Chief Justice Barwick would not allow counsel to ignore McTiernan. "You have not answered my brother McTiernan's question" he would often say. McTiernan was not devoid of humour. Nor should his gentleness be misunderstood. His Associates tell of how he could burst into energetic enthusiasm and become animated. But it was generally over history or politics, not the law.

At his home in Warrawee, McTiernan would receive friends and visitors - most of them having those qualities which he found congenial and by which he invariably selected his Associates. They would sit there in a large bright room under a substantial but conventional portrait of McTiernan. Lady McTiernan would keep any children at bay. Sir Edward would reflect on times long ago. His memory was that of an old man. He had instant and detailed recall of events of

the 1920s. Conversations could be called to mind, characteristics and even the clothing and appearance of the historical figures of that time. More recent events were less readily recalled. On his 90th birthday, I visited him. I recorded his words as soon as I had returned from his presence. Later published,[50] the record is a remarkable story of service to Australia over an unprecedented period through times of dramatic change.

In one way McTiernan, the constitutional reformer, contributed more than he knew to a reform of the Australian Constitution passed at referendum. It was occasionally his lot to assume the office of Acting Chief Justice. Being the senior puisne judge of the Court, he was obliged to step in for Dixon and Barwick when they were unavailable. On one occasion he did this to swear in new members in the Senate Chamber. The Members of Parliament, who rarely saw the justices of the High Court in those itinerant days, were uniformly shocked at McTiernan's great age and apparent feebleness. It was the sight of the octogenarian which encouraged the bipartisan support for the amendment of the constitution providing for the compulsory retirement of federal judges.[51] It was one of the few proposals to change the constitution approved by the people. Henceforth there would be no more life appointments.

McTiernan died on 9 January 1990. He was just short of his 98th birthday. At a sitting of the High Court on 5 February 1990 Chief Justice Mason, in a brief tribute, noted his long service:

> Sir Edward had a profound knowledge and appreciation of the law and literature, a knowledge and appreciation that contributed to the clarity of thought and expression which were the hallmarks of his judgments. Viewed in their totality, they exhibit a remarkable consistency of thought and decision over such a long period of judicial service. Sir Edward's unfailing kindness and courtesy were appreciated by all who appeared before him and sat with him. Sir Edward made a great contribution to the public life of this country in law and politics.[52]

Remarkably, his judgments begin at the 44th volume of the Commonwealth Law Reports. They end in volume 137. It remains for a full biography to be written, analysing those judgments. It will be surprising if they do not bear out what scalograms and judicial impressions suggest is the "remarkable consistency" of the world view of this venerable judge.

5 IN THE FOOTSTEPS OF MORE

Why should we be concerned with the life of Sir Edward McTiernan? This country disdains its own history. Too fascinated with the personalities of the other side of the world, its most gifted sons and daughters have too often served alien gods and ignored the lives of noble citizens closer to home.[53] According to Manning Clark, the present generation has a chance to be wiser than previous generations were. It can see an end to the domination of the "straighteners" and the opportunity for the "enlargers of life" to have their chance.[54]

I have found the personality of McTiernan of interest for things I shared in common with him. His was an Irish background, and although mine is of the Protestant tradition, the clue to the issues of Ireland is the essential similarity of

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0 M Kirby, "Sir Edward Aloysius McTiernan - Parliamentarian and Judge" (1990) 64 ALJ 320.
1 Constitution Alteration (Retirement of Judges) 1977 (Cth). Amending s 72 of the Constitution.
2 (1990) 168 CLR (v).
3 C M H Clark, *A History of Australia* (1987) vol 6, 496.
4 *Ibid* 500.

its separated people. He was a man interested in the world seen through th prism of a moral perspective. He had a concern for the disadvantaged. He wa sensitive to the issues facing ordinary working men and women. He was loyal t their causes. That remarkable consistency was played out year after year, an where necessary, in dissenting judgments. In McTiernan's time it was mor difficult to dissent than it is now. The ascendancy of analytical jurisprudenc made the path of the reformer and dissenter, like McTiernan, painful and difficul Yet he pressed on, true to his own colours. He was not unconscious of his ow responsibilities and the honour of serving as a judge in his country's highes court. He remained ever courteous and fundamentally humble. Doubtless thes personal attributes were daily renewed by the sure knowledge that there wa above him a power greater than any mortal power.

McTiernan was no saint. He had a reputation for personal meanness. This wa doubtless the product of the relatively humble circumstances of his early year On the other hand he was generous towards those for whom he had affection. H was extraordinarily sensitive to perceived slights but equally considerate of th feelings of others. He explained to colleagues his occasional interruptions whic some people thought showed a lack of understanding. The true explanation o them was, he said, that he thought counsel were not being given a fair go an should be asked a general question so that they could continue their argumer without interruption. He certainly stayed far too long on the Court. Every offic holder must keep in mind the need to make way for young people of honourabl ambition who follow behind.[55] By the 1960s, McTiernan's enthusiasm an energy had noticeably waned. Even the number of dissenting judgments fell. Th spell of Dixon was by then truly upon him. The energy required to contribute a intellectually worthy and alternative perspective to the High Court was nc usually there. To modern eyes, his restriction of his circle of friends and hi appointment of Associates to people of a like background, views and religio seems unacceptably narrow and discriminatory. Human beings, including judge are improved by acquaintance with people of a different background an experience. It takes a large spirit to escape the bonds of clan loyalties and th comforting reassurance of mixing with people like oneself. Doing so helps t destroy stereotypes built on childhood preconceptions. These are perhaps reason why observers note that he was not "a dominant force" in the Court.[56] He shoul have had sufficient insight to perceive that the time had come for retirement, t make way for fresh blood required to invigorate a vital branch of governmen For a man who succeeded so handsomely in his own youth, he betrayed littl thought for the more youthful aspirants who conceived themselves to be worth of similar chances in life.

For all that, he displayed in his life many endearing graces. Sir Thomas Mor canonised in 1935, was for him an exemplar. More's life was told in the Lives c the Chancellors by Lord Campbell who said of him:

> With all my Protestant zeal I must feel a higher reverence for Sir Thomas More tha for Thomas Cromwell or Cramner... I am indeed reluctant to take leave of Si Thomas More, not only from his agreeable qualities and extraordinary merit, bu from my abhorrence of the mean, sordid, unprincipled chancellors who succeede him....[57]

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55 See *eg* remarks (1919) 26 CLR (xi).

56 See *eg* D Marr, *Barwick* (1980) 214; M Coper, *Encounters with the Australian Constitutio* (1987) 124.

57 Lord Campbell, *The Lives of the Lord Chancellors*, (2nd ed 1856) 519. See generally

Happily McTiernan's successors have not merited such opprobrium. It has fallen to this Protestant reviewer to write twice of this most Catholic judge with a proper measure of respect. McTiernan never faced the mighty challenge that cost More his life. He will not join the company of the saints. No stained glass windows will memorialise him. Certainly, he lived to see the ultimate ascendancy of Catholic Australians with members of his once disadvantaged church in the highest offices of state. Today six of the seven justices of the High Court of Australia were baptised Catholics - a truly remarkable turnabout from the days of endangered religion faced by More and to a lesser extent McTiernan himself. The Prime Minister is also a Catholic. So is the Premier and Chief Justice of his State. The old days of minority disadvantage were wholly gone. Now there was a need for those who had overcome that disadvantage to perceive the contemporary disadvantages of others. McTiernan, as a child of the 19th Century, never took that leap of the mind.

Yet there are parallels with the life of the sainted Chancellor which should be noticed before this tale is closed.

Like More, McTiernan lived in a time of great change, of dangerous wars and of moral ferment. More had to face the challenge to his Church presented by Luther, the Reformation and the English Protestants. In McTiernan's world, the Church in his own lifetime came under unprecedented challenge. It was always an anchor for his existence. For More the great technological change of the printing press revolutionised the spread of ideas in a way that altered the old civilisations forever. McTiernan lived to see the age of nuclear fission, interplanetary travel, the microchip and in vitro fertilisation. Both More and McTiernan saw the law challenged in a time of radical change. Each in his way had to respond to the challenges.

Both were educated in the manner of the common law. Both worked under and with intellectual leaders of the legal profession. More was profoundly affected by his exposure to Erasmus. If no Erasmus entered McTiernan's early world, he certainly mixed, by happy chance, from the beginning with the large figures of Australian law.

Both More and McTiernan were elected members of the People's House of Parliament. More became the Speaker of the House of Commons. McTiernan took a seat in both the State and Federal Parliaments. Both were knighted. Both were sworn of the Privy Council. Both became judges in their country's highest court, continuing to exercise judicial power in the great tradition of the laws of England.

Both had about them a simplicity and modesty of personal demeanour which attracted respect and admiration.[58] For both, family life, devotion to a small circle of friends and, specifically, respect for their fathers was an important element on their personal road to humility. More, when Chancellor, would begin his day kneeling at the feet of his father, Sir John More, when still sitting on the King's Bench as the Senior Judge.[59] McTiernan's devotion to his father endured to the latter's end. Even to his 90th year, he could recall the happy days at Hillgrove in the family home of that country constable.

Burbury, *Sir Thomas More and the Rule of Law* (1980) 3.

58 J T Ludeke, "Thomas More" unpublished address to the St Thomas More Society, Newcastle, (1985) 3.

59 *Id.*

Like More, McTiernan was stubborn. At least in his early years, he would not take the easy path of concurrence. He held out for his own views though they were often unorthodox. The middle decades of his service were times of remarkable uniformity of thought in the High Court of Australia. To swim against that tide spoke of high moral conviction and the "indomitable Irishry" of which the poet Yeats wrote. Some time before the High Court of Australia, the House of Lords in England embraced McTiernan's opinion, that the simple words of income tax legislation should receive their plain meaning.[60] He struck down tax avoidance schemes in a way which was regarded with condescending bemusement at the time. With hindsight, we can see that many of his opinions on federal power, criminal law and tax avoidance were simply ahead of their time. Perhaps in a more supportive and congenial working environment, the light of his intellect might have shone more brightly than it did.

More's sudden end, for the urgent insistence of conscience, contrasts with McTiernan's long service. Each of these lawyers has lessons for their own country and beyond. More teaches succeeding generations the ultimate obligation of individual conscience and duty to the enduring law above even the mighty power of the state. For Australians, McTiernan shows that with luck, ability and opportunity a poor boy from a country mining town can rise to the highest offices of the State and nation.

As lawyers, we can celebrate the life of Edward Aloysius McTiernan in his centenary year. He accompanied our Commonwealth through its first testing century. His monuments are not in cold stone but in the living pages of the Commonwealth Law Reports. This is the privilege of judges. Their ideas and the fine workings of their minds are displayed for those who come after. They contribute to the seamless history of the law.

It falls to Yeats, another Irishman also from County Sligo, to offer this epitaph to McTiernan:

> Under bare Ben Bulben's head
> In Drumcliff churchyard Yeats is laid.
> An ancestor was rector there
> Long years ago, a church stands near,
> By the road an ancient cross.
> No marble, no conventional phrase;
> On limestone quarried near the spot
> By his command these words are cut:
> Cast a cold eye
> On life, on death.
> Horseman, pass by ![61]

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60 See *eg Federal Commissioner of Taxation v Casuarina Pty Ltd* (1971) 127 CLR 62, 84-86 and discussion in *Federal Commissioner of Taxation v Gulland* (1985) 160 CLR 55 at 86.

61 W B Yeats, "Under Ben Bulben" in U O'Connor, *The Yeats Companion*, (1990) 216.