

SUPREME COURT JUDGES OPENING OF TERM DINNER

ADDRESS 5 FEBRUARY 2009

During the War years 1939-1945 I was a pupil at Fort Street and for two of those years an arts undergraduate. Except for a cousin named Garfield Barwick, whom I very occasionally met, having my roots in country life in western New South Wales, I had very little association with or knowledge of legal practice or the courts.

1944 and 1945 spent as an Arts undergraduate at Sydney University were for me years of enlightenment confronted as I was with knowledge and intellectual challenges I had not previously encountered.

Despite the war and the tension and restrictions it brought, the university environment at the time was relaxed and almost idyllic. Most of us in Arts I and II were still in our late teens with the usual drive and questioning which late teenagers ordinarily have.

Except for old tennis courts the land in front of the main university building was open pasture where horses grazed. I especially recall the draught horses. On occasions they strayed onto the concourse in front of the archway below the Carillion tower. As a country boy I decided to demonstrate my expertise and to head them off. Whether accidentally or on purpose, they corralled through the archway into the quadrangle, creating mayhem among the students.

At that time the Union, the SRC and the Dramatic Society (SUDS) were active and the Andersonians and political and religious activism were well and truly alive. For a short time I even became the treasurer of the Labour Club.

Professor Tasman Lovell lectured in psychology. In an afternoon lecture early in 1944 an unruly student burst into the lecture room and announced "*We are marching on the city for freedom of the press*". It was my first taste of student politics. Calwell, then Information Minister, was threatening to censor the press. Within the hour hundreds of us marched down Broadway, up George Street shouting "*Freedom of the press*" until we reached the recruiting rostrum in Martin Place where we were addressed in strident tones by Malcolm Hilbury and his firebrand brother. The whole incident was spontaneous, electrifying to a novice, and no doubt a breach of the peace or some provision in the National Security Regulations. Amazingly, as I recall it, no police intervened.

As a result of all this I still hold the now apparently mistaken view that university life is about the search for truth.

During 1945 some ex-service personnel had begun to appear in Arts lectures but nothing prepared us for the numbers that confronted the relatively few Arts/Law undergraduates when we appeared at our first law lecture in St James Hall in 1946.

There were literally hundreds, perhaps two or three. Their ages ranged widely but most were in their mid-20s to mid-30s. Almost wholly male they were men on a mission catching up on absent years and bringing maturity, experience and a sense of urgency to the scene of student life that we had never experienced before. Largely it was this group that was to form the core of the Bar and the solicitors of the 50s and 60s.

The post-War influx placed great strain on the administration of the Law School. From the very start it was apparent that Margaret Dalrymple Hay, the Clerk of the Faculty, was well and truly up to the task. The biographical note in the Australian Dictionary states:-

“Ms Hay was trim and efficient looking in tailored skirts and jackets, soft blouses and colourful scarves. She was quick in mind and body and impatient at stupidity or bad manners.”

All this was true but there were times when some of us the young Arts/Law students in our late teens, felt, as we stood awaiting her attention, that she regarded all of us as stupid and bad mannered. Importantly, however, she had been of great assistance to law students who were serving in the forces and she did an excellent job of looking after their needs and the needs of other ex-service personnel on their return.

Professors Stone, Morrison and occasionally the Dean Shatwell lectured us. Most lecturers however were practising barristers like Charles McLelland in Equity, Frank Hutley in Succession and John Holmes in constitutional law, each of whom later became a judge of this Court.

One of the most vivid recollections I have of lectures is of those on constitutional law delivered by John Holmes in the smoke filled, steamy and close late afternoon environment of an upper floor lecture room in Federation House. He whetted the appetite which some of us, like Mason and myself, were later able to satisfy.

My first close association with the Supreme Court was its library. Many early mornings were spent there with Tony Mason researching cases. The library was furnished with stand up benches and tall stools if you wanted to sit. Because I was a full time law student for two years there were times when I was there throughout the day. The library was relatively small. It had a cross section of relevant Australian and English reports and possibly the United States and Dominion Law Reports together with the leading texts. It was conveniently located at the King Street entrance to the Court and was widely used by the Bar and solicitors whether they were involved in court or not.

During this full time period I was able to drop in on cases in the Supreme Court. It was a random selection moving from court to court. I was on a learning curve absorbing the atmosphere. The passing parade included Chief Justice Jordan and most of the other judges of the Court. I recall no special occasions simply what seemed the quiet, relaxed and pleasant demeanour of the judges in the Banco Court and the rapier like cross examinations of people like Jack Shand and Barwick and the generally high calibre of senior counsel.

In 1948 life became serious and I became a clerk at Henry Davis & Sons. The firm was located where it is today in the old MLC Building. In the same building were the then relatively small firms Greenwell York, Freehill Hollingdale & Page and Dawson Waldron Edwards & Nicholls.

Two of the sons of Henry Davis were the partners. As a result of their school days at Kings School they were close friends with Nigel Bowen, then a rising junior, whom they often briefed. Arthur Davis handed me an opinion which Nigel had delivered. I read it and arrogantly suggested that in certain respects it might be wrong. Arthur said “*Well you go up and discuss it with him.*”

In retrospect my journey to his chambers was professionally the most important journey of my life. It was like a single step commencing a journey of a thousand miles. He was 37, occupying chambers on the 2nd floor of Denman, bespectacled and quietly conservative in appearance. I explained my point of view and I quickly learned the quality of his mind. I was wrong. As I found later, he was what I would term a liberal progressive. He had returned from service in New Guinea on the front line. One day a young lieutenant called Ninian Stephen turned up at his battalion and served under him.

In 1950, immediately prior to commencing practice, I was Associate to Bernard Sugerman. He was then a Judge in Equity and the Land and Valuation Court Judge. A quiet unassuming man who smoked a pipe incessantly, he was extremely intelligent. He was a great friend of Julius Stone who often had lunch in his chambers. Sugerman had graduated from Sydney University and shared the University Medal. He was certainly one of those rare very gifted people whose intellect enabled him to talk profoundly with Julius Stone about the subjects covered in his immortal work *The Province and Function of the Law*.

Post-War resummptions meant that a great deal of our time was spent on the valuation of land. There were counsel of considerable capacity who constantly appeared in the court including E J (or Ted) Hooke, for a short period a Judge of this Court. Alan Saunders, a recent first class honours graduate, as well as Cliff Collins, who wrote the standard text on the valuation of land. Collins was a small man, tirelessly devoted to land and valuation matters. It was strongly asserted that he never threw away a single piece of paper, be it the leftovers of a brief or some irrelevant correspondence. If you went to his chambers to see him this was at first impossible. Eventually you found him seated at his desk hidden behind huge piles of paper.

Sugerman enjoyed this work, as well as sitting as a judge in equity, because it was an intellectual challenge for him and often brought to the Court counsel of the calibre of Barwick, Hardie, Wallace, Else Mitchell and others. In many cases, as in the Land and Environment Court today, the stakes were very high.

His quality of mind and temperament as a judge led to his subsequent appointment as second President of the Court of Appeal and on many prior occasions to being called upon to sit on the Full Court before that Court was established. He was, for instance, one of the five judges who sat on the Full Court in *Clayton v Heffron*, proceedings to which I will refer later.

I would regard Bernard Sugerman as one of the most intellectually gifted judges who has sat on this Court – perhaps on any court in Australia. At the time of his death it was said he was rarely in error, he was a Cardozo-type of judge, inclined to be self-effacing and yet nonetheless bearing the mark of the great lawyer in all he did or wrote while on the bench ((1976) 50 ALJ 613). He was a friendly man and to those who knew him well a good and loyal friend.

As I recall it, at the time I was Associate to Sugerman, Mason was Associate to Roper, Chief Judge in Equity. He has already given you an insight into the character of this impeccable judge. I say “impeccable” because to me he had every attribute you would expect such a judge to have. However, according to Nigel Bowen he had one defect – it was almost impossible to

get him to find fraud. This observation arose following a case over the authorship of the music of a well known song. My recollection may be at fault but I think it was called *Now is the Hour*. Our clients claimed that one of their family had written it in, of all strange places, Moree and had later played it in front of a Mr Darling then a manager at the music store, Palings. A grand piano was set up in Roper's court and one of our leading pianists played the tune. Darling denied he had plagiarised it and despite what we believed was a withering cross examination of him, Roper refused relief.

Charles McLelland was then a judge in Equity, later to become CJ in Eq. He sat on the first floor of the Hyde Park Barracks building above Roper J's court. It was undoubtedly a pleasant relief to appear before him. This was not only because of the perils of appearing before Myers J, but mainly because in himself he was thoroughly pleasant, a very good lawyer, his considerable intelligence being tempered with what I would term pragmatic wisdom and good humour. I appeared before him for over 20 years – throughout he remained young in mind and spirit. He was everybody's friend and a joy to appear before.

An interesting case before him which enabled him to give expression to all these facets of his personality was *Edwards Publishing v Walt Disney* 55 SR 162. I was junior to Bowen.

It related to the infringement of copyright in well known cartoon characters including "Donald Duck", an unnamed donkey and a dog, "Goofy". Walt Disney had chosen to establish his copyright in Australia. The trial lasted 10 days and much of that time was taken up by the Judge and counsel reading comics and comparing the features of these characters with those of the defendant's characters, including "Super Duck", the defendant's unnamed donkey and a dog "Hamburger". His Honour found, importantly for Disney, that his copyright in each of his characters had been established by the evidence. In relation to infringement he gave Walt Disney's donkey a vote but none for "Donald Duck" or "Goofy". To witness senior counsel of the calibre of Bowen and Hardie reading comics to the judge for days on end was an experience to remember.

Charles McLelland and his son and our friend, Malcolm, were very much alike. The same virtues abound in each.

Much has been said of another Equity Judge, Myers J, by those who have preceded me. I think I can say without doubt that I spent more time in front of him than any other counsel. I have added it up and in terms of the period over which the cases lasted it totals some 5 years. I only have to mention the Rheem case (3 years) and the Bayer case (1.25 years) to total 4.25. The others include *Continental Liqueurs v Gilbey*, *Butler Airways*, a lengthy probate suit and many, many Friday matters.

In the period before his appointment in 1953, F.C. Myers QC occupied chambers on the second floor Denman, next to Nigel Bowen. It was the largest room on the floor. His room, when you entered it to see him or borrow a book had a strange funereal air about it. Everything was in place, silence abounded and his desk behind which he was seated was clear except for the pad and the papers he was reading. I appeared with him in a case of *Cuell v Petters* shortly before his appointment. My friend, Godfrey Smith, was on the other side. Myers seemed pleasant enough but he suddenly vented his spleen on Godfrey and accused him of doing something underhand in relation to the case. These unpleasant thoughts were not ones I could readily embrace. I ignored them but managed to remain friendly with him.

Shortly after his appointment in 1953 I was asked by Russell Fox to mention a matter involving the interpretation of an order made by the Judge. It was late in the afternoon. I had

little time to read the brief and I can still recall walking to the Barracks up King Street past “Rainauds” restaurant and the Queens Club wondering what I could possibly say. When I arrived at the Court (Roper J’s old court) the case had already started and it was not long before I was on my feet. Referring to the order and looking for guidance from above I submitted “*Your Honour, perhaps by these words (mentioning them) you meant this (stating it) or perhaps you meant that (stating it).*” But guidance did not emerge. Suddenly the voice from the Bench responded: “*Mr Ellicott I’m not here to be cross-examined by you!*” I do not know what got into me (perhaps it was what he had said about Godfrey) but I responded, “*Your Honour, we wouldn’t be here at all if your Honour had made your Honour’s order clear in the first place.*” Strangely, nothing was said in response by the judge and the matter was duly completed.

Realising I had over stepped the bounds he agreed to see me and I gave my apology which he accepted with a smile. But it was not a good beginning. Perhaps some heavenly body had already decreed that I should serve 5 years of my life before him.

What has been said about Helsham’s capacity to deal with the judge is literally true. In his approach to Freddie Myers he reminded me of the approach which all Victorian counsel at that time, unlike NSW counsel, took to all judges of superior courts. I first noticed it in a patent suit, *HPM Industries*. Bowen and I had a hopeless case before Williams J in the High Court and were opposed by Douglas Menzies QC and Aickin. It was called the “*grovelling*” approach. Phrases delivered with obeisant gestures like “*Yes your Honour*”, “*Of course your Honour*”, “*Your Honour is so kind*”. It seemed to work with Myers J.

It would be wrong to conclude that Myers J was somehow to be compared with Kekewich J. Myers was a good lawyer, had strong principles, a philosophical overview of the law and rarely displayed anger. He was a man of singular courage having, despite his disability, stumped the Kokoda trail. He was essentially black letter to the core, but more so, because he was always inclined to see the difficulties in resolving legal problems rather than their solution.

Barwick could quickly overcome his negativity. Some counsel I believe used Barwick for this very purpose and Barwick would “*lead*” them for no fee to get the result. I saw Barwick handling Myers in the *Butlers Air Transport case* which he won and which led to Ansett taking over that company.

The *Rheem case* which continued over a three year period related to confidential information allegedly taken by Rheem Australia, the defendant, from American Flange, the plaintiff, and the manufacturer of “*Trisure*” a flange which is screwed into the top of an oil drum.

Smyth QC led Rath QC and Lockhart for American Flange and Cassidy QC led Tom Wardell and myself for Rheem.

Jack Cassidy had a keen, active mind, was energetic, full of fun, an extrovert and with a Northern Ireland background. Born in 1893 he had taken silk in 1938 and was a very successful trial lawyer in jury and non-jury cases alike. He held retainers for the Daily Telegraph and other papers. He appeared in *Hocking v Bell* in the mid-1940s in the High Court and Privy Council.

He played tennis with Adrian Quist and Frank Packer. He was instrumental in helping to organise the Liberal Party during the 1940s in New South Wales. At one stage he was vice-president. He told me that in 1949 he had been proposed for the seat of Lowe. He decided he

would not seek pre-selection. Soon after that he met Billy McMahon in Phillip Street who had just returned from England. He said to Billy *"I have just been offered pre-selection for the seat of Lowe but I have decided not to stand. I was to meet with the ladies committee in the electorate tomorrow. What about you taking the seat and going out to see them."* McMahon accepted and the rest is history.

By the time the Rheem case started in 1966 Cassidy was 73. Because of his age it was agreed that we would adjourn at 3.00pm each day. He also enjoyed a glass of champagne before going to court. It gave him *"a lift"* he said. He was by no measure an alcoholic.

At 9.30 each morning during the trial he would consume a glass of Great Western champagne lying on the chaise longue in his chambers. The balance of the half-bottle would be given to John Kehoe, then a young instructing solicitor, to take up to court. It in turn would be consumed at the 11.30am adjournment.

Early one morning, well into the trial there was a loud explosion in the Court. The cork of the champagne bottle flew out of Kehoe's brief case and ricocheted round the court landing on the floor between the associate and the bar table. Smyth was cross-examining in his usual fashion. It must have been absorbing because the trial proceeded without any reaction whatsoever from judge or counsel. At the morning tea adjournment I said to Cassidy that maybe he should go in and apologise to the judge. He did but returned saying that Freddie hadn't noticed anything untoward whatsoever. Following that a refrigerator was installed in the bar room by the solicitors and each morning Kehoe would place the half bottle of champagne in it to be consumed at the morning tea adjournment.

I had taken silk by the time this case started. Nevertheless difficulties with Myers had not altogether abated. I started examining our main technical witness early one afternoon. It was not long before I heard *"I object"*. I quickly realised it was not Smyth but the judge himself. Smyth quickly jumped to his feet and said *"Yes I object too your Honour"*. He disallowed the question and between that time and 11.00am the next morning he disallowed almost every question I asked. I was intent on continuing because the witness was vital. Suddenly around 11.00am Myers remained silent and the evidence went in without further objection. I felt I had conquered him at last.

Cassidy's closing address lasted 72 days. The case was won. Cassidy died in 1975 aged 82. He was a treasure.

Myers retired on 26 July 1971. The *"Bung"* case was in effect his swansong. In 1992 he was reported at the age of 89, to be leading a campaign for his fellow residents at a retirement village in St Ives. *"The flesh grows weak"* it was said of him *"but there's nothing wrong with his spirit"*. There never was.

I was friendly with Rae Else-Mitchell a judge of this court from 1958 till 1974. He lectured in constitutional law and appeared in a number of leading cases in this and commercial areas of the law. He also had a passion for history. I appeared against him on a number of occasions. He had one of those brilliant minds packed with information. His knowledge of case law was phenomenal. He had a point of view on most subjects even outside the law. Keen eyed he would press his point of view upon you.

When his appointment was announced it was a complete surprise to me. He was only 44. I thought he had a bright future as a silk. I immediately went to his chambers and asked him why on earth he had accepted the appointment. He said he held the view that if the Crown

asked you to be a judge you were duty bound to accept. This was, I found, the view of others but not one that I would ever have applied to judicial appointment. It is far too personal and life changing to demand immediate acceptance. I also thought he may not be happy as a judge because he had personal interests that extended far beyond it to public administration and policy and academic life. He resigned in 1974 when he was 60 and became the Chairman of the Commonwealth Grants Commission. He also became active in national and community affairs in Canberra and elsewhere. He died in 2006 aged 91.

Gordon Wallace QC was appointed a judge of this Court on 21 March 1960. On 1 January 1966 he was appointed the first President of the Court of Appeal in extremely controversial circumstances which were recently the subject of an address by Michael Kirby. He retired from that office on 21 January 1970.

At the bar he too had chambers in Denman. I knew him well and appeared with him on a number of occasions. He had a very wide and enviable practice. He attracted work of considerable quality. He was an effective and successful trial lawyer. He often appeared in the High Court but lacked the appellate skills of counsel like his contemporaries, Bowen, Barwick and Doug Menzies.

I was junior counsel in *Blomley v Ryan* (1956 99 CLR 362) before Alan Taylor. In that case I had four leaders in succession, Cassidy QC, Wallace QC, Lester Meares as a senior junior and Bowen QC. For some reason each of them was jammed. On the morning it started Cassidy was unable to be there. Wallace had a window of opportunity between 10.15 and 12 noon and was briefed that morning. He knew very little about the case when he rose to cross-examine Blomley Senior. However his clever cross-examination of Blomley set the tone of equitable fraud and catching bargain that permeated the case. On a later day Timothy Ryan was examined in chief by Lester Meares. I recall that Tim was so confused by the succession of leaders that he said at the morning tea adjournment in his befuddled state "*Who is this man who is asking me questions?*"

Gordon Wallace was one of those people whom history may treat unfairly. He certainly pursued political office of which I was unaware at the time. He was a bit of a charmer to his juniors and clients. He made juniors feel they had something to contribute. Probably because of my preoccupation with Myers J I never appeared before him.

There were a number of judges whom I knew well but before whom I never appeared. They included Bruce Macfarlan, Lester Meares and J D Holmes. I would like to endorse what Tom Hughes has already said of Bruce Macfarlan. As a silk he was very impressive and popular.

I appeared on several occasions with John Holmes in cases involving constitutional or administrative law. Apart from being highly skilled in constitutional and related areas of the law he was a good friend. He had a good sense of humour but was found to be an easy prey for practical jokers. I was his junior in a case *TCN v Commonwealth* (1963) (109 CLR 59) before the Full High Court in Melbourne. Mason appeared as a junior in the same interests. We were all staying at the Southern Cross Hotel. At dinner he had said to us that he was becoming very concerned about major hotels like the Southern Cross because they seemed to be offering customers all sorts of dubious services. On the morning of the hearing he stormed into the bar room at the High Court and in high dudgeon said "*I told you these top hotels are going beyond their bounds. During the night I was rung by a woman and offered the favours of the house! I am going to complain to the management*" It was a call which Mason, admittedly with my encouragement, had been able to arrange. The caller was the receptionist at the Hotel Australia where Mason had often stayed.

In the same case, Kitto was the presiding Justice. At one stage a vexatious litigant named Collins burst into the court shouting “*I want justice!*” Kitto said “*Officer remove that man.*” “*Yes*”, said Holmes, who was addressing the court, “*throw him out!*” Shortly after that Kitto, who despite his pleasant personality could be sharp with his questioning of counsel, used his stiletto on Holmes who finished his argument by throwing his brief on the table saying to us “*I will never appear in this court again*” and for a time he didn’t. He was a likeable man and close to all his juniors.

Whilst I was associate to Sugerman J I swapped places with Kinsella J’s associate (his daughter) for two murder trials that the judge was doing. It was one of my rare excursions into the criminal law and led to my becoming quite friendly with Kinsella in the years ahead. Born in 1893 he served in the First World War from 1914 to 1919 in both Gallipoli and France rising to the rank of Lieutenant. He was admitted to the bar in 1927 and developed a sound practice in common law and industrial law. He was an ALP member of the Legislative Assembly from 1930 for several years. He was a tall, 6ft, 4ins, dignified in appearance and took his office as a judge very seriously. He was appointed to the Supreme Court early in 1950 after serving as a District Court Judge and a member of the Industrial Commission. He was also a leading Catholic layman and was a member and later chairman of St Vincent’s Hospital’s advisory board. He took a keen interest in horse racing. Apart from being pleasant and worldly wise from the war time and political experience he was intelligent and had a sound knowledge of criminal law, the common law and commercial principle and was a very effective judge of this Court.

I only appeared before him once. It was a case called *Fowler v Begg*. He was able to see merit in an argument I put based on the *Wintergarden Theatre case*, then a controversial authority in New South Wales, and he agreed to refer it to the Full Court for argument where it prevailed.

Sir Alan Taylor was a judge of this court for a very short period before being appointed to the High Court bench. I first appeared before him as a single justice of the High Court in *Blomley v Ryan* (1954) (99 CLR 362). He had been a superb counsel. He had a cultured mellifluous voice. Extremely intelligent he was also worldly wise all of which equipped him to be highly successful on the bench. But he could be withering. One day he said to me from the Full Bench: “*Mr Ellicott you really should remember that your argument does not improve by repetition.*”

It was a salutary comment which at times I have forgotten.

Except for two, I cannot add anything of significance to what has been said to you previously by others as to the Full Court and the Chief Justices of the Court who are not now alive.

Comment has been made of the controversy surrounding the establishment of the Court of Appeal. As I recall it the basic problem was about ignoring judicial precedence and who should be the first President. Sections of the legal profession did not favour a Court of Appeal but the majority did. During the 1950s the Full court was often referred to as “the three blind mice” and there was a tendency to avoid the Full Court and take appeals from judges sitting as the Supreme Court direct to the High Court or the Privy Council. On the other hand, in the 1960s, when the High Court was dominated by New South Wales appointees, the tendency in Victoria was to regard its Full court as the ultimate Court of Appeal.

I want to refer to two Chief Justices whose lives in a significant way were intertwined.

Evatt was born in Maitland in April 1894. When he was appointed Chief Justice on 1 February 1960 he was 66. The intervening years of his life will, at least in broad outline, be well known to you including his record concerning scholarship, authorship, the arts and sport.

He came to be Chief Justice in controversial circumstances. His health was “shaken” and the brilliance of his mind had disappeared. Kylie Tenant, in her biography *Evatt – Politics and Justice* (1972) describes the decline:

“He knew his health was shaken by the years of incessant struggle – sometimes he had small lapses of memory. He would go to sleep ... in involuntary dozing.”

Alan Dalziell, his secretary for 20 years, in *Evatt the Enigma* (1969) writes (at 16):

“It was a rather sad spectacle to see this man eminent in the field of law, but now tired and distressed by party politics seeking a way out.”

Premier Bob Heffron fully supported his appointment but the Attorney General Reg Downing was believed to have opposed it. Obviously, at that stage, having regard to his age and the growing pressures on the Court, he was not fit for the task either physically or mentally.

I thought I would have an opportunity to witness him in action as an advocate when I visited the High Court during the *Bank Case*. He happened to be addressing the Court. However he was engaged in an endless quotation of cases from reports which literally covered the bar table. It was difficult to judge him. Among the profession Evatt was not regarded highly as an advocate. Nor was he known for his political rhetoric. Nevertheless his success in the Communist Party case, his commitment to establishing Australia’s role as a middle ranking power, his successes in relation to the United Nations and in promoting human rights earned him great support especially among younger people.

Apparently he was not always optimistic or eager to believe the best. He was said to have strongly criticised his junior Sir Kenneth Bailey, the Solicitor General, for fraternising with opposing counsel during the hearing of the *Bank Case* in London.

Bob Hutchinson who for a time was Commonwealth Crown Solicitor told me that he travelled back to Sydney with Evatt and Chifley shortly after Labor lost power in 1949. They were discussing how they felt about the loss. Evatt said the public were ungrateful having regard to what Labor had done for them. Ben Chifley put it differently. He said:

“It’s like going to bed with a blonde and waking up in the morning and finding she has gone!”

I was junior to Bowen and Hugh Robson in *Clayton v Heffron*. Because it involved the Colonial Laws Validity Act it was clearly at the centre of some of Evatt’s earlier studies. During the argument he constantly interrupted and at the time we thought that although he purported to know a lot about the subject he was sometimes forgetful and quite detached. Bernard Sugerman was on that bench and, it is believed, wrote the joint judgment.

This was obviously not a happy period in the Court’s history, having regard to the political context in which it took place, the obvious use of the office as a place to deposit Evatt in his declining years and the effect it had on other judges of the Court like Owen. It was especially

unfair to him. He did not deserve to be put in an office which he was unable to fill. Nevertheless if you stand back and fairly assess his career he was a remarkable Australian.

John Kerr took chambers on 2nd Floor Denman in the early 1950s. Whitlam as an active junior was there too. He was junior to Dovey QC in the Royal Commission into Liquor. Dr Evatt's chambers at this time were in Denman on the first floor and he used them when Leader of the Opposition. It is perhaps a strange coincidence that all the lawyers who had a direct role in the political action in the 1975 dismissal came from the same Chambers.

Of course, well before the early 1950s, Evatt had become closely involved in Kerr's career. Kerr wanted to become a Labor lawyer. The story of this association is recounted in Kerr's *Matters for Judgment* (1978) Ch. 3. Kerr's parents were not wealthy and the family lived in Balmain. In 1931 he approached the then Justice Evatt by going to his North Shore home asking for advice about a legal career. Kerr did not seek it but Evatt was so impressed that he ended up giving Kerr what he termed a scholarship of £50 a year. He became thereafter a mentor to Kerr.

By the time Kerr came to the bar in 1938 Evatt had already published his work *The King and His Dominion Governors*. Because of this Evatt in a sense remained Kerr's mentor for the rest of his life. He found great justification for his 1975 decision in Evatt's work.

Kerr's political views moved over the years and he became what I term a liberal progressive. He accepted appointment in 1966 as a judge of the Commonwealth Industrial Court. In June 1972 he was appointed Chief Justice of this Court. It was the shortest Chief Justiceship in the Court's history. He became Governor-General in July 1974. I never appeared before him. Sir Laurence Street at his swearing in described him as follows: "*a man of enormous administrative capacity and imagination, he has activated the whole judicial branch of government and set it marching forward to the year 2000 with a sense of order and of purpose.*" (1974) 2 NSWLR (xx-xxi).

John Kerr as Governor General was drawn into a deep vortex contributed to by political ambition, economic turbulence and government mismanagement. He was the innocent one, but, of course, this is not the time to tell that story.

Nigel Bowen was a judge of appeal from 24 July 1973 to 19 December 1976 and Chief Judge in Equity from 3 June 1974. I read with him, appeared with him and worked with him in government. He had many qualities of mind, body and spirit. He was a rare human being.

When setting up the Federal Court I knew that its success, amid mounting though misguided criticism, depended on the quality of its first Chief Judge and I had no doubt he was the person needed. When approached I found him to be very happy in the position of Chief Judge in Equity and I could not at that time offer him the same salary (it was several thousands short) and he knew he would be stepping into controversy. He was not immediately positive about it and I was immensely relieved when, after a period of consideration, he agreed to come. The Federal Court's future was then assured and it was in that Court that his judicial and administrative capacities shone and are to be appraised.