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**EDITOR:**

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*A Practitioner of the Supreme Court of South Australia*

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## JUDGES OF THE SUPREME COURT

\*The Honourable John Jefferson Bray, Chief Justice.

†The Honourable David Stirling Hogarth.

The Honourable Charles Hart Bright.

The Honourable Roma Flinders Mitchell, C.B.E.

The Honourable George Henry Walters.

The Honourable Howard Edgar Zelling, C.B.E.

The Honourable William Andrew Noye Wells.

The Honourable Alexander Keith Sangster.

The Honourable Samuel Joshua Jacobs.

‡The Honourable Leonard James King.

The Honourable James Michael White.

The Honourable Christopher John Legoe.

## ACTING JUDGES

§The Honourable Donald Carter Williams.

\*\*The Honourable Douglas Ralph Newman.

## ATTORNEY-GENERAL

The Honourable Peter Duncan, M.P.

\*On leave of absence from 22nd May, 1978 to 27th October, 1978.  
Retired, 27th October, 1978.

†Acting Chief Justice from 22nd May, 1978, to 29th October, 1978.

‡Appointed Chief Justice, 30th October, 1978.

§Appointed 28th September, 1978.

\*\*From 28th September, 1978, to 30th November, 1978.

## MEMORANDUM

A special sitting of the Full Court was held on Friday, 27th October, 1978, on the occasion of the retirement of the Honourable the Chief Justice (Dr. J. J. Bray, LL.D.).

THE HONOURABLE THE ACTING CHIEF JUSTICE: We have met here this morning to honour and pay our respects to the Chief Justice on the eve of his retirement from this Court.

This is a momentous occasion in many ways, because it is the close of a chapter in the legal life of the Chief Justice. His legal life started in the year 1929, when he entered the University of Adelaide as a student in the Faculty of Law. Nearly four years later, in December, 1932, which was as soon as he possibly could, he graduated with a degree of Bachelor of Laws, having shown his prowess in that time in the form of first class passes, the equivalent of the distinctions of today, and Stow and David Murray Prizes.

During the greater part of this time, he was also busy as an articled law clerk. Then as a newly admitted practitioner, busy as he was, his interest in the academic side of law led him in the following year to study for, and achieve, the honours degree of Bachelor of Laws. He was the second person in this State to achieve this distinction, the only recipient of the honours degree before him being Dr. Anstey Wynes. And may I say that at that time to achieve the honours degree was a matter of hard application. It involved the study of Holdsworth's *History of English Law* (which in those days fortunately ran to no more than nine volumes), and to pass examinations, one in the history of common law and one in the history of equity. While lesser mortals might have quailed, the Chief Justice took these hurdles in his stride in a single year. And without pause he went on to earn one of the few Doctorates of Law which had been awarded by the University of Adelaide to that time.

His brilliant career as a student at the University was a portent of things to come. He had already exhibited his love of the law, not as an end in itself, but as an instrument to use in the attainment of justice. This is a love which has stayed with him all his life.

I will leave it to others to speak of the work of the Chief Justice as a legal practitioner in general practice, as a barrister, and as Queen's Counsel. When he came to this Court as its Chief Justice in February, 1967, he came equipped with a depth of legal learning, an enthusiasm for legal research, and an ability to analyse a problem and crystallize the salient issues to an extent which few, if any, of his predecessors have equalled; and I am confident, none has surpassed.

It has ever been the burning desire of the Chief Justice to achieve justice in his decisions, but sometimes a law is intractable, and its strict application leads inexorably to a decision which the individual judge feels runs counter to the ideals of abstract justice. In such a case, the Chief Justice never flinched from his duty—his duty to administer justice according to law, the law as it has developed over the centuries, and as it has been laid down by Parliament. He did not put himself above the

law. On these occasions he did not hesitate to express his views about the matter, and to do his best to see the situation put right for the future.

But his intellectual honesty is such that he could not bring himself to give a decision in which he did not believe, based on the facts as he believed them to exist, and on the law as he knew it to exist. This absolute intellectual honesty is a virtue which we, his colleagues, have seen in practice and admired for the great virtue that it is. It is something I hope we will always follow and imitate.

If I speak for a moment of Sir Christopher Wren, I assure you that I am not being completely irrelevant. It was his architectural genius which, to a great extent, led to the rebuilding of the City of London as it is known even today, after the Great Fire in the seventeenth century. All about the city were to be seen fine buildings erected according to his design. By introducing this topic particularly I have given myself the opportunity of quoting some Latin to the Chief Justice. We all know that he loves the classics, and my only doubt is to whether he will approve my pronunciation and my translation, but he has that right of reply so highly valued by advocates. The Latin phrase which I want to use is that said to relate to Sir Christopher Wren—*Si monumentum requiris circumspice*. That is, as I understand it, “If you seek his monument, look about you”. If you seek a monument to the legal work of the Chief Justice, you must look, not about you at random, but in the place where the fruits of his work are preserved: in the South Australian State Reports for the whole of the period since his elevation to the Bench. There you will see evidence of his learning, of his literary ability, his intellectual integrity, and his power to express himself cogently and convincingly.

It is not often that a Judge of a colonial Supreme Court is cited as an authority in England by the members of the highest Court in the land, the House of Lords. It is seldom indeed that a Judge in such a Court is cited when the judgment from which the citation is taken is a dissenting judgment in his own Court. It is a rarity, and I would think a unique occasion, when such a citation is made which profoundly influences the decision of the House, and thereby changes the course of the development of the common law on a topic of importance, involving the rejection of respected and hallowed authorities, some of them centuries old. And yet this is what happened, in the case of a dissenting judgment of the Chief Justice, in *Director of Public Prosecutions for Northern Ireland v. Lynch*. The report is to be found in the 1975 volume of the Appeal Cases, where the House of Lords decision is at page 653. Let me quote from one of the speeches, that of Lord Morris of Borth-y-Gest. He referred to a case decided in our Full Court in which the Chief Justice gave a dissenting judgment, and he went on to say: “The Chief Justice (Bray C.J.) dissented. In a closely reasoned judgment, the persuasive power of which appeals to me, he held . . .”, and he then went on to discuss the details of the decision. The case was decided according to what many had thought were the heretical views of the Chief Justice, but now they have been sanctified and are now received as orthodox doctrine. And so, when I say that the legal work of the Chief Justice, at its zenith, is to be found in the South Australian State Reports, I would add that one must

look also in the 1975 volume of the Appeal Cases, in which the decision of the House of Lords is to be found.

I have been on the Bench myself for a long time and it is many years since I held a brief. But on learning of the Chief Justice's intention to retire, some months before he went on leave, I delivered myself a brief to argue his case before himself as the arbiter. I argued long and earnestly against his decision to retire, but my eloquence was wasted. As was his wont when hearing a case he listened to me courteously, he appeared to note mentally the points which I made, he appeared to consider them dispassionately, but he remained unconvinced. There was no court of appellate jurisdiction, and his decision had to stand.

When the Chief Justice leaves us he will leave not only the record of his work in the Law Reports, but also, I am delighted to say, something very tangible, a portrait executed by Mr. John Dowie, whose presence here today we welcome. When you leave the court today, ladies and gentlemen, it will be displayed for the first time on an easel outside the door in the lobby, outside the door of this court room. I have watched the progress from shortly after Mr. Dowie commenced the painting only a few weeks ago. I am confident that, like me, you will see in it a vivid and vital portrayal of the Chief Justice. He has an expression which I have often observed, and it is good that we who have known him so well will have this daily reminder not only of his work but of his appearance; and that generations to come, who read the words of the Judge, may see the man as he is today. We thank the Law Society for its enterprise in arranging for the painting of this portrait. We thank Mr. Dowie sincerely for the very fine work he has done with the portrait of the Chief Justice.

With the departure of the Chief Justice from this Court we are losing a friend whose presence will be sadly missed. We will miss his subtle and kindly sense of humour; we will miss the opportunity of sitting with him in the Full Court; and we will miss the opportunity of reading yet further of his judgments.

I said earlier that today marked the close of a chapter of his Honour's legal career. I hope that it will not mark the end of his association with the administration of the law. With his talent for legal research and his ability to express himself, we can only hope that he will continue, and that we may see the fruits of his future work in the academic journals, not only of Australia, but of the United Kingdom, journals such as the *Law Quarterly Review* and the *Modern Law Review*. They would be richer with his contributions.

Chief Justice, we, your colleagues, bid you farewell as a member of this Court. You go with our respect and with our best wishes for the future; and may good fortune attend you in the years ahead.

THE HONOURABLE THE ATTORNEY-GENERAL: To farewell your Honour at this special sitting of this Court is indeed a very sad occasion and one which the law fraternity in South Australia has approached with great regret.

It is appropriate on this occasion for me to express the gratitude of the Government, the Bar, and the people of South Australia, to your Honour for the distinguished service which you have rendered to us during the period in which you held your office.

In 1967 the then Attorney-General, Mr. Dunstan, described your appointment as one which had received appreciation from all segments of the community. The public expression of regret upon the announcement of your retirement only reflects the tremendous growth in that appreciation during the time you held office.

Your Honour was appointed as the Chief Justice of South Australia on 28th February, 1967, following in the footsteps of Sir Richard Hanson, Sir Samuel Way, Sir George Murray and Sir Mellis Napier, and in bringing your unique attributes of academic and professional experience to the office you have enhanced the traditional respect which the holders of this office have attracted to it.

In the eleven years in office your Honour's work has received world-wide acknowledgment where systems of British justice prevail. With your Honour's wider view of matters through the breadth of your learning and experience you have served the community, the law and the profession in most exceptional ways.

You have effected the administration of justice fairly and with a perception which has been notable, particularly in the realm of the Court of Criminal Appeal. May I remind your Honour of these words which you spoke on the presentation of your Commission as Chief Justice, on which occasion you said: "The law exists to serve men, to provide a just settlement of their disputes and to protect them against violence and dishonesty. Amongst other things, it represents the elements of stability and permanence in the community". Your Honour's judgments have demonstrated that your Honour has kept this attitude in mind constantly in making your judicial determinations.

The weight of the office upon which your Honour commented when appointed has done little to dim the interest which you have shown in the community beyond the court room. Your continual concern in legal education at the University of Adelaide where your Honour served as a lecturer in Jurisprudence, Roman Law and Legal History, was only a small indication of your wider concern for the persons who passed through the university.

As your Honour will recall, I first had the pleasure of making your Honour's acquaintance when I served as a student member on the Council of the University of Adelaide of which you were then and are still the Chancellor. From that time on I can say with the greatest conviction that your Honour in all of our contacts has been courteous, patient with me, and of enormous assistance at all times. I have been most fortunate to have had the benefit of your Honour's wisdom and wit on many occasions during my present office. I wish personally to acknowledge your Honour's kindness and courteous assistance which I, together with my predecessors, have received. That quality of kindness and courtesy has been expressed towards all members of the profession during your

time as Chief Justice, and I am sure we are all going to miss that very much. I am sure that I accurately express in return their gratitude, especially the gratitude of the younger members of the profession whose sometimes tenuous arguments you have heard with patience and understanding.

Your Honour's breadth of practice, the manner of your practice, both in the city and the country, provide a model for the young who seek to serve the community and the law in the valuable career of legal practitioner.

It would be remiss of me on this occasion if I did not make some mention of the esteem with which your Honour is held by ordinary members of the South Australian community. The name John Jefferson Bray and your office during your tenure have become synonymous in most people's minds in South Australia with a feeling of community security and of well-being, a feeling that the concept of justice, so loftily expressed in the textbooks, has been applied on the ground. It is my view that no greater tribute could be paid to a Chief Justice than that expressed in such a community attitude, and I believe, Sir, the very presence of this crowded court room this morning is a true expression of those sentiments.

Your Honour's illustrious service to the Bench in particular is to be applauded on this day and will be long remembered by those of us living, and your judgments permanently recorded in the law reports will be long remembered by those of us living and those yet to come.

I want in conclusion to express to you my deepest personal gratitude and best wishes, as well as the goodwill of the Bar of this State and the Government, and our hope that your retirement will be a long and very happy one.

THE PRESIDENT OF THE LAW SOCIETY (MR. E. P. MULLIGHAN Q.C.): May it please the Court, there is, among the legal profession, a deep sense of sorrow at the enforced premature retirement of your Honour, the Chief Justice. Your Honour has presided over this Court with great distinction and has maintained the most cordial relations with the profession.

Most of us present today clearly remember your Honour's work at the Bar which was outstanding. You appeared as counsel in almost every jurisdiction, with great distinction and considerable success. You undertook any brief, in the best traditions of the Bar, regardless of the popularity of the cause or the likelihood of success.

It is unnecessary to mention particular cases in which your Honour was involved. It is sufficient to say that they included many of the most difficult and important cases in the Courts of this State. Your Honour attained the unofficial title of "The Leader of the Bar". Obviously very few have obtained that recognition and yet your Honour maintained a close and personal relationship with the profession and, in particular, its most junior members. That relationship has continued and is greatly valued by the lawyers of this State. At all times your Honour was readily approachable by the profession and ever willing to be of assistance. It was no surprise to the profession when your Honour took your



present office. As was said then, and at other times, including recently, you were the clear choice of the profession.

On the occasion of the presentation of your commission, your Honour set for yourself a yardstick. You have been reminded of it recently, and again today. I am able to say that it is the unanimous view of those for whom I speak that you have measured up to that self-described standard, and have done so magnificently.

The retirement of a Chief Justice in the past has been described as the closing of a chapter in the history of the Court. Such a reference is appropriate now. The term of your Honour's office has been a most memorable chapter in the history of the law in this State. When you took your seat this Court already enjoyed an excellent reputation. Your Honour has greatly enhanced it.

Your scholarship and great knowledge in matters of law, and otherwise, are reflected in your Honour's judgments, which have touched and, indeed, helped to solve, many problems facing contemporary society. These judgments are widely read throughout Australia and the common law world. Your simplicity and clarity of language has enabled every person connected with the law to readily understand your Honour's decisions regardless of the intellectual ability of the reader. Any description of your Honour's judicial qualities must be inadequate, but should include your constant patience and courtesy to all who appeared before you.

The Law Society acknowledges and is grateful for your Honour's influence upon the law in this State, which will always be remembered, and is timeless. Consequently, your Honour will appreciate the sense of sorrow in the profession of which I have spoken. However, there is also a sense of warmth and pleasure as your Honour will now have more time to spend among your books and papers, and in the pursuit of your many interests which until now time has restricted. It is only right that some greater degree of leisure should be available to you.

Lord Radcliffe wrote: "But it is the lawyer's plain duty to be pedestrian, to keep his feet on the ground; and it is only once or twice in any generation that one is seen who walks with wings." Your Honour may well be so described.

The Law Society extends to you its warmest wishes on your retirement.

THE HONOURABLE THE CHIEF JUSTICE: My brother Hogarth, Mr. Attorney, Mr. Mullighan, my brethren, or should I say my siblings, of the bench and the bar:

I thank all of you who have spoken for what you have been kind enough to say and I thank all those who have attended for the honour done me by their presence.

It is indeed impossible for me to sit here and speak to you without emotion and regret, without what Sir Mellis Napier in his adaptation of Virgil's famous line used to call the sense of tears in mortal things. Believe me, the decision to retire, in one sense four years prematurely, was no light decision, and there have been occasions when I have wished

that I could recall it. I am satisfied, however, that it was the right decision. I do not think that my intellect has deteriorated, but my energy is flagging and my patience is becoming impaired; and I think it is best for the State and the law as well as for myself that I should retire while I am still capable of doing the job and still capable, I hope, of doing some of the things that I have always wanted to do and have put aside for more urgent tasks.

It seems to me, after considering the precedents, that the speech of a retiring Judge tends to fall, like Caesar's Gaul, into three parts, retrospect, acknowledgment, and valediction. As always, as my brother Hogarth has said, or nearly always, I cheerfully bow before the weight of authority.

As my brother Hogarth has said, I entered into articles in the year 1930 at the age of seventeen and was admitted to the bar at the age of twenty-one. I practised for twenty-four years as an amalgamated practitioner and for ten years as a silk, and after that I have held the office of Chief Justice for over eleven and a half years. Thus my working life has been spent in the service of the law for forty-eight years, nearly half a century, nearly two-thirds of the allotted span of the psalmist. Indeed, since I received my doctorate in 1937, took silk in 1957, and was appointed Chief Justice in 1967 I thought last year that in the interests of symmetry I should retire in 1977, but my sister Mitchell then persuaded me that in this, as well as in more important legal contexts, the pursuit of symmetry can be carried too far. Of course it was not until early this year that I received the medical report which turned the scales, and I should say with reference to that that I am not at present incommoded in any way by my condition, apart from easy fatigue, but the diagnosis served as a warning that life is precarious.

I have found the practice of the law demanding and absorbing. Ideally—and I say ideally because I would not have you think that I claim for myself all the qualities I am about to mention—ideally, it calls for the exercise of some of the highest faculties of the human intellect, the ability to impose order on a mass of discrete phenomena, to find, to grasp, and to maintain the hold on the thread of Ariadne which leads through the apparently impenetrable labyrinth up into the light of day. It calls also for industry, resolution, civil courage, humanity and sympathy, and for the ability to balance those qualities against each other and to give to each due weight and no more than due weight in the solution of the problems which confront, though of necessity confront in different ways, both the advocate and the judge. The law has some resemblance to the game of chess, but, of course, it does not exist for the sake of the game but for the attainment of justice and for the service of the people who perish without justice. I am both proud and humble that it has been permitted to me to play some part in the administration, and, perhaps for the short term over which judicial precedent endures, in the formation, of the law in South Australia.

The advocate, of course, is the champion of his client and, subject to the code of professional ethics which includes his duty to the court, his aim is victory: the judge has to do his best to produce a just result in

conformity with the law, to reconcile the demand for a just solution with the demands of legal principle. The advocate's task is more exacting, more urgent, but also more single-minded: again, subject to the code of professional ethics, his decisions are decisions as to the appropriate means to the desired end. The judge has to decide what the end shall be. He is not subject to the same demands of urgency. He has time to reflect, but his perplexities and responsibilities are, I will not say more than, but certainly no less than, those of the advocate.

It is not for me to assess my own performance in either role. I will only say that I have tried to perform both of them to the best of my ability. I will say also that the rights and liberties of the citizen depend in the last resort on the competence and conscientiousness of solicitor, barrister and judge, and I am sure that the supply of these will not fail in South Australia as, indeed, it has not failed in the past.

It would have been impossible for me to perform the duties of my office without the support and assistance and, if I may so, the affection of my fellow Judges, past and present. That support has never been lacking. I have sometimes had the misfortune to disagree with them judicially—and let me say in parenthesis that it is inevitable that there should be such disagreements: no case should reach an appellate court unless there is legitimate room for at least two opinions about it: and in my view disagreement where it exists should never be hidden under a misleading mask of unanimity. But I have always regarded the role of Chief Justice as merely that of *primus inter pares* and I can say that I have never had anything but kindness and courtesy from my colleagues and that judicial disagreements have never marred personal harmony.

I thank the Masters and Deputy Masters, past and present, whose support has been loyal and unstinted, whatever their unspoken reactions to some of my decisions may have been. Few people realise the heavy burden of administration which rests on them and on the Master in particular.

I thank all those who have been my associates. They have been good enough on a recent social occasion to say that they have learnt something from me, even if perhaps only in a negative way. I have learnt something from each of them. I thank my tipstaves past and present for their attention to my comfort and convenience. And I must make particular and special reference to my loyal and devoted secretary, Judith Bennett, who has given me most efficient and conscientious service of which I cannot speak too highly. Her naturally orderly temperament must have quailed before the task, daily successfully performed, of imposing order on the anarchy of my desk, and I know that within a few weeks after I cease to command her services the reign of chaos and old night will descend on whatever documentation will continue to reach me, and, indeed, be created by me, in my private capacity.

I would like, too, to thank the legal profession, both the bar and the solicitors. To the best of my knowledge, information and belief, our relations have always been cordial and whatever strictures may have been passed in the robing room have been mercifully hidden from my

ears. I have nothing to complain about in their treatment of me and much to be thankful for. I would like to think that, *mutatis mutandis*, the converse proposition was true.

It is time for me to make an end. I leave the law in a period of great difficulty, uncertainty and change. The law has known such periods before. Customs, conventions, mores, modes of thought, and areas of legal emphasis change and the law must change with them while still retaining a firm grasp on the fundamentals of justice. The essential duties and skills of advocate and judge remain, even though the subject matter to which they are applied may vary. I am confident that the common law system of justice will survive the technological and social revolutions of the late twentieth century as it survived the apprehended reception of Roman Law in the sixteenth century, the constitutional conflicts and civil wars of the seventeenth century and the industrial revolution of the nineteenth century. There are causes of concern both in the administration of the law and the content of the law at the present time. I have views, and indeed strong views, on some of these matters, but I do not regard this as a suitable forum for their ventilation.

I am severing my official connection with the law, but I am not severing the ties of comradeship and affection which bind me to my brothers and sisters on the bench and at the bar. It is not even true to say that when I put off my wig and robes in a few minutes I will do so for the last time, since although the superb portrait which you, Mr. President, and your Council have been good enough to commission, and for which I have expressed my gratitude in another place, is complete, the drawing which has also been commissioned is not, and I will have to sit again for it, wigged and robed. It is, then, only in a narrow and technical professional sense that I say farewell.