

1985-1986

THE
SOUTH AUSTRALIAN
STATE REPORTS

VOL. 40

EDITOR

R. M. HAGUE, C.B.E., LL.B.

A Practitioner of the Supreme Court of South Australia

THE LAW BOOK COMPANY LIMITED

1986

Published in Sydney by
The Law Book Company Limited
44-50 Waterloo Road, North Ryde, N.S.W.
389-393 Lonsdale Street, Melbourne, Victoria
40 Queen Street, Brisbane, Queensland
6 Sherwood Court, Perth, W.A.

ISSN 0049-1470

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Printed by K.B. Printing Services Pty. Ltd.
Gumbowie Avenue, Edwardstown, S.A.

JUDGES OF THE SUPREME COURT

*The Honourable Leonard James King, Chief Justice.

†The Honourable Howard Edgar Zelling.

The Honourable Samuel Joshua Jacobs.

The Honourable James Michael White.

The Honourable Christopher John Legoe.

The Honourable Brian Rothwell Cox.

The Honourable Robert Finey Mohr.

The Honourable Roderick Grant Matheson.

The Honourable Derek Willoughby Bollen.

The Honourable Robin Rhodes Millhouse.

The Honourable Elliott Frank Johnston.

The Honourable Graham Clifton Prior.

The Honourable Leslie Trevor Olsson.

The Honourable Maurice Francis O'Loughlin.

‡The Honourable John William von Doussa.

ACTING JUDGE

§The Honourable Robert Martin Lunn.

ATTORNEY-GENERAL

The Honourable Christopher John Sumner, M.L.C.

*On leave of absence, 26th May, 1986 to 10th August, 1986.

†Retired, 13th August, 1986. (Acting Chief Justice, 26th May, 1986 to 10th August, 1986).

‡Appointed, 14th August, 1986.

§From 1st August, 1985 to 31st December, 1985.

MEMORANDUM

A special sitting of the Full Court was held on Tuesday, 12th August, 1986, on the occasion of the retirement of the Honourable Mr. Justice Zelling.

THE HONOURABLE THE CHIEF JUSTICE: This special sitting of the Court is held to mark the retirement of Mr. Justice Zelling after seventeen years of service as a Judge of the Court. His Honour's attainment of the statutory age of retirement deprives this court of a Judge who is unquestionably one of the most intellectually gifted Justices ever to have been a member of this Supreme Court. His Honour's outstanding intellectual gifts were evident from the outset of his legal career. During the course of his legal studies at the University of Adelaide he was awarded the Andrew Scott Prize in 1935, the Ruby Fletcher Prize also in 1935, the Stow Prize in 1935 and again in 1938, the R.W. Bennett Prize in 1938 and the David Murray Scholarship in 1938. Following that very distinguished course he was awarded the Degree of Bachelor of Laws in 1938 also. His Honour was admitted as a practitioner of this Court in 1938. He had a most distinguished career as a lawyer for many years as a partner in a legal firm and later as a member of the separate bar. He was one of the pioneers of the separate bar and the present flourishing condition of that institution and the contribution which it makes to the administration of justice in this State owes very much to Mr. Justice Zelling's pioneering efforts. His Honour's successful career at the bar culminated in his appointment as Queen's Counsel in 1962. His Honour took an active part in and devoted himself selflessly to the corporate activities of the legal profession and was elected by his brothers to the highest position in the organised legal profession in Australia. The President of the Law Society who will speak later will doubtless refer more particularly to this aspect of his Honour's career.

I served with his Honour on a number of professional bodies over the years and am able to provide personal testimony to the dedication to which he devoted himself to endeavouring to ensure that the legal profession was serving the needs of the community to the maximum degree.

His Honour during his career has devoted much attention to the academic side of the law. He is, as is well known, a scholarly lawyer, who has contributed much to the development and understanding of the law by his writings in legal journals. During much of his career at the bar he was the acknowledged authority in the profession in this State on questions on constitutional law. He was lecturer in Constitutional Law at the University of Adelaide Law School from 1949 to 1962 and lectured in the law of torts in 1946 and 1947. He was a member of the faculty

of Economics at the University of Adelaide from 1959 to 1966, and lectured in Commercial Law in 1959 and 1960, and in Constitutional Law from 1960 to 1966 in that faculty. He has been a member of the faculty of Law continuously since 1948. He lectured at the Institute of Technology at Adelaide in company law, and mercantile law from 1946 to 1961. Mr. Justice Zelling has served as Chairman of the South Australian Law Reform Committee since 1968. His industry and ability in that capacity has enabled that committee consisting entirely of part-time members to produce, with a minimum of support resources, a continuous flow of valuable reports, making recommendations for the reform of the law. This work has been performed by Mr. Justice Zelling in addition to a virtually full work load as a Judge of this Court. The inroads into the time which would otherwise have been available for leisure activities must have been very great indeed. The reform of the law so as to enable it to meet the changing needs of society has always been close to his Honour's heart. He has played a notable part in the modern movement of law reform. His work in this area is of an enduring value and his role in the movement for law reform will be long remembered.

His Honour has been a community leader in activities outside the area of the law. I refrain from elaborating in order to avoid trespassing on the domain of the Attorney-General and the President of the Law Society who will follow me. Mr. Justice Zelling was appointed an Acting Judge of this Court on 27th March, 1969, and the appointment was made permanent on 22nd October, 1969. He has served continuously on the Court since that time. He has been Acting Chief Justice in my absence during the past eleven weeks. His Honour has brought to the Court and to his judgments a great depth of scholarship which will be sadly missed. His energy and application to his duties have been seemingly inexhaustible. He has been a loyal colleague and a good counsellor to those of us who have had the privilege of serving on the bench with him. I cannot close my remarks without reference to Mrs. Zelling. Sesca has been a friend to all of us throughout our professional careers. She was of great assistance to many of us during her period as Secretary of the Law Society and was a practising solicitor for many years. None who know the Zellings could doubt the extent of her contribution to her husband's work and his career. She must share the appreciation which we feel and express today for the contribution which her husband has made to the life of the law and the administration of justice in South Australia.

Mr. Justice Zelling, you will be very much missed by your judicial colleagues and by all with whom you have worked. We wish you and Mrs. Zelling every happiness for the future.

THE HONOURABLE THE ATTORNEY-GENERAL: If the Court pleases, I am sure it is with a mixture of sadness and pleasure that we assemble here today to farewell one of South Australia's foremost legal figures. On behalf of the Government and people of South Australia I wish to endorse the remarks of your Honour the Chief Justice in thanking

Mr. Justice Zelling for his considerable contribution to the South Australian Community in a number of fields. Your Honour Mr. Justice Zelling leaves behind you a unique stamp on this Court and on the law of the State. The facts of your achievements are well known. You were admitted to the bar in 1938, took silk in 1962, were appointed Judge of this Court in 1969. You came to the bench with a reputation not only as a fine lawyer but as one adept at passing on your skills to others. Indeed a few years ago you were able to claim both the attorney and the solicitor-general as former clerks of yours. Many others who currently hold judicial office had their skills developed under your tutelage. I know from personal experience as a student of yours in Constitutional Law in 1962 and many discussions with your former pupils both students and articled clerks that in an area when legal education and training was handled somewhat differently from what it is today, your Honour earned the respect of your students and articled clerks for the conscientiousness and painstaking attention to passing on your legal knowledge and experience to them.

Your Honour's association with Adelaide University and the law faculty spans some forty years. You lectured in constitutional law at the University of Adelaide for fourteen years between 1948 and 1962 and remained a co-examiner until 1981. For your dedication and commitment to the University you were awarded the rare degree of Doctor of the University in 1983.

Outside of the law your Honour has been very active in the Presbyterian Church. You have been active at all levels in the church and was appointed Procurator of the Church and held that position for many years. You were an active lay preacher and I am informed by people who know you in the church that you were sought after greatly for your excellent sermons. Your Honour has always had an interest in young people and you were the convenor of the Welfare of Youth Committee for the Presbyterian Church for some years.

For many these achievements would be sufficient for a full and satisfying career. However, I have not mentioned the work for which you were justly renowned around the country, and which as a representative of successive State Governments I wish to acknowledge at this special sitting today. I refer of course to the matter that your Honour the Chief Justice has already mentioned, namely your Honour Mr. Justice Zelling's chairmanship of the South Australian Law Reform Committee. Your Honour has had an enthusiasm for law reform dating back to 1949, including a period from 1957 to 1968 as a member and then chairman of the Law Society Law Reform Committee. Your commitment to updating and modernizing the law to meet contemporary expectations pre-dates by many years the time when law reform became fashionable and accepted by Governments throughout the nation. Your Honour became Chairman of the Law Reform Committee at its inception in October 1968 and has remained there until today. I should also mention that your Honour has agreed to continue in the position until the end of the year to complete some outstanding references and to enable the

government to determine the future of law reform procedures in South Australia.

I believe that your seventeen years as Chairman is a record in Australia. You were still in private practice in those early days, as one of her Majesty's counsel, but neither those duties nor the demanding tasks of a Supreme Court Judge have affected your commitment to the case of law reform over those seventeen years. In your time as Chairman you have participated actively in the preparation of every one of the ninety or so reports made by the Committee. Your extraordinary scholarly and detailed knowledge of almost every facet of the law has ensured that its work has been of the highest standard. In setting these standards you have given unstintingly of your private time.

There is little doubt that the extraordinary productivity and effectiveness of the Committee has been as a result of this commitment made by your Honour well beyond the requirements of your judicial office.

Under your chairmanship the Committee has operated efficiently and effectively and has attained a highly respected place among law reform agencies. By your personal efforts you have maintained liaison among the law reform agencies both in Australia and overseas and have greatly contributed to the interchange of information and ideas.

A feature of your reports has been that successive governments have, in general, acted upon them. By comparison with some law reform agencies, the record of implementation of the reports of the South Australian Law Reform Committee has been exceptionally good. This has been a tribute not only to your Honour's erudition in the law but your capacity to apply it in a practical way.

Your achievements have been formally recognised on two occasions. You were made a Commander of the Order of the British Empire in 1969 and, more recently, an Officer in the Order of Australia in recognition of your law reform work. Just as importantly, you have won the respect of your colleagues and all in the South Australian legal fraternity for your hard work, your extraordinary scholarship, your comprehensive knowledge of the law and, above all, humanity towards others. Your record is a tribute to yourself and to your wife Sesca who has shared with you the highlights and the trials of your chosen career.

On behalf of the South Australian Government, may I thank you for your contribution to this State and wish you both well in all that lies ahead. I am sure you still have much to give.

MR. T.A. WORTHINGTON: In rising to mark your Honour Mr. Justice Zelling's retirement from this Bench, I wish firstly to refer to your Honour's service to the Law Society and the profession.

As has been mentioned by your Honour the Chief Justice, your Honour was pre-eminent as counsel, having taken silk in 1962 and appeared throughout your career at the bar in many jurisdictions.

Your Honour served the Law Society for a number of years as a member of the Council and on Society Committees, including Law Reform, Legal Assistance, Articled Clerks, and from 1966 to 1969 discharged the exacting duties of a member of the Executive Committee.

Your Honour undertook the onerous position of President of the Law Council of Australia from 1965 to 1968 and chaired the Planning Committee for the 14th Australian Legal Convention held in Adelaide in 1967.

Mention has already been made of your Honour's other service to the community, especially as Chairman of the Law Reform Committee. Your Honour has continued during the time of your judicial office to have an active interest both as a Judge and as a member of the Faculty of Law in the education of the profession, a matter to which I shall refer again shortly. My Council, in recognition of your Honour's signal service to the profession, has extended Honorary Life Membership of the Law Society effective upon your retirement from this court.

The Vice-Chancellor of England, the Right Honourable Sir Robert Megarry, in opening the 20th Australian Legal Convention in Adelaide on 1st July 1979, said:

"By far the most important person in any court is the litigant who is going to lose. He matters more than anyone else, I think. He usually, of course, will not know it is him until the case is at an end, but will he go away from the court feeling that he has had a fair hearing and an impartial determination? That, to me, is one of the cruxes of all kinds of litigation. You must take the reasonable defeated litigant: there are some litigants of course who will be satisfied by absolutely nothing, but given a reasonable human being who is defeated, he ought to feel he has had a fair crack of the whip."

No reasonable litigant, especially the loser, would ever have come from your Honour's court feeling other than that he or she had had a full, fair and patient hearing of the case and all relevant issues.

A hallmark of your Honour's term on the Bench has been your erudition, an encyclopaedic knowledge of the law, and a notable interest in the limitless diversity and adaptability of the common law. Your Honour has often isolated a notion which may benefit by reference to the Full Court. Sometimes, of course, this has caused some temporary discomfort to counsel. Diligent counsel, having exhausted all available avenues of research, may have been in the course of an address when your Honour, with the apparently effortless serenity which can presage the delivery of a judicial yorker, would ask quietly if counsel were familiar with a further development of the point in issue by the Court of Appeal or the House of Lords and reported in the Law Reports section of last Thursday's London edition of *The Times*. It is perhaps a pity that at such times we could not share the view from your Honour's place to see counsels' faces wrestling with whether they have even managed to read last Thursday's copy of *The Advertiser*, let alone *The Times*, and thinking

that perhaps someone should be despatched to speak sternly to their newsagent who has clearly let them down again.

It is somewhat unique that the spouse of a Judge retiring from the Court should also be a practitioner of this Court and one who has also given dedicated service to the profession. Mrs. Zelling was Secretary of the Law Society from 1947 to 1950 and, having left the post, returned on more than one occasion to fill a temporary vacancy. She was a member of the Council from 1955 to 1963 and during that time served on a number of the Society's committees. Mrs. Zelling was admitted to practice in 1941, became a member of the Society in 1942, and, although refraining from active practice since your Honour assumed judicial office, remains a member of the Law Society. I wish to record the Society's gratitude to her for her service.

Your Honour, as I have said, has continued to maintain an active interest in the education and soundness of the profession. Although some details of its structure are yet to be finalized, your Honour has advised me, and I mention with your permission, that in the very near future you are to give to the Law Society a most handsome endowment, the express purpose being that the corpus is to be invested and administered to enable the Society from time to time to bring to South Australia speakers of excellence whom the profession would otherwise not have the benefit of hearing. May I express, Sir, the indebtedness of the profession for this generosity.

Another example of your Honour's desire to ensure that items of historical interest are preserved is the recent gift to the Law Society of the fine suite of office furniture which you used whilst at the Bar and which originally belonged to Paris Nesbit K.C., a founding member of the Law Society.

Your Honour has enhanced the quality of this Court and in the eyes of the profession it is fitting that your last period of service has been as Acting Chief Justice. You leave the Bench with the affection, the respect and the gratitude of the profession for your service to the law and the community. On behalf of the Law Society, I wish you and Mrs. Zelling a long and fulfilling retirement.

THE HONOURABLE MR. JUSTICE ZELLING: Chief Justice, my brethren of the Bench and Bar, Mr. Attorney, Mr. President, ladies and gentlemen. Thank you Chief Justice, you Mr. Attorney, and you Mr. President for the all too kind things you have said about me. I am most grateful to each of you. More than that, I am also grateful to each of you for what you have had to say about my wife. Both of us appreciate enormously the fact that you have taken the trouble to speak of her service in the law.

For myself I have always tried to conform to the precept of the wise Ecclesiastes: "What so ever thy hand findeth to do, do it with thy might".

I want to thank all of you, my friends who have of your friendship given up your time to share my last day as a Judge of this Court. It does not seem to be over seventeen years since I first came here as

an Acting Judge. Nevertheless, as Seneca once wrote, time is the one loan which even a grateful recipient cannot repay.

I have been fortunate in having had such a pleasant group of Judges, both past and present, with whom to work. I have had three splendid tipstaves: Ern Newson, the late John Philp and Jim Brown, fourteen eager and assiduous associates who put up more or less tolerantly with my antiquated beliefs, and two fine secretaries in Joan Leonard and Betty Curzons.

I have, as all of you have already said and I emphasize, been more than fortunate in the unstinting support of my wife.

It is now over fifty years since I entered the law. It has changed tremendously in that time, not least because of a Mrs. Donoghue who entered a cafe in my tipstaff's home town of Paisley in 1928 and a friend bought for her a bottle of ginger beer which allegedly contained a decomposed snail. I have always felt great sympathy for Lord Macmillan who, as the junior Law Lord, faced with two blocs of determined protagonists, had to cast his vote with one bloc and displease the other. Full Courts, I fear, are sometimes like that too. Nevertheless the underlying core of the law remains much the same because human nature does not change. It is a useful corrective, when one is tempted to think that seventeen years or even fifty years is a long time in the law, to remind oneself as Maitland did on occasion, of Pateshull, Raleigh and Bracton who gathered at Westminster seven hundred and fifty years ago "penning writs that would run in the names of kingless commonwealths on the other side of the Atlantic", and it may be added, in this country too.

The greatest differences between the world of 1935 and the world of 1986 are that in 1935 a common substratum of Christian belief underlay legal thought, as it did that of the community at large, and there was a common shared heritage of letters and classics in this profession. Today regrettably both of those are nearly gone. Helen Waddell, speaking in the year 1935, said that the Desert Fathers had indelibly stamped infinity on the imagination of Western civilization. After fifty years of corroding unbelief no one could make that statement confidently today. Even someone of the ability of Lord Radcliffe would have difficulty in reminding us today, as he did thirty-five years ago, of the words of St. Augustine of Hippo that life measured only in human terms is an inescapable disaster. The lack of that shared belief makes the articulation of the community conscience by the judiciary so much harder today.

The lack of contact with the past through the discontinuity induced by the failure to learn the classics, and to know thoroughly the best of literature in our own tongue, and not least the King James version of the Bible, has impoverished and will impoverish our own capacity to evaluate against those touchstones, the moral and civil dilemmas of public law with which the courts have today to grapple in increased quantity and intensity. Allowing the impressionable minds of the young to be satiated with sex and violence would have seemed incomprehensible

to students brought up on the vision of an ordered and rational society in Plato's Republic. Anyone preaching such modern fads as reverse discrimination or affirmative action would have been immediately met by the firm words of Cicero's *De Officiis* that one cannot injure one person to be just to another.

Reference has been made to my work in law reform. I have been fortunate to be the leader of a dedicated team of lawyers, judges, members of the practising profession and academics alike who have out of their dedication produced 108 reports in eighteen years, an average of exactly six a year. How much that has taken of their so called "spare time" is known only to those who have participated in it. Among their number are the Chief Justice, six of my brethren, and one of my past brethren. A seventh, Mr. Justice Millhouse, set the Committee going whilst he was Attorney-General. Every member of the Bench now retired who has sat on the Bench with me has acted as a commentator on draft reports, in some cases many times. Members of the profession and of the Faculty of Law have likewise given generously of their time and talent as members of the Committee and as commentators. That, as has already been said, is a tremendous record of shared endeavour to make the law more fit for and more consonant with the needs of late twentieth century South Australia.

There is some fear that the Committee's work will not extend beyond the end of this year. If that fear became actual it would be a serious indictment of a community which can spend millions of public money on sports and on facilities for gambling but could not find less than \$100,000 per year to keep the work of this Committee going for the benefit of that same community. I do indeed trust that that will not happen.

All of us I am sure would echo Lord Bowen's tribute to the judiciary and the legal profession. He said: "I am astonished when I hear at times the suggestion that our profession must be dull. The truer view would be that our work is inordinately engrossing. Time runs by the lawyer far too like the race in a millstream . . . there is not a study in the work more exact, more liberal or more elevating." May I take my leave of you with the prayer of that great international lawyer Hugo de Groot, better known by the Latinised form of his name Grotius. "May God write these lessons—He who alone can—on the hearts of all those who have the affairs of Christendom in their hands. And may he give to them a mind fitted to understand and to respect rights human and divine, and lead them to recollect always that the ministration committed to them is no less than this, that they are the Governors of man—a creature most dear to God."

And may God bless you all.