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JUDGES OF THE SUPREME COURT

THE HONOURABLE JOHN JEFFERSON BRAY, CHIEF JUSTICE.

THE HONOURABLE REGINALD RODERICK ST. CLAIR CHAMBERLAIN.

THE HONOURABLE JOHN LEO TRAVERS.

THE HONOURABLE DAVID STIRLING HOGARTH.

THE HONOURABLE CHARLES HART BRIGHT.

THE HONOURABLE ROMA FLINDERS MITCHELL.

THE HONOURABLE GEORGE HENRY WALTERS.

ATTORNEYS-GENERAL

THE HONOURABLE DONALD ALLAN DUNSTAN, Q.C., M.P.

THE HONOURABLE ROBIN RHODES MILLHOUSE, M.P.

MEMORANDUM

A special sitting of the Full Court was held on Tuesday, 28th February, 1967, on the occasion of the retirement of the Honourable the Chief Justice (Sir John Mellis Napier K.C.M.G.).

THE HONOURABLE THE ATTORNEY GENERAL:— May it please the Court and your Honour: This, Sir, is both a great and a sad occasion. It is a great occasion in that in farewelling your Honour we are saying goodbye as judge to a Chief Justice with an unexampled record on the bench, I believe, in the English-speaking world. Your Honour's completion of your long years as a judge of this Court, twenty-five of them as Chief Justice, has meant that you have had a profound influence upon the law and its administration in this State. Your Honour has become widely known for the view so practically expressed in your judgments in this Court, "that the law is to be a servant of the people and that effective right and justice must be done". The law is for human beings, and your Honour's humanity and understanding are widely celebrated and appreciated.

Your Honour's work as Chief Justice, backed as it has been by the deep scholarship and wide ranging interests for which you have become so widely known, has earned you the respect and admiration, not only of the people of this State, but of lawyers throughout Australia and overseas. It is well known to the profession here in what high regard your Honour's ability and work has been held by English judges of the very greatest authority. For those of us who have practised before you, you have shown much understanding and many kindnesses, and your guidance both to the public and to the Bar has been invaluable to the common weal of this State.

I know I can speak for my predecessors in office of the kindness and assistance which you have always shown to the Attorney, and not least of this has been so to me, and I have been deeply grateful for the wisdom and kindness which you have displayed in those measures of law reform and the administration of justice which I have had to discuss with you.

The Government is grateful that your ties with public life are not to be entirely severed but that you will remain the Lieutenant Governor of this State. In your retirement from the Bench the people of this State wish you well and I express to you on their, and the Government's, behalf our profound gratitude for a great life's work.

MR. A. K. SANGSTER, Q.C.:— May it please the Court: Today brings to a close a most memorable chapter in the history of this Court—the participation in, and presidency of, the Court by your Honour Sir Mellis Napier. At the beginning of the chapter, in 1924, we find the Court already renowned for its strength in learning, character and dignity, and for the eminence of its members. In that year we find names reminding us of the strength of both Bench and Bar—Chief Justice Sir George Murray and Justices Poole and Angas Parsons, Kings Counsel A. W. Piper (then President of the Law Society and later a Judge), E. E. Cleland (later a

Judge), Dr. F. W. Richards (later a Judge), E. B. Grundy, Paris Nesbit, P. M. Glynn, W. J. Isbister, F. V. Smith, and T. S. O'Halloran; the Judges associates included the late C. C. Brebner, and your Honour Justice Chamberlain. C. A. Edmunds was honorary secretary of the Law Society. At that time World War I had ended but five and a half years earlier, and World War II was still fifteen and a half years ahead. Many things, great and small, were so different from what they are today.

Through the pages of the chapter appear the names of former Justices Richards, A. W. Piper, Cleland, Mayo, Reed, Ligertwood, Abbott, Ross, F. E. Piper, Brazel and Millhouse, and your Honours the present Judges of this Court.

Mid-chapter we find your Honour Sir Mellis Napier, newly appointed Chief Justice to succeed the late Sir George Murray, acknowledging the tributes paid to your Honour and making modest references to your Honour's predecessors, but with a confident resolve, and I quote:— "To maintain so far as in me lies, the tradition that is our common inheritance from the Bench and the Bar of England. . . . As I see it, our civilization—the whole system of faith and polity—finds its ultimate expression in the judicial oath that binds us to do right to all manner of people according to the laws and usages of the realm, without fear or favour, affection or illwill."

Today we stand at the closing page of the chapter, reluctant to admit that this is so, and with a conviction—at least on my own part—that no speech such as this could even list your Honour's achievements or adequately describe your Honour's influence on the Court and on the laws of this State, or your Honour's eminence in the law and as a citizen. May I therefore be pardoned for selecting but one of a great many tributes that I could pay to your Honour, and say that your Honour has brought down to us today the reverence for the law and the passion for justice both of the Court as constituted from time to time, in over four decades, and of your Honour personally, and has taught the whole profession that there are not old laws and new laws, but a continuing and live body of laws, timeless but adaptable. In this sense the chapter of your Honour's influence has not closed and never will.

We wish your Honour contentment, and many a happy recollection in retirement.

THE HONOURABLE JUSTICE CHAMBERLAIN:— Mr. Attorney General, Mr. *Sangster*: I cannot allow this occasion to pass without associating his Honour's colleagues with the tributes that have been paid and the good wishes that have been expressed on behalf of the profession and the public. And when I say colleagues, I would take the liberty of including our four good friends who have done us the honour of coming to sit with us, and all of whom were his colleagues for longer I think than any of us. I can still claim some title to the privilege of acting as the spokesman of the Bench on this occasion, for my life in the law has been spent in one way or another under the influence of the Chief Justice. I remember him

first as a teacher of the law, while I was a student. At that stage I think his subject was Evidence and Procedure. If in the unlikely event you should require any evidence of his qualifications thus early in his career in these subjects, I would refer you to the *Evidence Act* and the *Justices Act*.

My first brief in this Court was before him, my only one I think as a private practitioner, acting, many of you will be surprised to hear, for a defendant, accused, according to my instructions falsely, of being the father of an illegitimate child. I well remember receiving a patient and courteous hearing of an unsuccessful argument. That was 42 years ago.

My earliest appearances in the Criminal Court, as a very raw junior, were before him, and the first lesson I learned was that if I desired to understand the art of advocacy, I could not do better than sit as a pupil at his feet. I have since done this both as an advocate and a Judge.

Over the many years of my practice I appeared regularly in his Court, and now for over seven years I have been his colleague. I will not try to add anything to the tributes that have been paid to him as a public figure here and in the newspaper articles in which I learned of his retirement, but in the circumstances I feel qualified to speak of him as a lawyer and a Judge and a colleague. In this last respect I need only say that his door has always been open to any of us when we needed help. Whatever the problem this has always been readily available, however complex or obscure the question. As a Judge perhaps his best memorial will be found in the South Australian State Reports. To say that these have been enriched by his judgments would be an understatement. It would be truer to say that their high standing here and elsewhere is, in a large measure, due to those judgments. A recent illustration of the extent of that standing is to be found in a remark by a member of the Court of Appeal in England only last year in these terms—having quoted a passage from a judgment delivered a good many years ago, his Lordship said, “I gratefully and respectfully adopt what was said by *Napier J.* in that decision”.

The breadth and depth of legal knowledge and scholarship, the grace and crystal clarity of language, and the grasp and analysis of intricate facts, will remain to be studied and admired so long as law reports are read. These, of course, are but part of his work, much of which is necessarily unrecorded, or as I should rather say, recorded only in the minds of those who have come under the spell of his personality. The problems disposed of out of hand in Court or chambers with lightning-like grasp and robust common sense, the many hundreds of summings up, each in its way a work of art and a pattern of masterly analysis, will remain only in the memories of those who were privileged to be associated with them, except for those very few which were transcribed for the purposes of appeal—without, I think, any Court ever discovering any error of law in any of them.

The French saying that “the intellect is the slave of the emotions” applies with appropriate limitations to all of us. There has been a very powerful slave in Sir Mellis’ case and an equally powerful master. I think

I can say, without question, that very high amongst the emotions that have directed the intellect, has always been the desire to do justice to the individual, as well as to uphold the law. He has always looked for and understood the truth that lay behind the legal form. There has always been a way round or through a law which appeared to stand in the way of justice or humanity.

The time has come when he has decided to lay down the second of his great offices. It is a source of satisfaction that he has felt able to retain the third, and highest. I remember his speaking years ago of a train journey that sooner or later comes to an end—or to the station where the traveller alights. The journey has not come, by any means, to an end. To pursue his own metaphor, Sir Mellis may be said to have perhaps changed trains to a branch line, but I am sure I speak for my colleagues when I hope, and predict, that there is still a comfortable and happy part of the journey ahead. There is, for instance, still a book to be written. It would be a very great pity if at least some of his Honour's great store of knowledge and wisdom on matters within and without the law, should not be preserved for posterity. I can offer evidence of the quality of the memory which may be drawn on for this purpose. Just as one example, in an appeal—I think the last in which I appeared for the Crown in 1959—he gave, early in the argument, and without a note, a list of old cases with names and references, including the pages, which disposed of the question at issue. I made some remark on this feat of memory, and received the reply, "It is not as remarkable as you might think—I had occasion to look this point up in Flynn's case" (which you will find in the S.A.L.R. of 1902).

Time, which lays its fell hand on so many things, has left this memory unimpaired.

We join in the expression of good will and gratitude for the past, and in the good wishes for the future.

We trust, and indeed we predict, with Rabbi Ben Ezra, that—"The best is yet to be—the last of life for which the first was made".

THE HONOURABLE THE CHIEF JUSTICE:— Mr. Attorney, Mr. *Sangster*, my brother *Chamberlain* and my brethren all, both of the Bench and of the Bar: You, gentlemen, have been very kind, I think perhaps you have been a little more than kind, you have been generous, straining the exact fact to the point at which it becomes friendship and goodwill rather than strict and accurate truth. Well, as you have said, all things temporal must have their beginning, and in the same way in due course they must have their ending. It is now forty-three years to the very day since I first presented my Commission to this Court and took my seat upon this Bench. Now we come to the end of the long road, and it would be strange, if at this juncture, I was not oppressed by the sense of tears in mortal things. When I take off my robes and put off my wig, it will be for the last time. This is the last occasion upon which I shall speak from this seat or from this Bench, and when I leave these precincts they will

know me no more. But perhaps you will remember the admonition, "Let not him who girdeth on his harness boast himself as he that putteth it off". I am putting off my harness but I would not have you think that I feel that life is ended. With Ulysses I might say, "Although we are not now that strength which in past days moved earth and heaven, that which we are we are, one equal temper of heroic hearts made weak by time and fate, but strong in will, to seek, to strive, to find and not to fail". Well of course there is a deal of poetic licence in the matter of heroic hearts, but leaving that out of the question that is as near as I can get it to my feelings at the present time. In the course of one of his essays I am reminded that Robert Louis Stevenson asked the question, "Does not life go down with a better grace, foaming in full flood over the precipice rather than miserably struggling in the shallows and backwaters of the delta to an inglorious end"?

Well I have preferred to retire from this office whilst you can still, as I hope you do, think of me and remember me as a leader and as a law giver, and this I will maintain, that nobody should be considered old so long as time has not impaired his zest for life and his ability to receive and deal with new ideas. Well, if I may be permitted to boast myself just a little, perhaps I will take advantage of your patience and indulgence.

Looking back I can see that my life has been set out not in seven but four ages of approximate equal lengths or chapters. There were twenty-one years when I was growing up, for which I need only say that having waited for ten months to attain the requisite age, I had the good fortune to be admitted as a practitioner of this Court on my twenty-first birthday. Then followed twenty years in practice, which I remember with a considerable measure of satisfaction. My brother *Chamberlain* has referred to the *Justices Act* which I drafted and to the *Evidence Act*. There was, likewise, a report upon the company law which was of some service at a later stage. But what I do remember with the greatest satisfaction is the fact that in and after the year 1912 I was one of a small coterie who resuscitated the Law Society of South Australia, which was then moribund, and after that I drafted the Act of Parliament which incorporated the Society and the rules under which I believe that it works to this day. These things I remember, as I say, with a degree of satisfaction. I believe that they earned for me the goodwill of the profession that was expressed to me when I first took my seat upon this Bench—a measure of comfort and support that has followed me through all stages of my career, encouraging and strengthening me in every way.

Well I suppose there could hardly be very many of you who were present when I took my seat in 1924, and there must be very few, if any, who could remember the terms in which I was welcomed at that time by the late Arthur William Piper, or my reply to that welcome. But as far as I am concerned I have lived with these things for forty odd years, and it seems to me, as it seemed to me then, that the duty of a Judge

is summed up in the whole duty of man, as it is set out in the Book of Micah—"He hath showed thee, Oh man, what is good! and what doth the Lord require of thee, But to do justly, and to love mercy and to walk humbly with thy God". I well know that I have not lived up to that admonition, that there are times that I have not walked humbly and no doubt there have been many occasions when I have been wrong, but nevertheless I have tried to live up to that ideal, and I shall be happy if you will think of me as one who sought truth, and loved justice.

Looking back to the eighteen years that I spent as a puisne Judge, I regard that as an apprenticeship to the office that I now hold, the office that I am now relinquishing. I like to think that from the first I not only pulled my weight in the team, but that further, I contributed to the atmosphere of a happy family which has characterised this Court from that day to this. In due course the Court was enlarged by the appointment of a fifth Judge, the late Mr. Justice Piper, but even so the pressure upon the Court was increasing and in and after 1940 when Sir George Murray and later Sir Angas Parsons were feeling the pressure of the years, the bulk of the work had to be done by Mr. Justice Richards and myself, and I suppose that for the last year of that period I carried the burden of the administration of the Court while the Chief Justice was unable to attend to these matters.

Then when the office of Chief Justice became vacant by the death of Sir George Murray, I would gladly have served under my brother Parsons if that had been possible. But that was not to be, and I well remember the terms in which my appointment as Chief Justice was received and welcomed by the people and by the profession in South Australia, in fact I think I can safely say that I know that my appointment had the approval of the general body of this State. I can only remember one dissentient, and that curiously enough was the late Sir John Latham, then Chief Justice of the High Court, who, not disapproving of me as an individual, but regarding the promotion of a Judge as a mistake and as a departure from what he regarded as the tradition of the British people, regretted the fact that there had to be a promotion.

As you must all be aware the recent years in this Court have been a difficult time, there were four Judges who were superannuated and retired in consequence of the change in the law, and following that there were the untimely deaths of three appointees, and in that way the whole Court was changed save for Sir Herbert Mayo and myself, and we have stayed on for the purpose of continuity, for the purpose of passing on the tradition and the feeling of the Court, and now that that has been done I feel that I am free and the time has come when I should hand over a Court running in full working order to brethren whom I can trust to carry on the work that has been mine for so long, and I do so feeling that that time has come.

Well, brethren and friends all, that is, as it were, the apology for my judicial life, and now I pass to what is the message that I would like to give you in retiring. There are I think two things that I have striven

for, two things that I have really believed in, I leave them to you as a torch that I hope that you will carry. They are the two aspects of the same thing; in the first place, there is your attitude to one another, and in the second place there is your attitude towards the law that you serve. In your attitude to one another I would have you remember that this is a fellowship, a brotherhood in which the Judges of this Court may be the leaders but they are nevertheless brothers of the profession who appear before them. The Court is entitled to the respect which you have always shown to it, and the profession are entitled to the courtesy and respect which I think you have always received from the members of this Court. But it is a two-way traffic, and it is a relation of brotherhood and the sense of a common purpose and service. The other aspect to which I have referred is the attitude which you adopt to the law which you serve. You are ministers of the law, no less than the Judges who give you the law, and I would that I could feel that in every member of the profession there is what has been referred to, and what I think I can fairly claim to have felt myself, a passion for right and justice, and I would have you see the law as a sincere, and by no means imperfect attempt to find a solution to the problems that arise when men have to live together. What we require is the art of living together—the art of living by law and the art really of civilization. The law is the cement that holds society together, and if you can see it as such you will realise the necessity for its adapting itself to the needs of the community at large.

One thing that has worried me in recent years has been a disposition of the public to regard the decisions of a Court of law as something that is open to question. Well of course there is the right to examine a judgment, the reasons for a judgment, the way in which a judgment has been reached, but once a judgment has been reached in due form of law, then it seems to me that *res judicata pro veritate accipitur*—that the judgment should be accepted as the truth, and nowadays I see a tendency in the papers and elsewhere to question, to take for granted that a judgment settles nothing. If society is to hold together a judgment must be taken as truth unless and until it has been proved to be wrong, and that is something that I trust that our people will not forget.

Now I have been talking for a very long time, I am afraid, but it remains for me to express my appreciation and my gratitude to those with whom I have worked, to my colleagues who have been with me on the Bench, to those who have passed from the Bench, and to my associates past and present, and to the staff and officers of the Court, remembering particularly the Masters who have always served the Court so faithfully and ably. Then I am afraid reluctantly indeed that brings me to the end, to the end of the road, and all that remains is for me to say farewell, which is fare you well, and to say goodbye, which I do in the archaic significance of “May God be with you, may He bless and guide you now and hereafter”.