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EDITOR:

F. D. Cumbrae-Stewart, E.D.
Barrister-at-Law.

REPORTERS:

D. R. Coatman
Michael Howard
J. E. Siddall
Barristers-at-Law.

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THE JUDGES
OF THE
SUPREME COURT OF TASMANIA

DURING THE PERIOD COMPRISED IN THIS VOLUME

THE HON. SIR STANLEY CHARLES BURBURY,
K.B.E.

Chief Justice.

THE HON. MARCUS GEORGE GIBSON.

THE HON. MALCOLM PETER CRISP.

THE HON. GEORGE HUNTER CRAWFORD.

THE HON. FRANCIS MERVYN NEASEY.

ATTORNEY-GENERAL

THE HON. ROY FREDERICK FAGAN.

SOLICITOR-GENERAL

DAVID MONTAGU CHAMBERS, Q.C.

MEMORANDA

During the absence of the Chief Justice as president of a Federal Royal Commission, from 18 July to 17 December the Honourable MARCUS GEORGE GIBSON, senior puisne judge of the court, was Acting Chief Justice.

On 18 December, shortly before the retirement of *Gibson J.* under s. 6A of the *Supreme Court Act 1887*, in the Full Court before the Chief Justice and GIBSON, CRISP, CRAWFORD, and NEASEY JJ., in the presence of a large gathering of the Bar and of solicitors, the Chief Justice said:

This is a unique occasion in the history of our Supreme Court because *Gibson J.* is the first of our judges to whom has become applicable the retirement provisions of the *Supreme Court Act 1951*, which provide for retirement of members of the judiciary at the arbitrary but hallowed age of three score and ten. No doubt the rejection by parliaments in Britain and the Australian States of the traditional constitutional principle that Her Majesty's judges should enjoy life tenure is widely accepted, but I venture to say that if any judge were to hold on the basis of an erroneous prophecy by ancient Hebrew prophets that man has but three score years and ten to live that it should follow that he should be stopped from doing useful work after that age he would be very promptly and very properly reversed on appeal; but parliament unlike the judiciary has the privilege of being illogical!

Be that as it may, one advantage of the retirement other than by death is that it enables the retiring judge's colleagues while he is alive to say of him the things they would wish to say, and gives the retiring judge in accordance with the cardinal rule of natural justice an opportunity to be heard in his defence.

Our brother *Gibson* was appointed to this Court in 1951. It was an appointment received with great satisfaction and confidence by the judiciary, the profession, and the public, because all concerned with the administration of the law knew that here was a man richly endowed with the essential qualities that go to make up a fine judge; a fine sense of justice to the individual and the community; a deep knowledge of human nature and a sympathetic understanding of human frailties; an outstanding ability to assess complicated evidence and thus "unmask falsity and bring the truth to light"; a capacity for hard work; and perhaps above all infinite patience. All these qualities have been exemplified in case after case that has come before him. I suppose many people think that most of the

day-to-day work of a judge is concerned with the solution of complex legal problems and that everything can be decided by what people call "the Law". But that of course is far from the truth. It is trite but true that the daily task of a judge is judgment as between man and man and between man and the community and what is involved in judgment in this sense is for ninety per cent of the process assessment of the facts and the weighing of their consequences in accordance with the judge's sense of fairness and his responsibility to the community. And it has been in this essential process of judgment in which I would like to say with great emphasis our brother *Gibson* displayed an unerring instinct for justice tempered with mercy, and as he has gone on through his sixteen years of office his judgment has increasingly had the wisdom of maturity. I have of course studied many of his written judgments and I have grown greatly to admire his ability to cut his way through a tangle of conflicting stories and reach what is completely a just conclusion.

Of his work in the criminal courts I know I speak for all my colleagues which I say we have learned much from his wise and balanced approach to the complicated and difficult task of sentencing. I have on many occasions sought and received valuable advice from him. He has at all times given effect to the primary purpose of punishment — to protect the community against law-breakers — while at the same time without being weakly merciful he has moulded the punishment to the individual offender to the end that he may be turned away from crime.

As to his work in the appellate jurisdiction — I would like to pay special tribute to him for his valuable contribution to the work of our Court of Criminal Appeal during a period when our *Criminal Code* has been under stress and strain in relation to the development of modern concepts of criminal responsibility. His work in this regard is permanently enshrined in our Law Reports.

And now, if I may come to more personal considerations, I want to say to our brother *Gibson* from all of us that in losing him from the bench we lose not only a fine judicial colleague but a most congenial and valued friend. We thank him for his gift of friendship and his tolerance of us all. We thank him for the inimitable way in which, on the bench and off it, he has so often lightened the burden of the day by his ready and dry wit. I hope that on some less formal occasion many of his judicial bons mots will be recalled. Perhaps in his retirement he may be induced to write an Australian supplement to Dr. *Megarry's* "Miscellany at Law".

I would like to add a special personal note. For much of the time I have been Chief Justice *Gibson J.* has been the senior puisne judge. I could not have had a more loyal or pleasant colleague. There have been two long periods, one of twelve months and the last six months, when I had to ask him to take on his shoulders the burden of the office of Chief Justice and Administrator. On each occasion he has done this cheerfully and willingly, and discharged his additional responsibilities with distinction and satisfaction to all.

Like a runner in the race he has reached the finishing post. but he has not stopped running. There remains the more leisurely and pleasant canter past the post. And so with full hearts we say goodbye to our brother judge from the bench. We shall miss him very much from our judicial conferences, but we have the consolation that we will be seeing him from time to time. We wish *Gibson J.* and his wife long and happy years of retirement.

Fagan A.-G. said: May it please your Honours, may I gladly join your Honour, the Chief Justice, and those who will follow me at the bar, in paying tribute to *Gibson J.* I have attended this court on similar occasions in the past, but the other occasions have been much more melancholy, when judges beloved of us all were cut short by sudden death, and occasions indeed much different from that of today. His Honour strides through the years gracefully. As your Honour, the Chief Justice has said, within a few weeks, he will have reached what used to be called the life span of three score years and ten. Medically, that period of years has been reviewed upward. Your Honour, the Chief Justice has drawn attention to the fact that legally it has become law, and since I am responsible for it, and if I am on the defensive here this morning, I would turn a diplomatic rather than a legal phrase and say, "It is not a bad arbitrary rule".

There are occasions when one, ill prepared or not happy with one's brief, is reminded of the prayer "Thank God for those who have nothing to say, and the courage not to say it", but many of us are not paid to answer such prayers, and so we do say it. But this morning is not such an occasion for one in paying tribute to *Gibson J.* is, if anything, embarrassed with riches. For his Honour has had a long and distinguished career in the law, and has rendered a great public service to the community: Solicitor to the Public Trustee; Magistrate; Acting Solicitor-General; Solicitor-General; Acting Judge; appointed to the Bench in 1951 permanently; Senior Puisne Judge; and has acted periodically as Administrator. His Honour has stepped

from one position to another with characteristic grace and ease. He came to this Court and took his place as though to the Bench born. Always a man of great natural dignity, simplicity of manner and a sustained courtesy, he was able to assume this position of great authority effortlessly. Patience and tolerance and kindness were always obvious in his court: such an example he set himself, and in that atmosphere, where urbanity prevailed, counsel and witnesses, and all concerned were always at ease and able to do their best. Surely, it must be in such a court, justice is the more surely achieved. Your Honour will be remembered gratefully always for that great urbanity which you brought to your court.

Your Honour had other great assets and attributes. One of them, perhaps, is best illustrated by a story which was in circulation a few years ago. I am not sure whether it is apocryphal or true. I could believe it to be true, especially as I have heard so many versions of it. A plaintiff and defendant who had been acquaintances for many years had a financial dispute which they could not settle between themselves, and it came his Honour's lot to decide the issue. His Honour delivered judgment orally, the case having concluded in the late morning just before lunch. The parties met in the foyer outside, and the plaintiff who had been successful said to the defendant, "Well it is good that is over. Hope it won't affect our friendship. Come and have lunch with me" and as they walked down the steps, the plaintiff, exuberant as successful plaintiffs always are, said, "What a handsome man the judge is, and how wise he looked" and the defendant gave the laconic reply, "Handsome, yes." But your Honour, perhaps it is well not to be thought to be too wise in appearance because it provokes such quips as a former Prime Minister once made of a distinguished Victorian judge when he said "No man could ever be as wise as Sir *Charles Lowe* looks." All these attributes are magnificent in a judge. They are perhaps essential to the perfect judge, but they are not enough. A judge must be completely non-attached, and he must have learning in the law; bias, prejudice, distaste, fear, all these are corrosive of justice. Those who appeared before your Honour, and those who have watched your Honour from a distance, always knew that there was no room in your mind for any of those irrelevancies. As to his learning of the law, as is well known it is a long time now since I abandoned the close study of the law in practice, and perhaps it would be better if I left that to those who are at the bar with me and practised before your Honour day by day, and I am sure are indebted to you for what

they have learnt from you. But perhaps I may be permitted to say, as one of the most persistent litigants in the courts, vicariously I am glad to say, I have had occasion many times to read your Honour's judgments, and I would say of them that they demonstrate a secure grasp of legal principles; that they were always ordered, succinct, lucid; if one wanted to disagree with them, it was clear your Honour had shown both as to fact and as to law, in the clearest possible way, how you had arrived at your conclusion. They demonstrated tremendous patience, a thorough investigation of fact and of law. They will, I am sure, be read by judges with interest and satisfaction in the years to come.

Your Honour, Mr. Justice *Gibson*, I would wish generously in the true sense of that word, to convey to you thanks for the great service that you have given to the law, and I trust that you will now have time to follow the many diversified interests that you have; that you will have a long and happy retirement. You deserve such a reward.

Lindsay Pearce said: Mr. *Wilson*, the President of the Law Society of Tasmania, has asked me to express his deep regret that he was unable to be present on this very important occasion. I speak, Sir, to convey the tribute of the Law Society. The Law Society is the profession, but the tribute of the profession will be found not in any words of mine but in this crowded bar; this crowded courtroom.

Since your Honour was admitted in 1921 a long succession of practitioners have come to know and to admire you. The Honourable the Attorney-General detailed the public offices which you have held. You have discharged, Sir, each task allotted to you with ability, with integrity, with dignity, and with humanity. These attributes are more than the sign of a good lawyer, they are the sign, too, of a good man.

In your retirement, Sir, we hope not only that it will be long and happy, but we hope that you will continue your association with the profession amongst whom, as you may not know, you have admirers, but you do know, Sir, you have very, very many friends.

Roger Jennings (President of the Tasmanian Bar Association) said: If it please the Court: Your Honour Mr. Justice *Gibson* was appointed to the Bench before the birth of either the Tasmanian Bar Association or the Southern Tasmanian Bar Association, but there are many of us here this morning who will, I am sure, recall with pleasure and with sincere respect occasions when you were our

adversary. Your relations then with your fellows at the Bar were as cordial as they have been since you first sat on the bench and as they have continued to be after the Bar Associations of which I have spoken came to life. I imagine there are many here, including all your Honours, who sit on the bench beside you, who have individual memories of particular occasions in which your Honour sat on the other side of the bar table to them. I believe that I had the privilege of conducting my first criminal defence in this position with your Honour as my most courteous, most helpful, but alas most experienced adversary. I am sure I speak for all who practise here today when I say that the image that you created for yourself as Solicitor-General has remained immutable, except that it is now so deeply engraved that you will long live in our memories as a very wise and a very kind man.

You are a judge who has never once to my recollection given cause for anything but the most temporary criticism, which is the lot of judges by the very nature of your work. But even when one recalls the accused persons and the litigants with whom you have dealt, I find it impossible even after, I think, twenty-two years now at the Bar, to summon up a recollection of a member of the public who has had a real complaint of any alleged injustice at your Honour's hands. Appeals of course there have been, and will always be, but of *bona fide* complaints of your failure to do right according to law I can find no evidence.

Your Honour has of course every reason to feel pride in the work you have done for the law in this State. The Bar is happy that you leave the Bench in good health at the end of your allotted span. We trust that you will not only remain in good health and enjoy a less onerous life than that to which we are well aware you have become accustomed, you were never one to shun unpleasant responsibilities and indeed of these you have had many — not only I say may you continue to enjoy good health and less work, but may you maintain sufficient contact and interest with what has become your life's work to enjoy a stimulating and useful retirement. The members of the Bar Association hope that you will maintain your former close association with us and that there will be much we can give each other in the years to come.

Your Honour, we offer you our congratulations on your many achievements, and assure you of our continuing deep respect and good wishes.

C. J. O'Sullivan (Deputy Commonwealth Crown Solicitor) said: May it please your Honours, it is my privilege and

pleasure this morning to appear to represent the Honourable, the Attorney-General of the Commonwealth. The Honourable the Attorney has been in touch with me personally and has asked me to express his personal regret that he is unable to be here on this occasion. He wishes particularly to join with everyone present in this distinguished gathering in the courtroom in recognising the most valuable service to this State, to the law and to the Commonwealth that has been made by *Gibson J.* The period since 1951 through which his Honour has occupied such a distinguished place on the bench of this Court has not been an easy one for any State judge in any State. It has been a period of advance and development in the law of the Commonwealth, and in addition, many adjustments have taken place in the law in respect of the authorities of the State and of the Commonwealth. This process has been one, undoubtedly as the legal profession and the judges would be first to acknowledge, it has been a process which has added to the responsibilities and the burdens upon the judges in every State. These responsibilities and these burdens have been borne with great distinction by *Gibson J.*, and this gathering this morning is a recognition of that fact, and is a great tribute to his Honour.

On behalf of the Honourable the Attorney-General of the Commonwealth and of all the law officers of the Commonwealth, and on my own part, I wish to express to his Honour, the hope that he will have many years of good health, a very happy retirement, and that he will continue to share the goodwill, as he certainly will, in the recognition that we are saying today goodbye from the bench at least to a great Tasmanian judge, a great Australian judge and a great Australian.

Gibson J. said: Chief Justice, Mr. Attorney, Mr. *Pearce*, Mr. *Jennings*, Mr. *O'Sullivan*, you do me much honour, the simple words "I thank you", and "I thank you very much" are perhaps all that is strictly called for. But custom decrees it otherwise, and although farewells should not be protracted, it is perhaps in order for me to linger at the door for a few words or so before the door finally closes on my judicial career. I thank also all those people who have been good enough to come here this morning, and I take that as being a great compliment. Some of you have come considerable distances, and that is an additional compliment.

I find it difficult to express myself. You have given an over-kind impression of my character and my characteristics, but this is customary on these occasions, and I like to think that it represents a good deal of what you really

feel. I feel a particular honour in that the Attorney-General of the Commonwealth has asked Mr. *O'Sullivan* to add his kind words to what has been said. I should have been happy, of course, as the subject of, or is it the object of, this function here this morning to have walked quietly off the bench for the last time, and not to have to face an ordeal of this description; but it has been not altogether an ordeal, it has been a wonderful occasion which will remain in my memory while my memory lasts.

The Chief Justice set this sitting of the Supreme Court down, and he asked me to sit here at this sitting, and who am I to disregard his instructions? I should not think it very dignified that I should be haled to perform my duties by *mandamus*.

On an occasion like this it is permitted for a person in my position, and at my age, to indulge to some extent in retrospect, but I promise you it will be brief. Since the Supreme Court commenced — that is not coeval with my sitting here — there have been nine Chief Justices of this Court and twenty-one puisnes, five of whom joined the ranks of the Chief Justices later. My own personal recollection and my own personal memory extends to five. Sir *John Dodds* is a dim figure I recall in 1914 when I was only a lad and I saw him sitting here where the Chief Justice is now, but I saw a good deal of Sir *Herbert Nicholls*, one of the strongest and most commonsense judges who has ever graced the Bench, who took a broad view of the law and a broad view of the facts; a man of sound judgment who was on the Bench I think for about twenty-seven years. With him was associated *Crisp J.*, later Sir *Harold Crisp*, a man of infinite charm, as his opponents found when he exerted it upon the jury — a man whose memory I revere as a perfect example of a gentleman, a member of a distinguished legal family on which he shed much lustre by his own achievements; and it is pleasing that another of the same name and of the same family is one of my colleagues.

He was succeeded by Sir *John Morris*, whom I was proud to have as one of my friends — a brilliant and young Chief Justice whose life was tragically cut short at a very early age — I think fifty-six. Of the puisnes when I commenced having anything to do with law, as an articulated clerk, *Ewing J.*, a prominent barrister who often crossed swords with Sir *Harold Crisp*, was in the full swing of his career at the Bar, and not very much later became a puisne judge.

Then there were *Clark J.*, whose achievements in the law need no words of mine to describe — the illustrious

son of an illustrious father; *Hutchins J.*, a sound practical lawyer with a penetrating mind; humbug and pretence could not live under his penetrating gaze; also *Green J.* who died at a tragically youthful age, a brilliant lawyer and a good friend. I shall not speak of my present colleagues, but they can, through the Chief Justice speak of me. I respectfully dissent from some of the over-kind passages of his judgment on me, but I don't press it to the point of appeal. Then, of course, there was a long gallery of colourful characters, whom the older ones among you will remember. I will not recall them, time is too short. I should like to have mentioned *Albert Richardson* and other persons who passed through these courts and have added a good deal to their colour and interest. The only permanent resident within these walls is, I suppose, the gentleman over there, *Robert Pitcairn*. This is rather curious because *Pitcairn*, as I understand, hardly practised at all in the courts, and it is curious that somebody whose chief claim to fame was his support of the anti-transportation campaign should find a place here, but I suppose having had that beautiful bust executed it had to be placed somewhere. The exercise of the legal profession isn't conducive towards such a set of features, and that is perhaps why he kept out of the courts. I except perhaps Mr. *Jennings* from that comment.

It is said that the Government appoints the judges and the Government in that sense makes the judges. It is true the Government appoints the judges, but the judges are moulded and made by their contacts with the world. They are made in the courts and the world of the law. My brother judges with whom I have the most cordial and pleasant relations, and from whom I have had every assistance in every possible way, have helped to mould what I am in the law. Then, of course, there is the Bar. Without a good Bar it is very difficult to have a good Bench, and I have always had the most gratifying co-operation and friendship with the Bar. I feel that here I have an audience of friends, and in the solicitors also, because solicitors and the Bar overlap. Although they are increasingly becoming separate, they still overlap, and one may see them skipping easily from one function to another. The Attorney-General has unfailingly been of assistance, and I am grateful for what he has done. He has been always a keen supporter of law reform in this State and anything that will tend to advance the cause of justice according to the law.

The judges have been greatly relieved by the appointment of the Master, or rather the revival of the appointment of the Master, who has made life a lot easier in many

respects for those of us on the bench. I give my thanks too, to the members of his staff.

Thanks, too, are due to the Probation Service, who every day deal with criminals; and with those who have fallen into ways of crime but who are not perhaps to be regarded as criminals by virtue of the modern approach in criminal law. To those devoted people I offer my sincere thanks for all the help they have given me.

To the Solicitor-General's Department; to the Crown Solicitor's Office of the Commonwealth; to the Shorthand Reporting Staff who have always willingly worked long hours to see that we got our transcripts; to the incomparable Mrs. Viney, and the typists of the Supreme Court staff: to the associates I have had, and particularly to Leslie Mein who was my associate for many years and to whom I am very grateful.

To my attendants, particularly to Hugh Macquarie who has been a very good attendant for many years.

To my good friends the magistrates; to the University Staff in the Faculty of Law; and to the press to whom any request for the suppression of anything the publication of which might injure the administration of justice never fell on deaf ears.

And finally, if I may touch a personal note, to my wife I give thanks for her help and understanding.

So, all these contacts, all these strands, all these currents, I use a variety of metaphors, help to mould the judge (to use another metaphor) from the material there is to work upon, and perhaps the most potent factor of all is the realisation of anyone appointed to the Bench of the enormous responsibility and far-reaching effects that his decisions may have. It is truly a matter for the greatest anxiety when one is dealing with the whole future of a young family in the matrimonial causes jurisdiction, or with the whole future of a person whose fortunes fall or stand on one's judgment; or with the liberty of an individual in the criminal court; all these things bring to anyone with any sensibility at all an overwhelming sense that he must endeavour to carry out the oath which he has taken, which is to do right to all manner of persons according to the law and usages of the State without fear or favour, affection or ill-will. This I have tried to do. If I have succeeded, or if I have substantially succeeded, I am happy.

The Supreme Courts of the various States are the great common law courts of Australia. They are the repositories of the safeguards of the individual, of the writ of

habeas corpus, of the other prerogative writs as they appear in their present form; they are the safeguard of the rights of the individual, of his right to liberty and of all the other fundamental rights that we have.

It is this high function of the State Supreme Courts that calls for the best that one has to offer. I have offered the best I had. Whether that was good enough is another matter.

Finally, I again thank you all and wish you all well.
