

**THE  
TASMANIAN  
STATE REPORTS  
1973**

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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. GUY STEPHEN MONTAGUE GREEN,  
Chief Justice.

THE HON. SIR GEORGE HUNTER CRAWFORD, Kt.

THE HON. FRANCIS MERVYN NEASEY.

THE HON. DAVID MONTAGU CHAMBERS.

THE HON. ROBERT RICHARD NETTLEFOLD.

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*ATTORNEY-GENERAL*

THE HON. MERVYN GEORGE EVERETT, Q.C.

*SOLICITOR-GENERAL*

ROGER CHRISTIE JENNINGS, Q.C.

CORRIGENDA

[1974] Tas. S.R.

- p. 2 Footnote (1), [1973] Tas. S.R. 93.

[1975] Tas. S.R.

- p. viii Reference to *Duffin v. Chivers*, [1973] Tas. S.R. 72.  
p. 9 Reference to *Duffin v. Chivers*, [1973] Tas. S.R. 72.  
p. 11 Footnote (2), [1973] Tas. S.R. 72.  
p. 12 Footnote (7), [1973] Tas. S.R. 72.  
p. 26 Omit reference to *Mineral Holdings (Aust.) Pty. Ltd. v. Tasmanian Conservation Trust*.  
p. 28 Omit footnote (1).  
p. 62 Footnote (6), [1973] Tas. S.R. 78.

[1976] Tas. S.R.

- p. 45 Footnote (18), 1915, St. R. Qd. 85, at p. 88.

[1977] Tas. S.R.

- p. 10 Footnote (25) [1973] Tas. S.R. (N.C.) 8.  
p. 11 Footnote (31) [1973] Tas. S.R. (N.C.) 8.

## MEMORANDA

On 29th October, 1973, the Honourable Sir STANLEY CHARLES BURBURY, K.B.E., Chief Justice of Tasmania, resigned his office to become Governor of Tasmania.

On that day, at a special sitting of the Full Court, he said: Sir Marcus\*, Sir Peter†, Mr. Attorney, Mr. Solicitor and members of the Bar; I have to announce that I have submitted to his Excellency the Governor my resignation as Chief Justice of the Supreme Court of Tasmania, and that his Excellency has been pleased to accept my resignation with effect from midnight tonight.

CRAWFORD J. said:

Your Honours, Mr. Attorney, Mr. Solicitor, President of the Law Society, President of the Bar Association, members of the Bar:

The noblest quality of which we humans are capable is honest and steadfast endeavour in the performance of our tasks. In the course of time, in one way or another, we must reach the end of our particular endeavours, and, when a worthy man does so, it is for me, a matter of deep sentiment, by reason of a firm realization that it has been only by such individual endeavours that we have been able to achieve and hold on to our civilization. Endeavour is the stuff of which civilization is made.

Today, our Chief Justice leaves the profession of the law, the field of his endeavours for some forty years. This is the last day on which his Honour will sit in the Court over which he has presided with distinction for so long. It is a matter of regret, not only for all of us here who have served under him as judges, but also for all the officers of the Court, who have come to admire and respect him.

His Honour has given long and devoted judicial service to this State. For seventeen years he has influenced this Court, during a time when many important decisions have been required of it, particularly in criminal law and in administrative law. During those years, he has maintained and added to the fine traditions of this Court. He has shown himself to be a sound and wise judge; well versed in the principles upon which our legal system is based, an expeditious judge, a man of wide learning and interests, gifted with a sense of humour and a ready wit, and an instinct for what is right.

He has effectively dealt with the administration of the affairs of this Court to the general satisfaction, I believe, of all. Among many things, I can mention how he has influenced the planning of new courts at Burnie and at Hobart, an effective system of reporting the judgments of the judges of this Court,

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\* Formerly Gibson J.

† Formerly Crisp J.

the present system for the recording of evidence, the greatly improved judges' libraries in Hobart, Launceston and Burnie, and, particularly, a close association between all members of the profession, by means of ceremonial occasions, of committee work and consultation, and, importantly, of his own personal example.

Your Honour the Chief Justice, we have all congratulated you on your nomination as a successor to his Excellency the Governor. We have said to you that we regret the end of this chapter of your life — the end of a notable legal career.

We all wish you well. We all pray that you and Lady Burbury may have good health and happiness so that you may fulfil your new duties with pleasure and satisfaction to yourselves.

I add a personal note. We practised at the Bar at the same time for some twenty-five years. I have served under you for fifteen years. You have given me years of friendship, and at all times your ready consideration, support and help; and I thank you. I regret deeply that our association in law has almost drawn to a close.

As you retire from this Court, you can take with you the certain knowledge of the goodwill and affection of all who have been privileged to serve under you.

M. G. EVERETT, A.-G., said:

Your Honour the Chief Justice, members of the judiciary past and present, and fellow practitioners.

In September, 1956, Sir, I was present in this Court when you took your seat on the Bench for the first time as Chief Justice. Now, some seventeen years later, I have the duty on behalf of the Government to say farewell to you on the occasion of your retirement from that office.

I well recall the pledge you gave on that occasion. It was to administer justice according to law, and there is no one present today who could deny that you have fulfilled that pledge completely and unreservedly.

When one examines your career, Sir, it becomes clear that few, if any, have surpassed the contribution which you have made to the legal scene of this State.

Beginning with your practice as a barrister and solicitor of this Court, you have moved through all the channels which ultimately coalesce at the heart of the State's legal system. I mention some of them: private practitioner; lecturer in the Faculty of Law of the University of Tasmania, and a member of that Faculty; barrister in private practice; Queen's Counsel; Solicitor-General; Chief Justice. One more step remains to be taken, and that is your formal appointment to the office of Governor of this State.

The feature of your career, Sir, has been not so much the progress that you made in the various offices you have occupied, but the quality of the service you have imparted to each office. If I may borrow the words of Boswell in his epitaph, in respect of Oliver Goldsmith:

“There is nothing you have touched  
“which you did not adorn”.

The erudition you have brought to the performance of your judicial office is a matter of common knowledge on a national level. Who could read for example, the judgment in *Bell v. Pitt*(1) in 1956, without recognizing the stamp of a true jurist?

The national recognition of your judicial capacity was manifest in your appointment as Royal Commissioner into the “Voyager” collision.

You had a long time previously left your mark as a Royal Commissioner by your painstaking enquiry into the fruit industry.

But juridical stature, Sir, is not achieved only by a deep knowledge of the law. The stature is only fully reached when certain basic human qualities exist to supplement the legal erudition. It is for these qualities that I suggest you will mainly be remembered: An unswerving sense of justice for the sake of justice; the common touch; sympathy for your fellow man, an understanding of the foibles of mankind, and a keen sense of humour. You have brought these qualities, above all, to your high office.

In the pursuit of a busy extra-judicial life, you have found time to interest yourself actively in the theatre and the arts, and many activities which affect the community generally. Always you have enriched the particular activity to which you directed your talents and your energy. You have lived laborious days. At a time when many men would be thinking of retirement you have accepted appointment to the office of Governor of this State. That you will also bring your fundamental dignity and human understanding to the enrichment of that office I do not doubt.

If it is to be the fact that, under the growing strength of Australian nationalism, that office will not survive in perpetuity, at least I am confident that when the cameras of history are focussed on it, your period as Governor, with Lady Burbury as a gracious helpmeet, will be recorded as one in which the office gained strength and purpose through your talents and your energy.

Unlike that day on 3rd July, 1956, when the profession gathered in this court to pay tribute to your predecessor, the late Sir John Morris, today is one not marked by sadness. Rather is it a day on which we can all recollect with pleasure and pride the associations with you which we have been privileged to enjoy.

(1) [1956] Tas. S.R. 161.

As a representative of the public, and on behalf of the Government of the State of Tasmania, I simply say, "Sir Stanley Burbury, we salute you." We wish you happiness and the full fruits of your endeavours as Governor of this State. And when the time ultimately comes for you to cease holding any public office, we hope that you will always be accorded the supreme respect and appreciation which your labours deserve.

K. N. DOCKRAY (President of the Law Society of Tasmania) said:

Your Honour the Chief Justice, your Honours. I rise to speak on behalf of the Law Society and on behalf of all members of that Society. I am very pleased to see a large number of members here today, and I feel that this shows the high regard in which the members of the profession hold you, Sir.

It is seventeen years since your Honour was appointed, as has already been mentioned, and it is difficult for many of us to believe this is the last occasion on which we shall see you on the Bench. More than half in number of the practitioners on the roll have been admitted to practice during the last seventeen years and for them especially, as indeed for all practitioners, you have become the embodiment of the law to such an extent that we did not contemplate your retirement.

On behalf of the profession I thank you for your services to the law. You have occupied your high office with dignity and distinction and you leave behind you many decisions which will guide practitioners in future years. But you leave behind you more than mere precedents. You leave us with a sense that the law is a living and a growing thing which adapts itself to changes in the social order so as to continue to protect society and the rights of the individual man. You have given us the sense that, although our law is rooted in the past, it deals with the problems of the present and is still the basis upon which society exists.

There is a quotation of Socrates which is well known but, I feel, so true as to bear mentioning again. Socrates said:

"Four things belong to a Judge:  
to hear courteously, to answer wisely  
to consider soberly, and to decide impartially."

And if one studies each of these four attributes there can be no doubt that your Honour has displayed the qualities of a good judge.

But your Honour has not only served in the field of the law. You have served as Administrator during the absence of the Governor. You have been National President of the Australian Heart Foundation from its inception, and you are a director of the Winston Churchill Memorial Trust.

As well as saying farewell to your Honour, it is my pleasure, again on behalf of the profession, to congratulate you on your



appointment as Governor of Tasmania and to give to you the best wishes of the profession for your term of office as Governor. It is your Honour's appointment to this office which has brought about your premature retirement from the Bench. I feel that your appointment is a recognition of your Honour's standing and eminence not only in the law but in the community. So what is a loss to the law and the legal profession, is a gain to the State and the community at large.

Sir, on behalf of the legal practitioners of this State, I say: "Thank you for your services to the law and the profession."

W. J. E. Cox (President of the Tasmanian Bar Association) said:

On behalf of the Bar Association, I would wish to express to you the appreciation of all those practitioners who practise primarily in the Courts themselves, and who, in consequence, have more day to day contact with your Honour, the Chief Justice, in the discharge of your judicial duties.

Your Honour will be remembered not only for the erudition of your judgments, coming as they did at a time of significant developments in the law, but also for the procedural reforms that your Honour, through the Rules Committee, brought into effect.

In an adversary system, a too rigid procedure can result in injustice. Just as substantive law must develop, so too must lawyers be ever vigilant to ensure that the procedure by which causes are brought and determined, is adapted from time to time.

The pre-trial rules owe their inspiration to your Honour, and their remarkable success is, with respect an achievement of which your Honour can justly be proud.

But on this day of farewell to you in your judicial capacity, I would wish simply to say to you with great sincerity, that we, as day to day practitioners before you, have appreciated your Honour's courtesy and good will towards the Bar. You have made us feel a real sense of sharing in the task of administering justice. While we regret your leaving us, we take pride in knowing that your talents will be exhibited in another field of high distinction.

You leave with us many happy memories, and take with you to your new exalted position our respectful admiration.

BURBURY C.J. said:

Sir George, Mr. Attorney, Mr. Dockray, Mr. Cox, and members of the Bar, I am deeply honoured by the most generous tributes that you have paid to my judicial work, and I am deeply touched by the things that you have said about my personal qualities and my relationship with my brother judges and with members of the Bar. I would, however, be guilty of self-deception if I accepted without qualification all that has

been said, but it would be ungracious of me if, on this occasion—the last occasion I shall sit on this Bench — I were to exercise my judicial function of correcting submissions of counsel, let alone of correcting errors in the reasoning of one of my brother judges. So perhaps I may take refuge in the well worn judicial *cliché* that I must not be taken to agree with everything that has been said; but I warmly thank you all for saying it.

I recently turned up the transcript of what I said when I took my seat on this Bench, on 3rd September, 1956, and I notice that I set myself certain judicial standards. Perhaps I have maintained some of them. Others I undoubtedly have not maintained. I referred then to the classic piece of advice to a judge: That at the beginning of a case, he should take a sip of holy water, and not swallow it until all the evidence and all the arguments are done. No doubt members of the Bar could testify that I have not lived up to that precept. And I also referred to Lord Coke's prescription of the daily life of a judge — Coke, L.J.C. whom my great mentor, Professor McDougall, taught me to pronounce "Cook":

"Six hours in sleep,  
 "On Law's grave study, six.  
 "Six spend in prayer,  
 "the rest on nature six."

I have found that I need eight hours' sleep instead of six. I have found that the judicial day is apt to be ten to twelve hours, rather than six, so that you will appreciate there have been many incursions into the prescribed times for prayer, and for contemplating nature!

I have had immense satisfaction from my life in the law, both at the Bar and on the Bench. I have never for one moment had the slightest wish to follow any other vocation. But I have worked in these courts for just over forty years — twenty-three as a barrister and seventeen as Chief Justice. It has been suggested that my retirement as Chief Justice is premature, but I am the ninth Chief Justice of this Court, and only two of my predecessors have served for longer than seventeen years. That was the first Chief Justice, Sir John Pedder, who served for thirty years, and Sir Herbert Nicholls, for twenty-three. This period is enough. That is not to say that the decision whether or not to retire was an easy one. But for some time I have felt that I would not wish to remain on the Bench until I reached statutory senility at the age of seventy. That, coupled with the real challenge and opportunity for further service to the public, presented by the invitation to become Tasmania's first Australian-born Governor, left me in no real doubt as to what I should do. All we lawyers know that the office of Governor is essential to the maintenance of responsible Government in this State under

our Federation, and many of us believe that there is great virtue in having a ceremonial Head of State. My firm objective will be to try to demonstrate to the people of Tasmania that this indeed is an essential and meaningful office. And I ask for the loyal support of my fellow members of the legal profession in the task that lies ahead of me.

I would be less than human if I pretended that I do not take some pride in some of my judicial work and in some of the measures of law reform I have initiated. Perhaps my greatest satisfaction as Chief Justice has been to have presided over our Court of Criminal Appeal during a period when, in a succession of major causes, it had the formidable task of formulating important general principles of criminal liability and of the law of manslaughter under our *Criminal Code*. It is a matter of tremendous satisfaction to me that the principles which our Court of Criminal Appeal have evolved and the basic judicial philosophy on which those principles are based have for the most part been approved by the High Court.

On the side of law reform I am glad to have initiated and obtained the acceptance by the profession of our pre-trial practice in civil cases, which has been adopted here along the lines of the American system and I thank the then Attorney-General, the Hon. R. F. Fagan, for giving me the opportunity to study pre-trial practice in action in America in 1964. As a result of the same study tour I have (for better or for worse) left my permanent mark on the Law Courts in the concept of the court-in-the-round. I have had great interest in the law of evidence. Ever since I have been on this Bench I have been impatient with many of the rules of evidence which I have felt stand in the way of justice. It is a matter of great satisfaction to me that some fundamental reforms of the hearsay rule, which I worked on for over twelve months, have been accepted by the profession and by the Government and will probably be introduced into Parliament next year. There is much else that I would like to have achieved before I left the Bench. I had hoped that by now a much simplified set of procedural rules would have been in force; but the task is a long and difficult one. Thanks to the splendid efforts of my brother Neasey, this is well under way. More fundamentally, I would like to have had the time to put into detailed form some ideas which I have had for many years about the court's proper role in the interpretation of Acts of Parliament. It is, I think, not sufficiently realised that with the ever increasing legislative activity of Parliament, the daily work of the courts is now much more concerned with interpretation of Acts of Parliament than with the common law precedents. The legal problems which mainly arise in the courts, are concerned with disputes about the meaning of words in statutes. Broadly, the courts are still bound to interpret statutes according to their

literal construction, and words remain our masters — even though they are but labels for ideas. We are still beset by the demon of formalism in this area of the law. The application of traditional principles of interpretation frequently leads to decisions which laymen most understandably regard as technical rather than just. I have thought for a long time that without sacrificing the basic principle that Parliament makes the law and the court interprets and applies it, it should be possible by appropriate legislation to emancipate the courts from the tyranny of words in their literal meaning and to enable the courts on a broad basis of justice to give effect to Parliament's purpose. A proposal by the late Dean Roscoe Pound has always appealed to me: that there should be attached to every Act of Parliament and official memorandum approved by Parliament itself, setting out the purposes of the legislation, and that the court should be required to interpret the Act in the light of those purposes, even if departure from literal meanings of words is involved. Perhaps, Mr. Attorney, I would be accused of being too radical if I suggested that if the court finds that an Act of Parliament is unintelligible it should have the right to send it back to Parliament for clarification!

At the end of my life in the law there are not many things about it which I believe with certainty to be true. But there are at least two. One is that the judiciary must continue to be the voice of the law and not its maker. We live in a restless society. But its sheet anchor is the stability of the law as achieved by its disciplined interpretation and application by an independent judiciary. If the law is to be changed it must be changed by the legislature and not by the courts. I hope that under the superficial and dangerously deceptive attraction of a Bill of Rights the Australian courts will never be placed in the position of supplanting democratically elected Parliaments as lawmakers — as has happened in the U.S.A. The other thing I know to be true about the law is that, although there is still much to be done towards simplification of court procedure, there is a point beyond which reform cannot go without sacrificing justice to efficiency. In particular, there can, I believe, be no substitute for the traditional safeguards to the liberty of the individual assured by a jury trial in the criminal court. No doubt the process of examination and cross-examination of witnesses, addresses by counsel, and summing-up by a judge is regarded by some as unnecessarily lengthy, tedious, inefficient and cumbersome. But we as a profession must never forget that the history of liberty has largely been the history of procedural safeguards. What Blackstone said two centuries ago still remains true:

“Delays and inconveniences in the forms of justice are the price that all free nations must pay for their liberty in most substantial matters”,  
or, as Shakespeare put it in “The Rape of Lucrece”:

“Time’s glory is to calm contending kings,

To unmask falsehood and to bring the truth to light”.

What greater satisfaction can there be to a judge than to find that after a long and tedious trial, falsehood has been unmasked and the truth has been brought to light by our traditional and essential legal procedures!

There are many people I would wish to thank today for their help in my judicial work. Firstly, and perhaps unorthodoxly, I would thank the High Court. I have been fortunate to be one of a generation of judges whose work has in some measure been supervised and corrected by such fine judges as Sir Owen Dixon, Sir Wilfred Fullagar, and Sir Frank Kitto — during a period of that Court which Sir Peter Crisp has most aptly described as “The Augustan Age of the High Court”. My judicial philosophy has been largely moulded by their splendid judgments. I have learned much when they have disagreed with what I have written, and I have been immensely encouraged when they have agreed with it. And every time I have written a judgment of any importance I have done so imagining that one or other of the members of that great judicial triumvirate has been looking over my shoulder, and I have asked myself what they would think about it.

Then I would thank my brother judges for their abiding loyalty and co-operation at all times. It is perhaps not generally understood that a chief justice has no power to direct any judge of the Court to do anything. The efficient organisation of the business of the Court depends upon the willingness of each judge to fall in with what the Chief Justice proposes. During the whole seventeen years of my tenure of office we have not had a single disagreement about what should be done. In particular, may I express my appreciation of the unswerving loyal support I have had from successive senior puisne judges: the late Sir Kenneth Green, Sir Marcus Gibson, Sir Peter Crisp and lately, Sir George Crawford.

Then I would thank the members of the Bar past and present for their co-operation with me in my endeavours to run an efficiently organised Court, for their respect at all times for the dignity and authority of this Court, and for their gift of friendship on non official occasions.

I have been most fortunate in my personal staff. I thank all those who have so faithfully served me in the past and those who do so now. I would particularly thank the succession of bright young law graduates who have been my associates over the past ten years. Their lively minds and their lively company have greatly added to the pleasure I have taken in my judicial work.

And lastly — and only lastly because she would not have

it otherwise — I thank my wife for making a home where it has been possible to write judgments; for protecting me from an excessive number of social engagements; and for her intuitive understanding of the judicial mind when it becomes wholly absorbed with the problems in hand to the exclusion of domestic matters.

And again I thank those who have spoken for what they have said; and those who have done me the honour by coming to the Court today.

Now all that remains is to say goodbye to you all and to say that this Court is adjourned *sine die*.

On 30th October, 1973, GUY STEPHEN MONTAGUE GREEN, Magistrate, was appointed Chief Justice of Tasmania in the place of the Honourable Sir STANLEY CHARLES BURBURY, K.B.E.

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