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THE JUDGES
OF THE
SUPREME COURT OF TASMANIA
DURING THE PERIOD COMPRISED IN THIS VOLUME

The Hon. GUY STEPHEN MONTAGUE GREEN, K.B.E.,
Chief Justice

The Hon. FRANCIS MERVYN NEASEY A.O.

The Hon. ROBERT RICHARD NETTLEFOLD

The Hon. HENRY EDWARD COSGROVE

The Hon. WILLIAM JOHN ELLIS COX, R.F.D., E.D.

The Hon. PETER GEORGE UNDERWOOD

The Hon. CHRISTOPHER REGINALD WRIGHT

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MEMORANDA

On 19th September, 1988, at a special sitting of the Supreme Court, GREEN C.J. said: I would like to extend to you all a very warm welcome to this special sitting of the Court which has been convened to mark the retirement of Mr. Justice Cosgrove, as a judge of this Court. In particular, I would like to say how delighted we are that two former judges of this Court, Sir George Crawford and Mr. M. G. Everett have been able to join us today and sit on the Bench with us.

Mr. Justice Cosgrove was born in 1922, the son of a former Premier of this State, Sir Robert Cosgrove, and Dame Gertrude Cosgrove. He was educated at St. Virgil's College, Hobart and the University of Tasmania, graduating with the degree of Bachelor of Commerce and later the degree of Bachelor of Laws with First Class Honours. His Honour did not in the first instance embark upon a career in the law. After serving in the war with the A.I.F. in New Guinea and New Britain, he, amongst other things, stood for Parliament, worked as a research economist in Canberra, and went into business. Knowing his Honour's qualities and abilities, I am quite sure that had he pursued a career in politics or in commerce he would have been most successful. However, fortunately for us, for the law and for the State, he accepted some very good advice and took up the law. In 1956 he was admitted as a practitioner of this Court and on the same day he was admitted as a partner in that fertile source of judicial talent, the firm of Murdoch, Cuthbert, Clarke and Neasey, as it then was. After seventeen years as a busy and successful practitioner, Mr. Justice Cosgrove was in July, 1973, appointed as the State's first Crown Advocate.

Although the creation of the office of Crown Advocate represented a significant innovation in this State, it did not take long for it to become fully accepted as a respected and important part of our legal system, and that was in large measure due to the professionalism, the integrity and the independence with which Mr. Justice Cosgrove discharged his responsibilities as its first occupant. In 1974 his Honour took silk, and on 2nd February, 1977, he was appointed a judge of this Court.

Because of the structure of our system, judges of the Supreme Court of Tasmania are required to assume a wider range of judicial responsibilities than are the judges of most other courts in Australia, but in the eleven years during which he has been on the Bench, Mr. Justice Cosgrove has amply demonstrated that he possesses in full measure all those personal and professional qualities which it is necessary to have in order to meet the special demands which the breadth of this Court's work places upon its members, and there is no aspect of the work of the Court in which he has not made a most substantial contribution indeed.

Mr. Justice Cosgrove has been a most effective and fair trial judge who amongst other things was particularly concerned to see that the evidence — especially expert evidence — was clarified and understood

as it emerged, although he was always careful to ensure that he did so without descending too far into the arena. As a judge of the law he had a formidable analytical capacity which enabled him to perceive and expose the real point at issue with what was to some of the more pedestrian of us, disconcerting swiftness, whilst at the same time always retaining that mark of the true judicial mind, a readiness to change a *prima facie* opinion he might have formed after further reflection or argument.

In summary, Mr. Justice Cosgrove's work on the Bench has always been done with thoroughness but also with commendable expedition. It has been informed by sound legal understanding and practical wisdom and it has been characterised by humanity and humour. But as well as his work as a practitioner and as a judge, Mr. Justice Cosgrove has done a great deal in connection with other aspects of the law. He was a former president of the Tasmanian Bar Association, he has lectured in criminal law, he has been chairman of the Council of Law Reporting and a member of the Board of Legal Education. The report he wrote as a result of his work overseas as a Churchill Fellow in 1970 had a most substantial impact upon legal education in this State, and it resulted in the establishment of the legal practice course. Whilst overseas, at the request of the Government, his Honour also examined the operation of no-fault schemes in British Colombia and Saskatchewan, and his report upon those investigations had a significant effect upon legislation which was subsequently introduced into this State.

Included amongst the many extra judicial contributions he made whilst a judge are the drafting of the *Civil Process Rules*, introducing the idea of requiring written submissions in the Court of Criminal Appeal and the Full Court and the drafting of rules under the Companies' legislation.

We shall be very sorry indeed to see Mr. Justice Cosgrove go. We will miss his professionalism and his hard work in the Court, and his enlivening presence in the Chambers. But there is some consolation in the fact that he is not leaving the law altogether, but will continue to give what I know will be most valuable service to the law as Tasmanian Law Reform Commissioner, and I suspect, in other ways as well.

We wish him a most enjoyable and satisfying retirement.

J. M. BENNETT A.-G.: If the Court pleases. Your Honour, I rise on behalf of the Government and the people of this State to thank you for your contribution to the law, and in particular to the Bench of the Supreme Court of Tasmania.

His Honour the Chief Justice has listed in some detail your achievements throughout your legal career, your Honour, but with

great respect to him there are two areas where his list is deficient. The first is the enormous respect that you achieved prior to your elevation to the Bench as the "father of the Bar". You all too willingly put your pen and tools of trade down to assist those perhaps more junior practitioners or perhaps those who were not as adept as yourself to assist them when they needed perhaps a shoulder to cry on, but certainly some advice, and we all thank you for the advice that you gave us at some time or another.

The second area, your Honour, is since your elevation to the Bench of this Court, the amount of time and expertise that you put into various committees, certainly too numerous to list here, but all of which were aimed at and which did improve the delivery of justice in this State. On any standard of proof your Honour, I think both of those counts are provable and I think the appropriate way to determine those two counts will be to say "thank you" from everybody concerned.

I must say that as I came down the Midlands Highway today, I was mulling over as to how I would raise the sometimes delicate subject of retiring age and like any lawyer should, I suppose, I went to the authorities — and what better authority could I go to but Volume No. 40 of the Tasmanian Law Newsletter of July, 1988, and I saw there, your Honour, an exchange under a heading "Foot in Mouth" between yourself and another prominent member of the Bar, who shall remain nameless, but who I can assure you is present in this Court, and is second from the end of the starboard side of this Bar table, and there his usual eloquent plea was being put on behalf of a sixty-year old client who he put the proposition to you could therefore be described as elderly. You are reported, your Honour, along with one of your brother judges as "colouring and spluttering" and I think I will just take your advice as quoted in that newsletter and quote "Just get off the subject".

Your Honour, it is far too early to thank you for your total contribution to the law because of course, as his Honour the Chief Justice has said, you have accepted, and the Government is very grateful that you have accepted, the position as Law Reform Commissioner for this State, and of course you have already started work.

Suffice it, I think, to say, your Honour, that I should simply content myself by saying thank you, for gracing the Bench of the Supreme Court in Tasmania with such distinction. Thank you, your Honour.

B. H. CRAWFORD [President of the Law Society of Tasmania.]: It is my pleasure and privilege to address your Honour on behalf of the Law Society of Tasmania.

Your Honour was appointed to the Bench in 1977 as the sixth permanent member of the Court. Your Honour's appointment was

most deserving after a notable career as a barrister and solicitor and, for over three years, as the inaugural Crown Advocate. Apart from the time taken up by a busy career you had been for a time lecturer in Criminal Law at the University and a member of the Faculty of Law. You were instrumental in establishing the Legal Practice Course now undertaken by students at the completion of their law degree. In 1970 you became a Churchill Fellow whilst Chairman of the Legal Education Committee of the Law Society and you travelled to the United Kingdom, Canada and New Zealand to study legal practice courses in those countries. As a result, from 1971 a Legal Practice Course was established as a division of the then College of Advanced Education and this Course has proved a successful and necessary part of the education of law students. The Society is grateful to you for your interest, enthusiasm and powers of persuasion which led to the establishment of the Course and for the support which you have given to it since its inception. You have also been a member of the Board of Legal Education established under the *Legal Practitioners Act* 1959 and, more recently, of the Attorney-General's Legal Education Review Committee.

Another interest of your Honour has been that of law reform. The Society is delighted that you will maintain your involvement with the law upon your retirement from the Bench by your acceptance of the position of Law Reform Commissioner. I refer particularly to your Honour's interest in the reform of criminal law, evidence and procedure. Your Honour's work was most valuable in the introduction of the *Civil Process* and *Commercial Arbitration Rules*. Your Honour is currently chairman of a committee inquiring into the resolution of civil disputes. All these projects exemplify your interests in reform of the law. Your judgments too have referred when appropriate to the need for reform.

All the above activities show that your Honour's interest goes far beyond the day-to-day practice of the law and the judgment of cases coming before you, to other areas of importance to our community related to the law. However a list of your Honour's achievements does not do justice in describing your Honour's achievements as a judge.

The former Solicitor-General, Roger Jennings Q.C., in welcoming you to the Bench as Solicitor-General in February 1977 referred to some of your Honour's attributes which proved to be prophetic of your work as a judge. He said: "You accord respect for the views of others, and happily have been known at times to be persuaded by them, but when your conviction remains firm you have never been known to be timid about it." An example of your Honour's forthright and firm views occurred in a case where your Honour commented on a submission made on appeal from a criminal conviction. It was submitted to the Court of Criminal Appeal that the trial judge should have invited the jury to consider alternative verdicts despite the fact that they were not open on the evidence. It was submitted that by a process described as "Jury Dynamics" the jury might have chosen to convict the

accused of those alternative and lesser crimes. Your Honour stated in your judgment:

> "I must confess that I regard the notion of 'Jury Dynamics' as one as imprecise, speculative, and illusory as the science, art, or quackery of fortune-telling". [*Buttle v. The Queen*, 1984 Tas.R. 209, at p.215.]

Those who have appeared before you have been made aware as soon as your Honour has a firm or tentative view and this has led to constructive dialogue between Bench and lawyers. Thus the issues have been defined and submissions clarified.

Your courtesy to younger members of the Bar is noteworthy. You have exhibited these virtues not only to them but also on occasions whilst assisting unprepared practitioners towards a realisation of their unpreparedness. Your Honour's excellent sense of humour has put many a member of the Bar or litigant at ease. Your Honour has an acknowledged ability to simplify areas of the law ordinarily suffused with complication and obscurity. Mr. Jennings also referred to the fact that your "views were always arrived at by a process of total intellectual integrity formulated with impeccable logic and expressed with the greatest care and precision." These words can still be used after the last eleven years' experience of your Honour's work on the Bench.

Your Honour's appreciation of this welcome characteristic of a judge is perhaps best exemplified by your Honour's remarks in a judgment in 1984 where your Honour referred to an authoritative judgment by Lord Denning and remarked:

> " . . . as with so many of his Lordship's judgments, all that he did in that case was to direct attention to a simple proposition which underlay a plethora of authorities. That is no small service — we have all often noted how a single flash of what is, in truth, blinding clarity does no more than reveal something so obvious that we are at a loss to understand how it could have been previously forgotten or misunderstood." [*Smedley v. Smedley*, 1984 Tas.R. 49, at p.51.]

Your Honour has been on all occasions humbly aware of the fallibility of the process of judgment. The role of a judge as you saw it was to approach as near as possible to a just result without ever being certain that that result is achieved. I refer to your Honour's summing up to the jury in a case in 1986 when directing the jury on what weight they should give to your views concerning the evidence:

> "Now it will become obvious to you that what I am about to say is not mere repetition of counsel's arguments but represents my own reasoning and to some extent my own opinion . . . Now it is very important, therefore, that I repeat . . . that you are the judges, not me. My words carry no more weight than counsel's. The fact that I sit up here in special robes, that everyone stands up when I come into court, everyone stands up when I go, does

not make me eminently wise and intelligent. People show respect for my office, not for my intellectual prowess. I am no different from counsel. It is not many years ago when I was sitting down there saying, 'If it please your Honour' and so forth. I am just a man and what I say is just a man's comment. So you listen to me, but listen critically, and apply your intelligence to what I am about to say."

[*Unsworth v. The Queen*, 1986 Tas.R. 173, at pp. 180, 181.]

Your Honour's judgments are marked by their incisiveness and the assistance which they give to those using them as precedents because of their clarity and logical consideration of the law.

Your Honour's particular interest in the criminal law arises from your deep respect for the rule of law and for the rights of the subject. One of your Honour's final judgments before your retirement provides an excellent example. Your Honour was there considering the right to silence of the accused person and the question of whether some comment to the jury could be made by the trial judge if the accused failed to give some explanation when asked for it. Your Honour said:

"The place of the right to silence is, in my view, beyond dispute. It is part of an unwritten concordat between the three arms of government and the people by which an agreed base for just and responsible government is established.

It is one of a series of fetters on the power of the executive arm of government. These fetters include *habeas corpus*, which fetters imprisonment without presentation to the Courts; the privilege granted to witnesses to refuse to answer incriminating questions; the refusal of the Courts to admit evidence obtained by oppressive means or deliberate and illegal exercise of power; the requirement that the Crown, i.e. the executive, must prove the guilt of an accused beyond reasonable doubt. These are all shoots from the one tap-root — the preservation of the rights of the individual against the executive arm in which reside all the government powers of enforcement. The most significant feature of these restrictions on that power is that they are accepted by the executive itself, as well as by Parliament, the Courts and the people. They represent the common understanding of the government and the people, in respect of the ordinary affairs of life. There may be occasions, such as occur in war, revolution, and espionage when this common understanding is temporarily put to one side. But it is never forgotten or abrogated. Each of these restrictions is, and is acknowledged by all arms of Government to be, an indispensable bastion in the common man's fortifications against oppression." [*Harris v. The Queen*, 1988 Tas.R. 31, at p.36.]

Your Honour's remarks just quoted are eloquent testimony to the importance of preservation of the independence of the judiciary.

The members of the legal profession in Tasmania wish you a long and happy retirement and a successful period of office as Law Reform Commissioner.

D. J. PORTER (President of the Tasmanian Bar Association): May it please the Court. At times on past such occasions the speakers have expressed the sentiment that to them the occasion has been one of pleasure and regret, and I find I am no exception. The pleasure, of course, is to be able to speak on such occasion, in my case on behalf of the members of the Tasmanian Bar Association, and in so speaking, to note your Honour's great achievements and contribution to the administration of justice in this State. The regret is evident from the very nature of this sitting, i.e. to mark your Honour's retirement as a judge, this regret being only a little tempered by the knowledge that your Honour will continue to serve the law and the community as Law Reform Commissioner.

The particular regret is to lose from the judiciary and the immediate practice of the law a fine and distinguished lawyer whose accomplishments and bestowals of service have already been chronicled. It needs here to be said that your Honour has always, as a practitioner, as Crown Advocate, and as a judge of this Honourable Court, demonstrated a profound, scholarly understanding of the law and its dynamics, together with a deep appreciation and sense of legal history, being able to readily perceive its relevance in the modern context.

The expression "a good, practical lawyer" has unfortunately been often used in somewhat of a disparaging way, but I think that given its proper and literal meaning it can be applied to your Honour, in addition to those matters to which I have already referred. Your Honour has shown what can only be described as an extraordinary capacity to quickly analyse a matter, and reduce it to its fundamental components of fact and of law. Your Honour possesses exemplary clarity of thought and economy of expression, and has always striven for the expedition of matters coming before the Court, seeing that the lack of it did little credit to the profession and more particularly perhaps implied injustice to the members of the public.

Your Honour's concern with the effective general administration of justice has meant many hours of your Honour's time working behind the scenes, as it were, towards measures of reform. These efforts have, I think, gone largely unheralded, but I hope that that situation is now redressed, at least in part.

Speaking as I do on behalf of the Bar Association, it would be wrong of me not to make particular mention of your Honour's contribution as far as this association is concerned. As has been noted. your Honour was elected president, that being on 10 October 1970, ceasing to act in that office on 7 October 1972, having given great service, and for that we thank you.

On behalf of the members of the Bar Association, I extend our thanks to you for your continuing and unflagging efforts in the practice of the law in all its facets. Your Honour's deep sense of justice and

fair play, great capacity for work and your Honour's insistence at all times on the highest possible standards, will, I hope, long be remembered. I sincerely trust that you have a long and happy retirement, although I am conscious, of course, that to use the word "retirement", particularly in your Honour's case, is to adopt somewhat of a misnomer. In any event, you leave the Bench with our gratitude and our very best wishes.

If it please the Court.

COSGROVE J.: Chief Justice, Mr. Attorney, Mr. President, Mr. President, ladies and gentlemen.

Thank you very much for your attendance here today, and for the very kind, much too kind, words spoken by you and on your behalf.

On Friday I will make my exit from the legal profession — a final exit. Although I will remain in contact with the members of the profession I will no longer be myself a member. Instead, I will be that figure comically and perhaps disdainfully known to you as the officious bystander. I have deliberately described my exit as being from the profession, not just the Bench. Bench and Bar are but two aspects of the one calling. While it has been an honour and a source of great satisfaction to serve on the Bench, my whole life in the law has afforded me a similar satisfaction and sense of honour. I am grateful to have had the opportunity to serve the community in this calling as one member of a group of men and women dedicated to the daily pursuit of truth and justice. Indeed, I am grateful today in many ways. There are the fundamental gratitudes to God for my life, to my parents for conception, birth and upbringing, to the Christian Brothers for my early teaching, to my wife and family for happiness. But today, my chief gratitudes are for legal things and persons. I am grateful to Sir Stanley Burbury for his early encouragement. There are others too, who encouraged me and I am grateful to them all. I am grateful to that great teacher of the law, Bob Baker, and again other teachers, one of whom preceded me to the Bench, and is here today; to my partners in practice, two of whom are on this Bench today; to my many opponents, friendly fighters, valued for their friendship and their fighting qualities: to those with whom I have worked as Crown Advocate and as a judge, and to those who worked for me, as clerks, associates, attendants, secretaries and transcribers. They have all been good to me and I treasure their goodness. But most of all I am grateful to have played a part, a small one to be sure, but still a part, in the application, preservation and development of the common law, that treasure chest of moral values which is the foundation of our community peace.

It is hard to define the common law. It is not, as some think, solely judge-made law. It has received contributions from the judiciary, of course, but there have been many other contributors. Parliament has made a considerable and under-acknowledged contribution, and if

you look you will find the work of kings and queens there too. In one way and another you will find all the protagonists of our history there. But the most pervading influence has been the common man. It was a stroke of national genius of choose the common man as the determinant of the law's application, as a criterion of the contents of rights and duties, and in the form of the jury, as the judge of guilt. It is this constant reference back to the common man which has time and again drawn the law back from the brink of tyranny. It is this central concept which ensures the public acceptance of the rule of law. Without that acceptance the rule of law would not exist. The law would be merely an instrument in the hands of the powerful. But because of this basic reference point, and because the law has always been based, as Holmes said, on experience rather than logic it became the law of the free. As Disraeli said "All your laws smack of liberty".

The roots of the common law lie deep in mediaeval Christianity, but the tree grew on the soil of an island, an island insulated from the terrors and cruelties of European wars and brigandage. It was nurtured by a sturdy independence of mind which ensured tolerance, but which would tolerate only so much injustice. Because of the embodiment in the law of the Christian insistence on the paramount importance of the life of the individual human being, and accordingly on compassion, the common law has survived threatened excesses of patriotism, pride and ratiocination. Because of its links with ordinary people it has been slow to develop, but its moral values have never fallen below the moral standards of the community and usually it has tended to raise those standards. It has not opposed progress, but because it has always demanded the reason for change and has been always conscious of its origins and its history, it has kept progress steady and tended to check erratic developments. The interaction between the law and the community has been relatively calm.

This duality of influence continues. In this century there are two great land-mark decisions which reflect the original values of the common law. They are *Woolmington v. D.P.P.*, [1935] A.C. 262, and *Donoghue v. Stevenson*,[1932] A.C. 562. One reminds us of the sanctity of individual life and liberty, and the other of our duty to our neighbours. Those decisions dramatically reflect our principles, but so does the whole process of the common law. To have played even the smallest part in the development of this great human institution is a wonder indeed, and for that wonder I am grateful.

And as I have said, I am grateful to you all. I leave you now with some words of G. K. Chesterton, which Sir Peter Crisp paraphrased to me not long before he died.

> "For there is good news yet to hear and fine things to be seen before we go to Paradise by way of Kensal Green."

Thank you all.

GREEN, C.J.: Thank you, Mr. Justice Cosgrove.

Well ladies and gentlemen, thank you for joining us today. In addition to what has been said, this crowded courtroom provides further evidence of the regard in which his Honour is held by the Bar and by all sections of the community.

Thank you for coming.

On 23rd September, 1988, the Honourable HENRY EDWARD COSGROVE resigned his office as a judge of the Supreme Court.

On 5th October, 1988, EWEN CHARLES CRAWFORD was appointed a judge of the Supreme Court in the place of the Honourable HENRY EDWARD COSGROVE.