



## SIR MELLIS NAPIER

*Chief Justice 1942-1967*

If the life of the law has been experience, as Oliver Wendell Holmes once affirmed, then the life of the law in South Australia, at least since the beginning of this century, has been rich in the experience it has been able to draw upon from the judicial work of the Chief Justices of the Supreme Court. From 27th March 1876 until 28th February 1967, only three justices have presided over the Bench of the State's highest court. Sir Samuel Way was Chief Justice for almost forty years after he was appointed to replace Sir Richard Hanson in 1876. Sir George Murray was next to be appointed to this position in 1916 and he was followed in this office by Sir Mellis Napier in 1942. This year, on 28th February, the third justice in ninety-one years to preside over the Supreme Court retired, as he said in his farewell speech from the Bench, "forty-three years to the very day" after he first presented his commission as a puisne justice of the Court. Sir Mellis Napier served as a puisne justice of the Court from 1924 until he became Chief Justice in 1942. His record of service on the Bench of the Supreme Court is unparalleled in the State's history and he joins a select band of Australian justices who have become almost a legend in their own lifetime; justices like Sir Owen Dixon of the High Court and other High Court and State Supreme Court justices who have worked for more than a generation in a judicial capacity on the benches of superior courts of record in this country. In South Australia it is highly unlikely now that Sir Mellis Napier's record term on the Supreme Court Bench will ever be equalled. Since 1944, the Supreme Court Act has provided that all justices of the Supreme Court appointed since then must retire when they reach the age of seventy.

The legal career of "The Chief", as he has been known affectionately for many years, spans more than half of the recorded legal history of South Australia. It goes back to before the turn of the century when federation was yet to be proclaimed and a young Scottish immigrant, who was born in Dunbar on 24th October 1882, entered into articles of clerkship in the office of Charles Cameron Kingston, one of the architects of the Commonwealth Constitution. The young Mr. Napier had come to Adelaide with his family in his youth and most of his early education had been completed at the City of London School. He entered the Law School at the University of Adelaide in the days when the famous New Zealand jurist, Sir John Salmond, was the Bonython Professor of Laws. Today, Sir Mellis is one of the last surviving students of the "Salmond era" at the University of Adelaide. At the conferring of degrees in December 1902, Thomas John Mellis Napier received the degree of Bachelor of Laws at a ceremony presided over by Sir Samuel Way, who was then Chancellor of the University. History records that the Chancellor was visibly ruffled by the "unseemly undergraduates" who disturbed the proceedings on this occasion and the twenty year old articulated clerk was unwittingly admitted to the rank and privileges of the degree of Doctor of Laws. The preceding candidate was Sir John Forrest, the famous West Australian statesman, who received the degree of Doctor of Laws, *ad eundem gradum*. When it was Mr. Napier's turn to receive his degree, the tumult raised by a group of students, reputedly from the medical school, had so disturbed the Chancellor, that he mistakenly recited again the admission ritual for the degree of Doctor of Laws.

Because of his age the young law graduate had to wait for ten months, however, after he had otherwise fulfilled all of the requirements for admission to the Bar, before he could be admitted as a Practitioner of the Supreme Court. The former Chief Justice was admitted finally on his twenty-first birthday in October 1903 and the youngest practitioner in the State then became a Managing Clerk in the firm of McLachlan and Vandenberg. In 1906 he entered into his first partnership with Mr. A. J. MacLachlan and the firm was named McLachlan and Napier. In the following seventeen years while he remained in private practice, various amalgamations and changes altered the structure of the partnership arrangements which had been made originally by the young practitioner.

Three years after his admission as a practitioner, Sir Mellis Napier appeared as junior counsel in the Supreme Court in the case of *Billiet v. The Commercial Bank of Australasia Limited*<sup>1</sup>; the first of a series of reported cases in the next seventeen years in which the future Chief Justice made his mark at the Bar as a leading counsel with a strong leaning to the civil side of the Supreme Court's jurisdiction. In later years, one of his colleagues at the Bar at this time, Mr. Frank Villeneuve-Smith K.C., was to remark that in this period Sir Mellis Napier soon gained a "rapid ascendancy" over his colleagues and this was acknowledged formally in 1922 when he was appointed as a King's Counsel. In his last years at the Bar, Napier K.C. continued to make regular appearances in the Supreme Court and he also gained a considerable reputation as a counsel in industrial matters, representing the State Government in cases before industrial tribunals. At this time, he was briefed also by the Government in *Welden v. Smith*<sup>2</sup>, a *cause célèbre* of the period which went finally on appeal to the Privy Council. Finally, on 13th February 1924, the forty-one year old barrister was appointed as a puisne justice of the Supreme Court of South Australia, joining Chief Justice Murray and Mr. Justice Poole and Mr. Justice Angas Parsons (a former partner) on the Bench of this Court. Sir Mellis Napier was appointed to replace Sir John Gordon who had recently died, and who had been appointed as a member of the Supreme Court a few weeks after the new judge had been admitted to the bar in 1903. Under the heading "A Popular Appointment", the *Advertiser* of 14th February 1924 reported that the elevation of the new justice to the Supreme Court Bench was "generally expected" and the paper commented that Mr. Napier "is another Scotsman of distinguished ability". In referring to his career at the Bar, the paper added that "a good deal of his success has been due to his skill and ready discernment in the cross-examination of witnesses".

During the twenty years before his elevation to the Bench, the new justice had not only devoted his time to private practice. He drafted a new Justices Act and an Evidence Act and he took a close interest in the reform of company law in the State. He lectured in a part-time capacity to students in the Law School at the University of Adelaide and was active in the corporate life of the profession of this State. The former Chief Justice was one of a small "coterie", to use his own word in his farewell speech, who resuscitated the Law Society of South Australia just before the First World War and he served on the Council of the Society for many years. At one time he was

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1. [1906] S.A.L.R. 193.

2. [1922] S.A.L.R. 95.

Vice-President of the Society and was also responsible for drafting the Act which incorporated the Society.

When he presented his commission to the Supreme Court, the new puisne justice was greeted by an array of silks whose names are now part of the legal history of South Australia. They included Dr. F. W. Richards K.C., a former associate of Chief Justice Way, who later became Crown Solicitor and then served on the bench with Sir Mellis Napier for twenty years, Mr. Frank Villeneuve-Smith K.C. and Mr. A. W. Piper K.C., another silk destined for judicial office. In the crowded courtroom Mr. Piper welcomed the new justice to the Bench and a few days later, on 4th March, Mr. Justice Napier fulfilled his first judicial functions when he presided at the monthly arraignments for the criminal sittings of the Supreme Court.

Not unexpectedly, the new justice soon made his mark upon the work of the Supreme Court, particularly on its civil side, mirroring his achievements as a practitioner in the previous twenty years. Over the years since 1924, the volumes of the South Australian State Reports and those in other jurisdictions, too, bear witness to Sir Mellis Napier's great capacity, throughout his judicial career, to unravel intricate factual situations and to apply to them a clear, lucid, erudite exposition of the law. With a relish, rarely equalled on the Bench, Sir Mellis Napier seems to have welcomed the opportunity to construe the terms of a difficult will or to determine the meaning of a deed of trust. As a puisne judge he drafted new Supreme Court and Evidence Bills which were enacted by the State Parliament in the 1930s and by the beginning of the next decade, with Chief Justice Murray in failing health, Sir Mellis Napier was already playing an important part in the administration of the affairs of the Supreme Court. With the death of Sir George Murray and with the senior puisne judge, Sir Angas Parsons, in ill health as well, the Playford government appointed Mr. Justice Napier as the Chief Justice of the Supreme Court in 1942.

From 1942, until his retirement in 1967, the Chief Justice was clearly a powerful, dominant figure in the work of the Supreme Court. Only rarely was he in dissent in matters decided on appeal by the Full Court of the Supreme Court. Generally his judgments at first instance were never disturbed on appeal by the Full Court or the High Court of Australia. In the years since 1942, the burdens of office grew immeasurably and the premature death of three appointees to the Supreme Court in the Chief Justice's latter years on the Bench undoubtedly complicated this position even more. Nevertheless, despite the growing pressures of judicial work and long periods administering the government of the State as Lieutenant-Governor, the Chief Justice proved always to be a strong administrator in regulating the affairs of the Supreme Court and he continued, at the same time, to publish judgments which were not impaired with the passing of the years.

In the New Year's Honours List in 1943 the Chief Justice was knighted, and in 1948 he was awarded the K.C.M.G. Like his predecessors, Sir Mellis Napier has always maintained an active, purposeful interest in public affairs not directly related to the life of the law. In 1948 he became the fourth Chief Justice of South Australia to be elected as Chancellor of the University of Adelaide and in 1959 the University marked his major contribution to its

work when he was admitted *ad eundem gradum* to the degree of Doctor of Laws. Not long before this he had also been admitted to the rank and privileges of the degree of Doctor of Laws in the University of Melbourne. As the Deputy Chancellor, Sir George Ligertwood, remarked on the occasion when the degree was conferred by the University of Adelaide, the mistake made by Sir Samuel Way at the Commemoration Ceremony in 1902 had been "prophetic to say the least", and at the time the Chief Justice received this honour in 1959 it had been given only ten times in the history of the University. The Chief Justice continued on as Chancellor of the University until 1961. As Lieutenant-Governor of the State since 1942, Sir Mellis Napier has administered the government on many occasions and between 1944 and 1953, for example, he served in this capacity for an aggregate total of more than three years. Since his retirement from the Bench he has retained this appointment and once more took over the reins of Vice-Regal Office when the Governor, Sir Edric Bastyan, served as Administrator of the Commonwealth in mid-1967.

One of the former Chief Justice's most important contributions to the public life of the Commonwealth occurred just before the Second World War. In 1936 he was appointed by the Commonwealth Government as the Chairman of the Royal Commission on Banking and he was granted leave from the Supreme Court in 1936-1937 to carry out this work. In 1959 he was also appointed as chairman of the Royal Commission of three Justices of the Supreme Court which was set up by the State Government to investigate the circumstances surrounding the murder conviction of Rupert Max Stuart.

In his work on the Bench there are at least four strong recurring themes which emerge in the judicial utterances of the former Chief Justice. Like his predecessors, Sir Mellis Napier always retained a strong sense of the traditions permeating the life of the law in this State. Secondly, he emphasised the importance of maintaining the continuity of the law. Thirdly, and just as importantly, the former Chief Justice balanced tradition and continuity with the need to adapt the law to the needs of changing circumstances. Fourthly, where possible, Sir Mellis Napier leaned to the view that justice was not to be subservient to formalistic, legal principles. More than anything else perhaps, an anecdote which is not apocryphal serves to emphasise Sir Mellis Napier's belief, too, that judges still have a vital law-creating function to carry out within the framework of the limitations inherent in the exercise of judicial functions. On one occasion, counsel was being pressed by the former Chief Justice for authority covering a particular point. Finally, the barrister asserted that he was unable to help the Chief Justice with any cases and it seemed, so he said, that there was no authority on the issue. The immediate reply of the Chief Justice, according to the oral tradition at the Bar, was simply: "Don't worry, there soon will be".

In his farewell speech from the Bench on 28th February Sir Mellis Napier referred once again to his respect for the traditions of the Supreme Court which he confirmed had been a factor influencing him in deciding to stay on the Bench until his eighty-fifth year. As he told the crowded courtroom on this occasion: "As you must all be aware the last few years in this Court have been a difficult time, there were the 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 . . . ” In many ways, these words echoed similar sentiments which had been expressed by the Chief Justice when he took up this appointment in 1942. On 30th March 1942, in reply to an address from Mr. Frank Villeneuve-Smith K.C., the newly commissioned Chief Justice looked back at the judicial life of his two predecessors in office. The new Chief Justice then stated: “I can make no pretence to the culture and scholarship of the late Chief Justice, or to the wide learning and the vigorous intellect of his predecessor, Sir Samuel Way. But there are other respects in which I feel that I need not be afraid to match myself with those great figures of the past. I mean my regard for the reputation of this Court, and my resolve to maintain so far as in me lies, the tradition that is our common inheritance from the Bench and Bar of England”.

Moulded and conditioned by these traditions, of which he spoke so affectionately on these two occasions, it is hardly surprising that the former Chief Justice maintained, throughout his judicial life, a firm emphasis on the importance of precedent in determining matters which came before him. His judgments demonstrate a continuing respect for the authority of the judicial wisdom of the past contained in the volumes of the law reports in England and Australia. At the same time, in accordance with the traditions of the common law, this respect was tempered with the understanding that judicial law-giving should not be made the slave of past generations. As he summed up this attitude in his final speech from the Bench, the former Chief Justice said: “The law is the cement that holds a society together, and if you can see it as such you will realize the necessity for its adapting itself to the needs of the community at large”.

A recognition of a need to try wherever possible to achieve justice within the scope of the inherent limitations placed upon the exercise of judicial functions is also to be found in the judicial utterances of the former Chief Justice. In *Blight v. Warman and McAllan*<sup>3</sup>, for example, the Chief Justice was called upon in the Full Court to examine the power of a court to allow an amendment to be made to pleadings. As he said on this occasion: “. . . according to the practice under the Judicature Act, the rules of pleading are to be regarded as subservient to, and not as over-riding, truth and justice. As the late Sir Samuel Way used to say, ‘the trial judge is not umpiring a game of chance or skill, he is administering justice’. For that purpose the judge is given ample powers of amendment, and, when the occasion arises, those powers should be exercised to bring the pleadings into line with the undisputed facts, as they appear in the case presented by the plaintiff”.

The departure of Chief Justice Napier from the Bench of the Supreme Court was, as the Attorney-General, Hon. D. A. Dunstan Q.C., M.P., told the Court on 28th February, “both a great and a sad occasion”. As the Attorney-General stated: “It is a great occasion in that in farewelling Your Honour we are saying goodbye to a Chief Justice with an unexampled record on the Bench, I believe, in the English speaking world. Your Honour’s completion

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3. [1964] S.A.S.R. 163.

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." Clearly, at some future time, when the history of the law in this State is written there can be no doubt that the middle years of the twentieth century will be known as the "Napier era" in memory of a Chief Justice who has left an indelible mark on the life of the law in Australia.