

PREFACE

DEDICATION TO SIR FRANCIS BURT

I congratulate the Student Editorial Board of the Law Review on their decision to dedicate this issue to the Hon Sir Francis Burt KCMG as a tribute to his service to the law and legal education in Western Australia. I am honoured to have been invited to contribute this preface to the issue.

My first substantial contact with Sir Francis was more than thirty years ago in the Christmas Vacation of 1955-1956. I was then employed as what is now known as a Summer Clerk in the firm of Joseph Muir & Williams (the predecessor of Freehill Hollingdale & Page, Perth). Sir Francis was one of the partners. As I recall it, he was then about 38 years of age and had already established a formidable reputation as an advocate. I discovered that he had been admitted to practice in 1941. Almost immediately afterwards he joined the Royal Australian Air Force and returned to practice in 1945.

In December 1955 I was then 17 years of age and due to commence my studies at the Law School the following year. I remember being very excited when he asked me to draft some documents. The first was a writ of *fi fa* directed against a well-known Perth litigant. I still possess a manuscript draft opinion I also submitted to him. At that time my greatest thrill was when he took me to court with him. One thing which struck me was that he treated me as an equal. He had then and has retained ever since an easy informality in his dealings with all manner of people. I have a clear recollection of him sitting on the table in the robing room at the Supreme Court, puffing on a cigarette, swinging his legs and explaining to me in detail how he was going to cross-examine the next witness. He was appearing in the Criminal Court defending a man on a charge of stealing as a servant. It was fascinating to watch the cross-examination proceed as he had planned it.

Another thing which struck me at that time was the near- illegibility of his handwriting. With much practice I later acquired some expertise in deciphering his hand. He let me have one of his briefs which contained the notes for his address. On looking at them again recently I was reminded of the masterly simplicity of the analysis which he made of the facts of the case and their legal significance.

At that time he was the Visiting Lecturer in the Law of Contract at the Law School. I attended his lectures as a student in 1957. The basic text was Cheshire & Fifoot's *Law of Contract*.¹ I have kept the textbook and my lecture notes. Burt's lectures were methodical, precise and humorous. As students we were in awe of the power of his intellect. We hung on every word. His explanations were simple and clear. His exposition of cases was a model for others. Above all, from the students' point of view, his lectures were among the easiest lectures for students to note. He shared with Lord Denning a style which encapsulated one idea per sentence. Thus, as he presented an argument the steps in it seemed very simple. One idea lead inexorably to another as sentence followed sentence. The lectures took place at 5 o'clock in the afternoon. Only later did I discover how lucky we were to have the benefit of them in the light of the extremely busy practice he had which took him to court most days.

In April 1959 "Red", as he was almost universally known, took Silk at the age of 41. Notwithstanding the increased workload he continued to give lectures at the Law School. His period as a Visiting Lecturer spanned twenty years from 1945 to 1965. In 1960 I left Western Australia for two years or so to study at Oxford. He encouraged me to go and gave me a reference. By the time I returned at the end of 1962 he had established the Independent Bar in March of 1961 and become its undisputed leader.

I served my articles at Stone James & Co (the predecessor of Mallesons Stephen Jaques). I was admitted in 1964 and joined Sir Francis' old firm as a partner. Between 1964 and 1967 I appeared as his junior on a considerable number of occasions. If one had done one's homework and had a contribution to make, he made

1. G C Cheshire & C H S Fifoot *The Law of Contract* 3rd ed.

one feel very much a part of the team as a junior. In one case in 1965 in which he led me the plaintiff alleged that a proprietary company's takeover of a partnership was a sham and that the partners were estopped from hiding behind the company, which was without funds, and from denying that they were liable as partners to persons who had dealt with them as such. At the close of the defence case Sir Francis turned to me and said "It's time to put the spinaker up. You can give the final address for the plaintiff." I spent a sleepless night working on what I was going to say. Next morning we went through it in his chambers. He made some suggestions for improvement. I was thrilled to have the opportunity. Of course, he had already made victory secure. He could so easily have avoided any possibility of sharing the credit for it.

As an advocate Sir Francis always gave the appearance of being in command. He was always superbly well-prepared and left no-one in any doubt that this was so. At the same time, however, his delivery was easy, with an air of spontaneity and occasional humour. He was the dominant figure at the West Australian Bar in the 1950s and 1960s. He appeared to be equally at home in civil and criminal trials as well as when arguing appeals. He appeared frequently in the Full Court and the Court of Criminal Appeal, as well as in the High Court of Australia and the Privy Council. He appeared twice before their Lordships. The first was in *Beamish v R*,² a celebrated criminal case and the second was *Hargrave v Goldman*,³ a hallmark decision in relation to bushfire liability.

I was junior in a number of cases when he was the leader on the other side. He was a formidable opponent. In one appeal to the High Court in 1966 I found myself as junior to the late Ken Hatfield QC with Burt QC leading on the other side. Sir Francis was aware of this beforehand. He was my leader in the immediately preceding appeal, which involved an action for damages for breach of a lease. Two points were to be argued. One was a "goodish" one and the other a "badish" one. We were agreed that the second point

2. Unreported decision of the Privy Council; appeal to the Supreme Court of Western Australia dismissed, [1962] WAR 85; leave to appeal refused by the High Court of Australia, noted (1962) 35 ALJR 459, and by the Privy Council.

3. [1967] 1 AC 645.

had little or no hope. Sir Francis suggested that he argue the former and I argue the latter. I can remember being petrified. I am sure that he had an idea that I might be required to have something to say about the law of equity in the following appeal. Hatfield QC had many great abilities but equity was not his strong point. I like to think that Sir Francis was offering me a dummy run. It was certainly not an easy one. Almost before I had uttered one complete sentence I seemed to be assailed by one member of the High Court after another and, at times, more than one simultaneously. Barwick CJ was presiding. After a few more sentences had provoked a similar reaction from their Honours I bent down and asked "Should I sit down?" Sir Francis said "Go on. You're doing fine!" A little later, after a particularly devastating exchange with Sir Garfield, I was sure my legs were giving way and I leant back and half sat on the top of the chair behind me. I felt a firm hand on my buttock push me forward and so I pressed on. The whole experience probably lasted no more than fifteen minutes. It seemed an age.

In the following appeal I did in fact reply to Burt QC, who had cited many old equity cases in support of his argument. I had the difficult task of arguing that a transaction evidenced by a contract of sale followed by a registered transfer of land was in equity a mortgage of the land which the appellant was entitled to redeem. My address in reply to Sir Francis was made a great deal easier by the fact that, because of his generosity, it was the second rather than the first time that I had been on my feet before the High Court.

Between July 1967 and the end of 1970 I was again overseas working with the Asian Development Bank. Once again I had been greatly encouraged by him. While I was away he was appointed a Judge of the Supreme Court in 1969. On my return at the beginning of 1971 and until his retirement I appeared before him in a number of cases, both at first instance and on appeal. The first thing one learnt when appearing before him was to be very careful before agreeing with any proposition he put from the bench. Just as when he was lecturer or counsel so also as a Judge he demonstrated that one idea led inexorably to another. Consequently, agreement with a proposition put from the bench by him could well lead to inevitable defeat. Looking back now I may have been flattering myself, but I always had the impression when I appeared before him that he was giving me a hard time. He was always testing. There were oc-

casions when I suspected he was teasing. I think he brought out the best in the advocates who appeared before him.

As a Judge he always looked for the issue or question on which the outcome of the case depended. He has a great capacity for probing and testing an argument. There was nearly always a very good atmosphere in his court. He was extremely courteous and remarkably tolerant whenever he was presiding. He never lost his sense of humour or his sense of fun. There were times when he could be quite mischievous. He is possessed of a great fund of commonsense and an equal fund of compassion. Above all, however, Sir Francis Burt has a brilliant mind which, as lecturer, counsel and judge he used to analyse the facts with precision and expound and apply the law to them. His judicial output was prodigious.

There is no doubt that between 1977 and his retirement in 1988 he was an outstanding Chief Justice. He was, and, happily, remains an outstanding human being.

It has been an enormous privilege for me to have known his friendship and to have been a beneficiary of his wisdom and encouragement. I am sure that the contents of this issue of the Review which follow will give him and his host of admirers much satisfaction.

David K Malcolm
Chief Justice of Western Australia

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