A Personal View of Mr Justice Murphy

by Sir Maurice Byers Q.C.

Those committed by duty or inclination to a consistent perusal of the Commonwealth Law Reports observe that diversity of judicial opinion co-exists with uniformity of judicial method. The method is labelled legalistic by those who dislike it or are impatient with its consequences. Despite the strictures of many and the anathemas of several, it is a flexible judicial technique for the orderly development of law. It is understandable to those who must advise the community on what has been and may hereafter be decided. It restricts judicial fancy by requiring the premise to contain the seeds of the conclusion and thereby tends to exclude random judicial mutants. The justices of the High Court have long been polished performers in this mode.

Those justices who have turned the course of decision in constitutional matters, have done so by persistent dissent elaborately expressed. Sir Isaac Isaacs swung the Court from the errors of reserved powers in this way. Sir Owen Dixon performed a like feat at least for a time, for Section 92.

What then happens to a judge who scorns both current orthodoxy and current method? Mr Justice Murphy's judicial career must be viewed bearing in mind that many of his constitutional beliefs or assumptions were unorthodox and that his modes of justifying them were in the main employed neither by the judiciary nor understood by the profession. This is not to say that his beliefs were wrong, even if in this field absolutes are admissible. For each generation views the Constitution anew against the background of changing perceptions of Australian needs and of Australia's relations with other countries including the United Kingdom. A generation ago the Australia Act would have been unthinkable to many, yet each State Parliament, and the Parliaments of the Commonwealth and the United Kingdom co-operated in its passing. The people barely raised an eyebrow. Thus, the legal relation between Australia and the United Kingdom is now undoubtedly what Mr Justice Murphy in 1976, asserted was then the case. He said: "The United Kingdom Parliament has no power (and had none in 1958) to make a law having force in any part of Australia": **Bistricic v. Rokov** (1976) 135 C.L.R. 552 at p. 565.

However, he went on to say (at p.567): "In my opinion (notwithstanding any statements to the contrary) Australia's independence and freedom from the United Kingdom legislative authority should be taken as dating from 1901. The United Kingdom Parliament ceased to be an Imperial Parliament in relation to Australia at the Inauguration of the Commonwealth. Provisions of statutes directed towards regulating the Imperial-Colonial relations (e.g. those in the Colonial Law Validity Act, 1865) then ceased to be applicable. There are strong grounds for considering that cases which held Commonwealth legislation ultra vires because of inconsistency with any law other than the Constitution (e.g. **Union Steamship Company of New Zealand Limited v. The Commonwealth**) were wrongly decided". Now, there is much to support the view that a law of the Commonwealth Parliament within its Constitutional powers could never have been invalidated by the Colonial Laws Validity Act if only because the Constitution, being a later Imperial Act, could hardly be construed as subject to the Act of 1865. So much was made clear in **China Ocean Shipping Company v. South Australia** (1979) 145 C.L.R. 172 at pp.204, 227. This would result only in the conclusion that the **Union Steamship of New Zealand Case** (supra) reflected the assumptions current in 1925 and for that reason, as well as that of logic, should no longer be applied. This view, namely the necessity to accomodate to changing constitutional conditions, is well enough accepted: **Spratt v. Hermes** (1965) 114 C.L.R. 225 at pp.272-3 per Windeyer J., **Bistricic v. Rokov** (supra) at p.558 per Mason J.

The point of my reference to and quotation of the second passage from Mr Justice Murphy's judgement in **Bistricic** is that he did not resort to the traditional judicial tools of reasoning and discussion of previous decisions to establish his heterodox position. His refusal to do so makes his statement more immediately understandable. And it is absurd to imagine that in 1902 the United Kingdom Parliament could legally, despite section 128 of the Constitution, have abolished the High Court and substituted, against the will of the Australian people, a Bench of Surrey Justices of the Peace. The whole point of the Constitution was the creation of responsible government for the Australian people in the federation to which the local Courts presence was central.

That after 1901 there were at least severe restrictions on the United Kingdom Parliament's legislative power over Australia is therefore unarguable. But the judge did not argue it and left his wider statement exposed to the criticisms showered on it in the **China Steamship Case** (supra) at pp.182, 209-214. I should say in fairness to him, that those who relied, in the **China Steamship Case**, on this obiter dictum made no attempt to support it by argument. They thus exposed what may then have been a passing judicial observation to a storm of analysis. A more sustained and convincing discussion had to await his decision in the latter case: see pp.234-239. Then it appeared surrounded by other and critical judgements.

A similiar example is the judge's statement of his views upon section 92. What he said in **Buck v. Bavone** (1976) 135 C.L.R. p.110 at 138 was that the prohibition did not extend beyond the imposition on interstate trade, commerce and intercourse of "customs duties or similar taxes, direct or indirect". What he wrote is lucid and powerful. It cannot be disputed that the Court's approach to section 92 is, shall we say, fluid. It is also obscure to the point of despair. Powerful voices on the Court have recently been raised for a reconsideration of what has been decided and a reformulation, or rather a new formulation, of the application and content of the section. When that occurs, Mr Justice Murphy's remarks in **Buck v. Barone** will be important, for at least he both recognized before many of his peers that reconsideration was necessary and ventured his adoption of Lord Wright's extra-curial opinion of its meaning. But his drastic departure from all received judicial opinions as to its operation served to imperil the force of what he had to say. Judicial techique required a more elaborate and argued approach if the Bench and the profession were to be convinced.

One feels when reading Mr Justice Murphy's judgements that they were written not for his colleagues or the practising members of the profession, but for the public and the students. It was his view that the law and its processes should be, and should be made to be,

understandable by all. He believed that the Court's decisions should be explained to those who reported them, to the public and to those affected by them. The Court, in involved cases, has done this from time to time, but I think he had in mind more sustained and widespread action.

His approach to the judicial art has, I think, obscured his worth as a lawyer. He had, beyond dispute, a powerful and original mind. If he had constitutional preconceptions, well, he was not alone in that. It would be difficult to find a Justice without them. In argument he went quickly to the core of the problem and dealt with counsel with unfailing courtesy and humour. His tragically early death left a gap on the Court that will not soon or easily be filled.

His influence will not I think be immediately felt. But I imagine many of those who as students have read his judgements will carry into their professional and judicial careers the impact of those pithy legal certainties in which his judgments abound. □

Sagas in Law

The long running Southern Cross v. Offshore Oil case which went for days in front of the Chief Judge in Equity, Mr. Justice Waddell, may have set records in New South Wales but it pales into insignificance compared with a case which is running in the United States.

In January 1979 a railroad tank car spilt less than a teaspoon of dioxin in Sturgeon, Mo.

In February 1984 the trial of a law suit filed by residents of Sturgeon began in the St. Clare County Court in Belleville presided over by Judge Richard Goldenhersh. In December 1986 the case was still going and the twelve jurors, and two alternates, hearing the case were about to break for their third Christmas.

The central issue is whether the residents were injured by the chemical. Dozens of medical experts have testified. One a physician and immunologist, was in the witness box for three months.

The jurors have become close friends, celebrating birthdays and anniversaries together. They have had two week vacations as well as breaking on two occasions to allow jurors to honeymoon and one to recover from an emergency appendectomy. □

On the Roof

Anyone who takes their midday stroll on the roof of Wentworth and Selborne Chambers these days will find workmen busily constructing a roof garden and barbecue area there. It appears that Counsel's Chambers has decided the denizens of Phillip Street should be lured away from their subterranean dining room to enjoy the sunlight and fresh air of the rooftop at lunchtime.

There is to be a restaurant which, presumably, will provide the fatted calf for the charcoal and usual barbecue features such as foil wrapped spuds, coleslaw, tomato sauce etc. It will not be licensed but you will probably be able to get high just breathing the fumes wafting up from the traffic in Phillip Street. There are also showers in the bathrooms so sweaty joggers can clean up there as well as in the showers in the basement.

The roof garden will be available for hire for functions in the evenings.

Counsel's Chambers intends to inform the huddled masses in Wentworth and Selborne Chambers of their new playground around Easter. It is hoped the announcement will be made well before the crisp winter air means no-one will dare set foot on the roof. □

Tune in . . . .

Those who set their clock radios on 2MBS-FM to awake them between the hours of midnight to dawn could be forgiven for thinking when they awaken to the dulcet tones of the announcer that they are already in court and an equity court to boot. This is because the recently retired Chief Judge in Equity, Michael Manifold Helsham, has kicked over the traces and taken up a career with that radio station.

Starting as a telephonist, the former Chief Judge's talents were rapidly recognised and after an initial training period he rose to the position of announcer of some of the station's musical programmes. Not content with that, and no doubt thinking wistfully of his days as an advocate, he has persuaded 2MBS to depart from its usual music format to allow him to give vent to his cross examination skills in a programme entitled "Powerpoint", in which he interviews such notables as Dame Leonie Kramer. □

Australian Federal Police — Interviews with Suspects in the presence of Solicitors.

A member of the Association drew the Bar Council's attention to an incident which occurred when some members of the Australian Federal Police, who allowed a solicitor to attend the interrogation of a suspect would not, however, permit him to interrupt the proceedings to advise his client.

The President wrote to the Commissioner of Police of the Australian Federal Police pointing out that the Council's view was that a person in police custody facing interrogation who has his solicitor present should have the right to seek such advice as he thinks fit from time to time.

R.J. McCabe, the Assistant Commissioner of the Australian Federal Police (Eastern Division), responded to the President's letter. He has agreed to take the necessary action to ensure that members of the Australian Federal Police under his command do not place unjustified restrictions on a solicitor called upon to advise his client during an interview.

Members of the Bar are reminded that they should not attend police interviews save in exceptional circumstances as their presence may render them liable to be called as witnesses in the proceedings and expose them to difficulties in retaining or accepting a brief in the matter: see Bar Rules 4 (g) and (h).

It would not, however, be inappropiate for counsel to remain outside the interview room and be consulted by the solicitor from time to time if desired. □