Sir George Rich

By David Ash, Frederick Jordan Chambers[1]

> Sir George Rich… was reading in the Association's library. The chair in which he was sitting collapsed under him and, being somewhat shaken he accepted from the librarian a glass of spirits, which effected sound restoration. His Honour jocularly submitted to Barwick, then President of the Association, a claim for damages, which led to a good deal of humorous correspondence between them and an ultimate 'settlement' in the presentation of the maple chair [presented by Barwick to the bar]. Barwick sought a latinism for the chair and Mr. John Sparrow, Warden of All Souls' College, Oxford, was enlisted to supply the inscription 'Hic parumper requievit Georgius Rich donec lyaeis laticibus suscitatus est,' his translation being 'Here George Rich reclined in rest until he was raised up by strong waters'.[2]

Today, the association's president presides over meetings from that same chair.

This is the fourth prosopography of men and women of the High Court for whom the New South Wales bar had been home. I say 'home'; we have had distinguished licensees; the Queenslander Sir Samuel Griffith was admitted in 1881, followed by Isaacs (in the colony's centenary year) and Higgins (another decade after that).

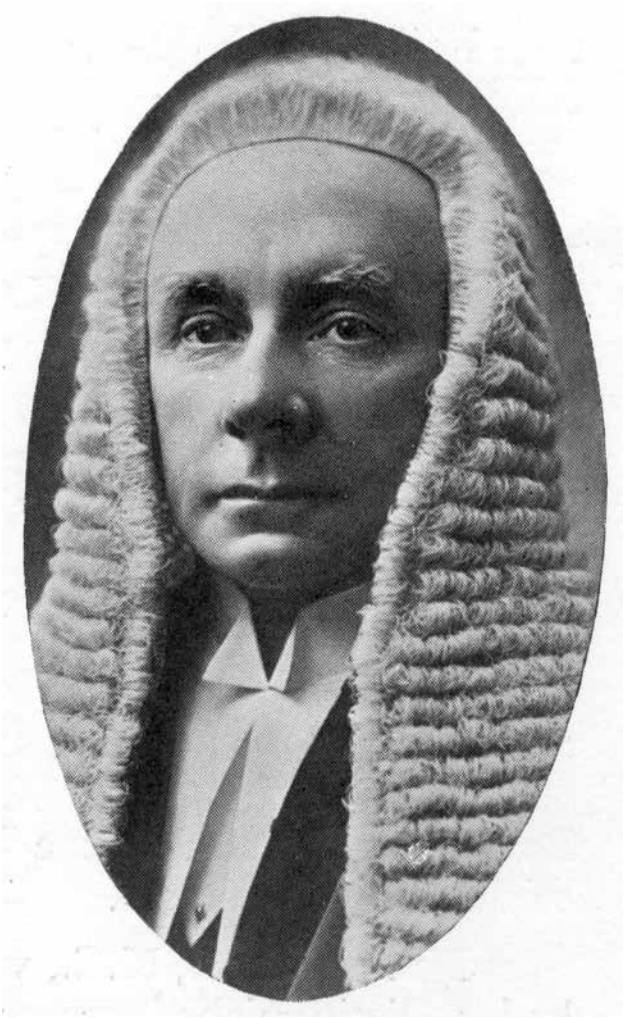
When those two judges were sworn in on 15 October 1906, Purves KC for the Victorian Bar said that he felt like being told by the nurse that it was twins and that 'Both are intelligent and both are beautiful'. After this and the other addresses, one source suggests that 'a disreputable-looking man at the back of the court room, which was crowded, rose and said in ringing tones: 'A voice from the Inner Temple! Congratulations to Mr Justice Higgins! Not quite a lawyer! Not quite a statesman! Not quite a gentleman!''[3]

Higgins recorded that the man was in fact being flattering (by pointing out after congratulations that he himself, unlike Higgins, was not quite these things) and that the person was Cornewall Lewis (the drunk nephew of the chancellor of the exchequer who first said that 'Life would be tolerable but for its pleasures').

Even if Higgins hadn't put the record straight, we could be sure it wasn't George Rich, a man who was quite a lawyer, quite a statesman and quite a gentleman. Some say he reclined too much. Others say he rested too much. The purpose of this outing is to determine whether it is too much that he now be raised up.

Early days

George Edward Rich was born at 5.10pm on 3 May 1863 in Braidwood, the son of Isabella Tempest (nee Bird) and Charles Hamor Rich, whom Simon Sheller has described as 'a highly respected and scholarly Anglican cleric of the district'.[4] Charles had arrived in Australia at the age of three. His first job – suitably enough, given his son's destination – was as headmaster of St James Grammar School in Phillip Street.



Unexceptionally for the times, two of their children died in infancy. The remainder included Hamor Charles Ellison Rich, known as Ellison and born on 25 July 1856 (at 7.00am). Ellison became a solicitor and, like his brother, served on his professional body. In fact, page 36 of the *New South Wales Law Almanac* for 1901 records that Ellison was a member of the Incorporated Law Institute of New South Wales and that George was – with their honours the judges and the attorney general and one A B Shand – on the Barristers' Admission Board. Page 31 records that the Bankruptcy Department of the Supreme Court included as acting chief clerk, one HA Rich. He does not appear to have been closely related. However,

I can confirm that for that year, the BAB was offering law & equity; Roman, constitutional, and international law; Latin; Greek; geology & algebra; French language & literature; logic; and history.

There was Mary Isabella Tempest Rich (9.00pm, 21 April 1854). Her address was eventually 52 Darlinghurst Road, Darlinghurst, which of course now houses the Kings Cross branch of the City of Sydney Library. She died in 1933.

One other Rich passed into adulthood, someone whose connection with this end of Phillip Street is enduring. This is Emily Tempest (3.00am, 20 May 1858). Emily would pass through a fair portion of her life as Sister Freda, a member of the (Anglican) Community of the Sisters of the Church, better known as the Kilburn Sisters. The arrival of this sisterhood in 1892 and 1893 created a furore in the Sydney (evangelical) church. Sisterhoods were essentially High Church, a little too much like papish nuns for many Sydney Anglicans. Far better deaconesses, always under the control of the local clergy.[5]

The significance of Freda's vocation is twofold. First, it may give some support for the view that Rich's family was more – and this is always a difficult word, out of context – liberal, at least as regards women, than others from an otherwise similar background.

Second, and of interest to Anglican barristers, the Sister Freda Mission for the homeless run from St James Church is rooted in the work for the homeless done by her and William Isaac Carr Smith. (As a biographer of the latter notes with due understatement, 'The career of an Anglo-Catholic Christian socialist in Sydney had its pitfalls…')[6]

Sister Freda herself lived at St Gabriel's, dying in 1936. St Gabriel's was a highly regarded school, although it closed through a lack of teaching sisters in 1965. Barristers who aim for the jack at the Waverley Bowling Club in Birrell Street will know that the club purchased the school's last site in 1965 for £227,000.[7]

Notwithstanding this rendering to Caesar, Birrell Street has the sectarian satisfaction of rendering also beyond; on the low side of its highest point and capped by a statue of Mary is the well-known institution for young Catholic gentlemen, Waverley College; while on the high side of the high point lies Saint Mary the Virgin Anglican Church, historically high.

Rich's education – a High Court standard

In the steps of Barton and O'Connor – although not of Piddington – Rich attended Sydney Grammar School, where he was a most successful student. He was a winner of one of the prestigious Knox prizes, which I assume were donated by the father of Rich's – and the nation's – second chief. He shared that particular prize – the junior prize for 1875 – with one 'Banjo' Paterson.

The prize has a solid literary pedigree. A two-time winner (1870 and 1871) was Joseph Jacobs. Now almost forgotten in Australia, Jacobs was one of the distinguished Jewish historians and the leading English folklorist of his day, eager to do for England as the brothers Grimm had done elsewhere. Without Jacobs's work, barristers' children would have been deprived of *Jack and the Beanstalk*[8] and *Three Little Pigs*.[9]

At the University of Sydney, Rich studied his classics under Professor Badham, and with the professor arranged for the introduction of night courses. A BA came in 1883 and an MA in 1885. Rich was also a founder of *Hermes* magazine, today an exclusively literary effort but then really an *Honi Soit* with a *Chaser*-ish bent. Someone, presumably Rich, penned for the first issue:[10]

> *Te, nefarium*
> *Calendarium*
> *Cum classificationibus*
> *Expectat studentium*
> *Cohors, utentium*
> *Teterrimus damnationibus.*

There are editors and Federal Court judges who write letters when people abuse the classics, but I'm game. [Ed, is it] 'Oh abominable first day, You with your 'classifications' expecting from this student body useful things, Oh most abominable damnation'[?]

I think the least of my sins is an abused ablative, but given that I always thought that Sydney University's now scotched motto *sidere mens eadem mutato* meant 'to sit on one's mind and change it', forgive me. More on Rich and mottos later.

From that first issue, Rich pulled for a nascent boat club, and a later issue records his contribution: 'The Hon. Sec., G E Rich, has just been called to the Bar, and intends to take a trip to England. His loss will be irreparable to us. His energy and activity have been an incalculable benefit to the interests of the Club. I hope his mantle will fall on a worthy successor.'[11] Rich did travel to England, going to the bar on 10 March 1887.

Going to the bar

1887 was a varied lot. Foremost for our generation is probably Alexander Barclay Shand, already mentioned and, of course, the first of the dynasty. For earlier generations of barristers, a name which would stand out is Wilfred Blacket, whose

Phillip Street, circa 1900. Photo: New South Wales Bar Association

reminiscences were published in 1927.[12] Comparing the 40 years between, he said:[13]

> In 1887 there were 155 barristers named in the Law List. I counted them very carefully for I was very anxious to know if there would be enough to supply the public need if I should happen to be away ill or on holiday at any time. In that year, Sydney's population was 350,866, and the population of New South Wales was 1,042,919, so that there was one barrister to each 2263 persons in the metropolis, and one to each 6728 persons in New South Wales. In this year's list there are 235 names and Sydney's population is 1,053,180 and that of the State is 2,349,401 so that the relative proportions are now one to 4481 and one to 9997 respectively. I do not think that the Bar forty years ago was more than sufficient for the work to be done. Many very large incomes were being made, and 'briefless barristers' – and they are the sort that readers of journalistic and other fiction hear most about – were deservedly few in number. Most of the juniors were acting in the living present and looking to the time when a beckoning hand would invite them to go to the Inner Bar on their way to the Bench. Certainly, in probates and in pleading there is very much less work than there was then, but in all other respects the volume and range of work have increased enormously.
>
> Federation has been a great boon to barristers, not only in respect of High Court work, but also because of the briefs for opinions and matters arising under Federal Acts. The blessedness of that phrase *ultra vires* is known only to members of the legal profession. *Ultra vires* has built many suburban cottages and has purchased much purple and fine linen and many golf sticks. May it live for ever and continue its annual production of much Costs!

I shall not, 80 years on, attempt to insert 'Difficulty with' before 'Federation' or to replace '*ultra vires*' with 'administrative law'.

Another person admitted in Rich's year was James Conley Gannon, whose practice had a redundant curiosity:[14]

> Jim Gannon, whose work after he attained silk was almost wholly in defending in the criminal courts, obtained a general licence [from the King] dispensing with his services in all criminal cases. This precedent has never been followed, probably because it may have seemed that if the King dispensed with Counsel's services in this general way Counsel would not to any considerable extent remain the King's Counsel.

There was also Edwin Mayhew Brissenden, a distinguished KC who was awarded an MBE for services during the war in France. Beyond this:[15]

> He was the inventor of an improvement of the heliograph, and was for a long time associated with General Rosenthal before the war in signalling of various descriptions. In conjunction with Mr. Bartholomew, of Beard, Watson, Ltd., he invented a signalling lamp, and in the early days of wireless telegraphy in Australia he was working on a private wireless plant owned by Mr Bartholomew, at Mosman.

Then there was Frank Dobson. The *Herald* of 27 April 1887 recorded:

> On Monday evening Mr. Frank Lambert Dobson, barrister, was found dead in his bedroom at No. 205½, Brougham-terrace, Victoria-street, by a fellow-lodger named James Adams. It appears that Mr. Dobson was last seen alive at noon on the

> same day, and that he then appeared to be in his usual health. When his dead body was discovered upon his bed, a sponge saturated with chloroform was lying by the side of his head. Dr. Kyngdon was called in, and he expressed the opinion that an overdose of chloroform caused the man's death. It is reported that Mr. Dobson had for a long time past accustomed himself to take chloroform, in order to induce sleep, as he was greatly troubled with asthma. Fifteen bottles labelled 'chloroform' and 'poison' were found in his room. Mr. Dobson was a single man, 25 years of age. Information of his death has been communicated to the city coroner, who will hold an inquest upon the body to-day.

Whatever the outcome, I doubt whether it was more suspicious than merely sad. Dobson's father was a respected and competent chief justice of Tasmania who had himself been troubled with asthma, having the good fortune to have it go away.[16]

The son of Sir William à Beckett, Victoria's first CJ, was admitted here in 1889, while Henry T Wrenfordsley, regrettably for Western Australia its chief justice from 1880 to 1882, somehow found his way on to our roll in the previous year. Wrenfordsley had also been chief in Fiji, an experience which has left us with most perfect evidence of the Colonial Office's dominion not only of the world but of the English language when it opined that his debts 'were not a credit to us'.[17]

Also in Rich's year was William Hessel Linsley, presumably the Hessel Linsley who commissioned his friend Tom Roberts to paint the actress Hilda Spong. In 1893, Roberts did, in *Practising the Minuet: Miss Hilda Spong*.[18] Spong saw some later success on the London stage, including a 1926 appointment with Basil Rathbone in *The Importance of Being Earnest*, Sherlock Holmes playing Ernest. Theatre-lover Walter Sickert also caught her, in *The Pork Pie Hat: Hilda Spong in 'Trelawny of the Wells'*. Despite one reviewer commenting that Mr Sickert 'occupies a self-defeating quantity of wall space', his work is the better.[19] Others admitted in Rich's year of 1887 were Geoffrey Evan and James Oswald Fairfax. This was not a dalliance:[20]

> [The James and Lucy Fairfax] family visited every continent of the world, every country of Europe, Palestine, Russia, Japan, the United States and parts of South America. During the 1881 expedition, their second and third sons, Geoffrey Evan and James Oswald, entered Balliol College, Oxford, thus beginning a family tradition which was to continue in later generations. Both rowed for their college, and both later went to the Bar at the Inner Temple.
>
> … [After the death of one of the other Fairfaxes in 1886]… James decided to buy his brother's interest in the business and bring in three of his sons – Charles, Geoff and Jim. Charles had already decided to join the company, and James now asked Geoff and Jim to choose between law and journalism.

They did, doubtless to the bar's loss.

A foundation Challis lecturer

From 1890, Rich was a (foundation) Challis lecturer. For those who have ever wondered about the ubiquity of Challis in Sydney University, or the presence of Challis House at the bottom of Martin Place, or the reason why there is a Challis Avenue in Potts Point, John Henry Challis made his money in wool trading and in property. He sold up in the 1850s and returned to England, spending the rest of his life travelling around Europe, dying in 1880 and leaving the residuary estate, after his wife's death, to the university.

The fund arrived at the university in 1890. The sale the previous year of 45 residential sites on the Challis Estate – i.e., bordered by Macleay Street, Challis Avenue, Victoria Street and McDonald Street – was probably unrelated. I assume McDonald Street used to run through from Macleay all the way to Victoria. The auction was by Hardie & Gorman in conjunction with Richardson & Wrench, the terms 10 per cent deposit, 15 per cent after three months interest free, the balance in equal yearly payments at 6 per cent.[21] Ah Sydney, the more things change…

Rich lectured until 1910, his first course being the Law of Obligations, Personal Property and Contracts.

Life at the bar

The bar's first professional association was formed in July 1896. Its address was 'in the chambers of one of its members at Wentworth Court on the eastern side of Elizabeth Street between King and Hunter Streets. Its bankers were the Union Bank of Australia.'[22]

An undoubted prompt for associating was the prospect of an amalgamated profession, for a bill seeking to achieve just that had passed the Legislative Assembly toward the end of 1895. The bill itself was resoundingly defeated in the Legislative Council, Attorney General Want saying 'of all the wretched abortions of a Bill which was ever produced, this Bill is about the worst'.[23]

The bar's first association floundered through a lack of interest and support from the bar generally. On 13 March 1902, Attorney General Wise called a meeting to consider proposals for a new association. At a broader level, these were new times; a new century, a new monarch. It was three years to the day after the man who would win Gallipoli for the Turks went to military college and thirty-one years to the day before Herr Goebbels became a late appointment to Chancellor Hitler's Cabinet, as minister for propaganda.

Members of the New South Wales Bar, June 1906, including Wade KC (centre), Reid KC, Blacket and, Brissenden (to the left). Photo: New South Wales Bar Association

On 20 March 1902, the meeting was held in the Banco Court with Wise KC presiding. The meeting resolved that a General Council of the Bar be formed, and that a provisional executive committee, which included Rich, Barton's son-in-law and Charles Windeyer's great grandson David Maughan, and Brissenden. (Maughan didn't rest on others' laurels; he pipped FE Smith and Holdsworth in his exams.)

The council was to be fifteen in number, the attorney general ex officio and fourteen other practitioners, of which no more than three could hold silk. The elected candidates included Want KC, soon to be Prime Minister Reid KC, later Supreme Court justices Ferguson, Gordon, Sly and Wade, Rich's contemporaries Blacket and Brissenden, and, as the first treasurer, Rich himself. Rich would sit until, I think, his appointment as an acting judge of the Supreme Court in 1911, serving as treasurer until 1905.

Rich found rooms in Selborne Chambers, which was built in 1883 (to honour the lord chancellor from 1872 to 1874 and from 1880 still then in office), but only established as chambers by Want [still then] QC finding a room there in 1896; it being filled with eleven more barristers the following year. Sir Jack Cassidy later recorded:[24]

> In September 1883 gas was first laid on to Selborne Chambers (it has flowed freely since) through a new four inch main ordered that year.... In the nineties electric light supplied by Sydney Electric Light Company made its partial entry into the building. In those days light wires could not go underground and, in order to supply electricity needs to Macquarie Street the company found in necessary to install an electric light pole on Selborne Chambers. This meant a windfall for Room 17 on the first floor and the one above for, as a quid pro quo for allowing the erection of the pole, the tenants received as a concession free electric light. A. B. Shand was the lucky recipient and remained the envy of his brothers, who had to wait years for electricity!

Rich was clearly popular at the bar; he seems to have spent much of his career there as a senior junior in the widest and best sense of that expression. He probably enjoyed a chuckle or two with his pupils, one of whom was Frederick Jordan, whose own wit was hidden behind 'a few well-frozen words':[25]

> Most newly admitted barristers read for six months with one or other of the leading juniors practising in common law or equity. A number read with two practitioners, one law and the other equity. R. M. Sly, G. E. Rich, D. G. Ferguson and J. M. Harvey had a number of pupils… Some barristers like Harvey kept their pupils at work all the time in their chambers writing opinions and drawing pleadings but others, like Rich, Ferguson and J. L.Campbell, took their pupils into court with them as their juniors.

Rich survived Jordan. Upon the latter's death, Lionel Lindsay would arrange for Ure Smith to publish *Appreciations*, a collection of Jordan's jottings:[26]

> For the publication of this memorial we are indebted to Mr. J. R. McGregor; I have contributed the woodcuts; and we have to thank Sir George Rich for the Greek and Latin, Mr. F. Hentze for the French and German, and His Excellency don Giulio del Balzo for the Italian translations of the Parallels.

I mentioned earlier that 'liberal' is a difficult word. Context is all. For Lindsay, was the Jordan he wrote of a conservative or a liberal?[27]

> Humanist and good European, Sir Frederick Jordan was saved by a delicate sense of humour from the snare of pedantry. His place is with that permanent minority, which, evading the market place, continues from generation to generation the perpetuation of culture.

I suspect that Rich, a late Victorian and early Edwardian liberal, shared Jordan's views of modernism:[28]

> In more recent times, James Joyce, having written in ordinary prose *Dubliners* and *Portrait of the Artist as a Young Man*, and evidently realizing that they were not better than good second-rate stuff, decided that desperate measures were necessary. The result was *Ulysses*, a work which in structure and content resembles nothing so much as a dunghill.

The Women's College

It is possible, and possibly necessary, to write a history of western feminism in terms of a competition between radicalism and liberalism; indeed the use by the author of 'enfranchisement' or 'liberation' or 'equalisation' – or, for that matter, 'frustration' or 'disappointment' – will indicate where the author stands.

For current purposes, it is important to acknowledge first that John Stuart Mill, the leading liberal of his day, was also the leading feminist, and second, that Mill would not understand how one could be one and not the other. In a recent essay in the *New Yorker*, a reviewer observed:[29]

> Mill believed in complete equality between the sexes, not just women's colleges and, someday, female suffrage but absolute parity; he believed in equal process for all, the end of slavery, votes for the working classes, and the right to birth control (he was arrested at seventeen for helping poor people obtain contraception), and in the common intelligence of all the races of mankind. He led the fight for due process for detainees accused of terrorism; argued for teaching Arabic, in order not to alienate potential native radicals; and opposed adulterating Anglo-American liberalism with too much systematic French theory—all this along with an intelligent acceptance of the free market as an engine of prosperity and a desire to see its excesses and inequalities curbed. He was right about nearly everything, even when contemplating what was wrong: open-minded and magnanimous to a fault, he saw through Thomas Carlyle's reactionary politics to his genius, and his essay on Coleridge, a leading conservative of the previous generation, is a model appreciation of a writer whose views are all wrong but whose writing is still wonderful. Mill was an enemy of religious bigotry and superstition, and a friend of toleration and free thought, without overdoing either.

It is no surprise that the men and women who founded the Women's College within Sydney University drew heavily upon an athletic brand of Millian liberalism.[30]

Rich was one such man. In a ballot in May 1891, he became one of five women and seven men elected. Others included Richard Teece, father of senior counsel in that extraordinary piece of litigation, the *Red Book Case*, and Rich's old headmaster, Albert Bythesea Weigall. Mr Justice Windeyer was an ex officio member.

The choice of the arms and motto was entrusted to the first and famous principal Louisa Macdonald, as well as Rich and J T Walker, a prominent financier, later fascinated with the finances for federation and elected as a liberal in the first senate.

Rich must have enjoyed Walker's company; the latter was keen 'but composed and exuding rectitude, with classic features enhanced by elegant whiskers, [and] nonetheless, warm-hearted and capable of fiery response'.[31] The motto chosen was 'Together', taken from Tennyson's 'Princess', whose heroine declares as her object 'To lift the woman's fallen divinity / Upon an even pedestal with man'.[32]

Rich became honorary treasurer, perhaps from the outset but in any event being recorded as such in the first calendar, published in 1893. Which, by the bye, records the college's temporary residence at Strathmore, Glebe Point, formerly and for many years the city base of Sir George Wigram Allen. The college history records that 'it was the wise and careful guidance, and the hopefulness also, of men such as Mr. J. T. Walker and Mr. (later Sir) G. E. Rich which guided the College through the financial difficulties of its early period.'[33]

Involved in such a way, it is likely that Rich attended or at least supported a benefit performance in May 1891 of *A Doll's House*. Not so Lady Jersey. Although the family of her husband, the then governor, had provided bedfellows for Charles II, William III and George IV in his princedom, the Jerseys decided not to support a somewhat radical view of marriage norms, with one commentator suggesting her decision was:[34]

> presented not as personal distaste for the play, but as an act of moral responsibility; if the colonists lacked the cultural sophistication to view the play as an 'ordinary spectacular

> representation' but would instead take it as the exposition of a 'philosophy of life' it behoved her as the Queen's representative not to endorse that 'detrimental' philosophy.

Rich is also likely to have attended what has been called 'perhaps one of the most outstanding events at the College', a masque performed in 1913 and later, I think, as a Depression fundraiser:[35]

> Between seven and eight hundred persons viewed the production, which was an outstanding artistic success. The verses were composed, at the instigation of Miss Macdonald, by two distinguished poets of the period, Christopher Brennan and John Le Gay Brereton.

Macdonald and Rich hit it off. In 1996, a collection of this remarkable woman's letters was published. It records that on 24 June 1892, she wrote to a friend that Rich 'is such a comfort to me for he manages everything, and his power of seeing the cornie [sic] side of things cheers me up.' Two years later, she wrote to the same friend:

> In the evening I went to Miss Scott's, where she was entertaining what Mr. Rich called with rather a wry face 'a mixed party'. Several of the Labour members, a Mistress-Laundress who is a member of the suffrage council, Mrs Lane the wife of the New Australia man and a few socialists scattered amongst the more ordinary people filled her room. I thought the entertainment was most entertaining, though I very nearly came to blows with one labour member and only saved myself from throwing something at him by precipitate flight!

In March 2010 in the Mitchell Library, I held a UK 6d aerogramme dated 28 July 1948, a good half century after the soiree. It was from Macdonald to Rich, thanking him for a food parcel he had sent and concluding:

> We have had a visit from your Prime Minister Mr. Chifley – but noone takes much interest in him – for bad manners and queer dealing our Government can give any politician points + beat them hollow – but everyone is absorbed in the Australian cricketers + the crowds to the matches have been abnormal. It's a relief to turn to something honest after all the folly + trickery of our public life.

It is a delicious coincidence that the then-principal of Women's College was one of Australia's most famous cricketers, Betty Archdale, whose claim it was that one of her own earliest memories was visiting her mother and leading feminist, in prison.[36]

In relation to the appointment of an earlier principal, Macdonald's successor in fact, we learn something of Rich's views of us as a nation. An unsigned letter from 'Judge's Chambers, Melbourne' and dated 20 May 1919, urges:[37]

> There used to be a snobbish feeling that everything from home must be superior to the native product.... I hope that we have outlived that and can judge people and things by merit and not by labels.
>
> We cannot expect to get anyone of the same class and calibre as Miss Macdonald. It must be remembered that the conditions of the appointment in 1919 are not so attractive as they were in the beginning – what is the earning capacity of £500 p.a. now as compared with then? Miss Macdonald told the Council from her observations in England it would be difficult to attract anyone of the highest capacity. We cannot expect such a person to give up her home and friends and exile herself amongst strangers in a new country (the conditions of which are foreign and probably obnoxious to her) and to remove herself so far from the centre of culture and learning.
>
> Parliament delegated the task of managing the College to us – can we trust the say-so of people in England when we have interviewed and tried candidates out here?

In context, the letter is a prime example of the unintended irony of the word 'home' for English speakers abroad. And those who persist in thinking that the use of the word is solely a rather embarrassing affectation of middle class Australians of the 1800s and 1900s may have regard to an earlier use: in 1755, some twenty or thirty years before his own domestic problems, George Washington would write to his brother Augustine that 'My command was reduced, under a pretence of an order from home.'[38] Unlike Rich, Washington had never gone and would never go, 'home'.[39]

The college interviewed and appointed an Australian, a daughter of a leading liberal and wool manufacturer and herself a brilliant classicist, Susie Williams.

Rich sat on the council from 1891 to 1937. At various times, he sat alongside names such as Garran, Cullen, Leverrier, Langer Owen, Street, Hughes (Hughes QC's grandfather) and Windeyer.

Rich also sat with his predecessor A B Piddington. Piddington's tenure was from 1915 to 1917, a time when he was at a loose end, Rich and his new colleagues having used the *Wheat Case* to neuter its constitutional rival, the Inter-State Commission, a body of which Piddington was chair.

Possibly the last formal involvement Rich had with the college, was to open in June 1952 the Mary Fairfax Memorial Library. She died in 1945, having been a noted philanthropist and

women's leader. Did Rich reminisce with her about her two brothers who had come to the bar with him so briefly, those 65 years before?

Unfortunately, I have no idea whether college resident and first female barrister to practise in NSW, Sibyl Morrison, ever appeared before Rich or what his reaction was. Any reaction was probably favourable; she practised in the whispering jurisdiction.[40]

Publications

For and of course, Rich's area was equity, along with probate and bankruptcy. He was a co-author with Tom (later his Honour Judge Thomas) Rolin of *The Companies Acts of 1874 and 1888*[41] and the *No Liability Mining Companies Act, 1896*.[42]

Those of us who use the word 'company' interchangeably with 'corporation' may be disarmed by the opening sentence of the former: 'Companies are either (1) incorporated or (2) unincorporated'.

Yet Rich the Latinist would have had no difficulty in seeing the distinction, corporation depending ultimately on the Latin verb 'to embody', thus conveying a sense of unity, whereas the softer and more general company, like companion, comes from 'panis', or bread, the sense of breaking bread together. He would have approved the comments of Buckley J upon construing a power in the will of Henry Morton – Dr Livingstone, I presume – Stanley:[43]

> The word 'company' has no strictly technical meaning. It involves, I think, two ideas – namely, first that the association is of persons so numerous as not to be aptly described as a firm; and secondly, that the consent of all the other members is not required to the transfer of a member's interest. It may, but in my opinion here it does not, include an incorporated company.

For those who wish to know where the legal etymology stands today, reference can be had to the *Corporations Act 2001* (Cth). Section 9 has a statutory dictionary meaning of 'company', while section 57A is headed 'meaning of 'corporation''. Liquor is quicker.

Rich also co-authored *The Practice in Equity*, itself founded on his and Gregory Walker's *Practice in Equity* and on J M Harvey's *Service of Equitable Process*. The reprint therein of the 1901 consolidation contains an interesting and perhaps desirable beast, 'The Memorandum + Certificate of the Commissioner for the Consolidation of the Statute Law', C G Heydon:

> I certify, except as aforesaid [a passage including qualifications and a thank you to A H Simpson CJ in Eq], this Bill solely consolidates, and in no way alters, adds to, or amends the law as contained in the statutes therein consolidated.'

Finally, Rich began and co-edited with R W Manning the first in the series *New South Wales Bankruptcy Cases*, published by Maxwell from 1891 to 1899.

The Riches' children, part I

On 14 May 1915, Jack Rich wrote:

> My darling Mother,
>
> I am writing to you, perhaps, on the eve of one of the greatest shows we have ever been in, and when, perhaps, we are seeing one another for the last time – officers and men.
>
> The room is thick with tobacco smoke, three French peasants are sitting around their kitchen fire, and have just made us some coffee. This is a farm and we are in the kitchen – there is no place, I think, like a kitchen for a last night. Our men are all around in the barns and up on the top floors. We can hear their voices – why do they sing always their sad home songs on nights like this? They have beautiful voices some of them, and always their sad songs at night. We hum in tune with their voices and then lapse into thought.
>
> It seems a long time since I last saw you all, and a long time since I was in Australia. I often think of the beautiful blue water around Darling Point, and that nice little beach at North Harbour. Those were good times – those long quiet Sundays in the launch. I am quite confident I shall see you again. Will I ever find anyone like my mother? I nearly had to go away – I didn't want the others to see me crying, but it is alright now. I am always thing of you and long for my weekly letter. I got one from father he seems cut up about that cable, but I am doing my bit, and am always thinking it will soon be over. Will you come home when peace is declared?
>
> I was touched by a shell for the first time this morning, although they have been bursting round me for months, and close enough too. I find if they are quite close there is, of course an awful explosion, but the bits go right up in the air and over. I have this piece (a Black Maria), it hit me on the arm, and tore my macintosh, but went no further – I was too far away and it was almost spent. They were shelling our front trenches, and losts of wounded were coming in mostly Inniskillings. I had a working party and we saw a lot of the wounded, some of them were pleased with themselves, they had 'jamy' ones and would go back to old Blighty, others, poor chaps, were moaning dreadfully. Bishop Gwynne, the 5th Brigade Chaplain was there talking to me and they brought two dead in – he buried them immediately. I wondered when he was saying the last prayers whether their people would ever be able to come and visit their graves.
>
> I saw a disgusting sight the other day. The Germans had been shelling the church by Neuve Chapelle very badly and had blown it absolutely to bits. One of the graves was blown up and

> no one had covered the bones up – the poor woman had been dead for years. The Tommies had a look over the ruined church, only the four walls stood, and yet they took off their caps. Some of the crucifixes were untouched and you could gather from their whispering that they were very much impressed.
>
> They hate the Germans, they would do anything to get at them, but it is impossible (it seems). They do some awful things, that sinking of the 'Lusitania' was dreadful. I really don't know how the submarine Commanders can carry their orders out. At least they could give them time to escape.
>
> The men have almost stopped their singing now; they are going to bed, and I must go too.
>
> It has been a lovely day, and one would hardly know we were at war. Sometimes when there is a lull in the firing, but it is only for a minute, we here get a particularly noisy time of it, as there is a battering of 60 pounders just in front of us – it has already broken four windows, the row is sometimes terrific, especially when the gun opposite us fires. There is a huge flash, and you can see the thing recoil, it seems quite its own length back.
>
> I must say 'goodbye' now darling, give my love to everybody, and tell Grannie I am going to write next week.
>
> Your loving son.
>
> Jack.
>
> God bless you all.

Three days later, Jack was shot through the head while leading back a straggler under his command. As a memoriam of sorts, I record that the reference to 'jamy' wounds pips by about a month the reference by Denis Oliver Barnett cited in the OED; on 10 June 1915, Barnett wrote to a friend 'If I get a 'jammy one' as it is called, I shall be back pretty soon, and that will be fine.' [44]

Meanwhile, on 19 May 1915, Laurence Whistler Street was killed in Gallipoli. His father was then the judge in bankruptcy and probate, and would join Rich on the Women's College council two years later. Street was also the council chairman of Sydney Grammar School. Perhaps he or Rich was present the day the list of the latest fallen was read out, Jack at number eight and Laurence at number nine. As to the High Court, O'Connor (by then himself dead) lost two sons, while Gavan Duffy and Higgins suffered one a piece. Many other legal figures suffered similar tragedy.[45]

Jack Fitzgerald

When Einstein died, his last words were in German but his nurse only spoke English. So the story goes. It has an obvious hole, but also an excuse for me. One thing has continued to puzzle me, and that is the basis for appointing the junior NSW judge in place of Piddington. Yes, I accept the standard line that Hughes was running for cover and went for someone who would not scare the big end of town. But I want to know, 'Why Rich in particular?'

While researching this piece, I found out that Rich had close correspondence with Jack Fitzgerald. Who, you ask? On 26 November 2009, the *Herald* published a piece by Damien Murphy on early Labor:[46]

> It was on April Fool's Day 1891 that The Sydney Morning Herald reported to the colony: 'The Balmain Labourers have called a public meeting, to be held on Saturday, for the purpose of forming the first branch of the Labour Electoral Leagues (LEL) of New South Wales.' That meeting was attended by the Balmain Labourers' Union secretary Charles Hart and Trades and Labour Council executive members, including Jack Fitzgerald, who later became an MP of prominence and associated with the push for a Greater Sydney, and Fred Flowers, who would go on to help the new sport of rugby league become established. There was also a short bloke who ran a mixed business with his wife selling books and fixing locks and umbrellas around the corner in Beattie Street - William Morris ''Billy'' Hughes, a future prime minister of Australia.

The answer to the question is, a man who was in on the ground floor with Billy. I was therefore excited when I went to look at Fitzgerald's letters at the Mitchell; I thought there might be some inkling as to an unknown and unexpected Labor connection; unfortunately, I am to much of Rich's handwriting as Einstein's nurse was to his dying words. No matter, for I have been able to transcribe some of the material, and I set it out in an order which gives this section a relevance beyond the interludial.

First, we learn that Rich once thought himself young compared to his colleagues. On 19 December 1912, he writes from the South Australian Hotel, North Terrace, Adelaide:

> [After inspecting some mines via the cages, and, semble, declaring some of the 'very wet + slushy'] That is one thing most of my [Supreme Court] brethren cd. not do…
>
> Two foolish [?] mines are having a little suit wh. is to last till Xmas. I thought an inspection wd. familiarise me with things.
>
> Nothing but rain down here.
>
> Just heard [?] of from [?] O'Connor's death. Difficult man to replace.

Second, we know that you weren't going to get lost, going to Rich for dinner:

> My dear Fitzgerald,
>
> How is it that we have not met in Sydney?
>
> It will give my wife + me great pleasure if you will sup with us on Sunday next at 7 o'clock at Belton, Mona Rd, Darling Pt.
>
> Ocean Street, Tram [?] to Mona Rd.
>
> Right side pass a terrace 2 semi detached houses + stop at 3rd detached house on hill.
>
> With kind regards,
>
> Sincerely yours, George Rich.

As to villa naming, Rich relied on his wife. He had married Elizabeth Steer Bowker in December 1894 in Paterson. Her father was a well-known doctor and horse fancier, Richard Ryther Steer Bowker, and her mother a daughter of an early settler in the Newcastle district. *Belton*, the Darling Point residence, was named for a town in Lincolnshire whence the Steers came. The Riches' first family home in Turramurra, was *Temple Belwood*, named for a property in Belton. When Rich died, it was at *Stanser*, along with Ryther, Steer and Bowker one of Rich's (by now late first) wife's family's names. The holiday house at Cronulla was *Sandtoft*, a return to the Belton realty.

On 29 May 1915, Rich wrote:

> My wife is splendid so calm + brave. He would have us brave she says. I was handed the cable as I took my seat on the bench in Adelaide. Poor child…
>
> His school pals write such fine things of him he had the keenest sense of honour the strictest sense of duty Keith Ferguson says.
>
> Time + work will I suppose help me. My wife will in full [?] time feel more but her pluck is admirable.
>
> Adieu

The news came on 24 May. That was the first day of a significant hearing on the High Court's criminal jurisdiction, *R v Snow*. Rich did not sit on the day, and the hearing proceeded over another seven days, with judgments given on 16 September. Francis Hugh Snow was a prominent merchant who had been charged under the *Trading with the Enemy Act 1914* (Cth), but his counsel argued successfully (a) that the Act was not retrospective; and (b) that there was no evidence fit for the jury as to any attempt after the Act's passage, being 23 October 1914.

Sir Josiah Symon KC – a former attorney who had forced the High Court to strike a decade earlier and certain of whose testamentary words were omitted from probate as 'scandalous, offensive, and defamatory to the persons about whom they were written' – led Piper KC and WA Norman, while Rich's old companion Blacket (now KC) led future premier Bavin (and, for Piddington, scourge turned saviour). Those interested in gardens of the period should visit *Beechwood* in Snows Road at Stirling. This was established by Snow as early as 1893.[47]

The Riches' children, part II

Jack's loss followed Rich. Possibly because of Jack's comments about the two that Bishop Gwynne buried, Rich followed up his son's recognition in the appropriate war memorial, and there is a letter from Menzies dated 20 December 1939 (with 'Canberra' blocked out and 'Melbourne, Victoria' typed over) which reads:

> Dear Sir George,
>
> Thank you for your note of 15th December. I have already written regarding your son, George, and hope to let you know something in the near future.
>
> I am returning herewith the 'In Memoriam' to your son John.
>
> You are well justified in being proud of him.

George Steer Bowker Rich had been born in 1902. He joined up in October 1939.[48] I have no idea what request was being made of Menzies, but he was discharged with the rank of captain in 1943. He died in 1964 leaving one daughter.

The Riches' middle child was a daughter, Lydia Tempest. Confirmed at St Mark's Darling Point and educated at Ascham, she might have been regarded as a typical upper middle class girl of her time. In fact, she fell completely deaf in her teens, later marrying Ashby Arthur William Hooper, who had taken an MC.

One wonders what feelings Rich had when, soon after the Second World War, his grandson John Ashby Cooper took the Sword of Honour at Duntroon. Cooper would see active service and receive the CBE; after his retirement from the army, he acted as private secretary to NSW governors Rowland and Martin. Having thus served the army, the air force and the navy, he died in 2007.[49]

Who's whose who?

A useful shorthand work for getting the gen on prominent people is *Who's Who*. It has a standard format – so you know what you're getting – and (as far as I am aware) it permits its subjects a say (if not the final) over the entries.

Those who have had cause to refer to it will know that one of its standard formats is the reference to children. If the subject has two sons, the entry will read towards the end, '2s'. If the subject has a son and two daughters, it will read '1s, 2d' and so on. I do not know the currency – excuse the pun – of this format, but consider the following, remembering that the Riches had two sons and a daughter.

In the 1914 edition, there was no reference to any children. (A perusal of other entries on the same page suggests it may not have been a standard format.) By 1922, there is '*son* – John Stanser Rich (*b.* 1895), Lieutenant 1st The King's Liverpool Regiment, volunteered 1 Aug. 1914 (killed in action, Festubert, 17 May 1915)'. In 1927-1928, 'elder son killed in action at Festubert, 1915'. In 1935, '2 s. (elder killed in action Festubert 1915), 1 d.' In 1944, '1 s. (elder killed in action Festubert 1915), 1 d.' In 1950, '1 s. (Capt., 2nd A.I.F., Tobruk), (elder son killed in action Festubert 1915), 1 d.'

For Street, the 1922 entry reads '*Sons* – Kenneth Whistler Street (*b.* 1890), volunteered in England, rejected for active service, served on Headquarters Staff in Australia; Lawrence Whistler Street (*b.* 1893; killed in action); and Ernest Whistler Street (*b.* 1898), served in the War (wounded)'; while the 1935 entry – in which the alphabet has relegated him below his nephew (an MC born in 1894); his firebrand daughter-in-law; and his son – reads '2 s. (one a judge of the Supreme Court)'.

To suggest that Street dealt better with what had happened than Rich would be unwarranted and impertinent. However, if the entries can be taken at their face value, and coming from an age where family tragedy is a missed episode of *Home and Away* and where heroism is the ease with which a sportsman escapes a romantic entanglement, one trusts that they reveal at the end a peace of sorts for Rich, his wife and his two surviving children.

The Supreme Court

In February 1911, George Rich had taken silk. He had little time to enjoy the inner bar, though, because later in the same year, he was made an acting judge of the Supreme Court in 1911, an appointment made permanent in 1912.

An early decision in which he participated was *Delohery v Williams* (1911) 11 SR(NSW) 596. Cornelius Delohery was a magistrate, and also the first president of the Public Service Association of NSW.[50] He was himself in public service until May 1900, when he was appointed to the Public Service Board.

The question which interested the court a decade later was whether he was entitled to superannuation from when he said he retired from the service (May 1900), or from the expiry of his board appointment (January 1910).

To describe the case as fun for all the family is to do it less than justice. A jury had awarded Mr Delohery some four thousand pounds, perhaps or perhaps not assisted by an alleged admission by the Crown's counsel at trial to the effect that 'the computed amount of superannuation of the plaintiff on his retirement as stipendiary magistrate, was some four hundred pounds a year'.

The alleged admission fell (allegedly?) from one A B Piddington (admitted 1890), Rich's soon to be predecessor on the High Court, a state of affairs which did not prevent him from leading the charge upstairs.

For Delohery, there was Lamb KC, the contemporary of Rich who would later grill Piddington in a royal commission held upon Piddington's judicial sensitivities and who would still later appear for one Captain de Groot upon a fracas on the newly built Sydney Harbour Bridge.

Of course, Lamb being silk, he needed a junior. The junior was one Cornelius Delohery (admitted 1889) and, in case there was any sense of slighting the other branch of the profession, Delohery's solicitor was A H Delohery.

Albert Henry Delohery was himself familiar with family retainers. It appears that one Henry Charles Smith ('a man of extravagant habits'), owed some six thousand pounds, including to his solicitor, the very Mr Delohery.

Young Mr Smith signed a document empowering Mr Delohery to do various things, a document which, if it were an assignment, would have effected a forfeiture of the youth's interest under his grandfather's will. And so it was that 1910 saw a High Court hear Owen KC and Maughan instructed by one Ash solicitor and his partner, argue successfully for young Mr Smith's non-assignment, against an equally daunting Knox KC and Harvey for Perpetual Trustee.[51]

But – and the point of the digression – Delohery appears in the report as one of the respondent plaintiffs and also as the second of two solicitors for the respondents. By the bye, page 349 of this CLR volume puts forever put paid to the notion that the law is merely black and white.

Fast forwarding to a later time, when Rich had been on the High Court for a quarter century, we find Ash having learnt nothing about having a fool for a client. The very partner referred to above having defrauded a number of clients, Ash was able to compromise one group of claims into seven annual instalments of five hundred pounds. Ambitiously, he claimed a deduction from his income, and, perhaps surprisingly, the full

court allowed him to hold it. Not so the High Court, who in 1938 unanimously found for the tax men. The case[52] interests for three reasons.

First, to close out the family feel of this section, it can be observed that Ash continued to use Maughan – now Maughan KC – together with his child (and grandson of the first Prime Minister Barton), Barton Maughan.

Second, to example the practical difficulties of a dual taxation system. Both the NSW and Federal Commissioners appeared, albeit by one counsel (the latter, by the bye, through the good offices of Commonwealth Crown Solicitor H F E Whitlam).

Third and importantly for current purposes, it gives us a good example of the sort of language Rich employed when he decided to write a judgment, and how it stands against the competition.

Rich v Dixon [No 1]

The report gives Rich in full flight:[53]

> You cannot treat the formation of partnership as if it were no more than the employments of a clerk nor the depredations of a partner as if they were the peculations of an office boy. [An ironic observation, for as Dixon J notes on the same page, the problem arose because Ash 'in an ill hour… admitted his managing clerk into partnership'.]
>
> The partner was a proprietor, and whilst all must sympathize with the taxpayer and deplore the wrong done to him by this partner it is impossible to treat that wrong as a characteristic incident of the carrying out of his profession the consequences of which are to be reflected in the profit and loss account until they are exhausted.

Compare Dixon:[54]

> There is a clear distinction between a transaction by which, on the one hand, an organization of partners is formed or set up to co-operate in the ownership and conduct of an existing business and, on the other hand, an actual carrying on of the business for the purpose of earning profits. The distinction presents a strong analogy between a transaction on account of capital and a transaction on account of revenue.

Dixon does not suffer in the comparison; the passage has a balance and elegance which Rich's statement lacks.

Rich also said 'But here we have an annual payment made for the purpose, in the colloquial phrase, of working off a *damnosa haereditas* of the taxpayer's dead partnership.'

I think Rich does himself an injustice; he is getting dangerously close to a pun. As I understand, the Roman law term dealt with burdensome inheritances; it was only a later co-opting that brought it into the world of bankruptcy, a transition of which a classicist with an interest in probate and insolvency would have been aware.

An 1870 translation of Gaius's Commentaries says:[55]

> 162. Extraneis autem heredibus deliberandi potestas data est de adeunda hereditate vel non adeunda. (163.) Sed sive is cui abstinendi potestas est inmiscuerit se bonis hereditariis, sive is cui de adeunda hereditate deliberare licet, adierit, postea relinquendae hereditatis facultatem non habet, nisi si minor sit annorum xxv. nam huius aetatis hominibus, sicut in ceteris omnibus causis, deceptis, ita etiam si temere damnosam hereditatem susceperint, Praetor succurrit. scio quidem divum Hadrianum etiam maiori annorum veniam dedisse, cum post aditam hereditatem grand aes alienum quod aditae hereditatis tempore latebat apparuisset.
>
> 162. To extraneous heirs is allowed a power of deliberating as to entering on the inheritance or not.
>
> 163. But if one who has the power of abstaining meddle with the goods of the inheritance, or if one who is allowed to deliberate as to entering on the inheritance enter, he has not afterwards the power of abandoning the inheritance, unless he be under twenty-five years of age. For, as the Praetor gives assistance in all other cases to men of this age who have been deceived, so he does also if they have thoughtlessly taken upon themselves a ruinous inheritance. I am aware, however, that the late emperor Hadrian granted this favour also to one above twenty-five years of age, when after entry on the inheritance a great debt was discovered which was unknown at the time of entry.

The co-optation itself has a past. In 1806, Lord Ellenborough CJ said 'Now it has been decided that assignees of a bankrupt are not bound to take what Lord Kenyon called a *damnosa haereditas*; property of the bankrupt, which so far from being valuable would be a charge to the creditors…'[56]

On its face, there is nothing peculiar in this statement. However, when one recalls that of Lord Kenyon it had been said 'One of his flaws was his defective education; he was too proud to avoid exhibiting his ignorance. He was particularly noted for using Latin incorrectly, leading George III to say 'My Lord... it would be well if you would stick to your good law and leave off your bad Latin',[57] and when one recalls that his immediate successor Ellenborough 'had always been strained relations' with him,[58] one wonders but may never know whether the latter was in fact criticising the looseness of the earlier's language.

The appointment

As to the outcome of Delohery's appeal, Piddington was absolved of any absentminded admission. And, in early 1913,

he was offered and accepted an appointment to the High Court. His subsequent resignation is a tale told elsewhere; as noted above, the thing that interested me for current purposes is whether Hughes had any particular motivation for appointing Rich.

There is the following from Hughes himself to his PM, in the first volume of Fitzhardinge's biography:[59]

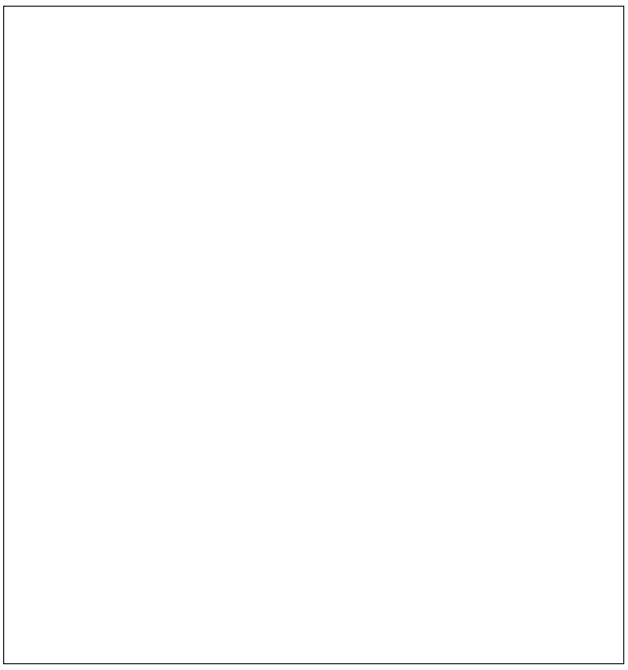
> As you know Piddington had rushed the press before I arrived here and I saw him to-day. His explanation was lame in the extreme. He gave me no reason for his extraordinary conduct beyond repeating what he had said in his telegram:
>
> I told him what I thought of him. He did not like it. But my remarks were quite justified.
>
> I saw Frazer in the morning. He agrees that the appointment should be made at once. He knows nothing of either man: He thinks Starke a good man. So do I but as I understand quite opposed to our view.
>
> Frazer is to see Isaacs J. casually. I am of course not in any way involved. Naturally his view is not conclusive. But it may be useful.
>
> I shall see Charlie again at 5.30: and will write you further.

Rich pipped Starke. If Starke knew this, it may explain their later relationship. Although to be fair to Rich, and without attempting any final statement on the difficult and highly gifted Starke (who cries out for a full biography), the existence of Starke in any relationship is probably sufficient explanation of its state.

Charles Edward Frazer, member for Kalgoorlie, was at this time postmaster-general; he introduced new stamps, although his one-penny stamp, which 'featured a kangaroo 'rampant upon a purely White Australia' was replaced' by Cook's government.[60]

The appointment – Rich's, I mean – was well-received, the *Daily Telegraph* recording:[61]

> At the Bar he had the faculty of clear convincing argument, and such a complete and intimate knowledge of the complicated law to which he bent his studies, that he stood almost alone among its exponents. Such qualifications themselves would strongly recommend any man for judicial preferment, but during his short occupancy of the State bench, Mr. Justice Rich revealed even greater and more valuable gifts. He had infinite patience, never-failing amiability of temper, and a trained glance that perceived a straight path through tumbled masses of technicality.



Sir Owen Dixon, taken when he was Australian minister to the United States, 1942. Photo: Australian War Memorial

Rich v Dixon [No 2]

I think a difficulty with Rich's work, at least as far as posterity is concerned, is that what sounds good as a decision does not always read well as a guide. *Briginshaw*[62] is another opportunity to compare and contrast the two judges.

Rich gives a one-page judgment, including:[63]

> In a serious matter like a charge of adultery the satisfaction of a just and prudent mind cannot be produced by slender and exiguous proofs or circumstances pointing with a wavering finger to an affirmative conclusion. The nature of the allegation requires as a matter of common sense and worldly wisdom the careful weighing of testimony, the close examination of facts proved as a basis of inference and a comfortable satisfaction that the tribunal has reached both a correct and just conclusion. But to say this is not to lay it down as a matter of law that such complete and absolute certainty must be reached as is ordinarily described in a criminal charge as 'satisfaction beyond reasonable doubt.'

Dixon, after a lengthy discussion, opts for:[64]

> Upon an issue of adultery in a matrimonial cause the importance and gravity of the question make it impossible to be reasonably satisfied of the truth of the allegation without the exercise of caution and unless the proofs survive a careful scrutiny and appear precise and not loose and inexact. Further, circumstantial evidence cannot satisfy a sound judgment of a

> state of facts if it is susceptible of some other not improbable explanation. But if the proofs adduced, when subjected to these tests, satisfy the tribunal of fact that the adultery alleged was committed, it should so find.

Rich sounds beautiful. Jessel might have delivered it – or the other – ex tempore a half century earlier. But if I wanted something I could pick off a shelf to help me with the problem down the track, Dixon's would be the one. To put it another way, if the judgments were ex tempore, one would walk out of the Court better understanding Rich, but one would walk back into Court with an understanding set ultimately by Dixon.

Other examples of Rich's felicity are given by Fricke. In *The Insurance Commissioner v Joyce*,[65] Rich famously aphorises that 'when circumstances are provided indicating a conclusion and the only party who can give direct evidence of the matter prefers the well of the court to the witness box a court is entitled to be bold.'[66] Dixon, on the other hand, said:[67]

> It is proper that a court should regard the failure of the plaintiff to give evidence as a matter calling for close scrutiny of the facts upon which he relies and as confirmatory of any inferences which may be drawn against him. But it does not authorize the court to substitute suspicion for inference or to reverse the burden of proof or to use intuition instead of ratiocination.

Rich's words sound good. But if one were met by an appellate judge with Dixon's rejoinder, I don't think 'But his Honour was in the minority' would suffice.

A final case is *Chester v Waverley*.[68] We can only regret the absence of Dixon from this particular bench; it would have been fascinating to see if Evatt and Dixon were to go into full common law combat so soon after *Grant v Australian Knitting Mills*, only clarified in the Privy Council.

Anyway, to Rich. His reasons in *Chester* seem to me to contain the best of Rich (a succinct statement of the issues and a straightforward analysis) and the worst (an attempt, through the use of colorful language, to reduce a complex policy question to a simple extreme of good and bad).

Here is the whole judgment; I think that the best runs to 'impecuniosity'; the worst from 'But the law'; I leave it for readers to demur or to defer:[69]

> This appeal arises out of the difficulties attending the law of nervous shock, which may be described as in a state of development. The facts of the present case are fully stated by Jordan C.J., in whose conclusion I agree. The breach of duty towards the deceased child on the part of the defendant is clear enough. It is of little importance whether it be called nuisance or negligence. The question appears to me really to be whether the kind of harm of which the plaintiff complains caused by the sight of her child's body on its recovery is within the ambit of the defendant's duty not to put the road in a dangerous condition. I am prepared to adopt Professor Winfield's view that nervous shock is 'a particular instance of damage flowing from the commission of some particular tort,' and that 'nervous shock sustained by someone who is not reasonably within the contemplation of the defendant falls outside the scope of his duty to take care' (Winfield on the Law of Tort (1937), pp. 85, 87), or, as was said in Bunyan v. Jordan, 'the harm which in fact ensued is not a consequence which might reasonably have been anticipated or foreseen.' In the present instance I think that a mother's shock on the production of the dead body of her child falls outside the duty of the municipality in relation to the care of its roads. She was not using the road nor a witness of the accident. Her subsequent shock is not reasonably within the contemplation of the defendant as a consequence of the condition of the road. A negligent motorist who caused great facial disfigurement to a pedestrian could not be made liable to every person who throughout the pedestrian's life experienced shock or nausea on seeing his disfigurement. The train of events which flow from the injury to A almost always includes consequential suffering on the part of others. The form the suffering takes is rarely shock; more often it is worry and impecuniosity. But the law must fix a point where its remedies stop short of complete reparation for the world at large, which might appear just to a logician who neglected all the social consequences which ought to be weighed on the other side. The attempt on the part of the appellant to extend the law of tort to cover this hitherto unknown cause of action has, perhaps, been encouraged by the tendencies plainly discernible in the development which the law of tort has undergone in its progress towards its present amorphous condition. For the so-called development seems to consist in a departure from the settled standards for the purpose of giving to plaintiffs causes of action unbelievable to a previous generation of lawyers. Defendants appear to have fallen entirely out of favour. In this respect perhaps judges are only following humbly in the footsteps of juries.
>
> In my opinion the appeal should be dismissed.

Of course, no amount of categorisation can get too close to the truth. Consider the following opening to a judgment: 'This case evoked another of the oft repeated and always unsuccessful attempts to determine the connotation of the vague and indeterminate words 'industrial dispute''. In the absence of anything more, I would have said that this would be a(nother) one pager from Rich. In fact, it is a two page judgment from Rich, but at his request, written by Dixon, who had not sat on the case.[70]

Rich v Dixon [No 3]

And so to indolence. The person to first make public such allegations was probably Sir Robert Menzies. In his 1970 autobiography, he wrote:

> Sir George Rich… was not a talkative judge. Social contacts with him outside court were invariably pleasant. He spiced his conversations with Latin tags, was delighted when they were occasionally understood, and had strong and frequently defamatory opinions of some other lawyers which were much enjoyed by his table companions, and particularly by me. But truth requires me to say that he was inclined to be indolent. He certainly wrote a few individual judgments which were a joy to read; but on the whole he preferred to attach his name to a joint judgment, the labour of writing which he left to his judicial partner.

Fricke points out that Menzies had also rejected the same characterisation of Barton, on the basis of his frequent concurrences with Griffith. That is true, but I suspect Menzies would draw a distinction with a concurrence, the sting in the above passage of course being the last clause.

We can assume that main source for Menzies' comment was his hero Dixon, but jointure is something which Rich adopted from the outset. Rich, at least according to the CLRs, was appointed on 5 April 1913. (As to the dating of the commission at 1 April 1913, there are Dixon's own observations on his own retirement, on 13 April 1964.[71]) His first reported case was *Buchanan v Cth* (1913) 16 CLR 318 and the relevant judgment is that of Gavan Duffy J, 'My brother Rich and I concur in the conclusion arrived at by the other members of the Court'.

In every case for that volume where those judges sat, the reasons were given either by Gavan Duffy for himself and Rich, or, where a more senior judge was sitting, that senior judge. Barton's report to Griffith was that Duffy was 'honest', that Rich 'follows him in all things', and that Powers was 'behaving more satisfactorily than either'.[72]

It is Menzies who relates the tale of Rich exclaiming 'Duffy, the trouble with you is that you talk too much from the bench' and of Gavan Duffy replying, 'Small wonder, since I have to talk for two.'

As far as I am aware, Rich's first reported judgment where he sits apart from Gavan Duffy – and comes to the same conclusion – is *Tooth v Kitto* (1913) 17 CLR 421. Rich's reasons inform for two reasons.

First, Rich chooses to express himself quite specifically in terms of the trial judge's reasons, the opening sentence being 'I agree that the construction placed upon the contract by Street J. is the correct construction.' The relevance of this appears later, upon a charge by Dixon.

Second, the nature of the case. It was about the meaning of 'harvesting season' in a written agreement. As more than one writer has pointed out, Gavan Duffy and Powers were lawyers first and last, bringing a lawyer's view to a body which was the final domestic arbiter not only of law in the narrow sense, but also of constitutional matters which had not yet been settled; Sawer observed that the pair tended 'to apply ordinary English common law principles of interpretation in a more literal fashion that did the senior justices'.[73]

The royal commission

In July and August 1915, Rich was a royal commissioner upon an inquiry into the administration of the military camp at Liverpool. He appears to have gone about his work with great diligence, it no doubt being a tonic for his own tragedy those months before.

Of all people, Rich must have loved the opportunity to find 'The evidence proved that there were not sufficient rifles for instructional purposes, and that the rifles used (Mark I) were obsolete here, or, as Major Heritage said, obsolescent in England.'[74]

He investigates, considers, and writes, well. He concluded:[75]

> The recruits are offering their lives for their country, and they are entitled to reasonable care and comfort without coddling and pampering.
>
> The duty of the Camp officers is to train and harden the men by plenty of exercise and good food, and enable them to take the field fit and well.
>
> The Spartan-like method of exposing soft recruits to unnecessary privations and hardships is not only cruel, but calculated to endanger their lives. In many cases the men may be permanently incapacitated and so become a burden on the country before they have had a chance of fighting on its behalf. This method, while increasing the expense of administration, impairs the efficiency of the force, and diminishes the numbers ready for active service.

The League of Nations

In 1922, Rich was a delegate to the League of Nations, and sat on its constitutional, judicial and political committees.[76] He also sat on the Nauru mandate sub-committee. In his papers at the Mitchell Library, there is a speech – longer than most of his judgments – given to a union (possibly the University

of Sydney Union) in 1923 and entitled 'The Work of the Third Assembly of the League of Nations'. Rich observed

> Another member of the [Indian] delegation was the Maharajah Jam Saheb of Nawanagar, better known to us as Ranjit Sinhji, the famous cricketer. He is one of the ruling princes in India. I heard two very good speeches from him in the assembly.
>
> One on the opium question where he made the point that the Indian worker takes a small amount of opium without harmful results in the same way as Europeans take beer or wine or coffee.

It was some years since K S Ranjitsinhji had received the Cardusian epithet, 'the midsummer night's dream of cricket'.[77] One wonders whether Rich – who would be passing judgment on Egon Kisch in little over a decade – had been at the public function in Sydney in 1897 when Lord Hampden the governor pointed out that the result of extending the *Chinese Restriction and Regulation Act 1888* might be that this star of the English team could not enter the colony.[78]

Rich finished in 1923 with an idealistic and doubtless for him melancholic observation:

> Do not indulge in a spirit of fatalism which sees no hope for the future but is resigned to the inevitable that wars must be waged.

Frederick Alexander James

The case for which Rich is best remembered is *James v Cowan*.[79] Frederick Alexander James was to Australian constitutional lawyers as Mr Diplock (decd) was to the English chancery bar. His biographer paints the opening scene:[80]

> When learning typing and shorthand, James had practised by repeatedly copying the Commonwealth of Australia Constitution Act. His familiarity with it now led him to suspect that vital provisions of the marketing-scheme legislation were in conflict with section 92, guaranteeing freedom of interstate trade. He obtained a licence for his packing-shed and registration as a dealer, but resolved to obey the directives of the dried fruits boards only when they suited him. In 1925, without prior notice to the Commonwealth board, he managed to sell most of his export quota in New Zealand where prices averaged £16 a ton more than in London. When he tried to do the same in 1926, the board annulled the contracts.

Cowan was one of James's many forays. Cowan himself in 1929 had taken refuge in the South Australian parliament after being served with a subpoena.

In *Cowan*, Starke gives the judgment at first instance, which Knox and Gavan Duffy adopt in a paragraph. Isaacs hammers out his hard dissent, and for frustration's sake, Rich hammered out a lengthy support of the majority.

The following is said by many if not all to be the exemplar of Rich's felicity:[81]

> The rhetorical affirmation of section 92 that trade, commerce and intercourse between the States shall be absolutely free has a terseness and elevation of style which doubtless befits the expression of a sentiment so inspiring. But inspiring sentiments are often vague and grandiloquence is sometimes obscure. If this declaration of liberty had not stopped short at the high-sounding words 'absolutely free', the pith and force of its diction might have been sadly diminished. But even if it was impossible to define precisely what it was from which inter-State trade was to be free, either because a commonplace definition forms such a pedestrian conclusion or because it needs an exactness of conception seldom achieved where constitutions are projected, yet obmutescence was both unnecessary and unsafe. Some hint at least might have been dropped, some distant allusion made, from which the nature of the immunity intended could afterwards have been deduced by those whose lot it is to explain the elliptical and expound the unexpressed. As soon as the section was brought down from the lofty clouds whence constitutional precepts are fulminated and came to be applied to the everyday practice of trade and commerce and the sordid intercourse of human affairs, the necessity of knowing and so determining precisely what impediments and hindrances were no longer to obstruct inter-State trade obliged this Court to attempt the impossible task of supplying an exclusive and inclusive definition of a conception to be discovered only in the silences of the Constitution.

I disagree. It is not merely too florid; it has a petulance and personalised grievance which is usually lacking in Rich. I prefer the following much gentler jibe:[82]

> At an early stage of the long controversy as to the true meaning of what sec. 92 omits to say, I joined with my brother Gavan Duffy in thinking that the immunity was confined to legal restrictions imposed upon trade and commerce in virtue of its inter-State character. The justification for this view, if any there be, is set out at length in Duncan v State of Queensland. One demerit was found in this view which was sufficient to make it untenable, namely, a majority of the Court steadfastly refused to adhere to it. It must be confessed that it supplied a criterion which was difficult of application, but it may also be claimed that no criterion which is easier of application has hitherto been revealed. But with the progress of time and in spite of the fluctuations of mind and matter the Court has arrived at definite decisions which declare that some things are and some things are not impairments of the freedom guaranteed by sec. 92.
>
> …
>
> After many years of exploration into the dark recesses of this subject I am content to take the decided cases as sailing directions upon which I may set some course, however

> unexpected may be the destination to which it brings me, and await with a patience not entirely hopeless the powerful beacon light of complete authoritative exposition from those who can speak with finality.

Of James, two more things. First, a spectacular climax to his efforts, when in 1938 and 1939 he sought damages from the Commonwealth on inter alia two grounds: that a breach of section 92 conferred a private cause of action; alternatively that the Commonwealth by its actions had offended the principle in *Lumley v Gye*.[83] He drew Dixon, who rejected the arguments but gave him £878 5s 7d on a conversion argument. Costs were adjusted to suit the outcome. Second, and something for us all to remember; the government, like any elephant, never forgets. As his biographer says:

> In 1936 his marriage finally broke down and his wife instituted divorce proceedings. She dropped the suit when James settled out of court, but the extent of her alimony demands had surprised tax inspectors who promptly wrought vengeance on her spouse.

The Privy Council

Mr James gives an introduction to another aspect of Rich's life, the Privy Council. James appealed and the judgment of their lordships preferring Isaacs over his colleagues was delivered by Lord Atkin. The judgment is sandwiched for posterity between those other staples of the law student, *Trethowan* and *Donoghue v Stevenson*.

In the family vein, I observe that the first two cases had a variation on a theme: Greene KC (later MR) led Maughan KC, Wilfred Barton and Bailleau led for the victors in the *Trethowan* while Greene KC led Barton in the second, the variation being that Maughan KC was not this time senior to his son but to his brother-in-law. As for Bailleau, I regret that I have been unable to ascertain whether this is the later Baron Bailleau, who was called to the bar but distinguished himself in business.[84]

James kept the council waiting four years for his next visit, *James v Commonwealth*. They did not feel slighted. Rather, the council overruled the High Court and decided that section 92 would bind the federal legislature. It was argued before, inter alia, Lord Russell of Killowen, in July 1936, the same month that Russell was sitting with Rich on an appeal from New Zealand.[85]

For the purpose of this article, it is interesting to record that the council's judgment in the 1936 Australian case was delivered by Lord Wright MR. Lest Australian lawyers think that it was only they and the High Court who couldn't make sense of section 92, in 1954 the *Sydney Law Review* managed to extract from Wright 'Section 92 – A problem piece'.[86] The particular pertinence is that Wright sets out an extract from Rich's 1930 reasons not only with approval but with reference to 'the language of a brilliant judge, now retired, Mr. Justice Rich'.[87]

I'm sure that the fact that I have criticised the language will not trouble Wright's spirit for a second. What is interesting is that even allowing for curial backslapping, 'brilliant' is a strong word. I would be curious to know whether Wright and Rich actually sat together during Rich's time.

Starke's reaction to the appointment was a note to Latham, 'Rich will be like a dog with two tails… But I thought the Privy Councillorship was reserved for those who had rendered distinguished political, judicial or other services. It is a pity to degrade the rank by such an appointment.'[88]

Rich's other duty while 'home' was less onerous; he was Australia's representative at the coronation of King George VI in May 1937. Pears' Soap was by appointment providers of soap to the royal couple, and I have a copy of the commemorative family tree issued for the occasion, 'The Royal Line in relation to European Royalty'.

Maybe Rich was in company too rarefied to need such a document. Even so, I think he would have enjoyed working his way from Princess Elizabeth, daughter of King James I of England, and Frederic V Elector Palatine and king of Bohemia, to the photographs of each of the extant leaders, Leopold III (king of the Belgians); Boris III (king of Bulgaria); Victor Emmanuel III (king of Italy); George; Carol II (king of Romania); Peter II (king of Yugoslavia); Gustavus V (king of Sweden); Wilhelmina (queen of Holland); Christian X (king of Denmark); Charles (King Haakon VII of Norway); and George II (king of Greece).

Two last matters from the 1936 case. First and again, Wilfred Barton was for James, this time leading Kevin Ward, the former Bulli solicitor whose career James made. Second, both the summary of the government's argument and what the council had to say at the end of their reasons about the calibre of the arguer, is a healthy reminder of the precocious brilliance of the 42-year-old Attorney-General Menzies, leading Simonds KC. Simonds himself – at 54, I think – was a year off his distinguished judicial career. Later, Simonds would lose one son at Arnhem and another from illness contracted on active service in East Africa.[89]

A Greek interlude

Ayres records:[90]

> More to [Dixon's] liking was what he heard the following night at the dinner Rich gave for young Enoch Powell, the new Professor of Greek at Sydney and the youngest man ever appointed to an Australian university chair. It was a small party, at the Australian Club – Rich, Powell, Alan Brown (Fellow of Worcester College, Oxford), the physician Alan Holmes à Court, A C Gain, and Dixon. Powell told Dixon of the work he was doing on the manuscripts of the ancient Welsh legal codes, saying he was tempted to try for a chair of Celtic studies. Dixon thought him an 'Enthusiastic scholar', 'Pragmatical', 'Clear about a German war, but apparently full of guts'. Powell would resign from his chair on the outbreak of war to join the British Army as a private in the Royal Warwickshire Regiment.

Holmes à Court's son would die in 1943, training as a RAAF pilot.[91] One of Powell's pupils was the son of the crown solicitor, Edward Gough Whitlam. I heard Powell once; whatever one thought of his views, his voice was extraordinary.

I think that Powell's experience with religion best sums him up; he went from atheist to devout Anglican, only to spend much of his later life 'trying to prove, with close textual reading, that Christ had not been crucified but stoned to death'.[92] His last words were from his hospital bed: he asked what was for lunch; on being informed that he was being fed intravenously, he said 'I don't call that much of a lunch'.[93]

Dixon v Dixon; ex parte Rich

As I have said, Menzies's accusation of indolence may well have found its root in Dixon. It is from Dixon that we have the first evidence that someone else was doing Rich's work; Dixon himself, in fact.[94]

A good example stems from Dixon's interesting dissent in *R v Brislan*, where he argued that section 51(v) of the Constitution was limited to two-way communication and so could not apply to mass media. It appears that he was able to be two-way by assisting Rich pen reasons reaching the opposite conclusion.[95]

Dixon's diary for 14 September 1938 read 'Spent all day doing R's Sun Newspapers Ltd and Associated Newspapers Ltd… Finished R's judgt at 2.15 am.'[96] Fortunately, this was in good time for Rich to deliver it, as on the 17th he did. It was also in good time for Dixon to hear and consider the appeal, Latham, himself and McTiernan affirming Rich the day before Christmas Eve.

Clyde Packer was a partowner of – and had come in as managing editor to help save – Associated Newspapers, publisher of Sydney's *Daily Telegraph*. Meanwhile, the sometime Labor treasurer E G Theodore and young Frank Packer came up with an offer which poor old Associated Newspapers found too good to refuse.

The offer consisted of a proposal not to publish a competitor. For a price. The chairman of Associated Newspapers thought the best person to deal with the task was the redoubtable managing editor, moonlighting as Frank's father.

And deal with the task Clyde did. He did so by authorising the company to pay Frank and EG almost a hundred thousand pounds, just enough, as things turned out, to get another magazine called *Women's Weekly* off the blocks.

After such a debacle, the High Court's refusal to allow the company to deduct the ransom might well have been the straw that broke the proverbial. Anyway, Dixon – wearing his own wig in the appeal – makes major headway into articulating a test for delineating which expenditure fell to the capital and which to the revenue accounts.

Rich v Dixon [No 4]

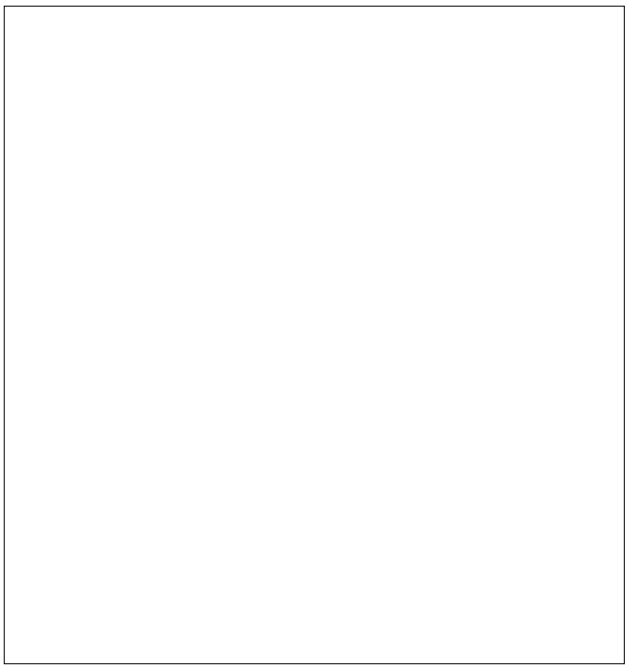
Dixon's usual practice, at least as regards judges from other (and therefore junior) courts was never to discuss a case, who had heard or was hearing it, if it might conceivably come before the Court.[97]

Which in isolation explains why Dixon was positively irate some years later when he came to believe that Rich's judgment on an appeal from the bankruptcy judge Mr Justice 'Sammy' Clyne, was written by Clyne himself.[98]

But this hardly sits well with Dixon's earlier – and presumably continuing – practice. I share Ayres's interest when he observes of the Packer case, 'Rich, one assumes, made the actual judgment and Dixon then wrote it up for him. Interestingly, in 1949 Dixon would take strong exception to what he would take to be T. S. Clyne's writing of a judgment of Rich's in an appeal against Clyne himself.'[99] This is a form of strict and complete legalism which I confess eludes me.

Be my musing as it may and while I am not aware of any direct corroboration (in Ayres's account, none of the other players ever expressly confirmed that Dixon was correct), there are two things which confirm Dixon's account.

The first is the text of Rich's reasons. He opens by saying 'I have read the judgment on this appeal prepared by my brother McTiernan, and am in substantial agreement…' This is doubly – or perhaps trebly – ironic, given Dixon also ghosted for McTiernan. Worse, Rich opens the next paragraph 'I should like nevertheless to add a few words of my own…' When one remembers Clyne and Dixon were pals, I suspect the real



George Rich on his 90th birthday. Photo: The Oxford Companion to the High Court of Australia.

reason Dixon saw red is that Clyne was – to use the words of the utter bar – taking the piss.

The second reason is far less patent but no less telling. If Clyne was a close friend of Dixon, he was also well-regarded by Evatt (who had, inter alia, appointed him to look into the Australia First Movement).[100] Note the last words in particular of Dixon's diary entry of Clyne's report to him that Evatt – as the government's advocate in the *Bank Nationalisation Case* – was using Clyne to get to Dixon:

> [Dixon records that Clyne had told him at a drinks party that] The A-G had said (1) the case was the most important ever before the Court legally as well as otherwise (2) he had put Starke right particularly over the interest question (3) Latham was a very difficult man (4) the Bench had been very decent to him (5) he liked old Rich (6) he wanted to get rid of two of the JJ. & how wd Clyne like to take the place of one (6) [sic] I was very subtle or had a subtle mind & had not shewn my hand (7) Barwick was a young upstart who had not inquired after the AGs health, though the AG was manifestly ill (8) I looked very ill at times. Clynes view was that the object was to discover my position & prepare Clyne should Rich seek his assistance.

The prospect of a bankruptcy judge heeding the call of the attorney to assist the senior puisne judge of the nation's supreme court determine the major political issue of the day, the nationalisation of banks, is a neat one.

In the matter of Clyne; re Rich, Dixon & ors

When *Isaacs v Mackinnon* was being debated, Rich was only months away from retiring. He did so in May 1950, making way for Frank Kitto. I think that *Isaacs* is an unfortunate place to leave matters. In particular, if we are to have Clyne, Rich and Dixon as catalysts for an analysis of who gets credit in joint judgments on bankruptcy, we must finish with *AWU v Bowen*,[101] in which the rights of joint creditors in a bankruptcy receives a curious judgment, remembering in prelude the following.

First, one would have thought that this was the best possible forum for discussing a neat and rarely litigated question of bankruptcy law. The primary judge was Clyne. Leading for the respondent was Barwick KC. On appeal was as strong a bench that that time in that area would afford: Latham, Rich, Starke, Dixon and Williams. Rich himself had been a bankruptcy expert for the previous 60 years.

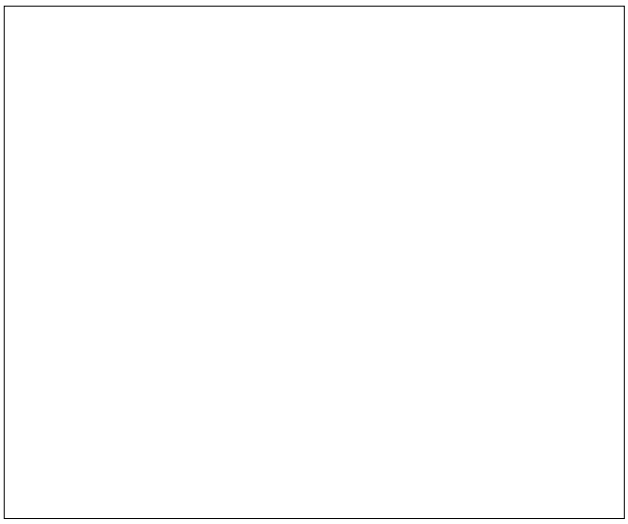
Second, and however wrong it is for an appellate judge to form as a habit the adoption of the trial judge's view, the fact is that Rich, whether from laziness or from a misplaced sense of economy, was not averse to this particular form of judgment. As noted above, he did this with an appeal from Street.

Third, and again however wrong it is for an appellate judge to avoid discursion, the fact of the matter is that Rich had nailed his colours to the mast in early days. In the important decision *Hoyt's v Spencer*, and after reasons from Knox and from Isaacs, Rich as the third says:[102]

> I have had the advantage of reading the judgments just delivered. As I agree with them, I consider that it is inexpedient to add, and I refrain from adding, collateral matter which, at best, merely paraphrases and often blurs the clearness of the main judgments, and so increases the difficulty of the profession in interpreting the decision of the Court.

It was not too long prior to this that Rich started to prefer writing jointly with Isaacs and not Gavan Duffy. Perhaps on a three-bencher, Knox had expressed the view that joint majority judgment in the same result was a little embarrassing for him as CJ. We may never know. Anyway, in *Bowen*, Clyne J gave reasons.[103] It is a succinct statement of the necessary issues. It succinctly raises but does not determine another issue.

The union appealed; Rich J said that he agreed with Clyne's reasons, while the other members – Latham, Dixon, Starke and Williams – gave fuller judgments. A well-regarded bankruptcy judge of a much later era, Burchett J, sums up the position in *Re Pollnow*.[104] Although there is a full reference to each of



A portrait of Sir John Latham sitting at his desk in the High Court. Photo: Australian War Memorial.

the other judges' reasons, I think the guernsey is rather neatly given to Rich:

> 13. When the matter went on appeal to the High Court as Australian Workers' Union v. Bowen (supra), Rich J (at 584) said:
>
> > 'I agree with the order made by the learned primary judge and with his reasons for holding that the bankruptcy notice and the petition for sequestration founded thereon were invalid.'
>
> 14. Accordingly, the remarks of Clyne J which I have quoted have the authority of Rich J. The other members of the High Court, apart from Starke J who dissented, also support the view which Clyne J had taken.

A brilliant classicist, formerly a lecturer in European history at the University of Melbourne and pupil master to Harold Holt, to say that Clyne died in harness is an understatement. Page 4 of the *Herald* for Friday 14 April 1967 finished its notice of the 80 year old's death on the Wednesday as follows:[105]

> Yesterday, the Sydney Registrar in Bankruptcy, L. G. Bohringer, adjourned to various dates in May, the 18 cases listed for hearing by Sir Thomas.
>
> Another 21 cases will be adjourned today.

Dixon v Rich settles

Despite their difficulties, Dixon clearly enjoyed Rich's presence. Upon his own elevation to the middle of the bench, he said:[106]

> I have the happiness to have with me once more Sir George Rich, who for so long, during I should think the greater part of my life as an advocate and as a judge, has given by example a lesson in the place that humanity, urbanity and wit may take in a court of ultimate appeal.

And during 1953, half way between Rich's retirement and death, Dixon observed in good humour:[107]

> We can no longer watch Sir George Rich shuddering as counsel stressed the second syllable of 'exigency' or pronounced 'economic' with a short 'e' or 'tenable' with a long one.

The Dixons were able to join the 90th birthday celebrations in Sydney. Dixon spoke, and while Rich was too overcome to respond, he insisted 'Australians should work'. Later, Dixon reported to his daughter, 'The idea of Sir George preaching the doctrine of work struck Mum as particularly amusing'.[108]

Acting chief justice

Ayres records:[109]

> In early March 1935 Evatt was encouraging Rich, as the Court's senior puisne judge, to press for a commission as Acting Chief Justice. 'Doubtless it might help towards his selection for the office but it is only a very trifling thing', Dixon thought after Rich had broached the subject. It would have suited Evatt, if he expected to be offered the position of Chief Justice by a future Labor government, to have it in the meantime go to someone who might not be expected to hold it long – Rich was now into his seventies.

It has been suggested that Rich 'procured amendment of the Judiciary Act to allow his designation during Sir John Latham's absence [as Ambassador to Japan]. While Rich's desire for the title amused most of his colleagues, it widened a rift between him and the irascible Starke who was next in seniority'.[110]

I don't have access to the records that the person who suggested this had. However, the second reading speech suggests a different story. The bill – the *Judiciary Bill 1940* – was 'for an act to enable Justices of the High Court during the war to accept and hold other offices, and for other purposes'; as to the provision Rich is supposed to have procured, the second reading speechmaker said:[111]

> There is only one other provision in the bill, and that is ancillary to the clause I have just quoted. It provides that, in the absence of the Chief Justice from Australia, the senior

> justice shall, during such absence, be designated Acting Chief Justice. The principal act does not make provision for that and, on previous occasions, when the Chief Justice was absent on leave, the judge who acted in his place could not be designated as Acting Chief Justice. This is entirely a war measure arising out of the appointment which the Government desires to make.

The bulk of Hansard is given over to the far more interesting issue of the extent to which a judicial officer ought be involved in other arms of government. On the one hand, the member for Batman argued that 'we are departing from a principle, and establishing a precedent, in a way which, to my mind, suggests danger'. On the other, the member for Bourke gave the (not wholly sensible) example of John Jay, who was sent by Washington to allay concerns between 'the parent and the revolted child'.[112] For current purposes, readers will be bemused if not relieved to find that the attorney in charge of the second reading – on this 21st day of August 1940 – was the same attorney who had elevated Rich those 27 years before, William Morris Hughes.

Rich et al

Rich and Starke were at least united – perhaps by age – on travelling to 'outlying states'.[113] When Rich arrived in Melbourne at 2am after a detour to avoid railway washouts, he wrote to Latham 'Water everywhere, but no drinks on train.'[114]

Rich was appointed KCMG on 3 June 1932. As recorded earlier, Rich was a privy councillor, and was made so in 1936. Rich had a rather bizarre introduction to Latham as his chief; when he was explaining his failure to send written congratulations, Latham replied 'Excuse accepted', leaving Rich to protest 'It is not an excuse, it is an explanation.'[115] Yet Rich seems to have recovered. Soon after 's appointment, Rich asked him 'I wonder if you look back on the fields of Canberra. Ours is a hard life and we have strange bedfellows and many restrictions.'[116]

In 1937, Starke insisted on a rehearing. Latham and Evatt despaired. Rich wrote to Latham much later (in April 1939) saying 'The old-fashioned idea is to deal with the case or not deal faithfully with your colleagues.'[117] In fact, Starke won that particular outing and the re-argued case is reported as *Nassoor v Nette* (1937) 58 CLR 446. I find the whole matter odd; the report records the rehearing[118] but conspicuous in his absence is Starke J. Latham CJ went one way, the balance in a joint judgment the other.

In another 1939 letter to Latham regarding some delay while Evatt added another citation to his judgment, Rich said 'It is difficult to play games with a sport who works outside the rules of the game'.[119] He had seen worse. In a letter to Latham he wrote 'My mind goes back to the time when Duffy opposed the acceptance of Isaacs' portrait, and with the aid of Knox and Starke prevented the court having it.'[120]

On 10 November 1950, Rich married again, his wife having died in 1945. Although he married in England, the marriage was to Letitia Fetherstonhaugh Strong nee Woodward, a widow from Victoria. The celebrations did not prevent him from writing to Latham the next day:[121]

> I have not seen the bill but I have always felt doubtful and have stated my anxiety. I hate the Commos… but I'll fight for liberty and justice and the old principle of innocence of the accused. Tomorrow one of us may be in the dock and you must prove your innocence and so on.

When Rich died in May, Dixon spoke warmly from the bench. Richard Searby, then Dixon's associate, remembered Latham phoning Dixon:[122]

> to say how furious he was. How could Dixon possibly do that, bring down the reputation of the Court by speaking like that about Rich? Of course that was nonsense, when somebody dies you don't necessarily say what you think about their foibles. But he always liked Rich, he was very fond of Rich and got on extremely well with him. He got on with Starke. He got on with every one.

I confess to preferring Rich on the Commies to Latham on the Rich.

Statistics

There has been considerable academic work on the court, in particular statistical work on the Latham years. Apart from Clem Lloyd's lively overview (*Not peace but a sword! – The High Court under JG Latham*), there is Russell Smyth's *Explaining Voting Patterns on the Latham High Court 1935-50* and *Explaining Historical Dissent Rates in the High Court of Australia*; and R N Douglas's pieces *Judges and Policy on the Latham Court*. (Other leaders in the area are Zelman Cowen and Tony Blackshield.)

In Smyth's work, there are two tables which make fascinating reading. I trust I am well within 'fair use' parameters (as to which, see section 40 of the Copyright Act); whether I am or not, I urge barristers to have a look at this and the other articles; it permits us to see those rows of CLRs in a wholly different light. Smyth's caveats are set out in a footnote to this article.[123]

I think it fair to say that one of the many remarkable things about these tables is that at least some of the figures accurately

Table 1: Explicit Agreement Ratios on the Latham Court 1935-40						
(Expressed as a percentage)						
	Dixon	**Evatt**	**Rich**	**McTiernan**	**Latham**	**Starke**
Dixon	-	64.9 (84)	55.6 (53)	48.8 (93)	1.6 (81)	0.0 (95)
Evatt	64.9 (84)	-	50.0 (40)	65.3 (70)	2.1 (64)	0.0 (91)
Rich	55.6 (53)	50.0 (40)	-	56.8 (51)	17.1 (50)	0.0 (45)
McTiernan	48.8 (93)	65.3 (70)	56.8 (51)	-	24.2 (79)	1.3 (85)
Latham	1.6 (81)	2.1 (64)	17.1 (50)	24.2 (79)	-	3.9 (65)
Starke	0.0 (95)	0.0 (91)	0.0 (45)	1.3 (85)	3.9 (65)	-
Note: figures in parentheses are the number of divided benches on which both judges sat.						

Table 2: Explicit Agreement Ratios on the Latham Court 1940-50						
(Expressed as a percentage)						
	Dixon	**McTiernan**	**Williams**	**Latham**	**Rich**	**Starke**
Dixon	-	50.0 (63)	36.6 (51)	17.9 (66)	30.2 (53)	2.0 (62)
McTiernan	50 (63)	-	10.3 (80)	53.2 (88)	11.0 (97)	1.2 (95)
Williams	36.6 (51)	10.3 (80)	-	20.7 (71)	35.9 (77)	4.1 (94)
Latham	17.9 (66)	53.2 (88)	20.7 (71)	-	18.8 (83)	2.8 (90)
Rich	30.2 (53)	11.0 (97)	35.9 (77)	18.8 (83)	-	4.0 (88)
Starke	2.0 (62)	1.2 (95)	4.1 (94)	2.8 (90)	4.0 (88)	-
Note: figures in parentheses are the number of divided benches on which both judges sat.						

reflect personal relationships. If this is the case as between Rich and Starke, old age appears to have made them positively chummy.

A summary

A liberal high churchman who chooses to live in Sydney can have diligence and humour, but he cannot live on the former alone. Prior to his appointment, Rich was not merely diligent; while he was no behemoth, he made substantial and original contributions to the law and beyond.

What happened? There is some material from which we may infer that Jack's death may have been a catalyst. Then there is the disarming frankness of his admission in *Hoyt's*. Finally, it is irrefutable that from at least the late 30s, there was either indolence or senescence.

The High Court reporter J D Merralls is surely correct when he says that 'Rich's standing as a judge suffered from his reputation for indolence, but his pithy reasons usually showed a sure grasp of legal principles. Their most serious failing as judgments in an appellate court lay in the lack of development of ideas.'[124]

But in the end, judges – even appellate judges – do not leave reasons and nothing more. Rich was a pleasure to appear before at a time when the bench was riddled with personal

rivalries. He decided matters on the facts before him and explained, through himself or others, how he got there. And would the nation really be served by one bench full of Dixons? Even Dixon would demur. In whose name he would demur, is something for another day.

Endnotes

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123. On page 101: 'The tables depict the number of times each pairing of judges voted together as a percentage of the number of times each pairing sat on one of the 229 divided Benches in the sample cases. [fn 59 Tables 1 and 2 and the ensuing analysis exclude the few cases in which Webb J was involved. This ensures two stable 'natural courts' of six Justices, which makes the results easier to interpret.] Here, 'voted together' means that Justices X and Y participated in a joint judgment, Justice X wrote a short concurring judgment of the form 'I concur with Justice Y' or vice versa. The explicit agreement ratios standardise the results for the number of times each pairing of Justices sat together. In Tables 1 and 2, the number of observations on which the percentage is based is given below each explicit agreement ratio in parentheses. It is important to standardise the results because, while Latham was Chief Justice, there were several periodic absences from the Court. For example, Rich was absent for several months after Latham became Chief Justice as he was sitting on the Judicial Committee in London; Latham was Australian Ambassador to Japan in 1940-41; and Dixon was Australian Ambassador to the United States in 1942-44.'
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