THE ROTARY CLUB OF MELBOURNE

WEDNESDAY 6 FEBRUARY 1980

GREAT HALL, NATIONAL GALLERY, MELBOURNE

DO WE REALLY HAVE TO KILL ALL THE LAWYERS FIRST?

A HOMILY ON LAWYERS, SAINTS AND SINNERS

The Hon. Mr. Justice M.D. Kirby
Chairman of the Australian Law Reform Commission

February 1980

THE ROTARY CLUB OF MELBOURNE

WEDNESDAY 6 FEBRUARY 1980

GREAT HALL, NATIONAL GALLERY, MELBOURNE

DO WE REALLY HAVE TO KILL ALL THE LAWYERS FIRST?

A HOMILY ON LAWYERS, SAINTS AND SINNERS

The Hon. Mr Justice M.D. Kirby
Chairman of the Australian Law Reform Commission

LAWYERS AND SAINTS

When in the Second Part of his celebrated history of King Henry VI, Shakespeare penned the revolutionary manifesto of Jack Cade ("The Thoughts of Chairman Jack", as it were), he devised what would nowadays be called the "perameters of a government action programme" or a "revolutionary senario". "The first thing we do", said Cade "let's kill all the lawyers".[1]

You can assume that I have not come here today to embrace that unsuccessful political philosophy of the 15th century. The distinctive feature of the liberal Western democracies, of which we are one, is the acceptance of the Rule of Law: a Government of Laws not of Men. The price we pay for the rule of law is that there must be rules. Because there are rules, there must be lawyers to represent those who breach them and argue about their meaning. There must be judges to resolve the disputes that arise. It is a blessing of our system that whilst so much of the world still lives under the authority of the gun, we in Australia enjoy constitutional government, an independent and uncorrupted judiciary and a vigorous legal profession, increasingly concerned about the state of the law.

Concern for the state of the law is needed today as never before. Mighty forces for change are at work. They include new moral and social attitudes, new scientific discoveries and new technological inventions that pose dilemmas for mankind. The legal profession faces these dilemmas with fortitude. The development of law reform commissions in all the parts of the world in which the common law of England has been planted, signals the recognition of the need to provide routine machinery that will help lawmakers keep the law up-to-date. It is not in the nature of lawyers to quake and tremble at the prospect of rapid change. After all, lawyers of our tradition have rebuked kings, taken part in in the trial of a few (and the execution of at least two). Not content with wordly sway, lawyers have even taken part in the trial of two blessed English saints.

Some of you may have been present in this very Hall two years ago when the Governor-General told the tale of the trial of St. Thomas More: lawyer, scholar, statesman.[2] The trial of that saint is quite well known. The trial of another saint, St. Thomas a Becket, some centuries after his death is less well known.[3] In the reign of King Henry VIII, the King became, somewhat belatedly, upset by the doings of St. Thomas a Becket. He caused a writ of Quo Warranto to be issued against the dead Saint for trial in the King's courts. That writ asks by what warrant a person holds a particular office. It is chiefly designed to secure the ouster of recalcitrant mayors and petty functionaries who cling to office beyond their legal authority. St. Thomas a Beckit was asked to what authority he purported to be a saint. It was decided that the saint (and I would ask you to note this) be represented by an assigned barrister to be paid for by public expense. This was a form of legal aid and it was given to St. Thomas a Becket to make sure that he secured a fair trial and due process of law in the Courts of the King of England. After hearing both sides fully argued, judgment of Ouster was duly pronounced against the deceased martyr for falsely usurping the office of a saint. He was dismissed as a saint. Such is the conceit of lawyers after our tradition that they were sure that their writ ran beyond the British Isles and its empire to the very doors of Heaven itself!

I ask you to mark that Henry, to secure a fair trial for the accused St. Thomas, made sure to have appointed for him as he faced this serious charge (and the potential loss of his sainthood), a skilled barrister, paid for from the public purse. I now want to bring you through four centuries to modern Australia.

LAWYERS AND SINNERS

In 1978, in Perth, an Australian citizen, one McInnis, was charged with rape. He denied the charge vehemently. He said the lady consented. McInnis was liable, if convicted, to a maximum sentence of imprisonment for life. In prison, McInnis engaged a legal practitioner, and arranged through him to lodge an application for legal aid, nominated the same practitioner as his counsel for the trial. This lawyer appeared for McInnis in an unsuccessful bail application and at committal proceedings. Trial was set for mid-October 1978. Several weeks before the trial, McInnis was told that his legal aid application form had been lost. Promptly he lodged a second notice. A few days before the trial the lawyer visited him in prison and briefly discussed some details of the defence. Apparently, because of the neglect of this lawyer, the second application for legal assistance did not reach the Legal Aid Commission until the very day before the trial. Legal aid was refused. Then the lawyer acted promptly. McInnis was sent a message in prison that his lawyer would not represent him at the trial the following day. Until that moment, McInnis thought he would be represented in trial between the Sovereign and himself on a charge of rape.

On the morning of the trial, McInnis spoke to his former lawyer at the Supreme Court. He was advised to make an application for an adjournment. This he did, undertaking either to appeal against the refusal of legal aid or to seek to muster the necessary financial support from his family.

The Crown opposed the adjournment. The trial judge referred to the anxious condition of the complainant and ordered the matter to proceed. He allowed McInnis a half an hour to read a copy of the depositions of the committal proceedings. The trial proceeded. The Crown was represented by an experienced Prosecutor. McInnis represented himself.

In the course of the trial, McInnis failed to put specifically to the complainant his version of the facts. This omission was criticised by the judge, although it is an error that may be easily made by people unfamiliar with the proper conduct of a trial and some trained lawyers. The trial judge told the jury that it was significant to the question of whether the accused should be believed. In the course of McInnis' address to the jury, he was interrupted with the observation "you are saying lots of irrelevant things".

McInnis was convicted and sentenced to six years imprisonment.

McInnis appealed to the Court of Criminal Appeal in the Supreme Court of Western Australia. That Court (the Chief Justice disagreeing) dismissed his appeal. McInnis then sought special leave to appeal to the High Court of Australia, our Federal Supreme Court. I pause so that you can reflect upon what you believe justice according to law requires in such a case.

The High Court had not only to ask itself the question whether an adjournment should have been granted by the trial judge. It seems commonly agreed that it should have been. The High Court asked whether "there was no possibility of injustice resulting" or whether McInnis had been "deprived of the prospect of acquittal" by the course that events took. By decision of four Justices to one (Mr Justice Murphy dissenting), the court declined the appeal.[4] The conviction stands. As we lunch here, Mr McInnis takes his lunch in gaol and will do so for six years less parole and remissions.

JUDGES AND THE ADVERSARY TRIAL

We in Australia claim the inheritance of British justice. We proudly boast that our system of law, and particularly our criminal law, is second to none in the world. The High Court dismissed McInnis' appeal, substantially, because they felt that (as presented by himself) his case lacked credibility and (as untested by skilled counsel) the Crown case was strong.

There is no point in our dwelling on an occasion such as this upon the facts of a particular case: whether McInnis was guilty or not guilty; whether his lawyer acted in the best traditions of the profession or not; whether the judge should have granted an adjournment or the Appeal Courts, as requested, a completely new trial. McInnis' case has an importance beyond its own facts, and the contention of individual injustice. It highlights, once again, the problems of the particular form of dispute resolution machinery which we have inherited in Australia: the adversary trial. Under this system, the judge does not take on the function (as he does in Europe) himself to search out the truth of the matter: to find the facts, to ask many questions and to take an active role in resolving the dispute. Under our system, the judge's role is that of a passive umpire in a furious game whose sole function is occasionaly "to blow the whistle when there is a foul and to restart the match and then to take no part in it nor tell the players how to play".[5]

In the last few years there have been a number of serious criticisms of this adversary trial. If these criticisms came from people who were out of sympathy with our institutions, we could dismiss them as malevolent or ill-informed. But some of the best informed legal thinkers are now raising questions about the fairness of the "verbal pugilism" of the trial system and pointing, by way of contrast, to the alternative system of <u>inquiry</u> which depends much less upon the skills of the combatant advocates and more upon the positive duty of the judge not just to referee the match but to discover the truth of the matters in issue for himself.

At the end of last year, Lord Devlin, a former judge of the House of Lords published a scathing criticism of the adversary trial.[6] Profoundly conservative in most matters of legal change and a telling critic of many ideas of reform, Devlin's critique of the adversary system comes as something of a thunderbolt for he acknowledges that this remnant of the medieval trial by ordeal remains the "centrepiece" of the English way of doing justice.

Devlin weighs the two systems of adversary trial and judicial inquiry and concedes that, in the end, in most cases, they probably reach similar conclusions. He admits that our trial system tends to give satisfaction to the parties and the public by having the dispute openly ventilated and by pitting two equal combatants, doing their best to "win the prize" for their particular side. As against this, he lists criticisms:

* the waste of time involved in waiting for judges, counsel and witnesses to be available;
* the expense inherent in requiring the continuous presence together of so many highly paid people;
* the inconvenience to busy witnesses who must often wait for days to be called for ten minutes of evidence;
* the indignities to which witnesses are often put by the procedures of cross-examination;
* the misplaced confidence lawyers have that they can evaluate truth from the appearance of witnesses in the artificial situation of a courtroom.

Without a legal representative, at least in important and difficult cases, the adversary system simply breaks down. It takes a lifetime of training and preparation to be able to present a case in the drama of a trial, with skill and persuasiveness. A State Chief Justice described on his retirement recently how the law calls:

> for the exercise of some of the highest faculties of the human intellect, the ability to impose order on a mass of discrete phenomena, to find, to grasp and to maintain the hold on the thread of Ariadne which leads through the apparently impenetrable labyrinth ...[7]

Some never acquire the skill. An unrepresented layman, passionately bound up in his own interest, can almost never match the talent and tactical, forensic advantage of trained

ounsel. Furthermore, even as between counsel, there are significant differences of eloquence and ability. Both in the criminal and civil courts, Lord Devlin urged that we should reconsider the cost effectiveness of the adversary trial system. In the criminal area particularly, Devlin asserted that there should be less emphasis on "winning the case" and a greater stress on dispassionately finding the truth of the matter:

> One of the most elementary duties of a civilised State is to provide for its citizens a system of settling disputes. This obligation would be meaningless if the price to the citizen was out of all proportion to the value in dispute.[8]

CONCLUSIONS

The latest task which the Federal Attorney-General has given to the Australian Law Reform Commission requires us to scrutinise the rules of evidence in Federal courts in Australia. Those rules are themselves based upon the adversary trial. They assume skilled opponents fearlessly presenting their case and helping the court to do justice. In days gone by, litigation was substantially the business of the wealthy. When the poor found themselves in court, it was usually in a criminal court as defendant. Until the 19th century, on serious charges, the accused was not even permitted to give evidence, lest he lose his soul by perjury. We have come some way since then. But have we come far enough?

The problem with our method of doing justice is acutely illustrated by the case of McInnis v. The Queen. Unless a person on a serious criminal charge is always represented, the procedures of adversary trial break down. If one person is represented and another is not, the procedures break down. If one person is represented by a Silk of the greatest skill and another by the rawest junior, the system has a tendency to break down. If one person is a humble citizen of little means and the other is the Government, a great corporation or a trade union, the system also has a tendency to break down. Listen to Lord Devlin again:

> Law suits between ordinary citizens of limited means are uncommon ... because the cost would be prohibitive. Yet the obligation of a State to provide justice is not discharged by devising a single and inflexible mode of trial whose cost is beyond the reach of the ordinary citizen. Everyone knows, every lawyer particularly knows, that for the ordinary citizen a law suit is financially quite out of the question. The citizen who is up against an insurance company or a trade union, or any other powerful litigant, must take what is offered and be glad that he has got something.[9]

No method of human justice is perfect, but we must labour to improve our system. In the name of assuring due process of law and the appearance of justice, we cannot confine the assignment of legal assistance in serious cases to saints alone. We cannot be content with due process of law for saints and those whom we think are saints. It is the boast of our legal tradition that even a plainly guilty man is entitled to a fair and public trial. But the fair trial guarantee will be empty unless in every serious case there is an enforceable right to be legally represented. That right exists in the United States. It does not exist in Australia.

More and more lawyers today perceive, as an attribute of their professionalism, a responsibility for the state of the law they help to administer. St. Thomas a Becket got a fair trial. But was the verdict right? McInnis might have got the right verdict. But can we be content that he got a fair trial and was convicted after due process of law? It is when lawyers stop talking of justice and fairness and content themselves with the form of things and the letter of the law, that society expresses its disquiet. The Law Reform Commission is one instrument designed to ensure that fundamental questions are asked about our legal system and that assumptions about its fairness are constantly put to public test. In our inquiry into Federal evidence law, there will be no sacrosanct procedures: not even the centrepiece of our legal system: not even the adversary trial itself.

FOOTNOTES

1. Shakespeare, King Henry VI, Part 2, Act IV, Sc.2, 85.

2. Sir Zelman Cowen, Sir Thomas More - Lawyer, Scholar and Statesman (1978) 52 ALJ 354.

3. The story is told in Lord Campbell's book, The Lives of the Chancellors and retold in Viscount Hailsham "The Duties of a Lord Chancellor" in B.W. Harvey (ed) The Lawyer and Justice (1978) 187, 189-190. For another case involving the Other World see Cummins v. Bond [1927] 1 Ch 167 (Eve J).

4. McInnis v. The Queen, unreported, High Court of Australia, 19 December 1979 (Applicatian for special leave to appeal refused).

5. Lawton L.J. in Laker Airways Ltd. v. Dept. of Trade [1977] 2 All E.R. 182, 208.

6. Lord Devlin, The Judge, (1979) Chapter 3 "The Judge in the Adversary system", 54.

7. Dr. John Bray (Chief Justice of South Australia) Retirement Speech (1978) 19 S.A.S.R. xi.

8. Lord Devlin, ibid, 69.

9. ibid.