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The Hon. Mr. Justice M.D. Kirby
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THE CULT OF JUDICIAL PERSONALITY

The creation of the High Court of Australia as a Federal supreme court at the apex of the Australian judicial system and the appointment to the Court of a small number of lawyers inevitably attracts attention to the personalities of its members. Generations of lawyers have spent countless hours analysing the written words emanating from the High Court in the pages of the Commonwealth Law Reports. Vigorous speculation, now spilling over to the public press, attends the appointment of new Justices. Great national controversy attended the retirement of Sir Garfield Barwick as Chief Justice and the appointment of his successor.[1] The retirement of Sir Ninian Stephen to accept appointment to the office of Governor-General of Australia from July 1981 likewise sparked a controversy which is current at this time of writing. In the public media, betting odds are offered on the chances of prospective candidates for appointment, the names of the hapless alternatives, and their comparative professional distinctions being reduced to the mathematical equation of some unnamed speculator's fancy.

Endless hours of gossip have engaged succeeding decades of Australian lawyers concerning the personality, performance, temperament and judicial attitudes of the Justices of the High Court. The move of the Court to its permanent home in Canberra has helped focus public opinion (as Sir Garfield Barwick said it would[2]) upon the Court and its doings. Inevitably, this has attracted the interest of a wider audience in the personalities and attitudes of the members of the High Court. The interest of this wider audience, once wetted, is unlikely to abate. It can be expected that the electronic media will, following the American example, bring discussion of the background and predilections of the High Court Justices into sharper focus before audiences of millions of the Australian public. This is not necessarily a bad thing. Greater knowledge about the 'keystone of the Federal arch'[3], the third arm of government in Australia, is an inevitable product of the growing realisation of the importance of the High Court of Australia in the Federal system of Australian government.

Analysis of the personal background of the Justices of the High Court of Australia has been rare. Apart from perfunctory items of Bar chambers' gossip, repeated in the daily press, there have been relatively few instances of serious examination of the background and experience of the High Court Justices, by which their approach to constitutional and legal problems coming before them, can be measured and understood. Few have been the judicial biographies. Few also have been the serious analyses of the judicial performance of members of the High Court. In 1969 there was an interesting analysis of the voting patterns of the judges in an essay titled 'Judges and Policy on the Latham Court'.[4] In 1971, E. Neumann wrote a monograph examining the background history of the judges, seeking to explain their judicial behaviour by reference to his analysis.[5] Following the quantitative methods of studying United States Supreme Court decisions,[6] Professor Glendon Schubert[6] brought the same techniques to Australia. His paper was titled 'The High Court and the Supreme Court : Two Styles of Judicial Hierocracy'.[7] Schubert later published a number of essays scrutinising judicial attitudes and policy making in the Dixon High Court.[8]

The end of the 1970s saw a remarkable outpouring of works in Britain and the United States, directed at an examination of the curial and extra curial behaviour of appeal court judges. Reference was made to their attitudes formed as a result of their background experience. In Britain the most important of these books is Stevens' 'The Law and Politics'[9] A more popular work, 'The Politics of the Judiciary'[10] attracted much general discussion. The controversy generated by these works pales into insignificance by comparison to the storm which erupted upon the publication of 'The Brethren'[11], purporting to be an account of the daily life of the Supreme Court of the United States, and an examination of the conduct and attitudes of the Justices of that Court.

If we in Australia do not fully embrace the over-simplifications of quantitative methods of studying appellate court judges' behaviour and 'voting' patterns[12], there is now a more general understanding that the judge of an appellate court, particularly a court at the apex of a legal system, necessarily looks at the legal problems coming before him through perspectives framed, in part at least, by his background, education and life's experience. This is not to say that the notion of judicial independence has been eroded, nor that this is a modern thing, importing deliberate social philosophies into hitherto neutral judicial activities. It is simply an acknowledgement that in any system of human justice a judge, fulfulling his judicial duties, cannot throw off his past. There is nothing shocking, reprehensible or new about this. But the tradition of 'value neutral' adjudication is so strong in the Australian judicial mythology that even today this assertion will be regarded by some as unwelcome.

SIR EDWARD McTIERNAN : THE PUBLIC CAREER

No Justice of the High Court of Australia has sat on that Bench for so long as Sir Edward Aloysius McTiernan. He was a member of the Court for 46 years between 1930 and 1976. His tour of duty exceeds by ten years the longest term served by any Justice of the Supreme Court of the United States. Only a fall in which he sustained an injury which made travelling difficult impelled his resignation in September 1976. Following the constitutional amendment in 1977, requiring future Justices to retire at the age of 70 years, it seems virtually impossible that any future judge of the Court will rival Sir Edward's period of tenure. Despite his long period of service on the Court, Sir Edward remained something of an enigma. He was courteous to the point of being gentle in his dealings with counsel — a behaviour characteristic not typical in the sharp years of the Dixon court and the sometimes abrasive period of the Barwick court. Sir Edward McTiernan's life has been little studied by the generations of Australian lawyers, in whose principal court he sat for nearly half a century. In part, this lack of knowledge of and attention to his career and contribution to Australian public life may simply reflect the many generation gaps that exist between a child of Queen Victoria's reign and lawyers of the age of interplanetary flight, nuclear fission and in vitro fertilisation. In part, Sir Edward's self-effacing modesty and Irish gentility have made his personality somewhat unapproachable. In part, the tradition of our courts is to focus so much attention on the personality of the Chief Justice, as to disperse the light of attention on those flanking him. Beside Dixon and Barwick, especially, there was often thought room only for shadows.

The recent advent of the ninetieth anniversary of Sir Edward McTiernan's birth — an event that passed unnoticed by many in the legal profession in Australia — revived the writer's interest in a remarkable career in Australian public life that took the son of a poor Irish immigrant policeman, born in a country town, through the Parliament and Executive Government of the State of New South Wales, and the Parliament of the Commonwealth to the highest court in the land, membership of Her Majesty's Privy Council and the post, on many occasions, of Acting Chief Justice of Australia. Such a life ought not to be uncelebrated. The triumph of ability and opportunity over initial adversity is the stuff of which the myths of Australian democracy are created.

The chief events of Sir Edward McTiernan's life can be briefly stated. Born on 16 February 1892, he was educated at the University of Sydney. He was admitted to the New South Wales Bar in 1916. He became a Member of the Legislative Assembly of New South Wales in 1920 and remained a Member of that Parliament until 1927, holding the posts of Attorney-General and Minister of Justice between 1920 and 1922 and 1925 to

1[illegible] . In 1929 he was elected a Member of the House of Representatives in the Commonwealth Parliament, a post he held until his appointment as a Justice of the High Court on 20 December 1930. In 1951 he was appointed a Knight of the Order of the British Empire. In 1963 he was made a Member of the Privy Council. He retired from the High Court on 12 September 1976, after a record term. He served as a puisne judge under Chief Justices Sir Isaac Isaacs, Sir Frank Gavin Duffy, Sir John Latham, Sir Owen Dixon and Sir Garfield Barwick. He resides in a leafy road in a northern Sydney suburb with Lady McTiernan, whom he married in December 1948. In his 90th year, he recollects vividly events of a supremely interesting judicial and public career.

For those Australian lawyers and future diarists who are interested, the contribution of Sir Edward McTiernan to the intellectual life of the law in Australia is there, readily available for detailed analysis. It is captured in the volumes of the Commonwealth Law Reports starting, remarkably enough, with Volume 44 published for the year 1930-31, in which his name first appeared next following the Honourable Herbert Vere Evatt under the name of the then recently appointed Owen Dixon. The judgments continued to flow until Sir Edward's retirement is noted in Volume 136. The analyses of these judgments has already begun. Professor A.R. Blackshield offers some comments in a quantitative analysis of the High Court of Australia between 1964 and 1969[13], a period that spanned the end of the Dixon court and the beginning of the Barwick court, during a period when Sir Edward was already the senior puisne judge. Commenting on Sir Edward McTiernan, Blackshield says:

> Its oldest member, McTiernan ... had by the time of Dixon's retirement sat alongside him in the court for over 33 years. Appointed by a Labor government along with Dr. H.V. Evatt, McTiernan had spent his first decade on the Court inevitably stamped as a Labor judge. But he was never the Labor firebrand that Evatt sometimes was; and after Evatt had left the court in September 1940, to return to Federal politics, McTiernan had steadily mellowed towards Dixonian 'neutralism'.[14]

By the technique of scalograms, Blackshield analyses a series of decisions in an endeavour to demonstrate the decision patterns of particular Justices on typical issues. Among these, McTiernan emerges generally at what might be called the 'left' scale of the seven Judges. His decisions are the least 'pro-employer' in industrial accident compensation cases. His decisions are the most 'pro-accused' in criminal appeals. His decisions are the least 'pro-laissez faire' in cases under section 92 of the Constitution. Next to Mr. Justice Windeyer, his decisions were the least 'pro-defendant' in road accident cases. In applications to review government decisions by prerogative writs, his judgments are the most sympathetic to government and the least supportive of the applicant.

Blackshield's conclusion is that in the decisions in the years analysed, Sir Edward McTiernan 'emerges as strongly anti-conservative'.[15] He qualifies this epithet, pointing out that it can only have a 'relative meaning' in scalogram analysis in the 'narrow universe of seven High Court Judges'. Many doubts are voiced about the limitations of the type of analysis offered by Blackshield.[16] But as an organisation of commonly voiced impressions in the legal profession, it will come as no surprise to most Australian lawyers, observers of the High Court scene, that Sir Edward McTiernan, 40 years after his appointment, was judged to be still, in reasoned legal decision-making, as tending towards determinations sympathetic to the injured worker; the criminal accused and the road accident victim, and unsympathetic to efforts directed at reducing beneficial government regulation of the economy or firm and decisive action by government officials. There are, of course, exceptions to this pattern of 'voting'. For example, he is not the least favourable of the Justices to the taxpayer in disputes with the Income Tax Commissioner.[17] Justices Menzies and Owen outflank him in this regard. But the impressions that probably exist about the general predispositions of Sir Edward McTiernan in the performance of his judicial functions, seem to be borne out by Blackshield's analysis.

In the memoir of Sir Edward's early career which follows, clues are offered as to how these predispositions formed in the reign of Queen Victoria and how they were reinforced in his early life as a politician and barrister representing Labor interests. Whilst true to his oath of judicial impartiality and independence, Sir Edward McTiernan also remained faithful to his origins.

THE EARLY YEARS

Patrick McTiernan, a native of County Sligo in Ireland, married Isabella Diamond, a girl from County Antrim. They migrated to New South Wales at about the time the debates about the Federation of the Australian colonies were beginning in earnest. They arrived, with few means, in a country which was about to enter the serious industrial troubles and unemployment of the 1890s. Other members of the family had migrated to Boston in the United States. Chance brought Patrick McTiernan and his wife to the Australian colonies. He was accepted into the New South Wales Police and stationed in the New England district and later the Armidale district. After a time he was assigned to Metz on the side of a gorge near Hillgrove in Northern New South Wales. Patrick McTiernan, as the police officer in charge of the district, was looked upon as the general useful public servant of the region : the confidant and adviser to the neighbourhood and expositor of law in a way that captured the attention at least of his young son Edward. Patrick and Isabella McTiernan had three sons. The eldest, a delicate lad, was James. The youngest was Jack. The middle son, born in February 1892, was Edward Aloysius.

The young Edward McTiernan went to the local public school at Glen Innis. Amongst his earliest recollections is of a day on which his father told him and his two brothers, he being then seven years old, that this night was the last night of a century and that, on the morrow they would awake into the 20th century. Earlier the same year, 1899, Edward fell off the veranda of his family's home and suffered a severe injury to his left arm. The break was very bad indeed and he had to be brought to the hospital at Armidale. Later this event was to prove most significant. This was a time when the Boer War was being fought, when Queen Victoria was celebrating her Diamond Jubilee and when the Commonwealth of Australia Constitution Act was being prepared for submission to the Imperial Parliament at Westminster.

Not long after the turn of the century, the family came down to Sydney and moved into a weatherboard house at Leichhardt, an inner Sydney suburb. His father remained in the police service. He sent the young Edward to the school run by the Christian Brothers Order at Lewisham. Later Edward was sent to the school of the Marist Brothers Order at St. Mary's Cathedral in St. Mary's Road, Sydney. It was from that school, in 1908, that Edward McTiernan matriculated. He had no immediate hope to go to University. His father was paid not in pounds but in shillings. His matriculation preceded the Bursary Endowment Act 1912 which was to offer support for poor children of ability to receive a University education. There was little hope, at that time, for a boy of Edward McTiernan's background to enter commerce. The banks and insurance houses were very much the preserve of the members and sympathisers of the loyal Orange Lodge. In those times of sectarian bias, the best hope for a bright lad of the Catholic persuasion was the public service. The young Edward sat the entrance exams for the State public service and also for the infant Commonwealth public service, only recently established with the advent of the new Federation in 1901. He won entrance to both services and discussed with his father which one he should choose. His father offered the advice that the Commonwealth service was preferable. Because of the 'Braddon Blot'[18], which limited the obligation of the Commonwealth to return three-fourths of customs and excise revenue to the States 'during the period of ten years after the establishment of the Commonwealth'[19] the elder McTiernan suspected that, in the long run, the Commonwealth would have much greater control over the resources than the States. Little did either Edward or his father realise that Edward would himself one day come to contribute to the constitutional decisions that would reinforce the Commonwealth's dominance over tax revenues.[20]

Edward McTiernan was offered a post in the Commonwealth Customs Department. He was sent to a job in the Victoria Barracks in Sydney. He worked for a time in the office of the Rifle Club at the Barracks. Aided by the money he was earning, he enrolled as an evening student in the Faculty of Arts at Sydney University. He recalls the lectures in history by Arnold Wood and the pride with which he was told to read his essays to the class. In the third year of his Arts course, then drawing an annual salary of forty pounds, he decided to attempt two subjects of the Bachelor of Laws degree. These were Constitutional Law and Roman Law and his lecturer in Constitutional Law was Professor (later Sir John) Peden. During this year he was transferred from the Rifle Club office to the Ordnance store, situated in Druitt Street North, closer to the centre of Sydney. Encouraged by his growing interest in the law, he made application for transfer to the office of the Commonwealth Crown Solicitor in the Attorney-General's Department. At first his application was declined. But the young Edward persisted and renewed his application. In due course a public service inspector interviewed him and asked him why he wanted to enter the law. His response was that he had an interest in law stimulated by his new studies. When asked what he knew of the law, he could only reply Constitutional and Roman law. 'Can you use a typewriter?' he was asked. To the response in the negative he was duly informed by this scrutineer of Federa public employment that it would be a whole lot better than knowing his way around the Constitution, for a young man of promise to know how to use the typewriter. Fortunately, this was advice which Edward McTiernan declined to take very seriously.

Upon completion of his Bachelor of Arts degree, he resigned from the Commonwealth Public Service in order to enter the legal profession. Chance played a part in how this event in his life came about.

THE LAW AND THE HIGH COURT

The young Edward McTiernan used to travel to his office by tram. He would take the tram from Johnston Street, Leichhardt by way of the Central Railway station to Sydney. The fare was tuppence. One day, to save the extra penny cost of the tramfare down George Street from the Central Railway into the city area, the young Edward McTiernan decided to walk. He walked the route of the tram line up George Street, on the Western side. He came to a bank building on the corner of King and George Streets and a large brass plate caught his eye. It read 'Sly and Russell, Solicitors'. In the manner of an Antipodean Dick Whittington, McTiernan passed the sign by but then decided to approach this firm of solicitors, the only one he knew, to ask whether they had a vacancy for a clerk. Upon his application, he was shown into the office of a solicitor,

William Charles Schroder. In those days, boys seeking articles of clerkship with a Sydney solicitor — and especially in a large and prestigious, well-established firm such as Sly and Russell, had to pay for the privilege of their training and instruction. 'Do you want articles?' he was asked after recounting his excellent academic prowess at the University. When it was explained that he could not afford the fee for articles, he was told that the firm did need a clerk but would pay no more than a pound a week. Without hesitation the young McTiernan accepted. He was told that his duties would be to sit in the office of Mr. Schroder, attend to the clients who came in and do the tasks assigned to him. By paying attention in the corner, he might learn something about the law.

After office hours, Edward McTiernan attended the lectures at the Sydney Law School. He applied himself diligently to his studies and graduated with first class honours in Law. In his daily work, he was frequently seen in Phillip Street, bringing briefs to the busiest and most distinguished counsel. Soon after his graduation, he saw an advertisement in a newspaper that another leading firm of solicitors, Allen Allen & Hemsley, wanted a common law and equity clerk and were willing to pay two pounds ten shillings a week for someone with relevant experience. The young McTiernan showed the advertisement to Schroder who urged him to make an application. He did so and was accepted and worked in that firm for a time. One day, one of the partners, Mr. Cowper, told him that he had been talking to Mr. Justice Rich, a judge of the High Court of Australia. Rich was looking for an Associate to be his law clerk. At this time the War in Europe was proceeding. Australia had five Divisions in the field — a very large contribution for a young country with a small population. Rich laid down the qualification that he would only appoint as his Associate someone who had volunteered for War service and been rejected.

Soon after the outbreak of the Great War, Edward McTiernan, in company with many of his generation, had volunteered. However, his offer of service had been rejected because of the fracture of his left arm, which he suffered at the turn of the century when he fell from the veranda in Glen Innis. It had never united satisfactorily. The arm was too weak properly to hold a rifle or to perform other duties of war service. McTiernan was rejected. But for the fall from the veranda, he might have died in Gallipoli or Flanders, as did so many of his generation.

Mr. Justice Rich engaged the young McTiernan. He entered for the first time the milieu of the High Court of Australia. He met every one of the justices except Richard Edward O'Connor. Rich treated him kindly, inviting him to dinners at which he met some of the leaders of the Bar. Rich was a friend of George Flannery KC, then probably the most eminent expert in Constitutional Law at the New South Wales Bar. As a result of this encounter, Flannery persuaded McTiernan to join the New South Wales Bar

a. in 1916 moved his admission. As Associate to Rich, the young Edward McTiernan drew six pounds a week. But the judge pointed out that it was not a job with a future. He urged his Associate to consider a life at the Bar and this advice was wisely taken. Flannery invited McTiernan to read in his chambers. McTiernan agreed and began a career at the Bar which took him into all jurisdictions, though primarily into the New South Wales Equity Court. To supplement his income, the young barrister established a coaching business. His first class honours Law degree combined with his patient disposition and a fair measure of available time, soon resulted in a flourishing activity, instructing young legal hopefuls in the disciplines he had himself so lately learnt.

LABOUR PARTY AND GOVERNMENT

It was at about this time that Edward McTiernan joined the Political Labour League, later to become the Australian Labour Party. It was not long before the Labour movement had a serious cause. The Labour Prime Minister, William Morris Hughes, was convinced that conscription would be necessary to continue the Australian war effort. To overcome difficulties in his Cabinet and in Parliament, Hughes responded to the cables from the British Government which urged further reinforcements, by introducing the Referendum Bill in 1916. The Bill was passed through the Federal Parliament and the Referendum fixed for 28 October 1916. Conscription had been introduced in Britain and New Zealand. But the campaign in Australia was a specially bitter one. The question posed under the Referendum Act was not entirely neutral in its terms:

> Are you in favour of the government having, in this grave emergency, the same compulsory powers over citizens in regard to requiring their military service for the term of this war outside the Commonwealth as it now has in regard to military service within the Commonwealth?[21]

The Bar supported the Referendum proposal, almost to a man. It was considered socially disgraceful to be opposed to the Referendum and to be aligned with those, principally Labour interests, who urged a negative vote. But McTiernan not only opposed it. At public meetings he spoke against conscription for overseas war service. He was the only Sydney barrister to take any public part in the campaign against conscription. The Referendum, of course, was lost. The Australian Labour Party was split in the Federal Parliament, Hughes, by a dramatic action realigned himself with certain of the Liberals, forming his own National Labour Party, and was commissioned to form his second Administration.

Participation in the Referendum campaign galvanised the young promising barrister Edward McTiernan into a political life. In the 1920 New South Wales State elections, he was endorsed as one of the candidates for the Australian Labour Party in the five-member constituence of Western Suburbs. At his first election, he was successful and was returned to the New South Wales Parliament as a Member of the Legislative Assembly. Before the meeting of the Parliament, the Labour caucus met to elect its Ministers. McTiernan was elected and appointed to the portfolios of Attorney-General and Minister of Justice. He was sworn as a Minister of the Crown before he had even spoken in the Parliament. At the age of 28 years, he was the first Law Officer of the State of New South Wales.

The great issue of the election campaign that led to a sweeping win for the Australian Labour Party and office for Edward McTiernan, was profiteering and post-War price control. One of the first tasks of the young Attorney-General was to draft a Profiteering Prevention Bill. Because of the strenuous opposition to government interference with commerce, McTiernan sought in his Second Reading Speech to place the measure into the context of the common law and other statutory efforts to control monopoly and unfair trade practices. He tackled directly the 'much-belauded law of supply and demand'.[22] He reminded Parliament of the great expectations of the post-War generation that the world would be improved, in the wake of the sacrifice made by so many young people:

> In the days of the war we were told to look forward to a new era of reconstruction in which everyone would have a fairer and better deal. But, so far as we can see, no serious attempts are being made to give effect to these ideals today. The new era is not yet and some people are bitterly complaining that many of the promises made during the war were altogether insincere. Something must be done by the Government to honour this promise in order that life may be made more bearable for the people. We are bringing down this legislation for the purpose of curbing the arbitrary authority of those people who would make life more difficult for the average man in this community. The elementary and primary right to which man is entitled is the right to live. ... The benefit of a right consists in the enjoyment of that right, and what we want today is to restore and maintain for all the people of this community the full enjoyment of the best and most elementary right which has been granted to men, namely, the right to live in peace and comfort.[23]

Another matter that engaged the attention of the young Attorney-General was the promise made during the election for an inquiry into a trial of a number of persons convicted and sentenced to imprisonment as a result of a series of fires in Sydney, during the war. The fires were alleged to be the work of members of the International Workers of the World organisation. Aspects of the trial had caused concern in Labour Party circles. In the result, a Tasmanian judge, Mr. Justice Ewing, was secured to conduct a Royal Commission. As a result of the Commission's report some of the sentences were reduced.

Anxiety about the concern shown for this group, seen in some quarters as a disloyal band of anarchists, was inflamed by suspicions in the same circles that the Labour Government was in the grip of Roman Catholic Irish sympathisers, disloyal to the Crown. It is difficult 60 years on to reconstruct the bigotry and emotions of that time. In the Parliament, Sir Thomas Henley, an Opposition member, gave voice to the passions of the time:

> There is only one party in this country that I know of which deals in sectarianism. Hon. members will not find sectarianism among adherents of the Church of England, Methodists, Presbyterians, the members of the Salvation Army or our Jewish friends. They are all of one accord, and there is no sectarianism there. There is only one section of this country which is eternally raising the sectarian issue, and trying to dominate the country, and that is Rome. The Roman Catholics are trying to impose on this country the same infliction as they have imposed on other countries.[24]

The young Attorney-General McTiernan gave this noisy element of opinion the opportunity to criticise him when, quite early in his Ministerial career, he attended a function in honour of Dr. Daniel Mannix, the Catholic Archbishop of Melbourne.[25] Mannix was the special bete noire of the anti-Catholic element in Parliament, because of the significant role he had played in opposing, successfully, the conscription referenda and because of the strong voice he had given to the cause of Irish independence.

The Leader of the Opposition, Sir George Fuller, drew to the attention of Parliament the fact that on 18 May 1920 two Ministers of the Government, including the Attorney-General, had attended a luncheon given by the Lord Mayor of Sydney in the Town Hall in order to welcome Dr. Mannix:

> We know that at the gathering the toast of 'The King' was omitted, and that Dr. Mannix, who had been delivering speeches in Melbourne before he came to Sydney was guilty of utterances of a most disloyal character to the country and the Empire. ... At that meeting this high dignatory of the church dropped all religion and directed his speech practically to political matters. ... At this gathering at which this disloyal representative spoke in the way I have mentioned ... the Attorney-General was amongst the speakers, and he referred to this rebel in our midst. ... Two Ministers of the Crown who have sworn allegance to the King ought to have been severely reprimanded by the Premier and put out of the Ministry. ... [S]uch a gathering is no place for representatives of the Crown to be present or, being present, for them to make speeches of such a character that was made by the Attorney-General.[26]

Sir George Fuller did not forget this incident and a year later he returned to it quoting what Mr. McTiernan, the Attorney-General, had said at the Reception 'after the toast of the King had been omitted'. According to Fuller, this is what McTiernan said:

> After this great reception it would be a very difficult task for the Prime Minister to carry out his threat to deport the Archbishop. I venture to say he is Australia's greatest citizen. He is an Australian institution.[27]

To 'exalt as a superman a person who has been shown to be disloyal and unpatriotic on various occasions and an enemy of our country and Empire' was just too much for Sir George Fuller and the Opposition. But McTiernan felt that the threat to deport Mannix — a threat never carried out — was unjust and motivated by sectarian bias. Furthermore, having regard to the large assemblies of people who had gathered to hear the Archbishop on his journey from Melbourne to Sydney, he believed that any such move would be seriously divisive of the Australian people. Just as he had spoken out against the conscription referenda, and joined the Labour Party, McTiernan, true to his origins, felt obliged to stand beside the controversial Irish bishop, whose calls for Irish independence were such an irritant to the conservative political forces of the State.

DENOUNEMENT

Edward McTiernan remained in the New South Wales Parliament until 1927. He first met Dr. H.V. Evatt, also an aspiring young barrister with a brilliant academic record, when Evatt entered the Parliament in 1925. He had earlier authorised the retainer of Evatt as George Flannery's junior in constitutional cases affecting the State. In 1922, during an interval out of government, McTiernan went back to the Bar and resumed his full-time practice. He was made a member of the Barristers' Admission Board but recalled to the Ministry as Attorney-General between 1925 and 1927. In that last year, he decided to leave politics, a decision he reversed in 1929 when he was elected the Member for Parkes in the House of Representatives in Federal Parliament. In December 1930, during the absence of the Prime Minister overseas, he and Evatt were appointed Justices of the High Court of Australia, he to take office one day later than Herbert Vere Evatt. After, in September 1940, Evatt resigned to return to political life, McTiernan was to continue in office for another 36 years, almost exactly. His diligent work as a legal essayist in the decisions of the High Court over nearly half a century must remain for analysis and scrutiny by another writer, perhaps at a later time. Possibly because of the public controversy that initially attended his appointment, or because of the times or his concept of the judicial office, Mr. Justice McTiernan retreated wholly into the secluded world of the High Court. He travelled from State to State for sittings of the Court, he stared down at counsel from the Bench, for many years on the right of the Chief Justice, and occasionally in the centre, as Acting Chief Justice or presiding judge. He looks out at us from the photographs of succeeding generations of the High Court judges.[28] Such is the passage of the years that there are few young Australians today who know of the early life of this judge of their highest Court, whose service spanned so many famous, decisive cases, and who knew every Chief Justice of Australia and all save one of the Justices of the Court. In due course, his biography may be written. This piece is offered, meantime, to remedy the neglected interest in the career of a distinguished and able Australian. He is still amongst us, his lively memory and personal anecdotes of the famous men of the Australian law, a constant source of delight and startlement to those who have the privilege of his company. How remarkable it is that there is still living in Australia today a man who has held so many high public offices, who was born as the Federation was conceived, whose life has covered the whole history of our Federal supreme court, who has been the professional colleague of the men who are now but names to the rest of us, whose judicial vote affected so many cases of constitutional and other legal moment. What a comment it is on our century that but for his fall off the veranda at his parents' home near Glen Innis in 1899, Edward McTiernan might not be celebrating his 91st year, with a lifetime of service to the people of Australia to reflect upon and to remember.

FOOTNOTES

* The personal details of the early life of Sir Edward McTiernan here recorded were told to the writer when he called on Sir Edward to congratulate him on his ninetieth birthday which fell on 16 February 1982.

1. See eg Melbourne Age (13 January 1982), Australian Financial Review (15 January 1981), Sydney Morning Herald (13 January 1981. See [1981] Reform 43.

2. G.E. Barwick, Speech at the opening of the High Court, Canberra (1981): 'The Judiciary Joins the Crown and the Parliament in the National Capital', 9 Sydney Law Review, 2, 275.

3. This expression was used by Alfred Deakin in 1902 and was taken as the title of the book by J.M. Bennett, 'Keystone of the Federal Arch', 1980 (A historical memoir of the High Court of Australia to 1980).

4. R.N. Douglas, 'Judges and Policy on the Latham Court' (1969) 4 Politics 20.

5. E. Neumann, The High Court of Australia : A Collective Portrait 1903-1970 (1971) (Occasional Monograph No. 5, Department of Government and Public Administration, Uni. of Sydney).

6. G. Schubert, Quantitative Analysis of Judicial Behaviour, 1959 and G. Schubert, The Judicial Mind, 1965.

7. Paper presented to the Annual Meeting of the American Political Science Association, 10 September 1966, mimeo.

8. G. Schubert, 'Judicial Attitudes and Policy-making in the Dickon Court' (1969) 7 Osgoode Hall LJ 1; see also Schubert, Judges and Political Leadership in Political Leadership in Industrialised Societies, 1967 (L. Edinger, ed) 220.

9. R. Stevens, 'Law and Politics. The House of Lords as a Judicial Body 1800-1976', Law in Context, 1979.

10. J. Griffith, The Politics of the Judiciary, 1977.

11. B. Woodward and S. Armstrong, 'The Brethren' : Inside the Supreme Court, 1979.

12. M.D. Kirby, Commentary on 'Judges and the Court System' in G.J. Evans (ed), Labor and the Constitution 1972-1975, 1977, 127.

13. A.R. Blackshield, 'Quantitative Analysis : The High Court of Australia 1964-1969 (1972) 3 Lawasia 1, 3.

14. ibid, 12.

15. id, 55.

16. J.D. Merralls in Evans, n.13, 131ff.

17. See scalograms in Blackshield, n.14 above, 13ff.

18. R. Garran, 'Prosper the Commonwealth' 1958, 119. See also Bennett, n.4 above, 73.

19. Australian Constitution, s.87.

20. See eg Uniform Tax Case, South Australia v. The Commonwealth (1942) 65 CLR 373; Second Uniform Tax Case, Victoria v. The Commonwealth (1957) 99 CLR 575.

21. Garran, 229.

22. NSW Parliamentary Debates (Legislative Assembly) 7 October 1920, 1407.

23. ibid, 1414.

24. NSW Parliamentary Debates (Legislative Assembly) 8 September 1921, 272.

25. ibid, 10 October 1920, 122.

26. id, 123.

27. McTiernan quoted by Sir George Fuller, NSW Parliamentary Debates (Legislative Assembly) 31 October 1921, 97.

28. A series of photographs of the Justices at various ceremonial occasions is to be