

## Obituary

### HON RAE ELSE-MITCHELL CMG

For the second time in a matter of months (see (2006) 80 ALJ 331) it is necessary to mark the death of a past Editor of this Journal. Soon after the death in Canberra of Professor Joe Starke QC, Rae Else-Mitchell died in the same city on 29 June 2006. Indeed, for a time they were in the same hospital and passed time debating ancient legal controversies. Else-Mitchell was almost 92 years of age at his death, having been born on 20 September 1914. His was a varied career as leading counsel, judge, public administrator, and man of libraries, universities and history.

Rae Else-Mitchell was brilliant, combative, proud and able. He became a leader of the New South Wales Bar, a judge of the Supreme Court of New South Wales and, later, Chairman of the Commonwealth Grants Commission. He held numerous statutory and public offices to which reference will be made. He served as joint Editor of this Journal, a role he fulfilled with Mr (later Sir) Nigel Bowen, between 1946 and 1958.

Rae Else-Mitchell had an outstanding academic record at Sydney University, where he took the LLB degree with first class honours and the top student prize in a year of great talent that included JR Kerr and 10 later judges. He joined the New South Wales Bar in 1939 at a time when work was still scarce for juniors. When the War came, he refused to join the AIF on the grounds of "pacifist" beliefs. But he performed important non-combatant duties as secretary to the Rationing Commission, based in Melbourne. It was there that he developed a life-long fascination with public administration.

In 1946, he returned to civilian life and the Bar. He took silk in 1955 at which time he was regularly appearing before the High Court and the Privy Council, commonly as leading counsel for the federal or New South Wales government. His appointment as a judge of the Supreme Court followed in 1958 and in 1962 he was also appointed a judge of the Land and Valuation Court. As an advocate he was brilliant and resourceful: full of confidence and a special master of the subtleties of constitutional law. He was also possessed of huge energy and a zest for living. Despite a rapidly expanding practice, he found time to write several textbooks, including one on hire purchase law in 1941, which went through four editions; one on land tax law in 1957; and the well-known *Essays on the Australian Constitution*, which he edited in 1952 and republished in 1961. These *Essays*, marking the first half century of the Commonwealth, became a standard text on constitutional law in several Australian law schools.

Inevitably, in the years after his appointment as a judge of the Supreme Court of New South Wales in 1958, his name was mentioned as a possible appointee to the High Court. According to the *Oxford Companion to the High Court* (2001), he was sounded out for such an appointment in the 1960s. However, by 1973, he reportedly indicated that he was no longer interested. However that may be, the volumes of the *Commonwealth Law Reports* and the reports in this Journal are full of cases in which Else-Mitchell was leading counsel. His intellectual prowess was never in doubt.

Once appointed to the Bench, he mixed his judicial duties with public engagements as a trustee of the Public Library of New South Wales (1961-1969) and as President of the Medico-Legal Society of New South Wales (1960-1964). As a judge, he quickly demonstrated what those who knew him were well aware of: he was quick, efficient and often impatient with those of lesser talent. In the ordinary course of events, with seniority, he would have participated frequently in the Full Court where his broad intellectual interests naturally took him. However, the establishment of a permanent Court of Appeal for the State, in 1966-1967, was a source of enormous resentment and frustration to him. He was not appointed a Judge of Appeal. Along with others who were passed over, he deeply resented the process by which the new appellate court had been created. Eventually, his frustrations and the chance of new opportunities led him to resign from the Supreme Court in 1974.

Before this happened, Else-Mitchell absorbed his mounting frustrations in countless busy engagements. He served on the St Vincent's Hospital Board; as chairman of a New South Wales Royal Commission into Local Government Land and Valuation Rating Systems (1965-1967); as a member of the Library Board of New South Wales (1966-1968), rising to be President of the State Library of New

South Wales (1974-1979); and as Deputy Chancellor of the newly established Macquarie University (1967-1976). In this last post, he served under Sir Garfield Barwick who was the inaugural Chancellor. Else-Mitchell's decisiveness and commitment to intellectual excellence were cherished contributions to the early days of Sydney's third university. But in his principal professional activity, he considered himself under-utilised.

Else-Mitchell's great intellectual loves, outside the law, were history and libraries. He took part in countless public activities connected with his historical interests. He was chairman of the Captain Cook Bicentennial Arts and Historical Committee (1969-1970), a member of the Archives Authority of New South Wales (1973-1974) and was elected President of the Royal Australian Historical Society (1970-1977).

It was exactly at this stage that he turned his wartime experience and his legal interests and practice to a wider focus on public administration. Between 1973 and 1975 he chaired the Royal Commission of Inquiry into Land Tenures. In 1974, he was appointed a member of the Council of the National Library of Australia, a post he held for a decade. And, in 1975, he was appointed chairman of the ACT and Canberra Public Library Service, a position in which he served for 18 years. But it was his appointment in 1974 as chairman of the Commonwealth Grants Commission that afforded him an office worthy of his remarkable talents, boundless energy and creativity. A mark of the respect in which he was held can be seen in the repeated renewal of his appointment to the Commission after 1976 by the Fraser government. He held the office until 1989. In that year, he took part in the Committee of Inquiry into Assets and Public Debt in the Australian Capital Territory and was appointed to the National Local Approvals Review Committee. In 1990, he accepted the post of chairman of the Casino Surveillance Authority of the ACT and held that position until 2000.

Few, if any, lawyers in the Commonwealth have had such an extraordinary and varied career. From a consummate barrister to a gifted if temperamental judge, he reinvented himself repeatedly in work that was worthy of his high capacity and prodigious memory and energy. When a complicated inquiry had to be launched, his was a safe pair of hands. He brooked no nonsense from lawyers or others who had to deal with him. His testiness was legendary, but so was his ability. His dedication to Australian history, to libraries and to public administration have left their mark.

There is an important story to be told concerning the sharp differences of view that arose between him and colleagues of the Supreme Court of New South Wales when the Court of Appeal was first established. He entrusted that story to this writer. In due course it will be told. It is a misfortune that such a talented lawyer was not fully stretched in the highest judicial offices. On the other hand, his disappointment in this respect drove him to explore other activities in life where he could serve to maximum social advantage. It may even be that his temperament and sometimes pride made him unsuitable for the relentless grind of a dispassionate judge in a collegiate court. But those remaining few who saw him at the height of his professional powers, at the time when he was editing this Journal, remember a tall, impatient, fast-striving man, striking in appearance, powerful in build and intellect, who bestrode the law and, ultimately disappointed, walked away from courtrooms to find other outlets for his energy.

The publishers of this Journal record their thanks for his service as Joint General Editor. Readers who remember the slimmer volumes of the 1940s and 1950s will recall his efficiency, intellect and wide-ranging talents. Earlier notes in his career may be found at (1979) 53 ALJ 736; (1980) 54 ALJ 243; (1984) 58 ALJ 475; (1986) 60 ALJ 420; and (1999) 73 ALJ 799.

Rae Else-Mitchell's first marriage in 1941 to Daphne Hannaford was dissolved in 1968. His second marriage, in 1968, was to a fellow lawyer, Margaret Brewster, with whom he had a son, Francis and a daughter Rosamund. The son pre-deceased him. He and Margaret Brewster separated and he formed a partnership with Karen Bidwell, with whom he faced with fortitude the 2003 Canberra bushfires. His family and friends on 7 July 2006 organised a secular memorial service in his honour in Canberra at which, among others, Margaret Brewster, Rosamund Else-Mitchell, Karen Bidwell and Edward Muston of the Sydney Bar spoke. Suitably enough, this occasion was held at the

National Library of Australia. Despite his great age, it was attended by many who remembered, valued and admired him. His restless spirit now, at last, is still.

*Michael Kirby*

