

Sir John Latham

An Appreciation

On 25th July, 1964, John Greig Latham died. Ten days or so before, he had suffered a cerebral embolism which had deprived him of the power of speech and of the use of the right side of his body and left him with no hope of recovery. His death ended a career, the mere recital of which reads like a fairy tale of success against great odds.

He was a state school boy, who, as a scholar, a lawyer, a judge and a statesman, rose to the highest positions and who still, at the time of his death, ranked as one of the elder statesmen of Australia. The note he contributed to "Who's Who in Australia 1962" gives a conspectus of his varied activities and many achievements and is as follows:

LATHAM, Rt. Hon. Sir John Greig, G.C.M.G., cr. 1935, M.A., LL.M., LL.D. (Hon.), Melb., Chief Justice High Court of Aust. 1935-52; first Aust. Minr. to Japan 1940-41; son of T. Latham; b. Aug. 25, 1877, Ascot Vale, Vic.; ed. St. Sch., Scotch Coll. Melb., Univ. Melb.; Exhibs. & Scholarships in Logic, Phil. & Law, Supreme Ct. Prize; interstate lacrosse player, Capt. Vic. team; called to Bar (Vic.) 1904; was lectr. Univ. Melb. in Logic, Phil. & Law; served World War I with Navy; memb. staff Aust. del. at Peace Conf. 1919; Founder & Past Pres. League of Nations Union; M.H.R. for Kooyong, Vic., 1922-34, Atty.-Gen. 1925-29 & 1931-34, Dep. Prime Minister, Minister for External Affairs 1931-34; rep. Aust. at Disarmament & Reparations Confs. 1932; Leader Aust. Mission to East 1934; Leader Opposition 1929-31 (stood down in favor of Rt. Hon. J. A. Lyons to take deputy-leadership); Pres. 1st Aust. Legal Convention 1934; Chancellor Univ. Melb. 1939-41; Aust. Rep. Centenary Celebrations, New Caledonia 1953; Pres. Vic. Amateur Ath. Assn. to 1956; V-Pres. Aust. Red Cross Socy. 1944-61, first recipient Red Cross Medal of Honor 1961; Chrmn. of Trustees Gowrie Scholarship Fund; Pres. Aust.-American Assn. Vic. since 1951; Pres. Aust. Elizabethan Theatre Trust 1954-1961; memb. Fulbright Scholarship Bd. 1952-61; Pres. Aust. Assn. for Cultural Freedom 1954-61; Dir. Humes Ltd.; C.M.G. 1920, P.C. 1933, K.C. 1922; publication, Australia & the British Commonwealth of Nations 1929; m. 1907, Eleanor M., d. R. Tobin, 1 s.

When I went to the bar in 1906 Latham had passed his leanest years and was establishing himself as an able and very learned lawyer and from then till his death I knew him intimately. But I had known of him for at least ten years earlier. He had come from a family which then lived in the inner suburb of Fitzroy where he attended State school. His father claimed never to have earned more than £300 a year and even at the greater value of money in those days the living in the household could not have been luxurious. John and his brother Leslie—afterwards a distinguished physician—both won scholarships to Scotch College where

the foundations of his later success were truly laid. Leslie, the younger of the brothers became dux of the College, a prize which eluded John whose achievement was consistently high but in whose path stood a lion. In the last talk I had with Latham a few days before his fatal seizure he said that a hurdle he never surmounted was Henry Christian Winneke, the best examinee he ever encountered. H. C. Winneke became afterwards the father of the present Chief Justice of Victoria. He was a fine scholar and later was appointed a County Court Judge. My own mother had heard of what the Latham boys had done and held their achievements before me to stimulate my own ambition.

Penurious circumstances were not the only difficulty Latham had to surmount. As a boy he suffered from a painful stammer. To correct this, with the courage of a Demosthenes, he underwent a course in elocution and voice production. He also compiled a list of synonyms for words which he found difficult to articulate and taught himself to use the easier words to express his meaning. So successfully did he do this that scarcely anyone in later years was conscious that he had ever had any impediment in his speech. At first, however, nervous strain could cause a relapse. He was wont to relate how on his first appearance in Court before Mr. Justice à'Beckett he rose and stood silent quite unable for a time to articulate a single word. At the University in his Arts course he took first classes in logic and philosophy and in his second year took the exhibition and in the third year the scholarship in logic and philosophy. In the law course which he then took he gained the exhibition in Roman law and jurisprudence and shared the scholarship in the Final Honours Examination in Laws. He graduated M.A. in 1899, LL.B. in 1902, LL.M. in 1936 and received in 1959 the degree of LL.D. (honoris causa). He lectured in logic, philosophy and the law of contract. His interest in the University was unflagging. He was a member of the Council from 1922-1941. He was Deputy-Chancellor 1935-1939 and Chancellor 1939-1941 when he went as Australian Minister to Japan.

Sir George Paton, Vice-Chancellor of the University of Melbourne and himself a distinguished lawyer, says of him:

"Sir John was a distinguished exponent of the law. His training in logic and philosophy was apparent in his judgments, but his wide political and administrative experience, combined with a realistic common sense, enabled him to escape the worst abuses of an abstract logical approach. He believed that, if the words of a section made it possible, constitutions should be made to work. He could reduce the most intractable material to an ordered statement and students are grateful for the clarity of his judgments."

Like many poor scholars he turned after his graduation to teaching and for a short time he was a resident master at a salary of £70 a year at the Hamilton

Academy in the west of Victoria. After a short tenure there he returned to the University of Melbourne as a lecturer as I have said. I recall his telling me that at that stage of his career he was offered a senior academic position in another State at a salary much in advance of what he was receiving. I think it was £800 a year. But his mind was set on a career at the bar and after much hesitation he refused the offer. He entered as a pupil the chambers of Hayden Starke who was then forging his way to the front rank of Victorian lawyers.

Latham's parents were devout Methodists and there is no reason to suppose that in his boyhood and youth he did not adhere to the same persuasion. Some little time before his death he told me he had been going through his papers and had come across an essay written by himself at the age of fourteen entitled "The effect of Sin upon the Sinner". In his mature years however he became a member and Secretary of the Rationalist Association and to the attitude of mind of this Association I believe he adhered to the end. His early connexion with Methodism no doubt explained why the widely attended Memorial Service was held in Wesley Church, Melbourne, and why Sir Irving Benson, its pastor, conducted the service.

Of his career after leaving Starke's chambers till the outbreak of the first World War I say little. It was much like that of any other junior of the time. The collapse following the boom years of the late eighties and early nineties of last century had led to a dearth of legal business which operated till about the end of the first decade of the new century. Latham suffered the lean times as did almost all others. His work was at Petty Sessions and in the County Court with rare incursions into the Supreme Court. But he was conspicuously absent from the jury courts. Whatever he did was marked by knowledge and pertinacity and he had a proper share of success. His physical relaxation was indulged in lacrosse, in which he captained a State team, and tennis. He married in 1907 a lady who was a B.A. and who later in her own right was awarded a C.B.E. and became a member of the Order of St. John of Jerusalem.

Of the marriage there were born three children—Richard a brilliant student who became a Rhodes scholar and a fellow of All Souls, Oxford, and was lost in an Air Force raid near Norway during the last war; Freda who died after reaching womanhood, and Peter who survives and is a Lieutenant-Colonel in the Australian Military Forces. The tragedy of the loss of Dick and death of Freda were blows which affected him deeply.

During the period before the outbreak of the first World War he displayed great interest in public affairs and he became the Australian correspondent of two leading English papers. On the outbreak of war he joined the Australian Navy and held the rank of Lieutenant-Commander. This ranking led after the war to an amusing episode. Earl Jellicoe in passing through Melbourne on his way to assume the Governor-Generalship of New Zealand was entertained by the then Lord Mayor of Melbourne. Seated on Jellicoe's right was a distinguished Victorian who was an eminent physician but whose many qualities did not include

much sense of humour. Jellicoe asked him if he knew who the Lieutenant-Commander was who accompanied Hughes to the Peace Conference. The doctor replied, "Oh that was Latham, he was not really a naval man, but a barrister. Do you know, Lord Jellicoe, that before the war he knew as little about the sea as you or I?"

At the end of the war he was one of the Australian delegation headed by W. M. Hughes to the peace conference. I have heard him recount some of his experiences on a sub-committee which sought to mark out the boundaries of the succession states which constituted the witches' brew of the old Austro-Hungarian Empire.

One incident during the Peace Conference is I think especially worth preserving. The Australian Prime Minister William Morris Hughes was not *persona grata* with the American President Woodrow Wilson. During the Conference Woodrow Wilson left on the liner George Washington to return temporarily to the United States. Hughes at that time had adopted the Parisian Conference habit of entertaining guests at breakfast and on this occasion Latham was invited. As he entered Hughes greeted him "Have you heard the news? The George Washington has gone down with all on board." Latham responded "But this is dreadful, Mr. Hughes!" "It is worse than that," replied Hughes. "It isn't true."

On his return to Australia and the bar (Latham told me) he found his practice gone and he seriously contemplated going to the Sydney bar to try his fortune there. But Hayden Starke at this juncture went on the High Court bench and in the distribution of his briefs a great many came to Latham and this determined him to stay in Victoria.

In 1922, Latham opposed and defeated Sir Robert Best for the constituency of Kooyong in the House of Representatives and it was not long before he became Commonwealth Attorney-General, an office he held from 1925 to 1929. When in England while there to appear before the Privy Council the Lord Chancellor asked him was he satisfied with the composition of that body and he replied that there seemed to be an excessive proportion of longevity represented in it since the average age of its members sitting was almost 80. The Lord Chancellor promised that he would see that the position was corrected. And it may well be that the more satisfactory personnel which has since prevailed is due to this encounter.

The electoral holocaust which overtook the Bruce-Page government in 1929 brought this period of Latham's Attorney-Generalship to an end for the time being. It left him, however, leader of the rump of the party and when the party again came to power Latham stood aside and gave way in the leadership to Mr. J. A. Lyons who subsequently became Prime Minister. Latham again held the office of Attorney-General and also that of Minister for External Affairs. By deferring to Lyons he became the only Australian who normally might have been expected to become Prime Minister, voluntarily to forego that expectancy. In 1935 he became the fifth Chief Justice of the High Court, a position he held till his resignation in 1952.

Latham was a tall spare athletic man with keen intellectual features. In public he was precise and incisive in his speech and dignified in his bearing. In

private a quaint sense of dry humour seasoned his conversation. He was fully seized of the importance of his high office and during his tenure of the Chief Justiceship fully upheld its importance and traditions. His written judgments proceed, as one would expect from his experience and training, in syllogistic form, and given the premisses from which he proceeded the conclusions he drew seem impeccable. When once he formed his opinion he held it firmly and expressed it with force, notwithstanding that others disagreed with his conclusion. He was quite unawed by the eminence of the dissentients. A striking instance of this is his dissent in the *Bank Nationalization Case*.

No picture of Latham would be complete without the mention of some other characteristics. Like all really great men he was a humble man and never paraded his own great talents, though of course he could not help but display them in appropriate company. He had great kindness towards others. I never heard him in private speak an unkind word of others, though there must have been many of whom he disapproved. But the politician in him liked to hear his work and actions praised and like the Deity in Browning's poem he missed his little human praise when it was not forthcoming.

It now remains to give some estimate of his stature as a lawyer and Chief Justice.

By 1935 I had long left the practice of the bar and consequently never appeared before him or saw him in action as a judge. I have therefore thought it proper to seek from others more qualified than I am their opinion on this aspect of his career. Sir George Paton's opinion I have set out above.

Professor Zelman Cowen of the University of Melbourne Law School has been good enough to express the following opinion:

"This is not the occasion to attempt a careful estimate of his place in the law, though I hope that that will be done on due occasion. He was a successful and eminent barrister and an able and strong Attorney-General of the Commonwealth of Australia. As Chief Justice, he was accounted a capable and fair-minded administrator of his Court. In his judicial work, in dealing with constitutional questions, he was at pains to insist that his task was distinctively legal and that political considerations and influences were not relevant. Nevertheless he brought to his work on the court a background of political experience which had become unusual on the High Court. Overall, his judgments supported a broad view of Commonwealth power as was disclosed by his interpretations of the defence, industrial, external affairs and financial powers of the Commonwealth. In the context of defence, this was perhaps most strikingly illustrated by his elaborate dissent in the *Communist Party Dissolution Case*.

He showed little sympathy for the 'revived' doctrine of intergovernmental immunities within a federal system, though his own resolution of the problems posed in the *State Banking Case* was not persuasive. His interpretation of section 92, as evidenced by his judgment in the *Bank Nationalization Case*, would have imposed less restraint upon the Commonwealth than did the interpretation of the section adopted by other members of the High Court."

Professor Cowen has also expressed the view that as a constitutional lawyer, Chief Justice Latham took a

consistently liberal view of the extent of Commonwealth power as may be seen in the *Metal Trades Case* 64 C.L.R. 387, *Brislan's Case* 54 C.L.R. 262, *R. v. University of Sydney* 67 C.L.R. 295, the *First Uniform Tax Case* 65 C.L.R. 373 and his general interpretation of the extent of section 96 of the constitution. His background of politics, the professor thought, led him to the view that there were areas of judgment for the legislature in which the court had no place, a view forcibly shown in his dissent in the *Communist Party Case* 83 C.L.R. 1. He time and again repeated his view that the court had no business making political judgments and then translating them into law and that judicial review was concerned with purely legal concepts and techniques and needed no assistance from any other constitutions. See *Burgess' Case* 55 C.L.R., at page 628 and the *Communist Party Case* at page 153 and the *First Uniform Tax Case* 65 C.L.R., at page 429. His opinion as to unconstitutional statutes was that they were utterly void and of no effect, which anyone was entitled to disregard. Professor Cowen thought that Latham's interpretation of section 92 gave the Commonwealth far greater flexibility than that of Sir Owen Dixon which prevails, and refers to the *Bank Nationalization Case* and the *Air Nationalization Case* in support of his opinion.

Professor David Derham, Dean of the Faculty of Law at the Monash University, writes:

"As a lawyer, and in particular as a constitutional lawyer, he revealed through his years on the bench a characteristic approach to legal problems which may have served, by indirection, to express his faith in parliamentary democracy, which he had confirmed during his years as a leader in the House of Representatives and as a Minister of the Crown. He was precise in expression and formal in reasoning. He looked to the logic of words to solve problems in the law. By such logic were the proper fields for lawyer's and for court's powers to be marked out. Substantive questions about the government of men, the future welfare of society, the general weal or woe, were for others, charged more directly with responsibility for government, to worry about. The results of his work were almost always clear beyond misapprehension. To those who thought his judgments were formalistic and too far removed from the realities of constitutional government, he might well have answered: 'You have too little faith in the electorate, too little faith in the checks and balances of popularly elected parliaments, too little faith in responsible government. I know those earthly powers and I have faith to rely on them to preserve society in ways not safely open to lawyers or to judges.'"

Perhaps the clearest illustrations of those basic characteristics of Sir John Latham as a constitutional lawyer are to be found in his majority judgment in the *First Uniform Tax Case* and in his dissenting judgment in the *Communist Party Case*.

Now he has gone. His place is among those who have made Australia great. And I do not doubt that among them he will deserve a high place.

C. J. Lowe*

*K.C.M.G. A Judge of the Supreme Court of the State of Victoria, 1927-1964.