As time goes by

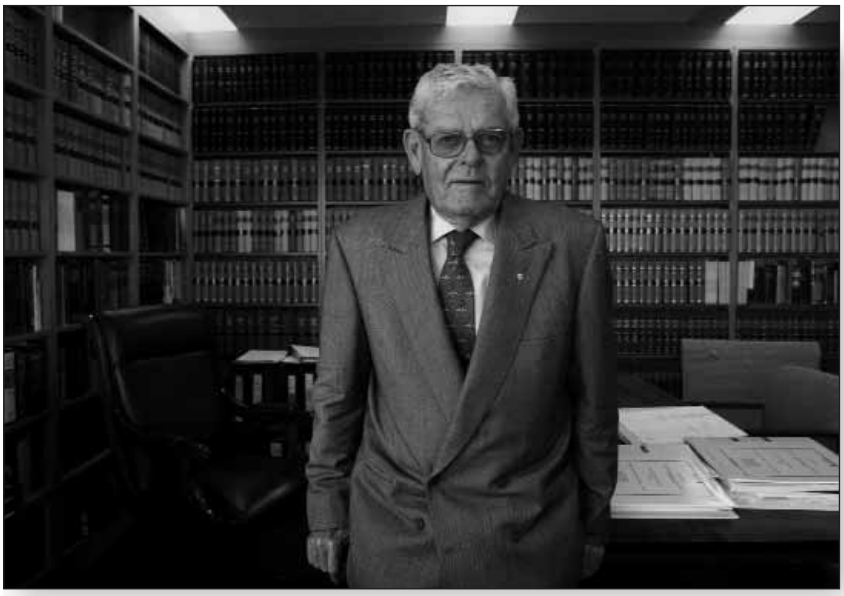
A speech delivered by the Hon T E F Hughes AO QC to the justices of the Supreme Court at the opening of the 2006 law term.

Chief justice, you have asked me to speak about judges of this court before whom I have appeared. I am honoured by the invitation and thank you for it. I have decided that I must observe some self-imposed ground-rules. They are:

- (with two exceptions) to say nothing about the living; and
- to disregard the injunction *de mortuis nihil nisi bonum* so far as may be necessary in the interests of candour.

To look back 57 years, to 11 February 1949, the date of my admission to the Bar, is a long retrospect. It looked even longer when, in the course of preparing for this speech, I discovered in *Who's Who* that two judges of this court were not then born. I appeared before each of them last year. Sir Frederick Jordan presided in the old Banco Court on that day. Bruce Macfarlan moved my admission. My father had briefed him from time to time and rightly held a high opinion of his ability. As counsel, Macfarlan – he was then a senior junior – had a grave and courtly manner. His hallmarks were thoroughness and hard work, leading to a complete mastery of the many briefs on his table. He became a judge of this court in 1959 after a successful career as silk. When the Court of Appeal was established in 1966, he was offended by the figurative separation of sheep and goats that the new system entailed. He was not alone. There was a substantial schism which took time to heal. Some of the non-anointed were heard to refer to a particular member of the anointed as 'King Rat'. But Macfarlan was not given to name-calling.

I had but one conversation with Jordan. It was not a forensic occasion. At the end of the Second World War, I applied unsuccessfully for one of two Rhodes scholarships that were open for 1946. He was chairman of the Selection Committee. To get to the interview in time, I had flown from the UK as a passenger in the back of an Avro York, reclining on mailbags that were part of the cargo. After a leisurely journey – it lasted about 14 days via Malta, Cairo, Bahrain, Karachi, Negombo, Cocos and Perth held up by engine trouble at Negombo during which time I visited the HQ of South East Asia Command, also known as Supreme Example of Allied Confusion – I arrived in Sydney on 14 December 1945 and scarcely had time for a shower and change of clothes before going to Government House for the interview. Sir Frederick presided.



Tom Hughes AO QC in chambers.

Jack Slattery, his associate, (this was my first meeting with him) conducted me into the interview room. Any tendency on my part to be overawed by the occasion was dispelled by the cordiality of the interviewers.

However, cordiality to strangers was not a characteristic of Sir Frederick. He did not exude warmth or geniality in public; he was known as Frigidaire Freddy; he could be mordant, as when in giving judgement in a divorce appeal, he described the respondent and co-respondent as having committed adultery 'al fresco, as it were, in a motor car'; or as, when a timid counsel explained apologetically that his hesitant reading of an affidavit was due to the near illegibility of the copy in his brief, Jordan intervened by observing that by accident counsel must have been provided with one of the copies intended for the court.

Jordan's mastery of the principles of equity was renowned. Who, as a student of the Sydney University Law School, will forget his *Chapters on Equity*, even if not remembering much or anything of its contents? His judgmental technique was didactic: he approached the questions for decision by means of a compact and lucid essay upon the principles established by the relevant authorities. So vast is the flow of modern judicial decisions that his judgments are not often referred to these days. But they are well worth reading as models of conciseness and a treasure trove of learning. In his valedictory speech, Dixon paid high tribute to him: see (1964) 110 CLR xi.

He died in office on 4 November 1949, after nearly 16 years as chief justice. His judgments show that his command of principle was not confined to equity, which had been his chosen metier at the Bar. He had not come from a privileged background. He joined the civil service on leaving school at Balmain, putting himself through Sydney University in Arts and Law while earning his living. Those who knew him well testified to his possession of an earthy sense of humour in the tradition

Kenneth Street, ca. 1931.
Photo: Falk Studios/State Library of New South Wales

of Rabelais. He was fluent in French and Italian.

On 6 January 1950, Sir Kenneth Street – then senior puisne – became Jordan's successor. Sir Kenneth had held office as a judge of the court for nearly 20 years. His successor as senior puisne – AV Maxwell J (of whom more later) – welcomed him at a formal sitting of the court soon afterwards. CE Weigall KC, the state solicitor-general, spoke at that ceremony on behalf of the Bar. He was as deaf as a beetle and used an ear trumpet as an elementary form of prosthesis. This was not an effective aid. He appeared regularly in criminal appeals. The level at which those instructing him had to speak on these occasions invested the proceedings with a pantomimic quality hardly conducive to the maintenance of decorum or legal professional privilege. As well as being very deaf, Weigall was at this time very old; his views were lacking in contemporaneity, as illustrated by a statement, in his welcoming speech, that 'there has never been a time *in the history of the colony* when it has been more essential that the traditions of the Bar should be maintained': see the memoranda section of 1960 SR (NSW).

As my practice developed, appearances before Sir Kenneth Street in the full court became gradually less infrequent. He commanded great respect as chief justice, also great affection. He was a patient, considerate and courteous team leader who left the court in good shape at his retirement on 14 December 1959. To all these sterling qualities there was the added bonus of a deep sense of humour. At the time of his appointment the court had eleven puisne judges; when he retired, the number had increased to 21.

The appointment of his successor was not good for the morale or the performance of the court. There was a strong professional consensus in favour of the appointment of the senior puisne, WFL Owen J.

But that was not to be. The Labor Party in the federal sphere was then in a state of convulsive turmoil because of the split that had led to the formation of the DLP. HV Evatt, the leader of the opposition, was not free of responsibility for the split. His capacity for divisiveness was formidable. His performance, appearing as counsel in the Petrov Royal Commission, had been troublesome, to put it mildly. Could a place be found for him outside politics?

The party managers prevailed on the state government to appoint Evatt to the vacant office of chief justice. He was sworn in on 15 February 1960.

As senior puisne, it fell to Owen to speak on behalf of the Bench on this inauspicious occasion. His words were brief: no expression of congratulations or welcome: only a pledge of aid and assistance by the judges and officers of the court 'to the limits of their ability'. Owen's remarks occupy nine lines of print in the 'memoranda' section of (1960) SR (NSW). This economy of speech was hardly surprising. As chairman of the trio of judges (the others were Philp J and Ligertwood J) appointed as royal commissioners into espionage following the defection of Vladimir Petrov in 1954, Owen had had to deal with Evatt's increasingly erratic behaviour as counsel appearing before them. They withdrew his leave to appear. Evatt's forensic antics in the Petrov commission had made a deeply adverse impression.

Owen J plugged on unhappily as senior puisne judge, honouring his pledge until mercifully and deservedly relieved by appointment to the High Court in September 1961.

During his brief period of office as chief justice of NSW (he retired on 24 October 1962), Evatt was suffering from an illness (in lay terms lack of adequate blood supply to the brain) that impaired his mental faculties to the point of disabling him from the effective discharge of his judicial duties. He can hardly be castigated for having taken the appointment: for I doubt whether he appreciated his lack of capacity. I appeared before him in the full court on several occasions. He had no grasp of the case in hand. It required some dexterity to deal with his interpositions in argument because they were often scarcely rational and seldom, if ever, relevant. If you search the *State Reports*, you will find that all the judgments in his name were delivered jointly. His contribution to them was nominal.

Owen J (born 1899) occupies a special place in my pantheon of judges, and that for several reasons, not least his helpful influence on me as a young lawyer.

Cordiality to strangers was not a characteristic of Sir Frederick. He did not exude warmth or geniality in public; he was known as Frigidaire Freddy.

He took silk in 1935, after 12 years of practice. He was appointed an acting judge of this court in 1936. In October 1937, his appointment became permanent and he served in that office for 24 years. His father and grandfather

held judicial office, each in their time as a judge of the Supreme Court. His youth was unconventional in that he ran away from Shore at the age of 15 to join the 1st AIF. At 16, when serving in France, he was wounded in action; after returning to the lines he was wounded again, this time by gas. He recovered to join the newly formed Australian Flying Corps in which he received a commission as lieutenant. On discharge in 1919, he toyed briefly with the idea of becoming an engineer before opting to study law. He passed the Bar examinations and was admitted to practise in August 1923. His practice soon took off.

I knew him well: his father and mine were contemporaries and great friends. He was my father's best man. For several years after the Second World War he came trout-fishing with us in a remote and beautiful place called 'Yaouk', on the Upper Murrumbidgee. He was an accomplished fly-fisherman. He was a shy man: only those who knew him well were able to penetrate his polite reserve. Once you did that, his friendship was warm. I was his associate during 1948, learning much at his feet. His mind was incisive. He had an enviable capacity for succinct expression. He took no more than 20 minutes to charge a jury in a straightforward case.

In his contributions to the administration of justice and public affairs, Owen was not just a lawyer. His talents spread into other areas where his services were in demand by government.

Between 1942 and 1945 he served as chairman of the Central Wool Committee, responsible for the acquisition and marketing of the Australian Wool Clip. In this task he succeeded Sir Owen Dixon, who regarded him, as did Menzies, as a suitable prospective appointee to the High Court, where he ultimately arrived.

Barwick was not given to generous praise. Commendation from him was hard earned. His recitation, in the eulogy (reported in 125 CLR) upon the occasion of Owen's death is rightly replete with unstinted appreciation of his public service:

> (T)hroughout all his judicial life he exhibited those qualities which are most sought in a judge: unremitting devotion to duty, a sound grasp of legal principle, a proper sense of fairness and right, and good and sound judgment.

Ill-health dogged him. He had an agonising affliction of a facial muscle caused by a disordered trigeminal nerve. Towards the end of his judicial career he suffered the partial amputation of a leg. He was only 71 when he died.

I have mentioned three chief justices – Jordan, KW Street and Evatt. The latter's successor was Sir Leslie Herron. He shouldered with ability the task of restoring balance and direction to the court after the departure of Evatt. He was appointed chief justice in October 1962 after many years as a puisne. He was, without being of great intellectual bent, an effective, albeit verbose, judge respected and liked by those who appeared before him. Before going to the Bench, he had a very large practice on the North Coast. He was affable, given to rather banal puns off the Bench such as:

'In speaking to you tonight I feel like a castrated glow-worm: delighted'.

A statement illustrative of the occupational pressures to which Bench and Bar are subjected now compared with those of bygone times appears from a few lines in the valedictory speech made by SV Toose J on the occasion of his retirement in October 1953. He recorded a piece of advice imparted to him when young at the Bar by Sir Alexander Gordon, whom he described as 'a very great man and a very great judge'. The advice was 'to start work at 9am and be there until 5.30pm'. Few barristers today would regard adherence to this tempo as adequate obeisance before the altar of the goddess of ambition. How many of you – I suspect none – could carry on your work effectively by keeping those hours?

WR Dovey QC succeeded Toose as judge in Divorce. Dovey's life on the Bench was somewhat turbulent. He had been a powerful, forceful and very successful advocate. He had a sonorous voice. He was adept in grasping facts on the run, after only a short excursion into his brief. He possessed great power of verbal expression. He had an imposing

Doc Evatt and his wife at the time of his appointment as chief justice of NSW, Mosman.
Photo: Jack Hickson / Australian Photographic Agency collection, State Library of New South Wales

physical presence. As a young man he had taught English before embarking in 1914 on military service to deal with the German colony of New Guinea. He and JW Shand were legendary exponents of forensic brawling in their encounters against each other. One morning, in the concluding stages of such a case, someone who saw Dovey taking the air after 10am at the doorway of the old Selborne Chambers, asked him: 'Why aren't you in court, listening to Shand's address?' The response came in the form of a rhetorical question: 'Why should I listen to John Wentworth Shand pouring a verbal shit-can all over me?'

In 1956, Dovey came under heavy criticism from the media because of his authoritarian conduct as royal commissioner into the arrest, and treatment by the police of one Studley-Ruxton, an Englishman dwelling on the fringe of society for whom my friend Antony Larkins QC, appeared, paid by Frank Packer. Dovey raised eyebrows by remaining vice-chairman of the AJC after his appointment to the court. As such, he heard racing appeals in the exercise of the club's statutory appellate jurisdiction. His capacity for terrifying witnesses, by peering and glaring at them through his monocle, was legendary. For him the transition from advocate to judge was not easy. While in office he suffered the humiliation of being voted off the AJC Committee.

One of Dovey's last briefs before appointment to the court was as senior counsel assisting AV Maxwell J as royal commissioner to inquire into the liquor industry. The inquiry lasted more than two years and was a bonanza for the participants from the Bar. Gordon Wallace earned 1000 guineas per week as counsel for Tooths. This was stratospheric remuneration. His junior silk, Richard Ashburner, was on 600 guineas. Victor Maxwell was a judge of unrivalled sharpness of mind. He had a big practice as silk in the late 20s and until his appointment to the court in 1934. He was under consideration for the appointment that Jordan got. Off the

Justice Victor Maxwell.
Photo: Hereld & Weekly Times Ltd Portrait Collection/State Library of Victoria

Bench, Maxwell was engaging and amusing, displaying warmth and charm which he did not replicate in court. There he elevated asperity and impatience to the level of an art form. When he retired in August 1957 to take an appointment as chairman of Channel 7, then in the Fairfax stable, Harold Snelling QC, then solicitor general, told a whopping fib in the course of the customary valedictory eulogy: he described him as having been 'at times a little impatient'.

There was one incident in the liquor commission that I well remember. I had a junior brief in it at 20 guineas per day until boredom inspired me to seek a release, which Brian Page, my instructing solicitor granted, to enable me to do other work. Maxwell and Dovey were set upon bringing down a well-known liquor merchant ('L') who was under suspicion as having possession in a secret location of a large quantity of illegally acquired liquor. He stoutly denied the accusation. He was stood down and another witness ('X') interposed, who gave some inconsequential evidence unrelated to the particular allegation against L, who was then recalled. Dovey continued to hammer him unavailingly for a while, until the commissioner interposed with this deadly and wholly inadmissible question: 'Mr L what would you say if I were to tell you that X has just told us that you had an arrangement to purchase the liquor from him and that he let you inspect the stock? Confronted with this quite false statement, L thought that he was compromised and confessed to possession.

Athol Railton Richardson was appointed to the Supreme Court in 1952. He had no practice, having been Liberal member for Ashfield in the Legislative Assembly for some years. But he had a silk gown, the basis for which must have been his status as a member of parliament. The government of the day saw a chance that if his seat were to become vacant, Labor might pick it up on a by-election. Richardson accepted the appointment so that when the by-election was being fought he was Richardson J. Labor cleverly selected as his successor a man with the same

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surname Jack Richardson – he had been in the same year as myself at law school. Rather cleverly he picked as his campaign slogan the words 'Judge Richardson on his merits'. He won the by-election but did not last long in the seat. Once ensconced in judicial office, Athol Richardson demonstrated orderly habits: he devised a card index system that he utilised to structure his directions in a jury trial. There were neat topic headings such as 'contributory negligence', '*volenti non fit injuria*', 'how to define negligence'. There was probably a card with suggestions about how to deal with Clive Evatt QC, who in those days was riding high. Richardson's problem was that he was not adept in the choice of the cards to be used. So, for instance, he would pick the 'contributory negligence' card for use when that was not in issue. Richardson was a well-meaning man who gained marks only for sincerity and effort. He lived in my electorate of Parkes. To my slight surprise I found that even when on the Bench he remained a paid up member of the Liberal Party.

I had the good fortune to read with Kenneth William Asprey during 1949 and 1950. He was an innovative and energetic advocate who prided himself, with full justification, on his ability as a cross-examiner. He was not plagued with doubts about his ability.

His method of advocacy was distinctly thespian; of his many forensic successes he was given to regaling people with vivid descriptions, the extravagance of which was alleviated by his flair as a raconteur.

It was part of his training method to give his pupils very difficult tasks, as when he sent me on one occasion to seek an ex parte injunction to restrain infringement of an industrial design. David Roper, chief judge in Equity, gave me short shrift, but gently so. I think he identified my pupil master as the instigator of this exercise in forensic hardihood. Ken had a habit of taking a blue bag, stuffed with briefs, home every night to Pymble. They must have been the most peripatetic papers in Phillip Street. His easy confidence as a trial counsel was not so evident in the appellate arena, where his adherence to a written argument created a slightly wooden presentation. He was appointed to the court in June 1963 after several months (from October 1962) as an acting judge. The general impression was that his ebullience and egocentricity would tell against his success on the Bench. The doomsayers were completely wrong: he deployed his considerable talents as an actor to play the part of judge. He was a great success on the Bench, both at first instance and in the Court of Appeal, to which he was one of the first appointees on its establishment (1 January 1966). Asprey was able to adapt his strong personality to the exigencies of judicial office. In sum, he was as good as he thought he was.

Frederick George Myers was appointed in 1953 as a judge to sit in Equity. The memoranda section of 1970 SR (NSW) records him as having retired voluntarily on 28 July 1971. He lived into his nineties and was an occasional writer of letters to the *Sydney Morning Herald*. One of his notable characteristics was the possession of physical courage and powers of endurance. He had a disability which required him to wear a cumbersome surgical boot. This did not prevent him from engaging in military service in World War II and from climbing the Kokoda Trail. He had a successful equity practice as silk when appointed to the Bench. Unfortunately his approach was towards creating rather than solving problems. He was unaffectionately and cruelly known as 'funnel web'. One member of the Bar, Michael Helsham, knew how to handle him. He was able to engage in a process of self-abasement, describing the magnitude of the difficulties that faced him in the presentation of his case. Thus he was able to appeal to a miniscule constructive streak in Myers's nature. It was an effective but not much admired way of dealing with a difficult judge. Michael Helsham at the Bar had an unusual but very large practice: it was equity work, GIO work and constitutional work for the New South Wales Government. In due time, he became an equity judge, succeeding to the office of chief judge. He ran an efficient court somewhat idiosyncratically. He had the commendable habit of giving ex-tempore judgments with greater frequency than his brethren. He served with distinction in the RAAF in World War II.

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No treatment of my subject would be complete without making reference to two judges, one long dead – Cyril Walsh – and the other happily still amongst us, in good health at the age of 87 – Jack Slattery.

Cyril Walsh was appointed on 8 March 1954 at the age of 45. He became a judge of appeal upon the establishment of the Court of Appeal on 1 January 1966. He was translated to the High Court of Australia on 3 October 1969.

His career before assuming judicial office was academically brilliant. On admission to the Bar in 1934 he

practised on the equity side of the court. In the main he had what used to be called a Friday practice. My perspective of him was that he was not given to professional over-exertion, perhaps because his talents were such that he took in his stride work that would have taxed others more heavily. He was seldom in chambers after 5pm.

His intellectual powers came into full blossom on the Bench. His temperament was completely suited to judicial office. Appearing before him, one gained a strong impression that one of his main aims was to enlist counsel's involvement in a co-operative exercise designed to expose and unravel the problems, factual and legal, thrown up by the case in hand. He was scrupulously polite, except when a step out of line by counsel would provoke a curl of his lip and a deserved rebuke. He displayed an incisive and inquiring mind; he was patient. I had the good fortune to appear quite frequently before him. My chief recollection of him after this lapse of time is of his participation in the *Concrete Pipes* case in 1971 in which I led a team, who, in order of seniority at the time were Bob Ellicott, Bill Deane and Murray Gleeson for the Commonwealth. On Walsh's untimely death at the age of 64, Barwick delivered a eulogy of unstinted, wholly deserved praise capturing all his outstanding qualities. You will find it at the front of 128 CLR.

Earlier I mentioned Jack Slattery and told you when I first met him. Later we were juniors in opposite sides in October 1955 in the Mace/Murray custody litigation when it went to the Privy Council. Mace was the natural mother, supported by Ezra Norton; the Murrays were the adopting parents, supported by Frank Packer.

To adopt modern jargon, I describe Jack Slattery without hesitation as a living national treasure. His record of judicial service is unsurpassed. He served on this court from 1970 to 1988. When he reached the then statutory retiring age of 70 he was chief judge at Common Law. The government wisely decided that his services to the state were too valuable to lose so soon. Hence the Slattery Act, which enabled him and others to serve on as acting judges to age 75. He was an astute and highly successful trial judge. He remained in judicial office until 1992. Apart from strictly judicial work, he gave sterling service to the state on numerous commissions of inquiry and in courts of Disputed Returns.

This has been a selective recollective ramble. Time prevents treatment of other admired performers of the judicial art, such as Charles McLelland and his son Malcolm who retired too early and had the potential for appointment to the High Court. Denys Needham was one of the most impressive judges before whom I ever appeared. We were colleagues at law school, he with a much better academic record than I. I equate his style with that of Cyril Walsh.

I have witnessed a long procession of judges through the halls of justice and propose to continue. I regret having been critical of a few – although very few. But history and sugar coating go ill in hand.

Portrait of Mr Justice Cyril Ambrose Walsh seated in chambers.
Photo: Mulligan, J A (John Aloysius), 1927-1996/National Library of Australia

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