Richard Edward O'Connor

By David Ash

We know too little about the third member of the first High Court. It is not clear whether he had four or five sons.[1] However, he is the subject of well-known praise, Sir Owen Dixon's observation that his work 'has lived better than that of anybody else of the earlier times'.[2]

When Dixon said those words, it was over half a century since he had himself first appeared in the court and before those three judges. And still a quarter century on, another distinguished chief justice would maintain:[3]

> But of the early justices O'Connor J probably appeals more to the modern legal mind (than Griffith CJ), as he did to Sir Owen Dixon. O'Connor J's judgments on questions of constitutional and public law indicate a sensitive appreciation of the underlying tensions in the Constitution and of the relationship between the courts, the Parliament and government.

A distraction

Before moving to O'Connor in more detail, I cannot pass up Dixon's brief. It will be recalled from the sketch on Sir Edmund Barton in the last but one edition of this journal that the first High Court had already had cause to question the Privy Council. But Dixon's big day out involved a doozy. It was a brief from his uncle[4] and is reported as *Cock v Aitken*.[5] Griffith opens with 'This case presents some features which, so far as I know, are unique in the history of the jurisprudence of the dominions in relation to the Privy Council.'[6]

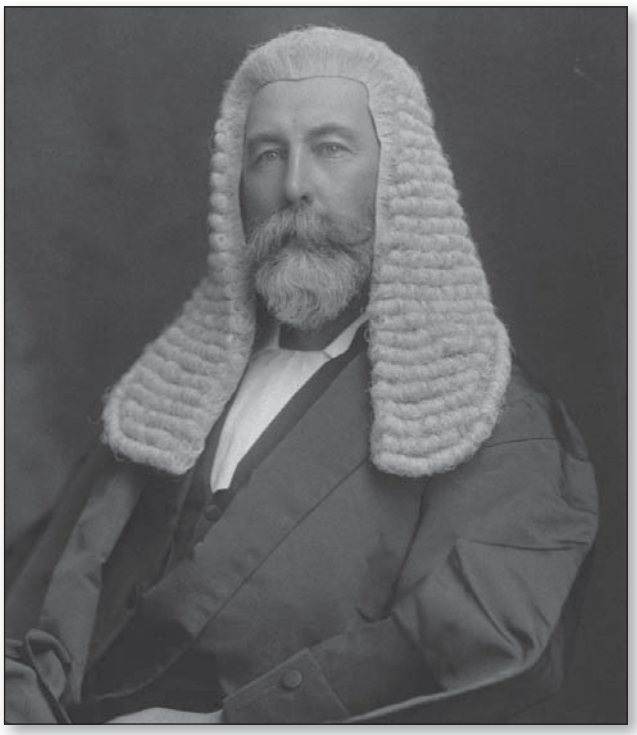
The short version is that two fights were had in the one matter. The first was a fight about the conduct of the trustees under the will of Mr Smith. The second was about the various rights of the beneficiaries under the will of Miss Smith, Mr Smith's daughter. The case was fought in the High Court in 1909. The trustees under the first will appealed to the Privy Council. In 1911, the council allowed the appeal.

Here things go awry. The appeal was conducted by Upjohn KC, who would not live to see his son's appointment to the council in 1960. One assumes that it was he who suggested that if the appeal were allowed, it would be necessary only to discharge the part of the order relating to Mr Smith's trustees. A not unreasonable request, mebbe. Be that as it may, the only opinion that mattered was to the contrary: '… the two parts in reality form only one order, and, therefore, the whole of it must be discharged…'[7]

The disgruntled party was no longer disgruntled, but another party was far from gruntled. Griffith CJ puts the position later the same year, in that first brief:[8]

> [Their lordships] accordingly dismissed the suit. I do not know of any other instance in which a judgment not appealed from, and not impeached, has been reversed by the Privy Council, nor do I know of any other instance in which a judgment has been reversed on the appeal of a person who has no interest in the matter.

I Casebased the 1911 decision to see what would happen. In fact, it has been considered recently by Campbell J in context of the question, whether a decision of the Court of Appeal which has been affirmed in the High Court for reasons different to those adopted by the Court of Appeal, is binding as a matter of law on first instance judges. That



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judgment[9] is fascinating for a number of reasons, but it is probably appropriate to stick with the litigation in which Dixon was involved, and then work a way back to the subject of this note.

The 1911 decision was not the end of things, of course. There was costs. Dixon gets another brief and Griffith opens with 'The question we are called upon to decide on this appeal is one that I suppose no court was ever before called upon to decide.'[10] He continues:[11]

> But we have to construe the Order in Council as we find it. I think it is only consistent with the respect which is due to so august a tribunal to say that, when it ordered that the action should be dismissed with costs, it meant costs in favour of the appellants, not costs in favour of persons not before the tribunal. I think it is proper to construe the Order in Council in such a way, if possible, as not to affect the rights of absent parties. It is not unusual for the Judicial Committee when allowing an appeal to leave an order for costs undisturbed. Nevertheless, as I have said, the Order in Council was in form that the order of the High Court should be reversed, and it must, I suppose, be taken that it was set aside and that the parties were, *quoad hoc*, left – so to say – in the air. I think, on the whole, although probably it was not intended, that we must treat the order of the High Court as now non-existent.

The volume in which the last salvo appears is also the volume with comments from the justices on O'Connor's death in November 1912. O'Connor steadfastly refused most honours, twice refusing a knighthood. It seems, though, he was disappointed not to receive an appointment to the council.[12]

Back to O'Connor

Actually, it is not necessary to look to colleagues then or future to get high praise for O'Connor. If a more visceral affirmation is wanted, it is hard to go past Arthur Harry O'Connor. He was this state's crown solicitor for most of the Second World War. As the office's historians have it, if one of his junior officers submitted an advice to him which referred to another justice, he would add something from one of his grandfather's judgments, having already explained 'I think this puts it well'.

This sketch of Richard Edward O'Connor is the second of a series intended to cover High Court appointments from the New South Wales Bar, from Sir Edmund Barton through to the present, whenever the present will be. None is intended as a biography. For that, the reader is referred to the online Australian Dictionary of Biography.[14] It is hoped, however, that the sketches in sum will one day provide something of a prosopography of the court itself, at least of its Sydney profile.

The court in 1903

It should not be thought that O'Connor's colleagues do not have their supporters. Sir Leo Cussen thought Barton's work was the best, while Michael McHugh observed a century after the court was founded that he was 'far from convinced that either of them would have made a better first chief justice than Griffith.'[15]

The New South Wales Bar Association has a frame of three photographs with the title 'Judges of the Federal High Court 1903'. In the middle is Griffith, with Barton on the viewer's left and O'Connor to the right. The descriptors are, respectively, 'chief justice', 'senior puisne judge' and 'second puisne judge'.

What does the frame tell us of the court, beyond the rather obvious fact that there were chosen for appointment three persons with features prototypical of British judges of the early twentieth century?

Significantly, I think, there is the title given to this new court. A century on, many of us who understand without need for thought that the court is the head of the third branch in our system, forget that the system itself – one of federation – was barely older than the court itself.

Section 71 of the Constitution provides that 'The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia…' This is a different creature from the one mooted in 1891; that was to be called the 'Supreme Court of Australia' and was to be left for the parliament and not the Constitution to establish.[16]

The corresponding provision of the US Constitution[17] provides that 'The judicial power of the United States, shall be vested in one Supreme Court…' The link with the US seems an obvious one, both in the 1891 discussions – and bill – and in the final product.

However, two remarks can be made. First, the final product seems diffident; it is difficult to see why the word 'federal' – a word appearing also in our frame – was thought necessary.

Secondly, why did we end up with a 'High' Court? The word 'supreme' makes its way to us from the superlative. Put another way, it really does mean 'highest', and not merely 'high'. There may be something in the debates, but absent my knowledge of it, I suspect that if there was any aping, it was of the mother country and not of our elder cousin.

For the Judicature Act of 1873 had done away with the former superior courts of law and equity, establishing in their place the 'Supreme Court of Judicature' consisting of two beasts, a High Court of Justice and the Court of Appeal.

The upshot appears to be that there was in England a Supreme Court which included a High Court and which was subject to the lords, while Australia opted for a High Court supreme in Australia but, Australia being a dominion, which was subject to the council: see above, or better, supra.

There need no longer be alarm. In Australia, all three branches of government have done their bit to make sure what was called 'High', is on any take supreme. In Britain, upon the commencement of Part III of the Constitution Reform Act 2005, the functions of the lords – and some functions of the council's Judicial Committee – will be taken on by a Supreme Court of the United Kingdom.

What of the sobriquet 'puisne judge'? In relation to judges, the expression has some ancestry. Sir William Blackstone refers to it in the Commentaries. By the time of the Judicature Act, it was the common expression for the junior common law judges at Westminster, and section 5 folds into the new High Court 'the several puisne justices of the courts of Queen's Bench and Common Pleas respectively [and] the several junior barons of the Court of Exchequer'.

A scan of some of our own reports at 1903 shows a variety of practice. In the 1903 State Reports for Queensland, the judges – including Sir Samuel Griffith in his last year as that state's chief justice – are not listed, while in 1904 they are, with the Honourable Patrick Real being 'senior puisne judge'.

Volume 3 of the State Reports of New South Wales, the reports for 1903, list a chief justice (and an acting chief justice) and a number of 'puisne judges' but no 'senior puisne judge'. So too the Western Australian Law Reports.

For reasons beyond me, the Tasmanians waited until the second year of the Second World War before adopting the same practice, although

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their legislation had been referring to [a] puisne judge[s] for many years.[18]

In New South Wales, there continues to be statutory recognition that the expression relates to junior members of our general superior court but not to other members of other tribunals, superior or inferior, section 2(1) of the *Judges' Pensions Act 1953* providing relevantly:

> *Judge* means a person holding the office of Chief Justice or puisne judge of the Supreme Court of New South Wales, President of the Court of Appeal or Judge of Appeal, President or other member of the Industrial Commission of New South Wales, Judge of the Industrial Court, judicial member of the Industrial Relations Commission of New South Wales, Chief Judge or Judge of the Land and Environment Court, Chief Judge or Judge of the District Court, or Chief Judge or Judge of the Compensation Court of New South Wales.

Griffith's Court

We don't know whether O'Connor made anything of being lumbered with 'Second Puisne Judge'. As a legislative administrator of great ability, one wonders what he thought of a nomenclature which implied to the layperson at least a hierarchy and not an equality of three.

What we do know is that the thing which must have made O'Connor's appointment one after Barton's was Barton's seniority as first minister and his implicit right to take whichever post he wanted. It is a reasonable inference because on 22 September 1903 Barton as first minister was advising Lord Tennyson as Governor-General 'Griffith will be the C.J., that is for sure; O'Connor will be one of the Judges that is equally sure. The remaining question is, *can* I persuade myself to leave politics and take the second place?'[19]

The details of Griffith's appointment were worked out in telegrams in Latin to preserve confidentiality.[20] Meanwhile, Barton's agonising soon ended. On 23 September, cabinet endorsed the nominees and on 24 September the new prime minister Deakin announced the appointments.[21]

Whatever merit each of the first justices had as a judge, on the question of who made the best first chief justice, McHugh must be right. The most significant features about this new court were that it was new and it was a court. It needed someone running it who was in the business of imposing himself, and Sir Samuel 'Dam Sam' Griffith, already years in the Queensland chief justiceship but also a federalist of note, was the man.

Griffith's own observation of O'Connor says a lot about both men:[22]

> If he had any judicial fault it was a quality due to his great kindness of heart, and one that is indeed generally regarded as a judicial virtue – I mean his long-suffering in the presence of tedious and irrelevant argument.

In his sketch of Griffith, A B Piddington – the next sketch in this series, of course – tells of a matter where C G Wade opened and Griffith was leaning to his argument. The question was whether to

grant prohibition, and Piddington sought to push Griffith back by advancing the proposition that prohibition ought be refused where the law is doubtful. Griffith said 'What does that mean – 'when the law is doubtful?' *The law is never doubtful in a Court of Appeal.*' [23]

When one reads that, one is immediately reminded of Jessel's axiom, a version of which is 'I may be wrong, I sometimes am, but I never have any doubt'.[24] Oddly enough, Piddington has the anecdote to qualify the reminder, recalling that Professor Butler once repeated the story of the axiom to Griffith, who immediately replied 'Well, he could hardly have meant that. He must have meant that he never expressed any doubts, for every judge must always feel some doubts at least until the conclusion of the argument.'[25]

And in a new court especially, each of the members seems to have accepted that there was not much room for doubt and not much room for dissent.

There was particular concern in matters constitutional, for good reason. Our primary image of the first court is as a somewhat parochial beast, hemming itself in with a pro-state reading. But this is to focus on one to the exclusion of the many. Each of Griffith, Barton and O'Connor had been closely involved in federation, and clearly wished for the court to contribute in the bedding down of the new nation state. O'Connor J's statement of the paramount principle of constitutional interpretation is as pertinent now as when he said it a century ago:[26]

> We are interpreting a *Constitution* broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve. For that reason, where the question is whether the *Constitution* has used an expression in the wider or in the narrower sense, the court should… always lean to the broader interpretation unless there is something in the context or in the rest of the *Constitution* to indicate that the narrower interpretation will best carry out its object and purpose.

For those who think that a preoccupation with American law is the province of any particular Australian jurist, Piddington notes that early in the court's history, 'American constitutional cases were resorted to in arguments about the Australian constitution, [with the result that] the custom became universal for the Bar to carry on exhaustive research into American cases.'[27]

Griffith also said of O'Connor that he was 'unsparing of himself in the labour which he had devoted to forming right conclusions upon the infinitely various questions… that came before the court… and to formulating reasons for his conclusions; nor could any kindly remonstrance dissuade him from working for that purpose to the limit – and sometimes, I fear, beyond it – of his physical capacity.'[28]

Piddington is blunter; O'Connor J was not as quick. 'Griffith's speed was a source of some trouble to Mr Justice O'Connor, who, though a very able man and one of the soundest lawyers and most impartial and judicial minds on the bench, was not a man of great quickness, either of apprehension or of expression. 'Dick' O'Connor (as the whole of the profession remember him), in politics, at the bar, and on the bench, was a man of extraordinary industry; indeed his comparatively early death was due to the lifelong devotion to his duty, both as a statesman and as a judge.'[29]

Opening of the first High Court of Australia in Melbourne, 1903. L to R: Edmund Barton, J W Griffith CJ, R E O'Connor J. National Library of Australia.

The Judiciary Bill

The High Court was not founded with federation, but only upon the enactment of the Judiciary Act in 1903. The passage of the bill was no mean feat. There was dissent aplenty. The grounds of economy and states' rights were in the fore, but personalities were not far absent. One particular matter – pensions for judges – was of special relevance to O'Connor.

The bill was initially well-received. Attorney General Alfred Deakin gave his second reading speech in Melbourne on 18 March 1902. Deakin was acknowledged by the English politician Leo Amery as 'the greatest natural orator of my day'.[30] (Members of the NSW Bar Association will recall that former president David Maughan took honours at Oxford ahead of F E Smith and William Holdsworth and counted among his other fellow students Amery and Simon.[31])

Deakin's speech itself was described in glowing terms, a three and a quarter hour effort in which the Attorney articulated not only his idea of the court – most famously, although as a quotation itself, as 'the keystone of the federal arch' – but also his idea of federation. He was able to acknowledge in 1902 that 'I would say that our written Constitution, large and elastic as it is, is necessarily limited by the ideas and circumstances which obtained in the year 1900. It was necessarily precise in parts, as well as vague in other parts.'

But great speeches do not necessarily carry great legislation. As to the question of judicial pensions – something which continues to infect debates from superannuation to sexuality – the Oxford Companion describes the situation as follows:[32]

> The Judiciary Bill 1902 (Cth) would have provided a pension for High Court justices (70 per cent of salary after 15 years service and attaining the age of 65 years), but the provision was deleted from

> the eventual Judiciary Act 1903 (Cth) for reasons of economy. Legislation was enacted in 1918 to grant Chief Justice Griffith the pension he would have received had he remained Chief Justice of Queensland (*Chief Justice's Pension Act* 1918 (Cth)), but High Court justices received no pension until 1926, when a non-contributory pension of 50 per cent of salary after 15 years of service was introduced, with provision for a smaller pension for justices retiring on account of disability or infirmity after five years service (*Judiciary Act* 1926 (Cth)).

Piddington – as one would perhaps expect – has a more whimsical explanation:[33]

> There is no doubt that O'Connor died from overwork, feeling unable to retire because at that time there were no pensions for High Court judges. The absence of the provision for pensions in the original Judiciary Act or High Court Act, whichever it is, was due to a singular accident, the origin of which was related to me. In the bill as introduced by the Deakin government [sic], judges' pensions were provided for. There was a hot attack upon the system of pensions when the bill was going through Committee, and the vote in their favour was carried on a Friday. Before the next sitting day, a member of Parliament saw Mr Deakin and said that he was very disappointed at the pensions provision having gone through in his absence, because he had prepared a very good speech about it and wanted to oppose it. Deakin, 'affable Alfred,' as he was sometimes called, very good-naturedly said, 'Oh, well, if you feel so strongly about it as all that, I'll have the bill recommitted and we can reconsider that clause in the bill.' The recommittal took place in due course, and on the next occasion the House reversed its decision and rejected pensions by one vote.

A human rights activist

What was the view of our founding fathers to what we know as 'human rights'? In a comparison between the British and US constitutions as illuminating today as when they were writing a century ago, Quick and Garran characterise the rights, privileges and immunities under each as, respectively:[34]

> [Under the former] Contained in numerous charters, confirmations of charters, and Acts of Parliament assented to by the Crown from the earliest period of English history, including Magna Carta (1215); the Petition of Rights (1627), 3 Char. I. c. 1; the Habeas Corpus Act (1640), 16 Char. I. c. 10; the Bill of Rights (1688), 1 Wm. And Mary c. 2; and the Act of Settlement (1700), 12 and 13 Wm. III. C. 2. The Bill of Rights is of special interest as declaring that certain recited rights are 'the true ancient and indubitable rights and liberties of the people to be firmly and strictly holden and observed in all times to come.'
>
> [Under the latter] Defined by the Constitution as amended from time to time. Subject to modification by the sovereign people, but secure against Federal and State Governments.

In fact, in Sydney in 1897 Andrew Inglis Clark proposed a clause providing inter alia that a state should not 'deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws'. In Melbourne in 1898, O'Connor proposed something similar, with its substance defeated by 23 votes to 19.[35]

Commentator Justice Ron Sackville has observed that one reason for rejecting the sentiment was that positively discriminatory legislation – against the Chinese, most obviously – would not have survived scrutiny and that non-Europeans generally might try to enjoy the (distinctly non-universal) rights hitherto the province of the Europeans. Sackville concludes that 'These historical snippets [of expressed concerns] suggest that a bill of rights, in a truncated form proposed by Clark and O'Connor, was rejected by the framers of the Australian Constitution, not because it was unnecessary for the protection of human rights (as understood at the turn of the 21st century) but precisely because it was necessary.'[36]

Had the bill of rights been incorporated, we might today have a very different compact. Certainly, if the US experience is something to go by, the tension between state legislators and federal legislators might be more keenly observed. It would also have had the effect that O'Connor would be seen as a man of reform, an activist, something which is probably not made out when one considers his other achievements.

Which is not to say he was an archconservative, politically or otherwise. Indeed, dogma is not something we see upon him. Rather, his virtue seems to have been an industriousness flecked with moderation, a quality which would make him an outstanding parliamentary administrator and jurist but also a person with neither the flair nor the desire to be inaugural premier or chief justice.

The background

O'Connor's father, also Richard, was born in County Cork and arrived in Sydney in 1835. From the outset, he was involved with administration of what we call 'Macquarie Street'. Among his achievements was being first librarian of the Legislative Council Library. But his legacy to his son must be the three posts he accumulated from the outset of responsible government: clerk of the assembly from 1856, clerk of the council from 1860, and 'clerk of the parliaments' from 1864. By 1868, O'Connor's father had produced the first edition of the Parliamentary Handbook.

O'Connor was born in 1851. Although over two and a half years younger than Barton, it is the consensus among Barton's biographers that his friendship with O'Connor started while they were both at the Sydney Grammar School. O'Connor had reared himself a devout Roman Catholic, previously studying with the Benedictines at their St Mary's College in Lyndhurst.

If he had a rebellious streak at all, its manifestation was a pride in claimed ancestor Arthur O'Connor, Irish patriot and sometime general in Napoleon's army (an appointment made in anticipation of an invasion of Ireland which never came off). The claim may not survive close examination; the Arthur O'Connor who sired the clerk of the parliaments appears to have married someone other than the rebel's French wife and in any event, I think, the rebel was a liberal protestant. Whatever, O'Connor supplemented his income in his early years at the bar by contributing to the Freeman's Journal, described by W B Dalley's biographer as 'the unofficial Catholic paper'.[37]

O'Connor read with Frederick Darley, being admitted to the bar in 1876. (Darley – himself Irish stock of a protestant variety – would later become chief justice.) O'Connor would take silk in 1896. His professional home was eventually Wentworth Court. The bar's history describes it in the following terms:[38]

> The first case of any large number of barristers having chambers together in one building had been at Wentworth Court, into which the first barristers moved in the early '80s. By 1890 there were twenty-eight barristers with chambers in the building and by 1920 forty-two. The last barrister moved out in 1927 when the building was demolished after housing the largest number of barristers in any contemporary chambers in Sydney over a period of forty years. Wentworth Court had a frontage to Elizabeth Street, in which it was first numbered 116 but later 64. The building extended to Phillip Street, its long corridor being almost a public thoroughfare ere Martin Place was conceived.

The Wentworth theme was continued when the bar tendered to the new High Court a dinner on 10 November 1903 to which the Supreme Court judges were invited. The Wentworth Hotel bill showed 81 diners costing 10/6 each. The High Court rose to the occasion, delivering their first judgment the next day.[39]

One might expect that the O'Connor who became the judge that he did was a conscientious barrister. Piddington confirms this:[40]

> In the eighties, when he was at the Bar, O'Connor came into Mr Robertson's shop and asked him if he had any book on the anatomy of the horse's foot. Mr Robertson replied 'No, but I can borrow one for you.' This he did, and later on O'Connor brought the work back and said 'That book won my case, and from now on there's only one book-shop for me.'

His role in the colonial parliament was a constructive one, although he succeeded with Barton in becoming embroiled in an affair which brought down the government, a tale which has been told in the sketch of Barton.

One thing which features prominently in the bar's history is O'Connor's role in provoking statute law consolidation. It appears that the colony had fallen behind. Victoria had consolidated its legislation only 15 years after consolidation. Queensland had Griffith. In New South Wales, however, 'the jungle was quite uncleared.'[41]

Into the mix was the fact that Queen Victoria was living too long: the practice of referring to statutes by regnal years was causing more than usual confusion. Mr Justice Windeyer had been confronted with an example in a divorce case in 1886.[42] A provision, 22 Vic 7 s3, dealt with the competence and compellability of spouses in relation to the giving of evidence. Section 13 of the Matrimonial Causes Act purported to repeal 22 Vic 10 s3, a provision of an Act since spent and which was to do with the prevention of scab in sheep. His Honour had little difficulty in applying an interpretation of necessary intendment to the spouses, although never mind the sheep. Still, not something which the law would wish on a regular basis.

On 29 December 1893 and at O'Connor's instigation, a royal commission was issued to about fifty men including members of parliament, judges, barristers and solicitors for the purpose of directing a 'diligent and full enquiry into the Statute Law in force in the colony.' Three years later, the job devolved solely to Charles Gilbert Heydon, and he committed great energy to it up until 1902. Coincidentally, he would be president of the New South Wales Court of Arbitration in the year O'Connor assumed the federal role.

O'Connor the strikebreaker

We tend to associate Henry Bournes Higgins with arbitration. He was empathetic to it and was author of the Harvester judgment. However, volume 1 of the Commonwealth Arbitration Reports records as the sole president of the Commonwealth Court of Conciliation and Arbitration 'The Honourable Mr. Justice O'Connor', appointed on 10 February 1905 and resigning on 13 September 1907.

In an essay published a century on, Stuart Macintyre wrote:[43]

> Nearly one hundred years ago a novel tribunal conducted its first hearing. A diminutive figure with a rasping voice and quick temper rose in a courtroom in Sydney to present a log of claims on behalf of the Merchant Service Guild. Opposing him was the counsel for the shipping companies, an experienced and smooth-tongued barrister. Presiding over the proceedings was one of the three judges of the recently formed High Court of Australia, seconded despite his resistance to serve as the foundation president of this Commonwealth Court of Conciliation and Arbitration.
>
> The proceedings were remarkably tranquil. The president, Richard O'Connor, stately, careful and courteous, heard arguments from counsel and evidence from a number of witnesses, then arbitrated on the union's claims (terms of engagement, wage rates, hours of duty, classification levels) and embodied his decisions into a binding award.
>
> It was a sweet moment for the union advocate, William Morris Hughes. His own work experience spanned employment as a young teacher-pupil in London, then migration to Queensland and later New South Wales where he took whatever was going, including spells as assistant to an oven-maker, and a mender of umbrellas. Billy Hughes knew the pinch of poverty: he worked his passage from Brisbane to Sydney as a galley hand. When he won election to the New South Wales parliament as a representative of the new Labor Party in 1894, his supporters bought him a suit.

The suit lasted well. By volume 2 of the court's reports, 'The Honorable [no 'u'] William Morris Hughes, M.P.' appeared as one of the two attorneys for the currency of the volume, the presidency being by now with Higgins.

O'Connor the strikemaker

If O'Connor was a reluctant conciliator and arbitrator, he was an even more reluctant striker, but strikers he, Griffith and Barton were.

The problem was ultimately one of personalities. In 1905, the attorney was Sir Josiah Symon; he had been knighted in 1901 for services to federation. Significantly for current purposes, he had been leader of the

South Australian Bar, he had been chairman of the Judiciary Committee at the 1897-98 Federal Convention, he had been reportedly 'very angry' about not receiving a seat in 1903, and – with a kind of ironic foresight – he had spoken in the senate with 'ominous reserve' about Griffith's own appointment.[44]

The dispute of 1905 involved a number of things, from an allowance for Griffith's shelving and the justices' travelling expenses to wider questions of where the court would call home and whether it should continue on circuit. The first salvoes were by Symon without the restraining hand of Reid (in a letter dated 23 December 1904) and Griffith without consultation with his colleagues (in a reply dated 27 December 2004).

By 21 January 1905, the nation's top judge was telling the nation's first law officer that he regretted that the officer had appeared 'to instruct the justices of the court as to the principles which should actuate them in the exercise of their discretionary power, but also to convey your disapproval of the manner in which they have already exercised them.'[45]

By early February 1905, the three judges had sent three jointly signed letters. The first was in defence of circuits. The second was an explicit reply to what they saw as an attack on the bench's independence, in which they refused to recognise the attorney's 'claim to instruct and censure the justices of the High Court with respect to the exercise of statutory powers conferred upon them in their judicial capacity.'[46] The third letter dealt with travelling expenses and the question of their residences.

Both Symon and the judges were seeking support, the latter to Deakin, although he had refused a place in Reid's ministry. Still the matter escalated. By March 1905, Symon was insisting that all vouchers for the judges' travelling expenses be submitted to him personally.[47]

O'Connor was due to sit in Melbourne on Monday 1 May, but on the preceding Saturday Griffith brought the fight to the public: from Sydney, he announced that sittings in Melbourne were to be adjourned.

Joyce continues the tale[48]:

> Symon telegrammed O'Connor to ask for his reasons for not sitting. Griffith replied: 'Mr Justice O'Connor has handed me your telegrams of yesterday we cannot recognise your right to demand the reason for any judicial action taken by the court except such request as may be made by any litigant in open Court'. Scribbled notes by Symon reveal his frustration: 'how can any Ct. because of disagreement as to Hotel Expenses go on strike?... no wharflabourers union do such a thing'; R[eid] behind my back since 1 January. Neither fair nor loyal to me. Is he committed to them in anyway. Did he make any promise or statement after our conversations 28 Feb. or any promise in Sydney now'.

It was only when the government fell at the end of June 1905 – with, in July, the accession of Deakin to the premiership and Isaacs as the new attorney – that things improved.

The Barton Ministry, taken in its first term of office, showing the members of the first federal Cabinet From L to R (standing): Senator J G Drake, Senator R E O'Connor, the Hon Sir P O Fysh, the Hon C C Kingston, the Hon Sir John Forrest Seated: the Hon Sir W J Lyne, the Rt Hon Edward Barton, Governor-General Lord Tennyson, the Hon Alfred Deakin, the Hon Sir George Turner. Photo : A1200, L13365, National Archives.

One suspects that Symon allowed a legitimate concern about economy to run away with itself, in circumstances where a personality like Griffith's was never going to wilt. Don Wright in a biographical note concludes that 'Symon's cause was just, but he spoiled it by the violence of his argument. Perhaps he was partly motivated by the events of 1900 and even by envy of Griffith's appointment.'[49] Symon remained the pre-eminent advocate in South Australia, a man of broad and deep learning and a noted philanthropist. He also had the pleasure of outliving the other protagonists by a good margin, only succumbing to a state funeral in 1934. Some words 'scandalous, offensive, and defamatory to the persons about whom they were written' were ordered to be omitted from probate.[50] But, and I stand corrected, the phrase 'the keystone of the federal arch' was his.

Overview

Readers were told that this was not a biography, and they cannot have been disappointed. There is no discussion of O'Connor the federalist and of his particular contribution to the debate about the degree of the proposed states' control over money bills. Nor is there discussion of his dexterity as government leader in the first senate.

I can report that he enjoyed long walks, trout fishing and camping, and that he engaged in 'violent bodily discipline' in the parliamentary gym,[51] and that his death in 1912 spared him from learning of the deaths of his oldest and youngest sons in France. We do know that he had two daughters, neither more nor less, one marrying the pianist and composer Roy Agnew,[52] and the other Alexander Maclay, son of the scientist and explorer Nicholai Mikluho-Maklai.[53]

O'Connor was able to draw upon his father's knowledge as a parliamentary clerk and his own training and practice as a barrister to make a contribution to Australia in three areas, its formation, its first parliament, and its first court. As to the first, he was no Barton. As to the second, he was no Deakin. As to the third, he was no Griffith. But his calm presence and informed contribution let leaders lead at a time when leadership was needed, and he was a great Australian.

Endnotes

1. Graham Fricke, *Judges of the High Court*, 1986, Hutchinson of Australia, page 31.
2. Sir Owen Dixon, 'Upon Retiring from the Office of Chief Justice', *Jesting Pilate*, 1965, The Law Book Company Limited, p. 258.
3. Sir Anthony Mason, 'The Use and Abuse of Precedent' (1988) 4 Aust Bar R 93, 109.
4. Philip Ayres, *Owen Dixon*, 2003, The Miegunyah Press, p. 21.
5. *Cock v Aitken* (1911) 13 CLR 461.
6. 13 CLR, 466.
7. *Smith v Cock* [1911] AC 317, 327.
8. 13 CLR, 468.
9. *Mid-City Skin Cancer & Laser Centre Pty Ltd v Zahedi-Anarak* (2006) 67 NSWLR 569.
10. *Cock v Aitken* (1912) 15 CLR 373, 380.
11. 15 CLR, 380.
12. http://www.adb.online.anu.edu.au/biogs/A110062b.htm.
13. http://www.cso.nsw.gov.au/lawlink/crown_solicitors_office/cso_ll.nsf/pages/CSO_morehistory.
14. http://www.adb.online.anu.edu.au/adbonline.htm. I have drawn details of O'Connor's life primarily from the entry for him in this work, an entry by Martha Rutledge.
15. The Hon Justice McHugh, 'The High Court and the Oxford Companion to the High Court', speech on 15/02/2002: http://www.hcourt.gov.au/speeches/mchughj/mchughj_oxford.htm.
16. Quick & Garran, *Commentaries on the Constitution,* 1995, Legal Books, page 719.
17. Article 3 section 1.
18. See e.g. 2 Will 4 c 1.
19. Geoffrey Bolton, *Edmund Barton*, 2000, Allen & Unwin, p. 297.
20. Ibid.
21. Bolton, p. 298.
22. 15 CLR, unpaginated.
23. A B Piddington, *Worshipful Masters*, 1929, Angus & Robertson, page 231.
24. Piddington uses this, but see R E Megarry, *Miscellany-at-Law*, 1955, Stevens, p. 8.
25. Piddington, p. 242.
26. *Jumbanna Coal Mine, No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309, 367-368.
27. Piddington, page 233.
28. 15 CLR, unpaginated.
29. Piddington, p. 244.
30. Michael Fullilove (ed), '*Men and Women of Australia!' – Our Greatest Modern Speeches*, 2005, Random House Australia, p. 86. The excerpts come from this source.
31. http://www.adb.online.anu.edu.au/biogs/A100443b.htm.
32. George Winterton, 'Remuneration of Justices', in Blackshield, Coper & Williams (eds), *The Oxford Companion to the High Court of Australia*, 2001, Oxford University Press.
33. Piddington, pages 246-247.
34. Quick and Garran, pages 318 and 319.
35. Justice Ronald Sackville, 'A Bill of Rights: Form and Substance' (2000) 19 Aust Bar R 101, 102.
36. Sackville, pages 101-102.
37. Robert Lehane, *William Bede Dalley – Silver-Tongued Pride of Old Sydney,* 2007, Ginninderra Press, page 52.
38. J M Bennett (ed), *A History of the New South Wales Bar*, 1969, The Law Book Company Ltd, page 200.
39. Bennett, p. 146.
40. Piddington, p. 246.
41. Quoted in Bennett, p. 106.
42. *Jones v Jones* (1886) 7 NSWR(D) 9.
43. Stuart Macintyre, 'One hundred years of arbitration – A novel institution', 7/02/2005: http://evatt.labor.net.au/publications/papers/133.html.
44. Troy Simpson, 'Appointments that might have been' and Susan Priest, 'Strike of 1905', Blackshield et al.
45. Roger B Joyce, *Samuel Walker Griffith*, 1984, University of Queensland Press, p. 263.
46. Ibid.
47. Joyce, page 264.
48. Joyce, page 265.
49. http://www.adb.online.anu.edu.au/biogs/A120174b.htm.
50. Ibid.
51. http://www.adb.online.anu.edu.au/biogs/A110062b.htm.
52. http://www.adb.online.anu.edu.au/biogs/A070018b.htm.
53. http://www.adb.online.anu.edu.au/biogs/A050285b.htm.