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HOMILY FOR THE RED MASS 1992

Delivered by Dr Geoffrey Robinson

Gospel: Mark 1:40-45

In approaching Jesus the leper had broken the law, for lepers were to avoid all contact with healthy people. His cry to Jesus was "If you are willing".

English texts of the gospel still say that Jesus was "filled with compassion", but many scholars now agree that an early copyist inserted "compassion" into the text when he felt scandalised by what Mark had actually put there: "filled with indignation". The context makes it clear that this indignation was not directed at the leper, but at what had been done to the leper, at the community which made outcasts of lepers, branded them as evil and chose to forget their existence rather than care for them.

Jesus was willing and, in touching the leper, he accepted his breaking of the law. More importantly, he accepted the human being behind the deformity of leprosy. The cure followed, but its most important element was always the loving acceptance of the person.

Jesus was not a lawbreaker, so he then obeyed the law by sending the leper away and telling him to show himself to the priests, but only after he had accepted and cured him. As he sent him away, the gospel says that Jesus was "deeply moved towards him", and there is more emotion in this scene than in any other in any of the four gospels, for Jesus was always deeply moved by the plight of the outcasts of society and by the inhumanity that people can show to those whom they think might threaten them.

If we substitute "A.I.D.S." for leprosy, the story becomes a contemporary one, but there are also many other people who feel themselves to be outcasts of our society: the Aboriginal people, the poor, the unemployed, the mentally ill, homeless youth, many immigrant people – all those who feel marginalised, alienated, not part of the society in the middle of which they live.

Such people encounter many problems in our society and, without doubt, one of the areas in which they have difficulty is the law. Like the leper, many feel that there is no solution to their ills through the law.

A primary purpose of all law is to give freedom. As a simple example, if I wish to drive from the city to the airport, it will take me twenty to thirty minutes, but if all traffic laws were abolished, it would take me twice as long, if I got there at all. In traffic the law seeks to give the maximum degree of personal freedom possible in the presence of the rights of other people in the community.

If I may sum up the difficulties of the outcasts of our society before the law, they feel that law oppresses them rather than gives them freedom; they feel that it gives freedom to more fortunate people, but not to themselves. They feel that in a court of law the more powerful and society itself have a freedom that they will never possess.

It is an important responsibility for all involved in the work of the law in this country to demonstrate in visible and practical ways that the law is in truth and in fact a liberating force. The outcasts of our society will need a great deal of convincing.

It seems to me that two tasks are essential. The first is a task of education, so that people are aware of both their rights and obligations, so that there is a better understanding of the liberating and civilising role that law can play in society, and so that there is a better understanding of the relationship between the individual good and the common good. At the end of a decade in which greed has played no small part and in the absence of any widespread study of jurisprudence in our universities, perhaps the first task is to ensure that young lawyers themselves have thought through these issues.

Legal positivism on its own is not an adequate answer to all of the questions raised by the concept of law. For example, it has led to the almost universal idea that whatever is legal is automatically moral, as though our legislators were both creators and arbiters of right and wrong. As one instance among many, not all harmful drugs are illegal and to encourage dependence on such drugs, while legal, is certainly not moral. In the world of business, this confusion between legal and moral has been the cause of much injustice to many outcasts of our society. To act within the law is in itself no guarantee that one is acting justly. In suggesting various legal solutions to businessmen lawyers must be aware that some legal solutions are more moral than others.

The second task is that of ensuring that all who administer the law have a developed and refined social conscience. "Laws" in the plural are words on paper, "law" in the singular is ultimately people – legislators, judges, lawyers, police and ordinary citizens. It is they who give the law a human face and bring it to life, they who make of law either a liberating or an oppressive force, they who use law to civilise a nation or to create one or other form of anarchy through injustice. We need people who share both the compassion of Jesus and his indignation when he saw what good and ordinary people had allowed themselves to do to the lepers when they felt that their interests and comfort were threatened.

EXTRACT FROM A SPEECH BY HIS HONOUR JUDGE W. J. DIGNAM, Q.C. AT THE SILVER JUBILEE OF THE SOCIETY OF ST. THOMAS MORE, THURSDAY, 26 NOVEMBER 1970.

Towards the end of 1930 noted Sydney Catholic the late W. J. Coogan suggested to this group that they should consider the practicability of organising the attendance of the legal profession at a Votive Mass of the Holy Ghost (Red Mass) in Sydney. He instanced the example of Lister Drummond, K.S.G., who after his conversion helped to found the Catholic Truth Society and was responsible for reviving the ancient custom of lawyers attending Mass in a group at the opening of Term.

On 18th December, 1930 Andrew Watt, K.C., and Matthew O'Neill issued an invitation to a meeting at the Southern Cross Library, 150A Elizabeth Street for the consideration of the proposal. The following is the actual form of invitation:

SYDNEY
18th December, 1930

A VOTIVE MASS FOR LAWYERS

You are invited to attend a Meeting of Catholic lawyers to be held at the Southern Cross Library, 150A Elizabeth Street, Sydney at 8 p.m. on Tuesday next the 23rd December, 1930, for the purpose of considering the question of arranging for a Mass at the opening of the Law Term in February next.

As you are aware this custom is time honoured in England and on the Continent of Europe where it is the practice of the profession to attend what is known as the "Red Mass" at the opening of the first term.

A large number of the profession in Sydney have signified their intention of attending this Meeting, and your co-operation is earnestly solicited.

A.R.J. Watt, M.J. O'Neill

N.B. Communications may be addressed to either of the Signators C/- Southern Cross Library, 150A Elizabeth Street, Sydney.

The following is a report of the meeting from the Catholic Press of 1st January, 1931.

"A 'RED' MASS

CATHOLIC LAWYERS' PROPOSAL

A meeting of Catholic lawyers was held at the Southern Cross Library on the 23rd ult. Mr Justice McTiernan, C.H., presided, and amongst those present were the Hon. J. Lane Mullins, C.H., K.C.S.G., Messrs. P. Gallagher, T. O'Mara, W. J. Dignam, J. V. Gould, G. J. O'Sullivan, F. A. Dwyer, the Hon. R. D. Meagher, K.C.S.G., Capt. A. W. M. d'Apice, K.C.S.G., Messrs. M. J. O'Neill, C. M. P. Horan, F. A. Finn, M. J. McGrath, V. J. Flynn, S. J. Carroll, J. A. Clapin, B. M. Byrnes, J. Lynn, G. B. Thomas and F. Hidden.

Mr. Justice McTiernan read a letter from the Archbishop's secretary, stating that his Grace approved of the proposal for a Red Mass and that the idea was much appreciated by him.

Apologies were received from Mr. Justice C. G. Heydon, Messrs. G. E. Flannery, K.C., J. J. Carroll, K.S.S., A. McEvilly, H. Morrissey, J. O'Donohoe, L. G. Tanner, T. J. Purcell, H. F. Links, J. C. J. Ryan, T. A. McNevin, B. J. McGrath and B. Clancy.

Mr. Gerald O'Sullivan then outlined the proposal and informed the meeting that through the kindness of Mr. Ernest Williams, of the English Bar, the Jesuit Fathers at Riverview Mr. P. S. Cleary (editor of the 'Catholic Press') and Mr. W. J. Coogan, he had been enabled to obtain various reports of the Red Mass held in London, Dublin, Rome and New York, which he read for those present.

Mr. J. Lane Mullins then moved that the excellent example of the profession in other countries be followed, and that the ceremony be instituted in February next at the opening of the Law Term.

Mr. J. V. Gould seconded the motion, which was supported by the Hon. R. D. Meagher, Messrs. Gallagher, Clapin, O'Neill, Flynn, Thomas and Horan.

The motion was carried unanimously, and following suggestions by the various speakers, it was decided that those present at the Mass should approach Holy Communion in a body, and on this account the Mass should commence at 8 a.m.

It was further resolved to approach the Chief Justice and the Bar Council, to inform them of the proposal. After some discussion, it was arranged that subject to approval the members of the Bar should robe as is done in other countries, and that University graduates not members of the Bar should wear academic dress; also that University Law students and articled clerks be invited to be present.

A committee was appointed, consisting of Messrs. A. R. J. Watt, K.C., J. Lane Mullins, C.H., K.C.S.G., A. W. M. d'Apice and Messrs. W. J. Dignam and G. J. O'Sullivan (joint secretaries) to arrange the details.

After motions had been carried that letters of thanks be sent to Mr. Ernest Williams and to the Southern Cross Library Committee, the meeting closed.

(The 'Red Mass' is a survival of the old Catholic times, when members of the Inns of Court attended Mass in their guild chapel. It is called a 'Red Mass' because, as it is a Votive Mass of the Holy Ghost the celebrant wears red vestments. – Ed. C.P.)"

Mr. Watt called on Sir Philip Street to explain the proposal and the Chief Justice received him most graciously and gave his approval. The idea of a "Red" Mass and the wearing of wigs and gowns in Church was so novel that it attracted considerable publicity and the late E. George Marks, veteran court reporter, gave it generous coverage. As Archbishop Kelly had just left for overseas Archbishop Sheehan presided. The organisation at the Cathedral was in the capable and friendly hands of Monsignor Bartlett.

The Catholic Press reported the attendance at the Mass and the launching of the historic ceremony as follows:

"For the first time in Australia the historic Red Mass, which has been known for centuries in the Old World as a devotional commencement of the legal year by the profession of law, was celebrated at 8.00 a.m. His Grace Archbishop Sheehan presided and nearly 200 Catholic members of the N.S.W. legal profession attended the ceremony. It will be made an annual religious event.

Wearing red vestments for this Low Mass a Votive Mass of the Holy Ghost, Rev. Fr. G. Bartlett (Administrator of St. Mary's) took his place at the altar as celebrant. His Grace Archbishop Sheehan was attended by Rev. Frs. M. Lynch and J. O'Donnell, the latter also acting as master of ceremonies. Rev. Dr. M. Petorelli conductor of the Basilica choir, played selections of sacred music while the procession was entering and leaving the church.

On the sanctuary were Rev. Frs. M. Ryan, M.S.C. and P. Moloney, M.S.C.

There is every reason for congratulating the legal body upon this happy thought of connecting Christ and his church with the activities of the profession. It is an instance of practical faith, furnishing additional proof that the appeal of the Church is as strong with the cultured as the lowly. Not only did the large gathering from the profession stamp the movement with the seal of approval, but the laity flocked to the celebration of the Mass, a gratifying recognition of its purpose.

Then again the wide representation included in the legal congregation was of a most satisfying completeness. The procession into the Basilica embraced two former Supreme Court Judges (ex Justices Edmunds and Heydon), His Honour Judge Coyle, the Attorney-General (the Hon. A. A. Lysaght, M.L.A.) three senior counsel (Messrs. A. Watt, K.C., G. E. Flannery, K.C., and W. J. Curtis, K.C.) three city magistrates (Messrs. W. J. Camphin S.M., M. J. McMahon, S.M. and W. A. Flynn, S.M.), about 30 members of the Bar, and large groups of solicitors and articles clerks. Papal titleholders who practise at law comprised the Hon. J. Lane Mullins, C.H., K.C.S.G., M.L.C., Mr. M. J. O'Neill, K.C.S.G., Mr. A. W. M. d'Apice, K.C.S.G., Mr. J. J. Carroll, K.S.S. and Mr. G. F. Hughes, C.H.

Apologies were received from Senator the Hon. J. J. Daly (Minister for Defence), the Hon. Frank Brennan (Federal Attorney-General), Mr. Justice McTiernan of the Commonwealth High Court, who are at the present time engaged in professional work outside this State and from the Hon. R. D. Meagher, K.C.S.G.

The representatives of the judiciary attended the Red Mass in full court robes, senior counsel wore full bottomed wigs, and the junior Bar appeared in court robes. Among the barristers were Messrs. E. F. McDonald, N. P. McTague, J. Leonards, A. J. de Baun, T. P. Flattery, B. Clancy, P. Gallagher, J. F. Molloy, C. V. Rooney, H. H. Studdert, T. P. McMahon, J. S. Clancy, T. O'Mara, W. J. Dignam, J. V. Gould, F. J.

Letters, E. S. Miller, W. S. Flynn, G. O'Sullivan, W. F. Sheahan, B. J. McGrath, H. J. Godsall, W. S. Sheldon, also J. J. B. Kinkead, Hugh Maguire, E. C. Calahan, John Clancy, R. R. Kidston, J. O'N. Doyle, C. D. Monahan, F. P. McRae, E. P. Kinsella, J. A. Clapin and E. J. Walsh. Also noticed were Messrs. J. M. O'Donohue (Acting Registrar-General) John Merrick (Examiner of Titles) and Lieut.-Colonel P. W. Fallon.

The very large and representative group of solicitors included A. H. O'Connor, M. J. O'Neill, H. Morrissey, C. O'Dea, S. J. Carroll, T. J. Purcell, L. A. Lochrin, E. R. Lorton, John Hickey, F. E. Reed, J. J. d'Apice, J. P. Ryman, E. T. Hollingdale, J. C. J. Ryan, A. G. de L. Arnold, Thos. McNevin, J. J. Mulholland, Neil Collins, M. D. Roach, E. G. Sayegh, F. A. Finn, W. J. Roberts, E. R. Tracey, J. N. Gammell, H. Links, K. D. Manion, B. J. Tier, Leo Sexton, A. J. Moran, C. P. White, K. M. White, A. J. Devereaux, V. J. Flynn, B. F. Watkins, Clive Wilkinson, J. J. McNally, A. Harney, J. Harney, C. J. McDonell, W. McEvilly and W. B. Meehan.

It is pleasing to record that the last-named, W. B. Meehan has been one of our most faithful members and a regular attendant at so many functions.

Mr. V. P Dwyer also came from Barmedman for the ceremony."

For the first Red Mass the time was fixed at 8 a.m. and there was no change in the regular opening time for the Courts. After a short period the practice spread to other faiths and the postponement of the times became more easily arranged. We have experimented with times but by and large the nine o'clock Mass seems to be the most convenient for all concerned. On one or two occasions light refreshments were served in the Chapter Hall but with the more elastic starting times and relaxed fasting discipline this proved to be unnecessary. The practice soon grew up of robing in chambers and this also eliminated the necessity of using the Chapter House. Silks and Judges have always robed in the Presbytery reception room.

The pious practice soon was followed by other religious groups and was adopted in other States and country centres and by other professional and academic organisations.

For the opening day of First Law Term, a later starting time became the accepted custom and the ceremonial procession became a feature of all the services. Catholic members of the profession in New South Wales appreciate the regular attendance at the Red Mass of the Chief Justice, Sir Leslie Herron. During the War years there were many visiting legal men present and on one occasion the U.S. High command was represented at the Mass by its Legal Officers stationed in Sydney.

I have a photograph of the attendance at the Second Red Mass in which one can distinguish well-known colleagues and their clerks, Fred de Saxe and Norman Marks. This photograph will be included in the archives of the Society.

The practice of the acolytes being chosen from the profession was an early feature and has happily continued to the present day.

It is appropriate here to acknowledge the importance with which the cathedral authorities have treated our attendances. The provision of the choir and organist, the attendances of the bell-ringers and the distribution of leaflets with the proper of the Mass and the selection of speakers to deliver the occasional address have all contributed to the success of the organisation.

Particular acknowledgement should be made to the Administrators, Monsignors Bartlett and Hurley and my own thanks should go in a special way to Allan Bridge (Mr. Justice Bridge) for his personal help in organisation. From the attendance at the Red Mass there developed the enlisting of members to attend retreats at Kensington Monastery and later at Mount Alverna.

You have all been made somewhat familiar with the founding of the Society through this well-prepared synopsis distributed to members for this function. The inaugural meeting was held as already stated on 14th August 1945 convened by Messrs. G. J. J. O'Sullivan, W. J. Dignam, J. J. McKeon, F. A. Finn, M. J. O'Neill, C. M. P. Horan, M. J. McGrath and W. J. Roberts.

Prior to the meeting a sub-committee comprising O'Sullivan, Dignam, McKeon, Roberts and Finn spent many hours drawing up a constitution and proposals to be placed before the meeting. The invitation to attend was in the following form:

"To the Spiritual Director and Members:

There is every reason to hope, and no reason to doubt, that the St. Thomas More Society will flourish in New South Wales, and will fulfil its noble ideals unbrokenly throughout the course of the years to come. Looking forward far into those years we may visualise some one or other of the Society's members of future time looking back to think upon the Society's beginning. For such, the Provisional Council in presenting this, its report, to the First Annual General Meting of the Society, places on record all the details of the Society's origin.

CONVENING OF INAUGURAL MEETING

The inaugural meeting of the Society was convened by a notice in the following terms, which was despatched to members of the profession known to the convenors:

Sydney
3rd August, 1945

You are invited to a meeting at History House, 8 Young Street, Sydney, on Tuesday the 14th day of August, 1945, at 8 p.m. to consider the formation of a St. Thomas More Society for Catholic Legal Men.

His Grace the Archbishop will be present.

G. J. J. O'Sullivan	)	
W. J. Dignam	)	
J. J. McKeon	)	
M. J. O'Neill	)	Convenors
F. A. Finn	)	
C. M. P. Horan	)	
M. J. McGrath	)	
W. J. Roberts	)	

LEGAL MEN PRESENT

There were present at the meeting Mr. Justice Kinsella, Mr. Justice Clancy, Miss J. E. Shewcroft, and Messrs. J. P. Baggott, Alan Bagot, L. G. Bohringer, M. J. Boland, Alan Bridge, E. B. Cahalan, W. H. Clark, Wilfred Collins, A. W. M. d'Apice, A. B. De Coek, W. J. Dignam, F. A. Finn, M. F. Hardie, J. P. Kelleher, P. J. Kenny, E. R. Lorton, H. Maguire, F. J. Mahony, J. S. Maron, W. B. Meehan, E. S. Miller, K. C., H. X. McGree, B. J. McGrath, M. J. McGrath, J. J. McKeon, M. J. O'Neill, M. J. O'Neill (Jnr), C. J. J. O'Sullivan, F. E. Reed, C. L. Regna, W. J. Roberts, W. F. Sheahan, J. P. Slattery, X. V. Swain, L. J. Tully, F. W. Vizzard and C. A. Walsh.

CHAIRMAN'S OPENING ADDRESS

In opening the meeting Mr. O'Sullivan said:

'I am asked by the Convenors to take the Chair at this meeting which has been called to consider the question of founding a St. Thomas More Society amongst the members of the legal profession in this State. In assuming that responsibility, I so do fully conscious of the fact that abler hands than mine might have been found among the convenors. When the Society is formed, its officers will all be chosen by the democratic vote of its members. In the meantime perhaps you will permit me to fill the hiatus.

Now there is not among the catholic lawyers of this State any Society or organisation wherein they might from time to time meet and discuss without restraint, and in a Catholic atmosphere, those problems of the times which so nearly touch us as Catholics, as citizens and as lawyers. We are living in an age and times not unlike those which witnessed the martyrdom of St. Thomas More 410 years ago. Then, as now, change and novelty were making the very air electric. The revolt of Luther had been some time under way and the unity of Christendom was broken in the Germanics. Henry VIII was running amok in Christian England – hitherto little affected by the

Lutheran example. A cloud hung over men's minds, just as today; and no man was wise enough to foretell or foresee what might happen next. Few men, indeed, could think straight even though vast majority of the men of England at the time were Catholic. Thomas More, however, was one of those very few. He measured value in terms, not of time, but of eternity.

The Lutheran rebellion, accelerated as it was by Henry's defection in England, has landed the world at the end of four centuries – quite logically – into a morass of materialism which is affecting every phase of our social, political, industrial and professional life. Christian ethics and standards are going by the board. Even the law, hitherto based on principles laid down in the ages of Faith, tends to become infected with the virus of the times. Catholic professional men find it necessary to combat this trend, and for the purpose of strengthening them in the fight we are everywhere forming guilds. Catholic doctors have banded together in the Guild of St. Luke. They are setting a splendid example to their fellows in the ethics of medicine. Catholic chemists, likewise have their Guild and are doing equally fine work. And there is a very-much-alive Catholic Journalists' Guild functioning strongly in Sydney.

We lawyers are behindhand. True, we inaugurated the Red Mass for lawyers at the opening of the Law Term. We did that fifteen years ago. The experiment was a signal success. We are proud to feel that the whole of the legal profession in this State followed our example the next year after the first Red Mass. Today, as you know, the Law Term opens with Christian services both in Catholic St. Mary's and Protestant St. James'. Moreover our example was soon afterwards followed in Victoria and some of the other States of Australia. But we must have something more than an annual Mass. We might again draw inspiration from the Catholic Bar of England, as we did in the institution of the Red Mass itself, and form here in New South Wales a St. Thomas More Society as they have already done in England.

The parent Society, if we may so refer to it, was formed in England some eight or nine years ago. In 1937 that Society invited the eminent scholar, Professor R. W. Chambers, to read a paper to the members. The Professor chose for his subject, 'The Place of St. Thomas More in English Literature and History'. That excellent paper is available in book form with a foreword by the Society's President, Lord Russell of Killowen. When introducing their distinguished guest, Lord Russell said: 'The Thomas More Society is a society composed of Catholic members of the English Bar and a few additional honorary members. They meet and share a diner maigre about twice a term on a Friday. As an aid to digestion they secure the kind attendance of some eminent authority, who, after dinner, addresses them or reads a paper on a subject of which he is a master. When he sits down, the members in turn say exactly what they think about him and his views, to the general satisfaction of all.'

One gathers from that introduction that the English Society caters principally for the spiritual and intellectual tastes of Catholic members of the English bar, whilst not ignoring entirely their frugal habits in matters of food. There would appear to be no good reason why the whole of the legal profession in this State should not follow this admirable lead.

His Grace, Archbishop Gilroy, has set the seal of his approval upon the idea. He will be here tonight, and as he is timed to arrive at 8.30 p.m. I must be brief. It is desirable, if possible, that we present him on his arrival with a fait accompli at least up to the point of resolving that a St. Thomas More Society be formed by us. We may perhaps be favoured with a short address from His Grace. After that an adjournment of, say, 20 minutes for supper might be made. We can then proceed with the business of formally settling the Constitution of the Society and providing for its temporary government until the first general meeting.

That, in very broad outline, is the case. The matter of the formation of the Society, of determining its scope, its objects, its constitution and so forth, is, of course, one for the meeting. Those of us who have considered the question have certain proposals to place before you tonight. We respectfully commend them to you. If you agree with the general ideas put forward, then, I think, we shall be enabled, through the Society, to play our part as lawyers in promoting the work of the lay Apostolate in this community. At the very least, we can hope to look forward to some entertaining meetings, not altogether without spiritual profit to ourselves, when the Society gets fairly under way.

It may be that there are some Catholic members of the profession in Sydney who have not received a notice of this meeting. We did our utmost to ensure that no one was overlooked, but it is possible and, indeed, probable, that some have been missed through lack of knowledge or inadvertence on our part. To those absent ones we offer our apologies and assure them that the omission will be repaired as, and when, their names are brought to our notice.

I would now ask Mr. John McKeon who, with others, has done much excellent work in the matter of promoting this meeting and otherwise in connection with the preliminaries, kindly to record the minutes of this meeting, and to read any apologies that may have been received.'

APOLOGIES

Apologies were read from Mr. Justice McTiernan, Mr. Justice O'Mara, Mr. Justice Kelly, Mr. Justice De Baun, His Honour Judge Studdert, His Honour Judge Coyle, Rev. D. P. O'Connor, S. J. and Messrs. C. A. R. Bourke, J. M. Brennan, Brian Clancy, K.C., J. G. Coyle, J. T. Monaghan, H. Morrissey, J. H. McClemens, C. C. Nelson, E. W. B. Sherlock, C. B. Wilkinson, T. M. Williams and A. R. J. Watt, K.C.

THE PREPARATORY STEPS:

THE FORMATION OF THE SOCIETY

Mr. M. J. O'Neill, at the request of the Chairman, outlined to the meeting the steps that had been taken up to the date of the meeting.

'Frequently from time to time', said Mr. O'Neill, 'Catholic legal men of Sydney have mentioned to one another the need for a society as a medium through which there could be accurately and fully expounded those principles of Christian ethics and morality which Catholic members of the profession should observe in their everyday legal practice. Amongst those with whom I had often discussed the subject the idea has been unanimous that such a society would be concerned with the spiritual and cultural aspirations of its members and not in any respect with their merely material advancement. To the establishment of a society thus spiritual in character the consent of His Grace the Archbishop would be requisite.

It was in the light of this feeling which I knew to exist that I mentioned to His Grace a few months ago, the matter of forming such a society. It is gratifying to know that His Grace viewed the project with approval. Subsequently, in May last, I and my friend and colleague, Mr. F. A. Finn, suggested to other members of the profession that some definite step in the direction indeed should be taken. As a result, the eight gentlemen whose names appear as convenors of this meeting informally resolved to sponsor the formation of the St. Thomas More Society for Catholic legal men of New South Wales.

As I have said, in the formation of a Catholic Society thus spiritual in character, the prior approval of His Grace the Archbishop to some form of Constitution became requisite, at least in certain essentials. The sponsors accordingly placed before His Grace a draft Constitution revealing the purpose of the proposed Society, its scope, and the manner in which

it might be governed. His Grace has given his assent to the scheme set forth in that draft, which will be placed before you this evening. Whilst gentlemen concerned have given a great deal of their time and thought to the details of this draft Constitution, they are not unmindful that much useful improvement may result from the members generally after they have had an opportunity of considering it. This thought, to, appears to have been present to the mind of the Archbishop, whose approval of the scheme covers a period up to the Second Annual General Meeting which normally will take place in October, 1946.

With regard to this conditional period of time, we should say that the draft Constitution contains its own provisions as alterations. Some such alterations require the Archbishop's approval before they become effective; others do not. But even in the period that will elapse before his Grace gives his final approval to the Constitution, the sponsors feel that in accordance with the true intent of the conditional approval already given, it would be proper for alterations of the conditional Constitutional to be made so long as the essential principles of the approved scheme remain undisturbed.

Thus far has this movement progressed. The purpose of this meeting this evening is, therefore, twofold: (1) to decide whether there shall be formed a society of the character I have outlined; and (2), if such a society be formed, to determine a constitution for it. As to the first purpose, I feel I need say little. Many of you gentlemen, perhaps, indeed, all of you, have expressed from time to time the need of such a society. I think I well know your feelings on this important matter and I am content to leave it at that. As to the second purpose, I simply remain subject to the approval of His Grace the Archbishop, your chairman until a suitable constitution is unrestricted. With pleasure, then do I formally move –

''That this meeting of Catholic members of the legal profession resolve that the St. Thomas More Society for Catholic legal men of New South Wales be hereby formed.'' '

Mr. O'Neill's motion was seconded by Mr. H. Maguire and was carried unanimously.

HIS GRACE THE ARCHBISHOP

The meeting's resolution to form the St. Thomas More Society immediately preceded the arrival of His Grace the Archbishop, the Most Reverend N. T. Gilroy, D.D. Welcoming His Grace, M. G. J. O'Sullivan said:

'Your Grace: We respectfully extend to you a hearty welcome to this meeting. At the same time we are happy to inform you that Catholic members of the legal profession of New South Wales, who are well represented by the members here assembled, have resolved to form a Society to be known as the St. Thomas More Society.

In doing so we follow in the footsteps of the members of the English Bar who, about 1936, formed a Society of that name under the presidency of Lord Russell of Killowen – a grandson of a great Irishman and master of the Common Law who became Lord Chief Justice of England in the latter half of the last century.

The raison d'etre of the Society – which we now know has the approval of Your Grace, is this:

PURPOSE OF SOCIETY

Consonant with the juris praecepta of the Justinian Oath Honeste vivere, alterum non laedere, suum cuique tribuere – the general purpose of the Society is to extend amongst the legal profession the highest ideals of culture and morality. To this end its specific objects are:

(a) to provide opportunities to members of acquiring a detailed knowledge of the principles of Christian ethics and morality in relation to the profession of the law, and this both through the presentation of those principles by experts and a free enlightened discussion of them amongst the members themselves; and

(b) to promote the constant application of the same principles by members in their everyday legal practice.

In thanking Your Grace for sparing this evening from your busy life to honour us with your presence, may we express the hope that we shall see you again on many future occasions after the Society shall have been fairly launched.'

THE ARCHBISHOP'S ADDRESS

The Archbishop was loudly applauded when he rose to reply.

'At the very outset,' said His Grace, 'I should like to offer to you my very cordial congratulations on the evidence of the truly Catholic spirit that animates you. Indeed, the very fact that you are here tonight is, I think, evidence of the existence of that spirit. You are all men who have a very busy life, and to come out at night to a meeting of this kind needs, certainly, an impulse that must be just a little more than ordinary. Consequently, I take your being here as proof of your devotion to your holy religion – and that, certainly, is something to your credit. In these days particularly, with the constant attacks that are made on religion, and the very little human inducement to show any practical demonstration of our attachment to religion, the fact that in spite of this opposition you have come together tonight is, to my mind a very healthy sign for the legal profession in this State. It shows that there is, at least, a foundation among the lawyers of New South Wales determined to uphold the noblest principles of the profession.

Yours is a very old profession – or, rather, a very venerable profession; and besides being a very venerable profession it is a very honourable profession. And I rejoice tonight that this venerable and honourable profession of yours has come into line, as far as Catholic principles are concerned, with other venerable and honourable professions. For some considerable time now the medical profession of this State has been united in a Guild, or at least the Catholic members of it have – and the Catholic pharmacists of this State have been united in a Guild. Yours is not a Guild, but a society but the end is the same.

To me personally, there is a sense of real satisfaction to learn that spontaneously the Catholic members of the legal profession in the State have decided to form a Society. Of course many of our enemies in the outside world would probably be amazed at the state of affairs that really exists. They think that the Catholic layman, as far as any Catholic activity is concerned, is simply summoned by a very appalling body known as the Hierarchy which calls the tune and everybody is obliged to dance.

Tonight I think we have the reverse of that. That will be a surprise to our friends outside – and I think it is a bit of a surprise to ourselves. I think it is a very healthy state of affairs that the laity themselves should take the initiative in a matter like this. I might have felt that it would be advantageous to form such a Society, I might have made a suggestion at some time that such a Society should be formed; but actually, although I did feel the first, I never gave any hint in regard to the second; and consequently it is a movement, purely and entirely, which has come into being because of the desire of the Catholic members of the profession, themselves. You, of course, know what is required of you as Catholics, and consequently, it is not my intention to dwell upon obligations; but might I just mention three simple things – that is to say, three virtues which ought to be outstanding among the members of your profession. If they are, then it may be that the members who practise these virtues will not make quite so much money as they otherwise might, but they will certainly have a clear conscience and not suffer from any remorse, and when the end comes, which is the great test, they will be able to look back upon a career that has not been marred by anything dishonourable.

Those three virtues you know just as well as I do are Truth, Justice and Charity. I

suppose there is no profession in the world that juggles so much with the truth as the legal profession. Nevertheless: "Truth Must Prevail". That is the motto of the "Osservatore Romano", the Papal semi-official newspaper; and I have not the slightest doubt you will agree with me that Truth is the very foundation of honourable dealings in your profession. And if it be expected of the profession as a body, it is not right that an example in that regard should be given by the Catholic members of the profession? And, further, is it not right also that if the Catholic members of the profession do not give that example, then we may look in vain for anyone else to give it? And since we ought to look precisely where this example ought to be found, we look with confidence to the catholic members of the profession, and among the Catholic members of the profession I am perfectly sure that an outstanding example will be given by those who constitute the foundation members of the St. Thomas More Society.

But Truth, of course, is not enough. In addition to Truth there must be Justice; and Justice is another thing that is juggled about a good deal. For us, there cannot be any other understanding of the term than the definition that is given by the scholastics – and that is, giving to each and to all what is their due. In the first place, of course, we have got to give to God what is His due, and then to every one of our neighbours the due that belongs to him. And it does not matter whether they are on our side or against us, they still have the right to Justice, and when they have the right we have the obligation to furnish it. Again, there ought to be a mark that is found in every Catholic lawyer and that is, that in any circumstances Justice prevails.

But Justice is something that is cold, something that is calculating; and there is something even better, greater, nobler than Justice and that is Charity. Often times it can be that men who have the handling of cases that come before the law courts can, by the exercise of the virtue of Charity, not only see that Justice is done, but moreover that Truth will prevail where otherwise it would not have prevailed. And the foundation of Charity must be that which we have learned from our earliest years – that is to say, the love of God. And it is because of our love of God that there must be the love of our neighbour. You remember the simple definition of Charity given in the catechism – the Divine virtue by which we love God, above all, for His own sake, and our neighbour as ourselves, for the love of God. Unless the love of God be the foundation of our love of our fellow men, then we shall certainly not love those who do not love us; and that is one of the points that our Divine Saviour made on more than one occasion in His public ministry. It is not sufficient to love those who love you, it is not sufficient to be kind to those who are kind to you, but in a particular manner this virtue is to be found exercised towards those whom you do not like naturally, who have not been kind to you, who have not done justice to you. Charity, therefore, ought to be the particularly distinguishing mark of every Catholic who professes to be a true son of the Divine Master.

It is a very happy thought indeed that you have chosen as your patron St. Thomas More. I hope he is not going to be simply a patron – he should also be a model. I do not hope that you will be able to follow him as a model in every regard, but at least, in principle, you should be able to follow him. There is this remarkable fact about St. Thomas More, that because he was willing to die for his principles he lived for them. Many of us are perhaps willing to live for principles that are noble, provided the cost is not too great. We ought to be, as St. Thomas More was, prepared to make the supreme sacrifice if necessary in order to stand for the principles that are dear to our hearts. He not only stood for those principles but he died for them – and there is this remarkable fact about the death of St. Thomas More he died not miserably but joyfully, and was glad at the end of his life that he was able to sacrifice family and fortune and life itself in order that he might profess his Faith. We might not perhaps have the privilege that was given to him, for after all there is no greater privilege given to man than to lay down his life for his Faith; but, at least, we can aspire to what approaches towards it, and that is, to be at least ready to do likewise if God in his Divine Wisdom considers us worthy of such a privilege, so far as, humanly speaking, it can be merited. So while I commend most cordially your undertaking, while I think you have made sacrifices in order to see that this Society is rightly begun, while I congratulate you for the spirit which animates you, I pray that Almighty God in his mercy will shower His blessings down upon you so that you will not lose even materially by your membership of the Society, but that it may be a means, as you hope that it will be a means, of promoting your own spiritual well being; and I trust that in promoting your spiritual well being your temporal well being will likewise not be neglected. It very often happens in this life that men who make sacrifices for a noble principle and expect to lose materially by it, find, to their surprise, that far from losing materially they gain even in that way as well. But, in any case, even if we should not gain materially, that, after all, is the least and the last consideration, and if we gain spiritually, then we have reason to be extremely grateful to Almighty God, because when material things pass away the spiritual will still remain.

So I trust that God will bless your undertakings, that He will bless yourselves, and that He will bless the men who conceived the idea of establishing this Society for the glory of God and for the honour of your profession, and I trust that it will be also for the welfare of Australia.

According to your constitution, the duty is imposed upon the Ordinary of the Archdiocese of Sydney, to appoint a Spiritual Director, and it gave me great satisfaction indeed to ask Rev. Dr. Carroll if he would be willing to accept this office. He willingly agreed that he would, and I, therefore, with much satisfaction appointed him as your first Spiritual Director.'

UTOPIA
THE JOURNAL OF THE ST THOMAS MORE SOCIETY

SIR EDWARD McTIERNAN – A CENTENARY REFLECTION

*The Hon Justice Michael Kirby A.C. C.M.G.**

INTO THE WORLD OF 1892

Year by eventful year, a century has passed since the birth of Edward Aloysius McTiernan on 16 February 1892 at Glen Innes, New South Wales. The second of two children of Patrick McTiernan, police constable, and Isabella McTiernan (nee Diamond) came into a world on the brink of great political and legal changes. His life virtually spanned the whole history to date of the Commonwealth of Australia. It saw mighty wars, great scientific and social changes and the apogee and fall of the British Empire. Instructive it is to reflect upon the world he entered and the controversies which were agitating Australia and the mother country at a time young Edward was born.

A year before his birth, an event was to take place which affected the course of his life. In 1890, provision was first made for the payment of members of Parliament elected at the next general election in the colony of New South Wales. With this development, in January 1890, the Trades and Labor Council decided to field candidates for the election. Plans were made to form Labor Electoral Leagues in every constituency. The first such League was formed in Balmain in March 1891.[1] In July, the Premier, Henry Parkes went to the people. In its first election, the Leagues contested 48 seats. They won 35. They then held the balance of power between the Free Traders, led by Parkes, and the Protectionists, led by George Dibbs. The Parkes Government resigned on 19th October, 1891. Dibbs became Premier. The leadership of the Free Trade opposition passed to George Reid. In January 1892, the Second Annual General Conference of the Labor Electoral Leagues met in the euphoria of its recent electoral triumph. The Leagues chose Joseph Cook to be their first leader, although there were already divisions amongst the representatives over the issues of free trade or protection. Labour was no sooner born than factions formed within it. Yet those early stalwarts could scarcely have imagined the future which lay before the political movement which they established. It would come, by the time of McTiernan's death, to command the treasury benches in the national Parliament and in all but two of the other Parliaments of Australia.

That national Parliament was still an idea in the minds of the Federalists. In 1885, an Imperial Act had set up the Federal Council of Australasia.[2] The Council lacked executive power and any provision for raising independent revenue. Henry Parkes saw it as an obstacle to a true federation. Concern about the defence of the Australasian colonies was also beginning to agitate Whitehall. With the Canadian Constitution behind them,3 the Imperial politicians were in a mood to look more sympathetically upon proposals for an Australian Federation, if only the colonists could agree amongst themselves.

On 24 October 1889, at Tenterfield, New South Wales, Henry Parkes made a stirring speech in which he called for the replacement of the Federal Council with a strong national Parliament having full control over all matters concerning Australasia as a whole. In the result, in February 1890, a meeting in Melbourne of the leaders of the Australian colonies, together with two representatives from New Zealand, discussed Parkes' proposals. They agreed to call a convention in the following year. This convention met in March 1891 in Sydney. It was the first Australian Federal Convention. It comprised 46 delegates from all Colonial Parliaments in Australasia. It met in the Chamber of the Legislative Council of New South Wales, the oldest elected body of the colonies. The first draft of an Australian Federal Constitution was agreed. The principal draftsman was Samuel Griffith, the Queensland Premier. He did most to shape the draft which the High Court yet to be created, was to expound and in which he, and later McTiernan, were to serve.

Parkes' loss of office in 1891 in New South Wales appeared to set back the Federal cause. How much of this news reached Constable McTiernan and his family in Glen Innes can only be a matter of speculation. Parkes was replaced by Edmond Barton as the new "leader" of the Federal Movement. In August 1894, George Reid, now Premier, of New South Wales, called for a second Federal Convention. This took place in 1897. It led to a third session in Melbourne in 1898 and to referenda throughout Australia in that and the following year. In June 1900, on the request of the Australian colonies, the *Australian Constitution Act* was passed by the Imperial Parliament.[4] Queen Victoria gave her royal assent on the 9th July 1990. The Commonwealth of Australia came into being on 1 January 1901. The young Edward McTiernan, not 8 years old, was to play the part in its Parliament and in the Federal Supreme Court for which the Constitution provided.[5]

In Britain the events of far away Antipodean colonies were less pressing than other concerns closer to home. In 1886 the Prime Minister, William Ewart Gladstone had introduced a Home Rule Bill for Ireland. He declared that Britain's treatment of Ireland was a "broad and black blot" upon its record:

"Ireland stands at your bar, expectant, hopeful, almost suppliant . . . She asks a blessed oblivion of the past, and in that oblivion our interest is deeper than even hers . . . Think, I beseech you, think well, think wisely, think, not for the moment but for the years that are to come, before you reject this bill"[6]

But reject it they did. It was thrown out of the House of Commons by 343 votes to 313. The Queen was asked to dissolve Parliament immediately. The election campaign which followed was fought with unequalled bitterness. The Conservative leader, Lord Salisbury, who had suggested that some people – "hottentots and hindoos" – were incapable of self government, was pressed on the entitlement of the Irish to different treatment.[7] But the final results of the election gave 316 Conservatives and 78 Liberal Unionists a huge majority over 191 Gladstonian Liberals and 85 Irish Nationalists. Rural England had voted against Irish reform. Gladstone resigned, to the profound relief of the Queen. She urged him not to encourage the Irish to expect that they would ever have Home Rule as that was "now impossible".[8] Impossible is a word that should rarely be written in history.

Ireland's travails in Britain continued into the 1890's. Gladstone's hopes depended upon the Liberal Irish alliance. In 1890 Charles Stewart Parnell was cited as co-respondent in a divorce suit. Parnell declined to resign. In the circumstances of the time this was a mortal blow to the friends of the cause of Irish Home Rule in Britain. Parnell married his lover in June 1891. He died, heartbroken, in October of that year.

An election was called in the middle of 1892. Gladstone emerged victorious to form his fourth Administration. He went to Osborne on 15th August 1892 to kiss the hand of the Queen. She consigned him to a bedroom where he found a cheap print of his old adversary Disraeli.[9] It was during this administration that Gladstone warned the Queen "on his own responsibility" of the "growing danger of a class war".[10] He contended that the evils in British society had been aggravated largely "by the prolongation and intensity of the Irish controversy". This time the Home Rule Bill secured its majority in the Commons in April 1893. But the Lords rejected it by a crushing majority of 419 to 41. It was said that not a dog barked from John O'Groats to Land's

End. Britain was bored with Ireland. The subject was exhausted. In due course, Gladstone resigned. How differently the history of the British Isles might have been if his determined efforts to secure Home Rule had then succeeded. Instead, a chancre of bitterness was to last. It has not yet been removed. It helped shape the experience of the young Edward McTiernan, growing in far away Australia but of Irish stock, and ever proud of it.

THE EARLY YEARS

Edward McTiernan grew up in Metz, later called Hillgrove – a small town in the New England region of New South Wales. It was a goldmining town. Its three thousand souls were in the care of his father, the constable. The McTiernan family had originated from Heapstown, in County Sligo Ireland. They would certainly have followed Gladstone's determined efforts to secure Home Rule for Ireland and to address the "black blot" which British rule had left. To escape that blot and its economic consequences most of the McTiernan family had migrated to Boston in the United States of America. However, Patrick, already a constable in Crown service, secured employment with the New South Wales Police. He migrated to Australia as a bachelor. But soon after his arrival he married Isabella Diamond, also an Irish immigrant. Mrs. McTiernan was a pious Catholic woman who taught the catechism at the local church school.

By all accounts, Metz was a law abiding town. The McTiernan boys might have sunk into the mining service without trace. But just before the turn of the century, an event occurred which was profoundly to affect Edward McTiernan's life. He fell off the verandah of the cottage in which his family lived and from which his father provided law and order to unreluctant Metz townsfolk. As a result of that fall, the young McTiernan broke his left arm. It never set perfectly. It always retained a weakness. Constable McTiernan realised that there would be little future for a boy incapable of hard physical work in a mining town. The fall was thus one of the reasons which propelled the small Irish Australian family to head south for Sydney. They set up their home in Leichhardt, an inner suburb.

The fall was later to have an even more profound effect on Edward McTiernan's life. When in 1914 the Great War broke out, he was quick to volunteer for the Australian Imperial Force (A.I.F.). His difficulty in loading the rifle with efficiency led to his medical exemption from military service. But for that fall from the verandah, he once told me,[11] he suspected that he would have been under the mud on the Somme, with so many friends of the A.I.F. who fought there for King and Country. Any one who has visited the Australian War Memorials and graveyards of Northern France will understand the poignant likelihood of this speculation.

Settled in Leichhardt, Edward McTiernan was sent to the Christian Brothers' School at Lewisham. Later he attended the Marist Brothers' School at Darlinghurst. That school, until its recent closure, boasted the Edward McTiernan Prize. When it was closed, it was amalgamated in an associated school run by the Marist order in Canberra. It continues its association with Edward McTiernan. To it, his widow committed a number of memorabilia of the famous student of the early days of the century.

In 1908 Edward McTiernan matriculated from the school at Darlinghurst. He had little prospect of entering the University, despite the promise he had shown as a school child. It was not until 1912 that legislation provided support for children of working class families to attend the Sydney University.[12] At that time there was also little hope that the young McTiernan would secure employment in the large commercial houses of Sydney. These were times of strong sectarian prejudice. Commerce was largely dominated by Protestants who boasted of the work ethic as if they had invented it. The best hope for the young Edward was the Public Service.

On his father's suggestion, he sat the examinations for entrance into the State and Federal Public Services. He won entrance to both. Although an officer of the State Police, his father advised that he accept appointment to the Federal Service because, he predicted, it was likely to grow in size and importance. Little could Patrick McTiernan have realised the impact which his promising son would have upon the decisions which would reinforce, with legal effect, his own instinctual prognostications.[13]

Edward McTiernan therefore began his long association with Federal Government in Australia. He was employed as a junior clerk by the Customs Department. They sent him to a job at the Victoria Barracks in Sydney. With his small wages, he enrolled as an evening student in the faculty of Arts of Sydney University. At the University he came under the influence of Professor George Arnold Wood who taught him history. Wood was a liberal. He had criticised Australian involvement in the "imperial" Boer War. His criticism was accepted by the receptive McTiernan.

In 1910, the Labor Party won a clear majority at the Federal Election. For the second time, Andrew Fisher, the Labor leader took office as Prime Minister of Australia. This time Labor had a working majority. It established, for the first time, its claim to be one of the two principal forces in Australian politics. Labor held its majority until June 1913 when Joseph Cook formed a Government with the majority of one. His Government remained in office when War was declared in August 1914, But within a month, in a general election, the Fisher Government was returned with sweeping victories. Those victories soon turned to acrimonious disputes. W. M. Hughes became Prime Minister, in succession to Fisher. In 1915 he set upon efforts to persuade Australians to the cause of conscription to fight in the European war. The Roman Catholic Coadjutor Archbishop of Melbourne, Dr. Daniel Mannix, addressed huge church gatherings in September 1916. He expressed a critical Irish perspective of conscription. Labor, which had been substantially built upon the support of Irish working people, fell into bitter division. In October 1916 a national referendum to permit the conscription of Australian men for overseas military service was narrowly defeated. Hughes and twenty three supporters left the Labor Government. They formed a new Coalition government which proposed a second conscription referendum. This too was defeated in December 1917 with an even larger majority.

The young McTiernan observed these debates closely. He lined up behind Mannix and the majority of Labor supporters in opposition to conscription. Most young lawyers of the time were Empire loyalists. It was a rough introduction to the world of politics for these were times of fierce passions. With a war proceeding in which many Australians were being killed, embrace of opposition to conscription was often presented as disloyalty to the country and even worse.

McTiernan's graduation in Law, which he had studied after completion of his Arts Degree, occurred in 1915. At graduation he was awarded First Class Honours, an academic tribute to his diligence and to his intellectual abilities. Graduating in the same class was Mr. Kenneth Whistler Street, later to be Chief Justice of New South Wales.

During his law studies, McTiernan had obtained a position as a junior clerk in the well established firm of Solicitors Sly & Russell. He had no connections with the firm. As he told it to me, he was walking along George Street when a large brass solicitors' plate caught his eye. He approached the firm and was ushered into the presence of William Charles Schroder. Doubtless impressed by the young man's excellent academic results, Schroder gave him a corner desk. McTiernan began his lifetime association with the busy world of legal Sydney.

It was Schroder who secured for McTiernan a position at Allen Allen and Hemsley, even then one of the largest firms of solicitors in Sydney. Norman Cowper, a partner of the firm, was approached one fateful day by Mr. Justice Rich of the High Court. Rich was looking for an Associate to whom would be paid the princely sum of six pounds per week. Rich's son had enlisted in the A.I.F. and had been killed in France. He made it plain that he would not accept an applicant who had declined to serve King and Country. McTiernan fitted the bill perfectly. He was young. His academic results were outstanding. He had volunteered. Rich took him on. For the first time, in 1916, Edward McTiernan entered the world of the High Court of Australia. In 1916, Sir Samuel Griffith was still Chief Justice. Sir Edmund Barton, father of Federation was still there. Isaac Isaacs, Henry Bournes Higgins, Frank Gavan Duffy, Charles Powers and George Rich made up a distinguished Court. McTiernan came to know them all. Indeed, at time of his death in 1990, he had known every one of the Justices of the High Court (and served with most) save for Richard O'Connor who had died in 1912.[14] He had a treasury of recollections of these formidable legal spirits. Most of them were happy memories. Effortlessly McTiernan would talk of them in his later years, as if they still walked the corridors on the way to the court room of the High Court. For McTiernan, they were still alive, their strong personalities vividly etched in his memory. His detailed recall of them could cause their ghosts to walk.

PARLIAMENTARY YEARS

Edward McTiernan had joined the political Labor League in 1911. During the conscription referenda he had opposed the proposals. He never made a secret of such opposition. At the time the opinion of a fledgling barrister would not have counted for much. Roman Catholics predominated in the League. Their opposition to the proposals for compulsory conscription for overseas imperial war service were reinforced as the news came in from Ireland of the savage suppression of the Easter Rebellion in Dublin, in 1916, which the British regarded as a wicked stab in the back at a time of peril.

McTiernan, during his service with Mr. Justice Rich had been called to the New South Wales Bar. His admission was moved by George Flannery K.C., in whose chambers he subsequently took his place. From the start, McTiernan saw an opening in politics. Though only twenty eight years of age, he stood for election at the General State Election in New South Wales in 1920. The Nationalists were divided. The Labor interests won a narrow victory. Twenty five of the forty three Labor members of Parliament were Catholics. One of them was the young McTiernan elected for the constituency of the Western Suburbs. John Storey became the Premier and remained so until October 1921 when he died and was replaced by James Dooley.

McTiernan was commissioned to be Attorney General. He was, at the time, the youngest man in Australian history to receive appointment as the First Law Officer.[15] Within a short time he demonstrated the measure of determination and persistence which had come through his long years as a Judge. One of the first acts was to pilot through Parliament a measure to secure the readmission to legal practice of Mr. R. D. Meagher, a Sydney solicitor whose name had earlier been removed from the roll. The legal profession was virtually unanimous in its opposition to Mr. Meagher's restoration. Meagher was a prominent man on the Labor side of politics. He was Speaker of Parliament and was also to become Lord Mayor of Sydney. The Bill passed. Meagher was to be the solicitor in many notable cases of interest to the Labor Party. He was to brief both McTiernan, and the young and brilliant H. V. Evatt.[16]

Another initiative of McTiernan's involved the healing of a wound which had resulted from the incarceration of twelve members of the organisation International Workers of the World (IWW). They had been charged during the War with conspiracy. McTiernan established a Royal Commission under Mr. Justice Ewing of the Supreme Court of Tasmania. As a result of Ewing's report, ten of the "conspirators" were released in 1920. The remaining two followed shortly afterwards.

McTiernan also established a Profiteering Court. Concern about the misuse of market power was mixed with anger and disappointment of returned men coming back to economic difficulties in Australia after the end of the War. The Profiteering Court was never very successful. In this time of market economics, it seems an odd idea. In the context of the Australian love affair with compulsory industrial conciliation and arbitration, it was not so strange to Australians of 1920. McTiernan also established the Land and Valuation Court and secured the passing of the Fair Rents *Act* to protect the returned servicemen.

As Attorney General McTiernan was often required to confront the sectarian bitterness of the time. His well known association with Dr. Mannix, by now Catholic Archbishop of Melbourne, brought upon his head much spleen from conservative politicians. They were ever ready to denounce the controversial Archbishop and those who associated with him. Sir George Fuller, the leader of the Opposition, drew to the attention of Parliament the attendance of the Attorney General at a luncheon given in May 1920 to welcome Dr Mannix at the Sydney Town Hall. He said:

"We know that at the gathering the toast of 'The King' was omitted, and that Dr Mannix, who had been delivering speeches in Melbourne before he came to Sydney was guilty of utternances of a most disloyal character to the country and the Empire . . . At this gathering . . . the Attorney General was amongst the speakers and he referred to this rebel in our midst . . . Two ministers of the Crown who have sworn allegiance to the King ought to have been severely reprimanded by the Premier and put out of the Ministry . . ."[17]

According to Sir George, the venturesome Attorney General has told the reception:

"it would be a very difficult task for the Prime Minister to carry out his threat to deport the Archbishop. I venture to say he is Australia's greatest citizen. He is an Australian institution."[18]

McTiernan stood by the controversial Irish bishop whose calls for Irish independence were probably no stronger than those made earlier by Gladstone. They were a severe irritant to the conservative political forces in Australia at that time. Yet McTiernan stood true to his beliefs and to his origins.

In March 1922 at a general election in New South Wales, Labor lost seven seats. The Dooley government fell. George Fuller became the Premier. McTiernan was re-elected but consigned to the opposition benches. He saw this political setback as an opportunity to further his profession in the law. In Parliament he was quick to take up legal causes. The *Hansard Record* shows him speaking on many issues of concern to civil liberties. He opposed enlargement of criminal summary proceedings and reduction of the availability of jury trial. He spoke for the abolition of the death penalty. He opposed the sectarian measures pressed forward to provide a new crime of impugning a lawful marriage. This crime was a Protestant response to the Papal *ne temere* decree. This had declared that no marriage, including one between a Catholic and non-Catholic, was valid in the eyes of the Church unless conducted in the presence of a Catholic priest. For Protestants and secularist this was too much. McTiernan described the Bill to create a new crime as "pure unadulterated communism".[19] As Professor Buckley had suggested, nobody was likely to be persuaded that the Nationalist Government under Sir George Fuller was "communist".[20] This and other events of the time illustrate the serious blight

of sectarianism which infected politics in Australia at this time.

In May 1925 Labor won government again in New South Wales under its new leader J. T. Lang. McTiernan was back in government. Lang chose him to be Attorney General to the *chagrin* of H. V. Evatt who also come into Parliament in the election. These were turbulent times. Lang was determined to pilot through a number of important measures of social reform. They included provision for widows' pensions and child endowment. But perhaps the most enduring reform was the passage of the legislation for workers' compensation in 1926.[21] That Act of the Lang Government endured for almost the duration of McTiernan's life.[22] In its day, it was seen as a radical reforming statute. Later reformists lamented the fact that the original imagination which had inspired the 1926 Act was not to endure as it settled into its long operation.[23]

During this term of government, McTiernan introduced a Bill for the abolition of capital punishment. Although this passed the Lower House it did not secure passage through the Council. Even more critical for the Labor Government was rejection by the Council of the moves of the Premier to abolish the Upper House. Striking difficulty in his efforts to achieve this end with the Governor, Sir Dudley de Chair, Lang sent Attorney General McTiernan to London. His mission was to persuade the British authorities to convince the Governor of his duty to accept the advice of his elected ministers. McTiernan found London caught up in the middle of serious industrial unrest. Little time could be found for the Law Officer of a Government in state of a far away dominion. McTiernan took the opportunity to visit County Sligo to see the land of his ancestors. On his return to London he was "duchessed" in the way only an imperial Britain could do. He returned to Australia. His words of praise for the British Government scarcely commended him to the Labor newspapers. McTiernan's ascent in the social scale parallelled these international experiences. In opposition, he had moved with his family from Leichhardt to Haberfield. Now in Government again, and a barrister seemingly with a substantial career ahead of him, he moved to Strathfield. He was only to move once more, to Warrawee in the leafy northern suburbs of Sydney where he lived during most of his service on the High Court.

As Attorney General, McTiernan appeared in the High Court in a case involving a misguided effort to raise taxes by a halfpenny tax on newspapers. The Court rejected the tax, declaring it to be an excise.[24] By 1927, in a successful move to secure an early dissolution of Parliament, J. T. Lang resigned. He was recommissioned upon the basis that he would retain only William McKell and John Baddeley in his new ministry. McTiernan saw the writing on the wall. He was out of favour with Lang. He did not even renominate in the State election called for October 1927. The election saw Labor lose its slim majority. Thomas Bavin replaced Lang as Premier. Lang was not to return to Government until October 1930. McTiernan returned to full time practice as a barrister. As a tribute to his earlier academic success, the University of Sydney invited him to be Challis Lecturer in Roman Law.

McTiernan's period of Parliamentary service was not yet over. His life as a barrister did not fully consume him; nor were his political interests yet finally slaked. A Federal election of October 1929 provided him with an opportunity to enter the Federal Parliament. E. G. Theodore was looking for a good safe middle class candidate to offer in the Labor cause for the Sydney seat of Parkes. This stable middle class electorate around Croydon in Sydney's western suburbs, attracted McTiernan. A campaign was mounted for him by the first group of Labor lawyers: friends and colleagues of his. Most were Catholic lawyers who supported a moderately reformist Labor Party with the kinds of policies which McTiernan advocated.

McTiernan won the seat of Parkes handsomely. It was a seat which was to boast many famous members. Les Laylen was later to hold it. Later still, Tom Hughes won it for the Coalition parties supported by a group of lawyers who campaigned for him, as McTiernan's friends had done thirty years earlier.

McTiernan's period as Member for Parkes was short and inconspicuous. The *Hansard* shows him in occasional clashes with J. G. Latham, member for Kooyong, the leading King's Counsel from Melbourne who was soon to be his colleague in the High Court. But it was McTiernan's colleagues in the Caucus of the Labor Party who were soon to translate him from Parliament to the "least dangerous branch" of the Federal government.

THE HIGH COURT

The Labour Party in Government was lead by John Scullin. He was an extremely cautious man, more concerned than his opponents were about the slightest charge of making political appointments. The resignation of Mr. Justice Powers in July 1929 from the High Court left a vacancy unfilled at the election which brought the Scullin Government to office. In March 1930, Sir Adrian Knox, the Chief Justice, resigned affording the New Labour Government the rare opportunity to appoint two Justices. Isaacs was promptly promoted to Chief Justice. The two puisne positions remained. Scullin flirted with the idea of reducing the size of the Court to five Justices in the interests of economy.[25] *The Sydney Morning Herald* in December 1930 reported:

"Single Judges sat to hear cases on only 29 days compared with 71 days in 1929 and 45 in 1928. The number of days on which the Full Court sat to hear cases was much smaller in the last two years than in 1927 and 1928."[26]

So there was little pressure of work to fill the two vacancies. Their importance to the program of a Labor Government was not perceived by the cautious Scullin.

In December 1930, the Prime Minister and the Attorney General, F. Brennan, were absent in London. McTiernan's time had come. The Labor caucus in Canberra resolved to appoint two Justices to the vacant seats. There was a strong lobby for Dr H. V. Evatt K.C.. He was young. But his intellectual credentials appeared impeccable. He had appeared in numerous leading cases in the High Court. His scholarly work and university distinction, not to say his allegiance to the Labor Party, made him an obvious choice.

But within the Caucus, a group of members would not agree to Evatt's appointment unless it were balanced by the more temperate McTiernan. Ultimately, two vacancies being available, the decision was made. Scullin received a telegram. Desperately, by wire, he sought to dissuade his colleagues from the appointments. But they went before the Federal Executive Council and were duly made. There was nothing anyone could do about it, save by constitutional removal. Herbert V. Evatt K.C., at 36 became the youngest man ever elevated to the High Court. The Honourable Edward Aloysius McTiernan, 38, was appointed as from the following day, 20 December 1930. It was McTiernan who bore the brunt of the professional criticism which broke out on the announcement of the two appointments. The thrust of the criticism was that McTiernan lacked the distinction to deserve office in the country's highest court and that his only apparent claim to the office was faithful service to the Labor Party. Bar Associations and Law Societies around the country shunned him and Evatt. Typical was the South Australian Law Society. It voiced its opinion that Justices should not be appointed for their political opinions but only for outstanding legal reputation. As if in anger for the appointment, the Labor Party lost the seat of Parkes at the by-election to fill the vacancy left by McTiernan's retirement.

Much of the criticism ventured against McTiernan was based upon the fact that he

had never taken silk. This was the least significant of his disqualifications. Other Justices before (Sir Hayden Starke) and since (Sir Cyril Walsh) had never before judicial appointment received that commission. But there is no doubt that the criticism stung McTiernan, a sensitive man. It lead to anxieties which fuelled the ambivalent relationship he enjoyed with Evatt. A clever man of humble origins, McTiernan was hurt by the opprobrium heaped on him by the close knit, conservative legal profession with whom he was henceforth to spend his life. Still a bachelor, shy by nature and with only a small circle of close friends, his retreat into the judicial monastery reinforced the introspection and other-worldliness which had been noted during his time in politics. Although many Irish migrants and their families had participated in Labor politics, and most of them were Catholic, McTiernan was decidedly and noticeably so. He filled his private life with his associations in the Church. Before his appointment to the High Court, in 1928, he had taken an active part in the Eucharistic Congress held in Sydney in that year. For his loyalty and devotion to the Church, he was awarded a high Papal honour. So he was very visibly a Catholic public man. In the largely Protestant environment of the High Court and of the legal profession, this fact added somewhat to his isolation. And now he was cut off from many of the co-religionists and friends in the Labor Party who had sustained him to this point in his life. He was one of the founders of the Red Mass which, every year, opens the Law Term in Sydney. Faithfully, he would lead the Judges of Federal and State Courts into St Mary's Cathedral. He was also one of the founders of the St Thomas More Society. On one occasion he addressed its members on the 1926 Workers' Compensation Act of which he was inordinately proud.

Soon after Edward McTiernan arrived, Sir Isaac Isaasc was appointed, in an equal flurry of controversy, to be the first Australian born Governor General. Rumours spread that Evatt would be appointed in his place to the central seat of the High Court. Many believed that Evatt would have made a more stimulating Chief Justice than did Sir Frank Gavan Duffy, who succeeded Isaacs.[27] But now Duffy, Evatt and McTiernan provided a core of opinion in the Court which promised fair to the advance of Federal power and to the sympathetic resolution of disputes of concern to working men and women in Australia. The early cases in which McTiernan sat saw him quite frequently in concurrence with Duffy and Evatt.

In 1931 there came to the Court an appeal by the Labor Attorney General for New South Wales against a decision of the Supreme Court of that State concerning Mr. Lang's latest effort to abolish the Legislative Council.[28] Evatt could not participate because he had earlier been briefed in the proceedings. The majority of the High Court (Justices Rich Starke and Dixon) affirmed the Supreme Court. Chief Justice Duffy and McTiernan dissented. McTiernan's judgment is a closely reasoned piece, assertive of the powers of the New South Wales Parliament, in succession to the Parliament at Westminster:

"The gravity of the issues of law to be decided is emphasised by briefly noting the consequences which will flow from the success or failure of this appeal."[29]

An appeal to the Privy Council affirmed the High Court majority.[30]

Much more controversial, however, was the stand McTiernan took in the State Garnishee Case. The case concerned the validity of the *Financial Agreements Enforcement Act* 1932 (Cth). That Act, passed in the difficult economic and political circumstances of the time by the Lyons Government, was said by J. T. Lang's Government to strip New South Wales of the "sovereign" power to appropriate, control and expend its own revenue; to enable the Commonwealth to appropriate revenues of State contrary to the will of the Parliament of that State; to impair the officers of the State in discharging the powers and functions imposed on them by legislation of the State; to enable the Commonwealth to destroy the capacity of officials lawfully appointed by the State to perform their functions and to deprive the State of the power to discharge its functions, including its exclusive functions. These were the issues as seen by Evatt.[31]

On this occasion, Evatt could participate, and he did. Chief Justice Duffy agreed with Evatt's view. They proposed that the Federal legislation be declared unconstitutional. The same majority lined up against that view proposing that the Federal legislation be held valid. This time, McTiernan, instead of providing the equaliser which would have afforded the Chief Justice the vital casting vote, aligned his opinion with the majority.[32] On 21 April 1932, with Justices Rich, Starke and Dixon, McTiernan upheld the Federal Act as a valid exercise of the legislative powers of the Federal Parliament.[33]

In later proceedings, consistent with the respect for the Australian solution for such constitutional questions, McTiernan joined all of the Justices save Evatt in refusing a certificate under S.74 of the Constitution to permit New South Wales to take the closely divided judgment to the Privy Council. For Evatt the case warranted such an exceptional certificate:

"No case in which a certificate was refused resembles the present case in its importance.

Having reached the conclusion that the present case not only justifies, but imperatively calls for, a decision from the highest legal tribunal in the Empire, it is my duty to say so."[34]

McTiernan was a more consistent centralist and Australian nationalist. He was also defensive of the key position of the High Court of Australia in determining the allocation of powers.

"It (the High Court) is the tribunal specially created by the united will of the Australian people, as a Federal Court and as a national Court. It has very special functions in relation to the powers, rights and obligations springing from the Constitution . . . Since the foundation of the Court, a certificate has been granted in one case only. . .

It is . . . necessary that finality in the determination of the question of the validity of the Act should not be delayed by granting a certificate . . .

The application should be refused".[35]

The decision, so vital to the financial, constitutional but also political position of the Lang Government of New South Wales was a bombshell. From that day on, Lang refused to speak to McTiernan if ever they should meet together on a public occasion. He regarded McTiernan's decision as a betrayal. McTiernan acknowledged the slights but said that he "forgave" Lang for them.

Judges in difficult cases have choices. Nowhere more open ended are those choices than in constitutional cases where brief words of great generality must be given meaning. To the Labor supporters who had put McTiernan on the High Court, his inability to come to the same conclusion as the Chief Justice and Evatt seemed puzzling. To McTiernan, it was part of the judicial office and of the independence of judges under the law. Who knows to what extent the slights of 1930 played a part, even unconscious, in his determination to demonstrate quickly the independence of the politicians who, allegedly alone, put him in his place on the High Court? Who knows to what extent his desire to distance himself from Evatt, in a very public way, influenced, even unconsciously, his approach to the issues of the State Garnishee Case? In a sense, that approach was wholly consistent with an approach McTiernan was to adopt in the long years that followed. Consistently, he tended to favour an expansive view of the powers of the Federal Parliament. According to Professor Sawer, the reaction in Labor circles was a deep sense of disappointment that their appointee had

proved so impervious to their interest, and so quickly.[36]

During the 1930's, McTiernan joined in many joint decisions with Evatt; but more still with Dixon. He admired Dixon, whilst often finding his prose obscure. When Duffy was replaced by Latham in October 1935, there began the long and vital interval of the Latham Court which saw Australia out of the depression, through the Second War and into the busy times of post war reconstruction.

Material now available reveals what an unhappy place the High Court was during the 1930's. Squabbles were legion. There was a lingering resentment, particularly on Evatt's part, about the way in which, as he saw it, Duffy had been forced off the bench by "a combination which included one member of the present court".[37]

Duffy's successor, Latham, inherited a file full of the constant vexation which Mr. Justice Starke, in particular, inflicted on the Chief in relation to travelling expenses.[38] During the financial crisis which pressed upon the Court during the early period of McTiernan's service, allowances were cut and rail passes abolished. Rich complained that Evatt and McTiernan had consented to this "robbery" because, as former State Ministers, they enjoyed "gold passes" for free travel which survived the abolition of the Court's passes.[39] The most difficult member of the Court, Starke, never accepted the appointment of Evatt and McTiernan. An Associate has recounted a tale from that time which McTiernan repeated. Starke, passing McTiernan and his tipstaff in the corridor of the High Court would greet the tipstaff volubly, ignoring entirely the judge. This behaviour appears consistent with the contemporaneous evidence of Starke's letters to Latham after the latter was appointed Chief Justice. His usual description of Evatt and McTiernan was "the parrots". He charged them with blindly "parroting" the opinions of Dixon whose dominance of the Court Starke resented deeply:

"I am quite convinced that Evatt pays no attention to the facts and is merely a parrot. It is gravely detrimental to the High Court and its independence that whenever a grave difference of opinion is disclosed the "parrots" always reaches (sic) the same conclusion as Dixon."[40]

Lathan replied that Dixon was aware of his influence and found it "disagreeable". But Starke rejected this interpretation:

"I blame him (Dixon) a good deal for he angles for their support and shepherds them into the proper cage as he thinks fit".[41]

Evatt, formidable and himself capable of equal vituperation, was willing to respond in kind. McTiernan, a much gentler personality, absorbed these hurts with rare complaint. When Starke refused to sit on some of the circuits of the High Court, Latham had to depend heavily upon Dixon and McTiernan to ensure that the published sitting schedule of the Court was maintained. Only on one recorded occasion did McTiernan raise an objection and then in deferential terms.[42]

Immediately before and during the Second World War, Justices of the High Court took on extra-judicial responsibility. Lathan as Minister to Japan; Dixon as Minister to Washington and later Kashmir. McTiernan was also asked by Evatt (who by this time had resigned his seat on the Court and was Federal Attorney General) to conduct an inquiry into the alleged falsification of records in connection with aircraft production.[43] The outcome of his inquiry is unknown as it was subject to war time censorship.

Following the War, over opposition of R. G. Menzies, Evatt moved to increase the bench of the High Court to restore the number of Justices to seven. Their number had been reduced in 1933 to six as an economy measure. With new numbers, Labor scarcely took the opportunity to stack the court with its supporters – or even with mildly radical lawyers. The Government appointed Sir William Webb, Chief Justice of Queensland to the Court. Webb had no political association with the Labor Party. He turned out, like Dudley Williams also appointed from the Supreme Court of New South Wales to replace Evatt, to be conservative and highly traditionalist. With Duffy and Evatt gone, McTiernan was left as the only Justice with a philosophical inclination to the causes dear to the Labor Party. As the scalegrams of academic observers confirm, McTiernan was with a very high measure of consistency, usually favourable to the advance of Federal power. Through his decisions, McTiernan emerges on what may be called the *"left"* scale of the judges who served with him. His decisions were the least "pro employer" in industrial accident compensation cases. They were the most "pro accused" in criminal appeals. They were the least "pro laissez faire" in cases under S.92 of the constitution. Next to Mr. Justice Windeyer, his decisions were the least "pro defendant" in road accident cases. Yet in applications to review government decisions by the constitutional prerogative writs, his judgments were the most sympathetic to government and least supportive of the applicant challenging the benevolent state.[44]

McTiernan was not always in dissent. During the years of the Second World War the High Court, doubtless reflecting the peril of the time, adopted a generally expansive view of the defence power and indeed of federal power generally. With the end of the War, the bold moves of the Chifley Government were contested. By now often in dissent, McTiernan consistently supported the wide view of the powers of Federal Parliament.[45] The greatest of these test cases came in the Banking Case.[46] Latham and McTiernan alone supported the constitutional validity of the nationalisation measure upholding the Federal power. How ironical it is today to see the successors in Government to the Chifley Administration in the forefront of the moves to "privatise" banking – even to the point of selling shares in the Commonwealth Bank in the centenary year of the Labor Party which established it.

McTiernan's opposition to communism was undoubted. But he aligned himself with the majority in striking down the *Communist Party Dissolution Act* 1950 (Cth), the political centre piece of the restored Menzies Government.[47] Latham alone held out in support of Federal power. The referendum which followed this notable decision saw Evatt in his finest hour: defending the constitution as a charter of a free and tolerant people living in a community which accepted a high measure of diversity of opinion. Perhaps the older McTiernan saw in the legislation against communists – disadvantaging them for their allegiance and opinions not for their actions – reflections of earlier laws and attitudes against Catholics and other vulnerable minorities.

Sectarianism did not entirely die in the 1920's. It showed its unhappy face with the split of the Australian Labor Party and the creation of the Anti-Communist Labor Party and later the Democratic Labor Party in the 1950s and 1960s. Remnants of it can still be seen in the Australian political debates. The worst of it appears behind us. But McTiernan brought up to feel it keenly, did not entirely escape sectarian attitudes as I shall show.

HONOURS AND RETIREMENT

In 1948 Mr. Justice McTiernan, 56 married Kathleen Lloyd. By every account she is a formidable lady. One Associate even said that she could have concluded the Second World War if General Eisenhower had not been available. Perhaps the diffident and courtly McTiernan felt the need for such a daily influence in his life. That life had been left empty in 1945 when his father, Patrick, had died. Before Patrick McTiernan's death, the High Court judge was in constant communication with him. He was a dutiful son.

Upon the return of the Menzies Government in 1951 McTiernan was offered a knighthood by Mr. Menzies. The Order offered was of the British Empire. In the past, the Justices of the High Court had usually been elevated within the more prestigious Order of St Michael and St

George. Urged on by colleagues lower in the line, McTiernan begged to query Menzies' offer. The reply indicated the limited number of MCMG's available. KBE's provided no such difficulty. So McTiernan accepted. This faithful son of Ireland and of the Church became Sir Edward. After him it became a normal incident of the office of the Justices of the High Court during Coalition governments to be offered, and to accept, appointment as a Knight of the Order of the British Empire. It remained so during the Fraser Government, Sir Daryl Dawson being the last of the Justices so honoured.

In 1963 Sir Edward was sworn of the Privy Council. He thus became entitled to the honorific of "the Right Honourable". He sat in the Privy Council in 1973, taking a long journey around the world which Lady McTiernan organised. He insisted on being accompanied, even into the first class cabin of the plane, by his Associate. Reluctantly, the Federal authorities agreed. *The Appeal Cases* for 1973 record one appeal in which he sat in the Judicial Committee. It was an appeal from Hong Kong. Lord Wilberforce presided. The advice of their Lordships was given by Lord Pearson. In it, reliance was had on a decision of the Privy Council in which their Lordship's preferred a West Indian decision to one of the High Court of Australia in which McTiernan had joined.[48]

McTiernan generally kept his Associate, or law clerk, for a year or eighteen months. The qualifications for that office were simple. The candidate needed to be Roman Catholic, male, of Irish descent and preferably with an interest in Labor politics. McTiernan had severed his personal links with Labor politicians. But he kept a keen eye on political developments. He liked to discuss them with his Associate. On most days it was his practice to eat in his chambers with his Associate. They would together consume the meal which Lady McTiernan had prepared for them. Having no children of his own, the parade of Associates became part of McTiernan's family. Traditionally, an Associate would eat at home with the McTiernans at least once a week at the large house in Warrawee adjoining conveniently, a Catholic chapel. He was devout in his religious devotions: attending Mass on the Sabbath and on the feast days.

Many expected Sir Edward McTiernan to retire upon the election of the Whitlam Government in 1972. Throughout those long years of dissent and judgments ever briefer, it was frequently said amongst law students that "Eddie" was keeping a seat warm for the next Labor Government, out of loyalty to his origins. So it had been when Menzies returned to office. Within weeks Hayden Starke and George Rich resigned. Their resignations made way for the appointment of Justices Fullagar and Kitto. But McTiernan had few interests outside the law. Perhaps he saw no one more suitable to take his place. Perhaps nobody suggested that he should resign. Perhaps by 1972 he was more truly devoted to a judiciary above politics to render unthinkable the thought of resignation for the advantage of the Labor Party. Perhaps he expected the Whitlam Government to hold office longer than it did. Perhaps he was taken by surprise when the Whitlam Government lost office. Whatever the reason, he was still there when the Fraser administration came to power.

Indeed, McTiernan would probably have been there until his death but for an accident which occurred in the Windsor Hotel in Melbourne in 1976. He fell trying to stamp on a cricket (some say a cockroach). He broke his hip. The mending took a long time. When he was ultimately mobile again, Chief Justice Barwick declined to alter the accommodation of the High Court to provide for a judge in a wheelchair. It would cost too much. And although "Gar" and "Edward" had enjoyed a good personal relationship, the Chief doubtless sensing an opportunity to fill the post with someone younger and closer to his own world view, eventually persuaded McTiernan to retire. The retirement was gazetted on 12 September 1976. It closed the longest term of office served by an Australian judge – 46 years. It surpassed the term of 36 years served by Justice William Douglas of the Supreme Court of the United States of America.

One consequence of the long service was the fact that, in his age, Sir Edward was frail. His hands trembled in company with his voice. Yet his mind remained fairly clear to the end. On the bench he could be distracted. The fine quavering voice would often be difficult for counsel to understand. Chief Justice Barwick would not allow counsel to ignore McTiernan. "You have not answered my brother McTiernan's question" he would often say. He was not devoid of humour. Nor should his gentleness be misunderstood. His Associates tell of how he could burst into energetic enthusiasm and become animated. But it was generally over history or politics, not the law.

At his home in Warrawee, McTiernan would receive friends and visitors – most of them having those qualities which he found congenial and by which he invariably selected his Associates. They would sit there in a large bright room under a substantial but conventional portrait of McTiernan. Lady McTiernan would keep any children at bay. Sir Edward would reflect on times long ago. His memory was that of an old man. He had instant and detailed recall of events of the 1920's. Conversations could be called to mind, characteristics and even the clothing and appearance of the historical figures of that time. More recent events were less readily recalled. On his 90th birthday, I visited him. I recorded his words as soon as I had returned from his presence. Later published[49], the record is a remarkable story of service to Australia over an unprecedented period through times of dramatic change.

In one way McTiernan, the constitutional reformer, contributed more than he knew to a reform of the Australian Constitution passed at referendum. It was occasionally his lot to assume the office of Acting Chief Justice. Being the senior *puisne* judge of the Court, he was obliged to step in for Dixon and Barwick when they were unavailable. On one occasion he did this to swear in new members in the Senate Chamber. The Members of Parliament, who rarely saw the Justices of the High Court in those itinerant days, were uniformly shocked at McTiernan's great age and apparent feebleness. It was the sight of the octogenarian which encouraged the bipartisan support for the amendment of the constitution providing for the compulsory retirement of Federal Judges.[50] It was one of the few proposals to change the constitution approved by the people. Henceforth there would be no more life appointments.

McTiernan died on 9 January 1990. He was just short of his 98th birthday. At a sitting of the High Court on 5 February 1990 Chief Justice Mason, in a brief tribute, noted his long service:

"Sir Edward had a profound knowledge and appreciation of the law and literature, a knowledge and appreciation that contributed to the clarity of thought and expression which were the hallmarks of his judgments. Viewed in their totality, they exhibit a remarkable consistency of thought an decision over such a long period of judicial service. Sir Edward's unfailing kindness and courtesy were appreciated by all who appeared before him and sat with him. Sir Edward made a great contribution to the public life of this country in law and politics."[51]

Remarkably, his judgments begin at the 44th volume of the Commonwealth Law Reports. They end in volume 137. It remains for a full biography to be written, analysing those judgments. It will be surprising if they do not bear out what scalegrams and judicial impressions suggest is the "remarkable consistency" of the world view of this venerable judge.

IN THE FOOTSTEPS OF MORE

Why should we be concerned with the life of Sir Edward McTiernan? This country disdains its own history. Too fascinated

with the personalities of the other side of the world, its most gifted sons and daughters have too often served alien gods and ignored the lives of noble citizens closer to home.[52] According to Manning Clark, the present generation has a chance to be wiser than previous generations were. It can see an end to the domination of the "straighteners" and the opportunity for the "enlargers of life" to have their chance.[53]

I have found the personality of McTiernan of interest for things I shared in common with him. His was an Irish background, and although mine is of the Protestant tradition, the clue to the issues of Ireland is the essential similarity of its separated people. He was a man interested in the world seen through the prism of a moral perspective. He had a concern for the disadvantaged. He was sensitive to the issues facing ordinary working men and women. He was loyal to their causes. That remarkable consistency was played out year after year, and, where necessary, in dissenting judgments. In McTiernan's time it was more difficult to dissent than it is now. The ascendancy of analytical jurisprudence made the path of the reformer and dissenter, like McTiernan, painful and difficult. Yet he pressed on, true to his own colours. He was not unconscious of his own responsibilities and the honour of serving as a judge in his country's highest court. He remained ever courteous and fundamentally humble. Doubtless these personal attributes were daily renewed by the sure knowledge that there was above him a power greater than any mortal power.

McTiernan was no saint. He had a reputation for personal meanness. This was doubtless the product of the relatively humble circumstances of his early years. He certainly stayed far too long on the Court. Every office holder must keep in mind the need to make way for young people of honourable ambition who follow behind.[54] By the 1960's, McTiernan's enthusiasm and energy had noticeably waned. Even the number of dissenting judgments fell. The spell of Dixon was by then truly upon him. The energy required to contribute an intellectually worthy and alternative perspective to the High Court was not usually there. To modern eyes, his restriction of his circle of friends and his appointment of Associates to people of a like background, views and religion seem unacceptably narrow and discriminatory. Human beings, including judges, are improved by acquaintance with people of a different background and experience. It takes a large spirit to escape the bonds of clan loyalties and the comforting reassurance of mixing with people like oneself. Doing so helps to destroy stereotypes built on childhood preconceptions. These are perhaps reasons why observers note that he was not "a dominant force" in the Court.[55] He should have had sufficient insight to perceive that the time had come for retirement, to make way for fresh blood required to invigorate a vital branch of government. For a man who succeeded so handsomely in his own youth, he betrayed little thought for the more youthful aspirants who conceived themselves to be worthy of similar chances in life.

For all that, he displayed in his life many endearing graces. Sir Thomas More, canonised in 1935, was for him an exemplar. More's life was told in the **Lives of the Chancellors** by Lord Campbell who said of him:

"With all my Protestant zeal I must feel a higher reverence for Sir Thomas More than for Thomas Cromwell or Cramner . . . I am indeed reluctant to take leave of Sir Thomas More, not only from his agreeable qualities and extraordinary merit, but from my abhorrence of the mean, sordid, unprincipled chancellors who succeeded him . . ."[56]

Happily McTiernan's successors have not merited such opprobrium. It has fallen to this Protestant reviewer to write twice of this most Catholic judge with a proper measure of respect. McTiernan never faced the mighty challenge that cost More his life. He will not join the company of the saints. No stained glass windows will memorialise him. Certainly, he lived to see the ultimate ascendancy of Catholic Australians with members of his once disadvantaged church in the highest offices of state. Today six of the seven Justices of the High Court of Australia were baptised Catholics – a truly remarkable turnabout from the days of endangered religion faced by More and to a lesser extent McTiernan himself. The old days of minority disadvantage were wholly gone. Now there was a need for those who had overcome that disadvantage to perceive the contemporary disadvantages of others. McTiernan, as a child of the 19th Century, never took that leap of the mind.

Yet there are parallels with the life of the sainted Chancellor which should be noticed before this tale is closed.

Like More, McTiernan lived in a time of great change, of dangerous wars and of moral ferment. More had to face the challenge to his Church presented by Luther, the Reformation and the English Protestants. In McTiernan's world, the Church in his own lifetime came under unprecedented challenge. It was always an anchor for his existence. For More the great technological change of the printing press revolutionised the spread of ideas in a way that altered the old civilisations forever. McTiernan lived to see the age of nuclear fission, interplanetary travel, the microchip and *in vitro* fertilisation. Both More and McTiernan saw the law challenged in a time of radical change. Each in his way had to respond to the challenges.

Both were educated in the manner of the common law. Both worked under and with intellectual leaders of the legal profession. More was profoundly affected by his exposure to Erasmus. If no Erasmus entered McTiernan's early world, he certainly mixed, by happy chance, from the beginning with the large figures of Australian law.

Both More and McTiernan were elected members of the People's House of Parliament. More became the Speaker of the House of Commons. McTiernan took a seat in both the State and Federal Parliaments. Both were knighted. Both were sworn of the Privy Council. Both became Judges in their country's highest court, continuing to exercise judicial power in the great tradition of the laws of England.

Both had about them a simplicity and modesty of personal demeanour which attracted respect and admiration.[57] For both, family life, devotion to a small circle and, specifically, respect for their fathers was an important element on their personal road to humility. More, when Chancellor, would begin his day kneeling at the feet of his father, Sir Thomas More, when still sitting on the King's Bench as the Senior Judge.[58] McTiernan's devotion to his father endured to the latter's end. Even to his 90th year, he could recall the happy days at Hillgrove in the family home of that country constable.

Like More, McTiernan was stubborn. At least in his early years, he would not take the easy path of concurrence. He held out for his own views though they were often unorthodox. The middle decades of his service were times of remarkable uniformity of thought in the High Court of Australia. To swim against that tide spoke of high moral conviction and the "indomitable Irishry" of which the poet Yeats wrote. Some time before the High Court of Australia, the House of Lords in England embraced McTiernan's opinion, that the simple words of income tax legislation should receive their plain meaning.[59] He struck down tax avoidance schemes in a way which was regarded with condescending bemusement at the time. With hindsight, we can see that many of his opinions on Federal power, criminal law and tax avoidance were simply ahead of their time. Perhaps in a more supportive and congenial working environment, the light of his intellect might have shone more brightly than it did.

More's sudden end, for the urgent insistence of conscience, contrasts with McTiernan's long service. Each of these lawyers has lessons for their own country and beyond. More teaches succeeding generations the ultimate obligation of

individual conscience and duty to the enduring law above even the mighty power of the state. For Australians, McTiernan shows that with luck, ability and opportunity a poor boy from a country mining town can rise to the highest offices of the State and nation.

As lawyers, we can celebrate the life of Edward Aloysius McTiernan whose centenary approaches. He accompanied our Commonwealth through its first testing century. His monuments are not in cold stone but in the living pages of the *Commonwealth Law Reports*. This is the privilege of judges. Their ideas and the fine workings of their minds, are displayed for those who come after. They contribute to the seamless history of the law.

It falls to Yeats, another Irishman also from County Sligo, to offer this epitaph to McTiernan:

Under bare Ben Bulben's head
In Drumcliff churchyard Yeats is laid.
An ancestor was rector there
Long years ago, a church stands near,
By the road an ancient cross.
No marble, no conventional phrase;
On limestone quarried near the spot
By his command these words are cut:
Cast a cold eye
On life, on death.
Horseman, pass by! [60]

FOOTNOTES

*President to the Court of Appeal of New South Wales. Text on which was based an address to the St Thomas More Society, Sydney 23 July 1991. Personal views.

1. R. McMullin, *"The Light on the Hill: The Australian Labor Party 1891–1991"*, OUP, Melbourne, 1991.
2. *Federal Council of Australasia Act* 1885 (Imp.)
3. *British North America Act* 1867 (Imp.). In 1981 this statute was renamed The Constitution Act 1867.
4. *Commonwealth of Australia Constitution Act* 1900 (Imp.)
5. Ibid, s71.
6. See E. Magnus, *Gladstone,* John Murray, London, 1963, 357.
7. *Ibid*, 358.
8. *Id*, 364.
9. *Id*, 399.
10. *Id*,405.
11. Many of the details on Sir Edward McTiernan's life here recorded were told to the writer on the occasion of Sir Edward's 90th birthday in February 1982. See M. D. Kirby, *"Sir Edward Aloysius McTiernan, 1982 – 1990 – Parliamentarian and Judge"* (1990) 64 ALJ 320. The author gratefully acknowledges access to the forthcoming biography of Sir Edward McTiernan by K. Buckley, to be published by the Law Foundation of New South Wales.
12. *Bursary Endowment Act* 1912 (NSW).
13. See e.g. *South Australia -v- The Commonwealth* (Uniform Tax Case), (1942) 65 CLR 373; *Victoria -v- The Commonwealth* (Second Uniform Tax Case), (1957) 99 CLR 575. See also *Victoria -v- The Commonwealth and Hayden* (Australian Assistance Plan Case) (1975) 134 CLR 338.
14. See (1912) 15 CLR i.
15. Noted (1990) 168 CLR i.
16. *See Legal Practitioners' (Amendment) Act* 1920 (NSW). See also *Incorporated Law Institute of New South Wales -v- Meagher* (1909) 9 CLR 655.
17. *New South Wales Parliamentary Debates (Legislative Assembly)* 10 October 1920, 123. In his maiden speech to the House, lasting 2 hours, McTiernan begged his parliamentary colleagues to "look kindly on my deficiencies". See *New South Wales Parliamentary Details (Legislative Assembly)* 18 August 1920, 277. He admitted that he had not " acquired the parliamentary laugh or the parliamentary method of saying "hear, hear". Exceptionally, he interrupted was by an unnamed Hon Member who declared "you are the biggest capitalist in the House!" Ibid 278.
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20. See Buckley (above) in 11, fn 18.
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22. The Act was repealed by the *Workers' Compensation Act* 1987 (NSW).
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25. J. M. Bennett, *"Keystone of the Federal Arch – An Historical Memoir of the High Court of Australia to 1980"*, AGPS, Canberra, 1980, 51.
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27. Bennett, above n 25, 53.
28. *Attorney General for New South Wales and Others -v- Trethowan and Others* (1931) 44 CLR 394. The saga continues to this time. See Bignold -v- Dickson and Ors (1991) 22 NSWLR forthcoming.
29. **Trethowan**, ibid, 433.
30. See (1932) 47 CLR 97.
31. *New South Wales -v- The Commonwealth [No. 2]* (1932) 46 CLR 235, 240.
32. *New South Wales -v- The Commonwealth [No. 1]* (1932) 46 CLR 155.
33. *Ibid*, 227.
34. *Ibid*, 242 Cf McTiernan's deference to English House of Lords authority as late as 1943. See *Piro -v- W. Foster & Company Ltd* (1943) 18 CLR 313, 336. These were not unusual sentiments for the time. See also Griffith CJ's remarks (1919) 26 CLR vi.
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39. *Ibid.*
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41. *Ibid.* Letter of 2 December 1938.
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44. A. R. Blackshield, "Quantitative Analysis: The High Court of Australia 1966 – 1969" (1972) 3 *Law Asia* 1, 3.
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46. *Bank of New South Wales -v- The Commonwealth* (1948) 76 CLR 1, 391.
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48. See *Edwards -v- The Queen* (1973) AC 648 (PC). The Australian decision not followed was *The Queen -v- Howe* (1958) 100 CLR 448 where McTiernan J. had concurred with Dixon J. See *ibid*, 464.
49. (1990) 64 ALJ 320.
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UTOPIA
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THOMAS MORE – LAWYER

by The Hon. Mr. Justice John Dunford

Paper delivered to Amici Thomas More Conference, "New World and Utopias" at Manly on Saturday, 10 July 1992.

I

Whilst a lot has been written about Thomas More as a martyr, saint, humanist, philosopher and polemicist, it is important to bear in mind that for most of his adult life he followed the career of a lawyer, judge and administrator; and undoubtedly his training and career as a lawyer affected his attitude to life and to the great controversies which ultimately led to his death. I therefore want to spend some time looking at More the lawyer, because I believe that to ignore the lawyer in More is to ignore a substantial element of his personality. I intend to briefly trace his career as a lawyer, judge and administrator, and then look at how his training as a lawyer influenced his approach to Henry's divorce, the succession and the royal supremacy; and the stand he took at this trial.

II

More was born on 6 February 1478 in London. His father was a prosperous barrister and later a Judge of the Court of King's Bench, one of the major Common Law Courts in England. Not only that, but his maternal grandfather, Thomas Granger, after whom he was named, had achieved distinction in the legal profession, and in 1503 was elected Sheriff of London[1]. Subsequently his elder daughter Margaret (his beloved Meg) married William Roper (his biographer) who was also a barrister; so More was not only a lawyer himself but the grandson, son and father-in-law of lawyers.

After a time as a page in the household of Archbishop (later Cardinal) Morton, Archbishop of Canterbury and Lord Chancellor, at about the age of 14 he went to Oxford University, but within two years his father who wished him to follow his footsteps in the law, took him away from Oxford and enrolled him as a student-at-law at New Inn, one of the Inns of Chancery.

In those days, although the teaching of the Roman Civil Law and of Canon Law was in the hands of the Universities of Oxford and Cambridge, instruction in the English Common Law was carried out exclusively in the Inns of Court in London and their subsidiaries, the Inns of Chancery. As I say, More was enrolled at New Inn, and just after his eighteenth birthday he was admitted to Lincoln's Inn having been "pardoned four vacations", at the instance of his father[3]. This would have been about 1496. He subsequently became a Reader (i.e. lecturer) at Furnival's Inn, another one of the Inns of Chancery.

After a period of two to three years during which More lived with the monks at the London Charterhouse and contemplated a religious vocation whilst apparently continuing his studies, and probably his incipient legal practice, he left the Charterhouse, married Jane Colt in 1505[4] and quickly established a successful practice at the Bar. On 16 January 1504, he was elected as a member of the House of Commons. His practice at the Bar grew rapidly, he was soon in receipt of an income exceeding 400 pounds per year and was said to be in all the important cases[5]. In 1511 his wife, Jane, died and within a month he married the widow, Alice Middleton.

He was elected Marshall of Lincoln's Inn in 1510, Autumn Reader for 1511, and Lent Reader for 1515. By 1513 (aged 35) he was a Bencher of Lincoln's Inn and on 3 September 1510 he had been appointed Under-Sheriff of the City of London[6], also sitting as an arbitrator from time to time. The office Under-Sheriff was a part-time judicial office in the City of London Court. In addition the Under-Sheriffs advised the Sheriffs and had the right to appear as junior counsel to the Recorder to represent the City in the Superior Courts at Westminster[7].

So by age 35 he was one of the leading barristers in the City, held a part-time judicial appointment, was a Bencher of his Inn and had been a member of Parliament. No doubt the future looked rosy and a judicial appointment to one of the Superior Courts at Westminster must have appeared not unlikely.

He had already attracted the attention of the King and of his then Chancellor and Chief Minister, Wolsey. In 1515 he went to Flanders as part of a delegation on behalf of English merchants to renegotiate the commercial treaties of 1495 and 1506[7], and it was whilst there that he commenced writing Utopia[8]. Also at about this time he had one of his more notable successes at the Bar in a prize case appearing for the papal nuncio to oppose the forfeiture of a ship belonging to the Pope which had been seized at Southampton for a breach of the law of nations. The hearing was in the Court of Star Chamber and More was successful. The King himself was present and both he and Wolsey were impressed and became even more anxious to have More for the royal service[9]. Then in May 1517 exercising his powers as Under-Sheriff, he helped quell the Apprentices' Riots and later successfully obtained mercy from the King for a large number of those involved[10].

Shortly after, he entered the Royal Service full time, in 1518 being granted a royal annuity backdated to 29 September 1517, the date on which he left on a further delegation to Calais[11]. On 23 July 1518 he resigned as Under-Sheriff of London and was appointed Master of Requests and Privy Councillor[12]. In 1521 he was appointed Under Treasurer and knighted[13]. Early in 1523 he was appointed Speaker of the House of Commons[14] and in 1525 Chancellor of the Duchy of Lancaster and High Steward of Oxford and Cambridge Universities, resigning as Under Treasurer in January 1526[15].

Of course these judicial and quasi-judicial activities only constituted a small part of his duties in the King's service. He was involved in day to day administration and attendance upon the King and took part in a number of diplomatic missions abroad including Calais 1521, and Amiens, 1527 and he led the delegation which secured favourable terms for England at Cambrai, 1529[16]. Ultimately, on 25th October 1529 More became Lord Chancellor and was sworn in the following day in Westminster Hall with considerable ceremonial, the principal speaker being the Duke of Norfolk on behalf of the King[17].

III

On 3 November 1529 the new Parliament (the so-called Reformation Parliament) met and More as Lord Chancellor opened the Parliament in the presence of the King[18]. He presided over the debates in the House of Lords whilst his three sons-in-law and the husband of his stepdaughter were each members of the House of Commons[19]. Parliament only met for six weeks and was prorogued on 17 December 1529.

More now turned his attention to his judicial duties as Lord Chancellor. By this time the jurisdiction of the Court of Chancery as a court of equity was taking shape. More was the first common lawyer appointed to the office, previous appointees having been either ecclesiastics e.g. Morton, Warham, Wolsey, or prominent

noblemen without legal training. More sat as Chancellor to hear causes between 8 and 11 in the morning, and after dinner (ie. lunch) he was often available at his home at Chelsea to grant bail to defendants and issue writs of subpoena, and also orders and injunctions[20].

About this time the controversy developed between the Chancellor and the Judges over the Chancellor's issuing of injunctions against proceedings and judgments in the Common Law Courts, particularly over the latter's refusal to give effect to trusts, or uses, as they were then called. More apparently was of the opinion that law and equity might be beneficially administered by the same tribunal and he made an effort to induce the Common Law Judges to relax the rigour of their rules with a view to meeting the justice of particular cases. To this end, he invited the Judges to dinner with him, and went through the various objections that had been raised to injunctions issued in Chancery which he refuted one by one, and reminded the judges if they themselves would mitigate and reform the rigour of the common law, there would be no more injunctions granted by him. However the judges were not receptive to his approach, and the dinner ended on a somewhat sour note, whereupon More continued granting injunctions as before[21] and the issue was not finally resolved until the ruling of James I in favour of the Chancellor in the **Earl of Oxford's case**[22]. It was not until 1875 in England[23] and 1972 in New South Wales[24] that law and equity came to be administered by the same tribunal.

Meanwhile the storm clouds had been gathering in relation to the King's divorce and the ultimate break with Rome and on 16 May 1532, the day after the so-called Submission of the Clergy, which effectively gave the King control of the English Church, More resigned as Lord Chancellor and his legal, judicial and public career came to an end. It appears More had been seeking to resign for some time and it was only at that time that the King agreed to accept his resignation[25].

From May 1532 until 13 April 1534 More lived in retirement at Chelsea devoting himself to writing, defending himself against charges relating to his career as Chancellor, and preparing for the battles which he foresaw were to come. Twice he was called upon to answer charges that he had accepted bribes whilst Lord Chancellor and both those charges failed[26].

By the beginning of 1534 the position was that More was no longer Lord Chancellor and, so long as he declined to support King's divorce of Catherine of Arragon and his marriage to Anne Boleyn, which had taken place in secret on 20 January 1533 and announced at Easter that year, he certainly was not going to receive any further preferement from the King. He had declined an invitation to attend Anne Boleyn's coronation on 1 June 1533 thereby giving further offence to Henry and his new Queen and on 7 September 1533 Anne Boleyn had given birth to the future Queen Elizabeth. The charges of bribery against More had failed, and he had been included and then dropped from the bill of attainder relating to Elizabeth Barton the "Holy Maid of Kent" who was ultimately executed with her supporters on 21 April 1534. At that stage he had done or said nothing illegal and had committed no offence, he had made no public statements relating to the divorce or the King's remarriage, and the royal supremacy as such was not yet an issue.

IV

Parliament met again in March 1534 and passed a group of acts which strengthened the King's control over the Church[27].

But the most significant legislation for present purposes was the so called First Succession Act28 which declared that "by authority of this present Parliament" the marriage between Henry and Catherine was "against the laws of Almighty God and utterly void, any license or dispensation to the contrary notwithstanding", that the marriage between Henry and Anne was "undoubtful, true, sincere and perfect", it declared marriage within certain degrees to be prohibited by the laws of Almighty God and that no power on earth had ever had the power to dispense in such cases, and declared the children of Henry and Anne to be the King's lawful issue, and the order in which the Crown should descend to them was set out. All persons who by writing or printing should peril of the King or prejudice his marriage to Anne or the right of the issue of such marriage to inherit the Crown were to be adjudged traitors, and upon conviction to suffer death for high treason and forfeiture of goods, whilst persons doing such things by words without writing or act were to be adjudged guilty of misprison of treason and suffer loss of all goods and imprisonment at the King's pleasure. Finally the Act required an oath to be taken by all adult subjects to swear that they would observe, maintain and defend "the whole effect and contents of the Act" and once again the penalty for refusing the oath was to be loss of all property and imprisonment at the King's pleasure. Meanwhile on 23 March in Rome, the Pope delivered his judgment in the King's suit for declaration of annulment of to his marriage to Catherine, declaring that it was a truly valid marriage; news of this seems to have reached London on 3 April 1534[29].

Commissioners were appointed to administer the oath and the first layman, apart from members of Parliament, called on to take the oath was More. On 12 April, 1534 he was summoned to appear before the Commissioners the following day at Lambeth which he did the Commissioners being Archbishop Cramner, Lord Chancellor Audley, the Abbott of Westminster and Thomas Cromwell[30]. More was now faced with a real dilemma. He was prepared to swear to the succession, he accepted that Parliament had power to rest the succession to the Crown in any one, either legitimate or illegitimate. However the Act also required him to swear "to the whole contents of the Act" and those contents included a declaration that the King's marriage to Catherine was null and void, that it was against the laws of almighty God, any licence or dispensation to the contrary notwithstanding (which would include the dispensation granted by Pope Julius II in 1503) and it declared that no power on earth had ever had power to dispense with certain degrees of affinity. It also involved a denial of the Papal judgment of 23 March.

Moreover the oath tendered by the Commissioners, which had already been taken by members of both Houses of Parliament contained a further clause "to acknowledge (Henry) the Head of the Church of England and to renounce all obedience to the Bishop of Rome, as having no more power than any other bishop". This clause was not authorised by any Act of Parliament or other law, the Act of Supremacy was still six months away and the oath omitted the qualification which the clergy had placed in their acknowledgement of Henry's authority in February 1531, "insofar as is lawful according to the law of Christ". Accordingly, as a matter of law, he could not be required to take the oath in this form[31]. More was prepared to defend and uphold the succession as fixed by parliament but not to take the whole of the oath in the form it had been offered to him including the acknowledging of the King's supremacy in spiritual matters and rejection of the authority of the Pope. The commissioners brushed such objections aside, and he was committed to the custody of the Abbott of Westminster for four days to think it over, and no doubt to enable them also to think over what to do with him. Then, after again refusing the oath, on 17 April 1534, he was committed to the Tower[32].

In the meantime, it appears Cramner sought a compromise. He suggested that they might be satisfied with More swearing to the succession and to uphold it against all powers and potentates and excusing him from denouncing either the validity of the marriage to Catherine or papal supremacy,

provided that the form of oath taken should be suppressed, no doubt by another oath. This would have placed More in an intolerable position; he could have taken the oath, and he could have sworn not to disclose what oath he had taken, but others could have proclaimed publicly that he had taken the oath in the form taken by everyone else, and because of his oath, he would be in conscience bound not to deny it. However he never had to resolve this dilemma because the King, possibly under pressure from Anne, would not accept any compromise[33]. Therefore, because of his refusal to take the oath, More was liable to forfeiture of goods and imprisonment during the King's pleasure, but he had not spoken against the King's marriage to Anne, let alone done anything by writing or printing, and was not liable to death for treason. More apparently considered his imprisonment unlawful because he wrote to his daughter Meg complaining that "they that have committed me hither, for refusing of this oath not agreeable with the Statute, are not by their own law able to justify my imprisonment"[34].

Parliament met again on 3 November and within the next six weeks passed three more statutes that completed the laws passed in the Spring. The Act of Supremacy[35] declared the King and his successors were to be taken as "the only Supreme head in earth of the Church of England", the Second Act of Succession supplied the official text for the oath required by the earlier act, namely "to observe, keep, maintain and defend the Act of Succession and the whole effect and contents thereof", whilst the Treasons Act made it high treason and punishable as such to "maliciously wish, will or desire by words or writing to deprive the King or Queen of their dignity title or name of their Royal estates", or slanderously and maliciously publish and pressure that the King should be heretic, schismatic etc. High treason was punishable by death so amongst the effects of these statutes was to render it treason to maliciously speak or write against the King's title of "only Supreme Head in earth of the Church of England"[38].

In addition Acts of Attainder were passed against Fisher and More[39] for having refused the oath of succession, an oath the terms of which were not authorised by law at the times they refused it and they were rendered liable to the penalties for misprison of treason, namely forfeiture of goods and imprisonment during the King's pleasure – penalties they were already suffering.

Under the Treasons Act there had to be words or writing seeking to deprive the King any of his title, mere silence was not an offence; and the Act required that to constitute the offence any denial of the King's title had to be malicious. As More was not actually suffering punishment and forfeiture of his property for having refused to take the oath, it was impossible to make the enactment about oaths the foundation of a new prosecution and the plan adopted was to inveigle him into a verbal denial of the supremacy, and so to proceed against him for high treason[40].

There followed a series of visits to More in the Tower by Audley, Norfolk, Suffolk, Cromwell and others. More was consistently on his guard and did not say anything which could be construed as denying the royal supremacy. On 3 June 1535 he was told to either acknowledge and confess that it was lawful that the King should be supreme head of the Church of England or else plainly to utter his malignity. More replied that he "had no malignity and therefore could none utter", and he again declined to deny the supremacy[41]. The details of this interrogation are set out in Marius[42] and one can see More the lawyer at his brilliant best. He knew what would constitute a breach of the Treasons Act and what would not, he argued with Cromwell about "hypothetical cases", and in doing so made his line of thinking clear, but he did not speak against the King's title, or otherwise offend the terms of the Act.

The first to feel the wrath of the Treasons Act were John Houghton, Prior to the London Charterhouse and three other monks. At their trial on 29 April 1535 they pleaded that although they had denied the royal supremacy they did it on account of their consciences and not maliciously and, therefore that they were not in breach of the statute. But the court held that whoever denied the Supremacy denied it maliciously and the expressing of the word "maliciously" in the Act was a void limitation and restraint of the construction of words and intention of the offender[43]. They were hung, drawn and quartered at Tyburn on 14 May 1535. Fisher was tried on 17 June 1535 and was convicted and executed five days later[44]. He also relied on the presence of the word "maliciously" in the statute, arguing that he was merely giving his opinion to Rich to convey to the King on Rich's promise that the King undertook not to use any such opinion against him – once again the Defence failed[45].

V

The trial of More took place in Westminster Hall on 3 July 1535[46].

More defended himself with his undoubted ability. He pointed out that the only person to whom he had expressed his opinion on the divorce was the King himself when he had specifically asked for it, and in any event he was already in prison for anything he had said on that subject, he denied writing letters urging Fisher to resist and said that if their answers were the same it was because they had independently reached similar conclusions, and he called for production of the letters which the Crown was unable to produce because Fisher had burnt them, he denied that mere silence, without word or deed could amount to treason and quoted the Civil Law to that effect. The case against More was not going well. What was wanted was not evidence of how he justified his silence, but evidence that he had broken it[47]. Without that all the court had was evidence of misprison of treason rendering him liable to continued imprisonment, but no evidence of treason rendering him liable to death.

But the day was saved for the Crown by the evidence of the Solicitor General, Richard Rich who swore that, on 12 June when he had gone to the Tower to remove More's books, More had said that although a king could be made by Act of Parliament, and by Parliament deposed, it was not so with Primacy – and though the King be so accepted (i.e. as Head of the Church) in England, most foreign lands did not accept the same[48]. Here was the necessary evidence, a denial of Henry's title of Supreme Head of the Church in England.

More denied the conversation and accused Rich of perjury. He argued that having refused on so many occasions to express himself on the subject of the statute, it was incredible that he should have done so to Rich and, he attacked Rich's character. Alternatively he submitted that even if, notwithstanding his denials, the court accepted Rich's evidence, there was in the circumstances no evidence of malice and so no offence and compared the use of "maliciously" in the Treasons Act with the use of the world "forcible" in the Statutes of Forcible Entry; and finally he praised the King for all the honours he had bestowed on him in the past. Rich then called the two men who had accompanied him to More's cell on the day of the alleged fatal conversation, but both denied hearing it. It is generally believed that Rich's evidence was false, but it was enough to obtain a verdict of guilty from the jury.

Audley then commenced to pronounce judgment but was interrupted by More who objected to the indictment as being based on an act of Parliament which was invalid because the supreme government of the Church had been granted to the Pope by Christ himself, that England could not make a law repugnant to the laws of God and his Holy Church, any more than the City of London could make a law contrary to an Act of Parliament applying to the whole of England. He also argued that the Act was contrary to Magna Carta and the King's Coronation Oath. It was to no effect and he

was convicted and ordered to be hung, drawn and quartered, a sentence later commuted to beheading. Thereupon More, made a further speech saying, amongst other things, that after seven years study he could not find any authority for the proposition that a layman could be Head of the Church[49]. He was executed on 6 July 1535.

VI

More's career throughout had been that of a lawyer. He clearly saw what the Treasons Act required and defined, and for as long as he could, he tried to avoid offending against it by remaining silent. His approach to the issues were those of a lawyer and the attitudes and approaches formed by his training and career as a lawyer.

We do not know More's precise reasoning on the validity of Henry's marriage to Catherine of Arragon because he never expressed his views to anyone except orally to the King[50]. He was however prepared ultimately to accept Anne's marriage and title as Queen as a fait accompli, and not to speak or act to the contrary[51].

When the issue of the succession arose he took the common lawyer's approach to the doctrine of the supremacy of Parliament, and so if Parliament were to confer the succession to the crown on the children of Anne Boleyn, that was within Parliament's power; that of itself did not amount to an acknowledgement that Anne's marriage was lawful or that of Catherine was unlawful or void.

On the issue of the royal supremacy he was prepared to accept that the parliament could do anything within the realm, but he saw the Headship of the Church going beyond the mere government of the realm, he saw the Church as a visible united body separate from the temporal order, its rights and its separateness from the temporal order protected by Magna Carta. He believed the primacy of the Roman see was of divine institution, but having regard to the precedent of the Council of Constance, 1414, he probably believed that an ecumenical council had authority over, and power to depose a pope, but he also believed (on the authority of the doctors for the church over fifteen hundred years) that no layman could be Head of the Church, that it involved the exercise of priestly power. He died for the dual concepts of Christian Unity, under papal primacy and the separation of Church and State.

In these opinions can be seen what I would describe as the typical lawyer's approach: the search for precedents and authoritative writings and arguments by analogy. A large number of his contemporaries took the oath, and no doubt most of them did so with a clear conscience. Some of them were lawyers, although probably none of them were such good lawyers as More undoubtedly was. He had the lawyer's appreciation of fine distinctions, and the ability to see which distinctions mattered and which did not. If More had not been a lawyer, with his reasoning processes forged in the Inns of Court, and the Courts of Common Law, he may have reasoned differently and come to a different conclusion. Ultimately, we can only speculate whether More's training and experience as a lawyer was the decisive factor in fashioning the conclusions that led to his death. It must never be forgotten that Sir Thomas More was not only meant to be a lawyer, he was that above all else[52] and Ld Hailsham has said: "Though he was not the first layman to hold the office of Lord Chancellor, any more than Wolsey was the last cleric to do so, he was in a sense the first of the modern chancellors, a politician, a judge and a lawyer to his fingertips".[53]

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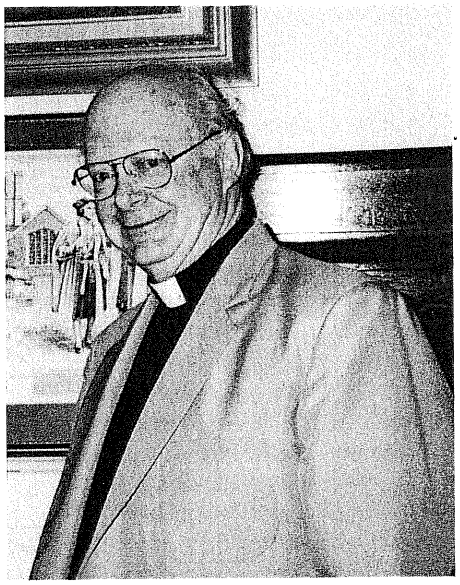
24. Supreme Court Act, 1970.
25. Marius 416–7, More's Epitaph composed by himself in Chelsea Old Church.
26. Chambers 270.
27. The Punishment of Heresy Act 25 Hen. VIII c.14, the Submission of the Clergy Act, 25 Hen. VIII, c. 19, The Ecclesiastical Appointments Act, 25 Hen. VIII, c. 20 and the Dispensation Act, 25 Hen. VIII, c. 21.
28. 25 Hen. VIII, c. 22.
29. Hughes 170.
30. Farrow 200.
31. Campbell 53.
32. Ibid 54–5, Farrow 212–214.
33. Chambers 300–5, Marius 463–4.
34. Farrow 215 quoting Roper.
35. 26 Hen. VIII c. 1.
36. 26 Hen. VIII c. 2.
37. 26 Hen. VIII c. 13.
38. Hughes 173–4, Chambers 307, Campbell 57.
39. 26 Hen. VIII cc. 22, 23.
40. Campbell 57.
41. Chambers 41.
42. pp. 496–9.
43. Chambers 323.
44. Farrow 222–3.
45. 1 St. Tr. 395 at 401.
46. 1 St. Tr. 386.
47. Chambers 337.
48. 1 St. Tr. at 387, Chambers 335–6, Marius, 502.
49. 1 St. Tr. at 392–4.
50. Marius 362.
51. More's letter to Cromwell, 5 March 1534, quoted Marius 456.
52. Guy 93.
53. Lord Hailsham of St. Marylebone, Forward to Thomas More Through Many eyes, 10.

APPOINTMENT OF THE SPIRITUAL DIRECTOR

On 7th April 1993, Our Patron, His Eminence Edward Cardinal Clancy appointed Rev Father Brian Francis Byron as the Spiritual Director of the Society.

Fr Byron was born in Bankstown, NSW, on 25 June 1933 and was baptized Brian Francis Byron in St Felix's Church on 6 July 1933, the date of the martyrdom of St. Thomas More. He began school at St. Felix's, had one year at St. Patrick's College, Strathfield, before going into the minor seminary, St. Columba's College, Springwood in 1946 and thence to St. Patrick's College, Manly, from where he was ordained priest for the Archdiocese of Sydney in 1957. Since then he was assistant pastor in the parishes of Ashbury, Erskinville, Five Dock, Elizabeth Bay, Camperdown, Manly, Toukely and Gladesville, where he later became Administrator and finally Parish Priest in 1979, a position he still occupies.

While he was a student at Manly the Pontifical Faculty was inaugurated and he was the first to graduate with the Licentiate. With the help of the Manly Union he had the opportunity to further his studies in Rome



where he attended the Gregorian University 1964-6, incidentally being present for some sessions of the Vatican Council II. The subject of his doctoral thesis was "Loyalty in the Spirituality of St. Thomas More", which was later published (1972).

Fr Byron's pastoral appointments were suspended in 1969 when he was invited to lecture at Pius XII Seminary, Banyo, Queensland, in Sacramental Theology and Moral Theology. After four years there he returned to Sydney. He spent two years at Manly helping with spiritual direction and lecturing. Later he was a part-time lecturer at various Catholic Teachers' colleges. Currently he is Chairman of the Archdiocesan Commission for Ecumenism.

Besides his doctoral thesis, Fr Byron has published two books on the theology of the Eucharist and articles in Ireland, England, France, the United States and Australia. His chief interest has been sacramental theology. He retains his interest in St. Thomas More and is an active member of the international association, Amici Thomae Mori, centred in Angers, France. He was one of the chief organisers of the most recent international conference of that organisation, "New Worlds and Utopias", at Manly last July at which he contributed a short paper, "Richard Rich Revisited", shortly to be published in Moreana – the International St. Thomas More Society publication.

ELECTION OF COUNCIL

At the 1992 Annual General Meeting of the Society the following persons were elected to the Council:

President
Mr John McCarthy QC

Senior Vice President
Mr Justice Sully

Junior Vice President
Peter Dwyer

Treasurer
Anthony Reynolds

Secretary
Anthony Restuccia

Council Members
Mr Justice Dunford
Peter Hall QC – Editorial Director – Utopia
Helen Reed
Vincent Pike
David Thorley
Garry McGrath