

"My Younger Predecessors"  
Address to Australian Corporate Lawyers Association  
Bar Common Room, Wednesday 19 August 1998

The Hon Paul de Jersey, Chief Justice of Queensland

Perception of age is a relative thing. People regard a forty-nine year old as a "young" Chief Justice only because the six immediate predecessors - which takes us back more than three decades - have, on appointment, been considerably older. Age of itself is irrelevant: the only issue is whether the appointee has the qualification and experience to carry off the role beneficially.

When first appointed to the Supreme Court in 1985, at the age of 36, my paucity of years was the subject of considerable interest. The media contended that I was the youngest person to have been appointed a Judge of a State Supreme Court. Not true - T.W. McCawley, for example, to whom I will come, was 2 months younger! That aside, it was a matter of essentially trivial if not irrelevant detail. Its significance could only relate to the aspect of experience, and as Mr Hampson QC wisely observed when representing the Bar at my swearing-in, "this defect, if it be one, will soon be remedied by time".

Serving on the Bench for the following thirteen years may explain why the government of the day was, in February this year, prepared to appoint a forty-nine year old Chief Justice. Age was again a focus of interest. "The youngest Chief Justice of Queensland?" I was asked: the answer is a clear "no".

When I noticed a new Chief Justice of New South Wales recently appointed at the age of 50 years, I mentally discerned a slightly interesting more national trend(?). There may be a progressive side to this, but historically speaking, for Queensland at least, such an appointment is *not* novel.

I have as many as three younger predecessors. The first Chief Justice of Queensland, Sir James Cockle, was 44 years old on appointment, Sir Samuel Griffith, 47, and the Honourable Thomas William McCawley, a mere 40.

And so today I offer vignettes of these three, as a precursor to a very brief indication of my own intended course.

I say "intended" with circumspection, recalling the question and answer: "What makes God laugh?" - "People making plans!". The deity may, I suppose, laugh even more about people claiming to know how he (or she) would react to such presumption. But returning to the judiciary ...

We in the Supreme Court were delighted to learn recently of the discovery of a hitherto "lost" large portrait of Sir James Cockle, the first Chief Justice of Queensland. The sketch for the portrait currently hangs behind the Bench in the Banco Court: the rather "postage stamp sized" picture which perhaps looks disproportionate, but for which we have always been - and remain - so grateful for the generosity of its donor, Dr Norman Behan.

The State Library is currently restoring the larger painting, which we hope to install with due ceremony later in the year. And so I come to the first in time of my younger predecessors, indeed the first Chief Justice of this State.

Sir James Cockle was appointed Chief Justice on 23 February 1863, at the age of 43. He was a skilful and diplomatic judge, successful in restoring damaged relations between the executive and the judiciary and thereafter "supervis[ing] a long period of judicial harmony"<sup>1</sup>.

At the time of Cockle's appointment, Queensland already had a Supreme Court, constituted by Queensland's first Judge, Mr Justice Alfred James Peter Lutwyche. For reasons not relevant today, Lutwyche had taken to criticizing the Government publicly through the press and otherwise - a practice which further soured an already poor relationship between the executive and the judiciary. Little wonder, then, that the Government bypassed Lutwyche when appointing the Chief Justice.

Cockle immediately proved an excellent choice.

He was able not only to achieve peace between Lutwyche and the government, with his "tactful, but firm"<sup>2</sup> requests that Lutwyche refrain from public comment, but also even earn the respect and friendship of Lutwyche himself - to whom he often referred as "my excellent colleague"<sup>3</sup>. Cockle was a consummate diplomat!

He had been educated, you see, at Trinity College Cambridge, called to the Bar at Middle Temple in 1846<sup>4</sup>. He had practised as a Barrister for 16 years in the Midland circuit, and was highly commended by Chief Justice Erle for the position in Queensland<sup>5</sup>.

On arrival, his "strict impartiality, and reputation for orderly and convincing decisions, soon assured him ... the respect of the legal profession and the community"<sup>6</sup>. Cockle was distinguished by immense courtesy, particularly to inexperienced practitioners. Sir Samuel Griffith, who had been an articled clerk when Cockle was Chief Justice, said that Cockle's "kindliness would never be forgotten by those who enjoyed it"<sup>7</sup>.

It is interesting to note that the passage on Cockle in the Australian Dictionary of Biography lists him as mathematician first, Chief Justice second. Apart from his

achievements on the bench, Cockle *is* remembered for significant contribution to science. The judge published over 80 scientific papers, concentrating on algebra and calculus, but also addressing subjects such as the motion of fluids, and the effect of magnetism on light<sup>8</sup>.

His mathematical bent is annually recalled, perhaps(?), by the students of Brisbane Grammar School, where the "Cockle Prize for Mathematics" is awarded, originally endowed by Cockle himself in 1874<sup>9</sup>. His scientific talent probably served him well as a judge. He is said to have employed a "scientific approach to the law"<sup>10</sup>, his reasoning "clear and logical" and his expression "concise"<sup>11</sup>. The accuracy of his decisions may be confirmed by the circumstance that only two of his judgments fell on appeal - and that in as many as 15 years on the Bench<sup>12</sup>. While not of course questioning the accuracy of Cockle's judgments, one notes - though presumably irrelevant - that the Full Court consisted only of Cockle himself and his "excellent colleague" Lutwyche!

Cockle was largely forgotten very soon after his death in 1895 in England. He had in 1878 retired, surprisingly to Queensland, at the age of 59, and returned to his home country. Unlike other succeeding Chief Justices - notably Sir Samuel Griffith - Cockle did not leave any monumental work by which he might be remembered. After his return to England, local memories here were kept fresh for a time by controversy surrounding his drawing a Queensland pension for the rest of his days in that distant Elysium England. But soon after his death, and with the end of the local financial burden of his pension, Queenslanders soon apparently forgot about Cockle's worthy contribution to the State. While not leaving a criminal code, Cockle had, in the words of Sir Samuel Griffith, "formed by precept and example, what were to be the future traditions of the Court, and earn[ed] for the Bench that respect which ... was in the first instance acquired, and can only be maintained by the personal qualities of the Judges"<sup>13</sup>.

Let me pass now to the youngest Chief Justice of Queensland, Thomas William McCawley, appointed on 1st April 1922 at the tender age of 40. He is not only Queensland's youngest ever Chief Justice, but was also to that time the youngest Chief Justice in all the British Empire!

Chief Justice McCawley's reign as Chief Justice was cut short by his untimely death barely three years after appointment. He fell dead of a heart attack on the platform of Roma Street Railway Station while waiting to leave for an Ipswich circuit<sup>14</sup>. Regrettably this Chief Justice is remembered more for the controversy surrounding his allegedly "political" appointment than for his significant contribution, which was to industrial law.

McCawley was brought up in Toowoomba. His legal career began in the offices of Messrs. Hamilton and Wonderley. After joining the public service, as a clerk at the Government Savings Bank, he took on Bar studies.

He completed the final examinations in 1906, reportedly with an average subject result of 70%. In 1907, at the age of 25 he was admitted to the Bar, and appointed First Clerk in the Department of Justice. He then rose, a mere three years later, to Crown Solicitor, in 1910, in 1917 to President of the Queensland Court of Industrial Arbitration, and later that year, to puisne judge of the Supreme Court of Queensland. A most rapid rise!

These appointments were highly controversial. The Supreme Court appointment was even challenged, constitutionally, in the Court itself. I will not address the reasons behind the legal controversy save to say that his opponents believed that because he had not gone through the essential step of practice at the Bar, his appointment must be condemned as "political". It was only through appeal to the Privy Council that his appointment to that bench was ultimately upheld ([1920] AC 691), both the Supreme ([1918] St R Qd 62) and High ((1918) 26 CLR 9) Courts, Griffith CJ presiding in the High Court, having held the appointment constitutionally invalid.

McCawley was not able to commence active service on the bench until May 1920. Not surprisingly, his rapid elevation to the position of State Chief Justice 11 months later provoked similar objection.

As I have suggested, even though McCawley's term as Chief Justice proved very short, he made significant contribution to industrial relations law - his area of particular interest. Some of his "firsts" in that area included the creation of an award for railway employees in 1917 - at that stage still in his position as President of the Queensland Court of Industrial Arbitration - and the fixing of a State minimum or "basic" wage in 1921. During his short life, he published several articles in that area, and on the punishment of offenders. We will never know what he might have achieved. Some unpublished notes suggest he had been planning an intense and critical study of the "successes and failures of industrial arbitration" and the creation of a uniform system of industrial arbitration to "avoid disputes between the States and the Commonwealth"<sup>15</sup>.

No doubt a most significant endeavour, but for the focus of a State Chief Justice?

Outside the law, McCawley was an active member of the University of Queensland Senate, having taken steps to facilitate the establishment of the law school<sup>16</sup>. He had also been responsible for assisting in the formation of an "Economic Society"<sup>17</sup>. Despite the much publicised controversy surrounding his career, his untimely death was described in one journal - as a "national calamity"<sup>18</sup>. One can but wonder whether the anguish no doubt aroused by the highly publicised objections to his appointments contributed to his sudden death. One may also query whether he could have displayed a breadth of interest appropriate to the position of Chief Justice.

The most famous, influential of all Queensland's Chief Justices has been the third youngest, appointed at the age of 47.

Sir Samuel Walker Griffith is notable for many reasons. Not only was he appointed Chief Justice of Queensland, on 13th March 1893, but then, in 1903, as Chief Justice of the High Court of Australia. That appointment carried the particular significance of his being the *first* Chief Justice of that court. Through those positions Griffith proved himself a truly great administrator, judge and draftsman.

Sir Samuel was educated at Sydney University. May I note, if irreverently, that his nickname in those years is said to have been "oily Sam", for his "ability to argue on any side of any subject"; and his degree of vanity in applying in 1863, when only 18 years old, for the headmastership of the Ipswich Grammar School<sup>19</sup>. He was called to the Queensland Bar in 1867. As an articled clerk, he had reportedly built up such a reputation that the then Chief Justice, Sir James Cockle, took "peculiar pleasure" in allowing him to interrupt his articles to undertake the much sought-after "Mort Travelling Fellowship", in England and other parts of Europe<sup>20</sup>.

A mere 9 years after his call to the Bar, the young Griffith took silk and developed a very successful practice.

Griffith's robustness extended to a concurrent successful career in politics. He was a courageous politician, and persistent. His allegation of corruption against Premier Sir Thomas McIlwraith was dismissed by a Queensland Select Committee in 1880, and again by an Enquiry in London. Yet Griffith persisted locally, eventually losing a motion censuring McIlwraith, following a parliamentary session in which he - Griffith - is said to have spoken continuously for seven (7) hours<sup>21</sup>!

He was elected as member for East Moreton in 1872 (in Opposition). It was during his period in that office that his skills as a legislative draftsman came to the fore, with two private member's bills leading to the Telegraphic Messages Act 1872 and Equity Procedure Act 1873. In 1873 he was elected to the new seat of Oxley and in 1874 appointed Attorney-General.

He took the reins as State Premier on 10 November 1883, for a four and a half year term, and later again in 1890. Griffith then retired from politics to take up his appointment as Chief Justice of Queensland. Extraordinarily enough, he had to this point also maintained a full legal practice: even during his terms as Premier he had remained undisputed leader of the Bar.

During his political career, Griffith attempted, not always successfully, to reform various areas of public concern. He had a keen interest in education, initiating a system of free and compulsory education through his Education Act 1875. He also took positive steps towards the establishment of a university in the colony. One of

our universities proudly bears his name. We tend to focus on the Constitution and Criminal Code, to which I will come. But the thrust of some of his other, peculiarly Queensland, initiatives is not so well known. He was apparently very concerned about social inequality. He sought, for example, to secure the admissibility of the evidence of Aboriginal witnesses, and fought to have Kanaka labour abolished from the canefields. He had publicly voiced objection to that use of cheap Pacific Islander labour ever since his first term as Premier. It seemed in 1885 that he had succeeded in eradicating it - but political pressures forced him to repeal the relevant legislation, much to his disappointment<sup>22</sup>.

Apart from implementing ground-breaking legislative reforms within Queensland, Griffith also actively involved himself - as is well known - in the move towards Australian federation. This began with his role in the formation of the Federal Council of Australia. Sir Harry Gibbs reminds us that "Griffith in fact prepared the draft on which the Imperial Legislation which set up that body was based"<sup>23</sup>. It proved ineffectual as a body, but did lay the foundation for the National Australasian Convention held in Sydney in 1891. Not surprisingly, Griffith keenly supported that Convention. He was a key figure at its discussions. In the words of Alfred Deakin, "Griffith was lean, ascetic, cold, clear, collected and acidulated... no other representative rivalled him"<sup>24</sup>.

Once again his skills as a draftsman were clear through his draft Constitution, Deakin observing that " as [a] whole and in every clause the measure bore the stamp of Sir Samuel Griffith s patient and untiring handwork, his terse, clear style and force of expression...Few even in the mother country or the United States... could have accomplished...such a piece of draftsmanship with the same finish and in the same time"<sup>25</sup>. By the time the constitutional discussions resumed in 1897, with the Second Constitutional Convention, Griffith had left the political world behind. But his involvement in fine tuning the draft Constitution continued. Professor La Nauze has said "it is fitting that the final form of the Constitution contains not only much of Griffith s text of 1891, but his lofty corrections of the words of the later and lesser draftsmen of 1897"<sup>26</sup>.

Griffith s major local achievement while Chief Justice of Queensland was the drafting of our Criminal Code.

His original draft of 733 sections, completed single-handedly, was adopted, as the Queensland Criminal Code in 1901, virtually intact after some revision by a Royal Commission. The drafting was an enormous task, requiring Griffith to consult, and where appropriate incorporate, "provisions of the English Draft Bill of 1880, the Penal Code of the State of New York enacted in 1881, the Italian Penal Code of 1888, a digest of the statutory criminal law of Queensland which Griffith himself had to prepare, numerous other continental codes, and all of the English statute and common law which the Code was to replace"<sup>27</sup>. The monumental impact of this Code in Queensland is obvious.

Perhaps less well known is the fact that the Griffith Code has, in whole or part, been adopted elsewhere in Australia, and even in much more distant centres. It is used in Western Australia, Tasmania and the Northern Territory.

Versions of the Code have also impacted internationally: in the neighbouring Pacific nations of Papua New Guinea, the Solomon Islands and Fiji; in much of English speaking Africa, including Nigeria, Kenya, Uganda, Tanganyika, Nyasaland, Northern Rhodesia, Zanzibar and The Gambia; and as far off as Cyprus, Palestine and subsequently Israel - where, notably, many of Griffith's key provisions remain in their original form to this day<sup>28</sup>. Sir Harry Gibbs has commented that Griffith's Code is "a monumental work, of lasting benefit"<sup>29</sup>.

Other examples of Griffith's somewhat less dramatic, but nonetheless impressive and prodigious work, include his re-drafting of the Queensland Supreme Court Rules, the Judicature Act and the High Court Procedure Act.

Amazingly, he also found time for drama, translating Dante's "Divine Comedy": although it must be conceded this drew little praise.

Sir Julian Salomons reportedly asked Griffith to inscribe his copy, "from the author," as "he would not like anyone to think he had stolen it, still less bought it"<sup>30</sup>.

In 1903 the High Court of Australia was established by Griffith's Judiciary Act, thus heralding the beginning of a new stage in the great jurist's already brilliant career, with his appointment as Chief Justice of that Court. The 950 reported cases on which he sat during his time on the High Court bench established the prestige of the High Court. In the words of Sir Harry Gibbs, who we know as Queensland's second Chief Justice of the High Court, Griffith "helped to establish the High Court as a court whose judgments came to be accorded complete respect within Australia and indeed, throughout much of the common law world, and he raised the standard of the bench and Bar throughout Australia"<sup>31</sup>.

Perhaps the most significant lawyer Australia has ever seen, Sir Samuel Griffith died in his beloved Queensland in August 1920, at the age of 75. His many excellent achievements ensure that he will be long-remembered throughout Queensland and Australia as truly one of this nation's great "founding fathers".

My three younger predecessors: two of them most significant contributors to the development of the position and role of Chief Justice, Cockle with his diplomatic measure and strong intellect, and Griffith through the plain dominance of his judicial skills. One can but surmise what McCawley might have achieved, if spared.

What do I draw from these examples? I have a prospectively lengthy term ahead

as Chief Justice - some twenty-one years. Cockle served sixteen, Griffith, including his time on the High Court, twenty-six! I have pledged my commitment to a progressive regime, and I embrace the challenge of the new millennium with enthusiasm.

The mission always remains the same: to lead a court which optimally delivers justice according to law. Many of the challenges of this technological age are of course different from those facing Cockle and Griffith. Our ultimate challenge these days is to help render justice more readily accessible to all. In facing that, we see the endemic problems of the legal aid system, we explore appropriate refinement of court procedure, we examine the interface between judicial and extra-judicial dispute resolution, the relationship between the courts and the profession. We are urged to demystify the judiciary: but how far should one go? We deal now with litigants rightly intolerant of delay. We serve a public sometimes sceptical about our approach to some issues - currently the sentencing of offenders. These are merely illustrations. There is a wide range of critically important issues.

But the example of these leaders, if properly appreciated, leaves one, when facing such issues, buoyed with optimism. Oscar Wilde cynically quipped that the one duty we owe to history is to "rewrite it". Obviously not so, and especially not so with Cockle and Griffith.

I draw inspiration from both their examples: would that my contribution to the good of the people of this State might equal theirs! But in the end, it is enough that one go forward inspired by the immense and constructive devotion of great predecessors to a noble and significant office, and thereby the people of this great and broad State of Queensland. I am immensely honoured to follow these, "my younger predecessors".

---

<sup>1</sup>J.M. Bennett, "Sir James Cockle First Chief Justice of Queensland" (1972) Vol.2, No.6 Queensland Heritage p.4

<sup>2</sup>Ibid p.4

<sup>3</sup>Ibid p.5

<sup>4</sup>Ibid p.4

<sup>5</sup>Ibid p.4

<sup>6</sup>Ibid p.4

<sup>7</sup>Ibid p.8

<sup>8</sup>E.N. Marks, Australian Dictionary of Biography 1851 - 1890, Melbourne University Press, p.436

<sup>9</sup>Ibid p.436

<sup>10</sup>Ibid p.436

<sup>11</sup>Ibid p.436

<sup>12</sup>Ibid p.436

<sup>13</sup>The Rev. Robert Harley, Obituary Notice of Sir James Cockle "Proceedings of the Royal Society" 1896 Vol.59 xxxiii

<sup>14</sup>McPherson "Supreme Court of Queensland" (Butterworths, 1989) p.309



<sup>15</sup>M. Cope, Australian Dictionary of Biography(1891- 1939) 221 p.222

<sup>16</sup>Ibid p.222

<sup>17</sup>Ibid p.222

<sup>18</sup>"The Age" , not the Victorian newspaper however, Saturday April 25 1925 (see McPherson, supra, p.309)

<sup>19</sup>DJ Murphy & RB Joyce "Queensland Political Portraits" 1859-1952 (Brisbane, 1978)

<sup>20</sup>R.B. Joyce, "Australian Dictionary of Biography - for Windows", Melbourne University Press, p.2

<sup>21</sup>Ibid

<sup>22</sup>See generally: Sir Harry Gibbs, "The Inaugural Sir Samuel Walker Griffith Memorial Lecture" LSJ 286

<sup>23</sup>Ibid

<sup>24</sup>Ibid p. 287

<sup>25</sup>R.B. Joyce, "Australian Dictionary of Biography for Windows", Melbourne University Press, p.11

<sup>26</sup>Ibid p.11

<sup>27</sup>R.S. O Reagan "Sir Samuel Griffith s Criminal Code" (1991) Australian Bar Review 141 p. 143.

<sup>28</sup>Ibid p. 147, 149-151

<sup>29</sup>Sir Harry Gibbs "The Inaugural Sir Samuel Walker Griffith Memorial Lecture" (1984) LSJ 286 p.289

<sup>30</sup>Ibid p.290

<sup>31</sup>Ibid p.290