

**“A Creature of a momentary panic” The passage of the Judges’ Retirement Act in New South Wales 1917 - 1918<sup>1</sup>**

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**‘Painful Scene in Court’**

On a cool Tuesday on 1 May 1917 there was a ‘Painful Scene’<sup>2</sup> in Sydney’s Banco Court. As described by the *Sydney Morning Herald* one Hugh Beresford Conroy a candidate in the then current Federal parliamentary election was the defendant. He was a man with a complicated domestic and business situation as evidenced by the fact that his wife was the plaintiff. Conroy’s application for an adjournment to prepare his case was not allowed by the Chief Judge in Equity, 74-year-old, English-born Mr Justice Archibald Simpson<sup>3</sup>. Counsel for the defense withdrew. Conroy said he would appear in person and applied immediately for Justice Simpson not to hear the case. When asked his reason Conroy replied: ‘because you have reached a stage of life when it is impossible in the afternoon to remember what took place in the morning. It has gone past your mind. You are not fit to sit and conduct such cases as the present.’

Conroy’s extraordinary outburst continued. He said that he had been to visit the Attorney General, David Robert Hall who ‘was of the opinion that (Justice Simpson) had reached a stage when (he) should no longer sit on the bench.’ Furthermore, Conroy claimed that Hall said that: ‘A bill was being prepared fixing a Judge’s retirement at the age of 70 years.’ Conroy also claimed that Justice Simpson was ‘unable to recognize matters of public interest’ and that the New South Wales Bar agreed with this assessment. Conroy’s manner was described as ‘dramatic in style and almost threatening’ by the *Sydney Morning Herald*.

Joseph Browne, also a member of the New South Wales Legislative Council, was counsel for the applicant. He objected to the attack and said ‘it was very painful to listen to such insulting remarks.’ But this had little effect. The exchanges between Conroy and Mr Justice Simpson continued with Conroy becoming increasingly agitated and eventually he ‘made a remark’ which caused ‘considerable excitement . . . throughout the court. The tipstaff approached Mr Conroy and shouted ‘Silence!’ Mr Conroy’s excited condition indicated a possibility of something more forcible than his language. The constable attached to the court came into the room. The Judge and his associate left the court and as they did so Conroy shouted at the top of his voice ‘I address you so that you can hear me. I know that you are deaf.’ Conroy was still fired up after two brief adjournments. When Justice Simpson refused again to grant the application and Conroy shouted: ‘You’ve got a maggot in the brain’ amongst other things, and made particular reference to Mr Justice Simpson’s supposed deafness and mental acuity.

After the account of the court room scene the *Sydney Morning Herald* included a short disclaimer from the Attorney General Hall and the Acting Premier Fuller admitting contact with Conroy but stating that they did not support his attempt to remove Justice Simpson from the case.<sup>4</sup> There was no denial about the proposed

legislation. The Bill to set the retirement age of judges at 70 was introduced into parliament on 23 October 1917. It was finally passed with amendments in 1918. Conroy's outburst was one of if not the first recorded public reference to the proposal to force New South Wales judges to retire at 70 years – the first time such a law was passed in the British Empire.<sup>5</sup>

Speaking to the Francis Forbes Society for Australian Legal History, former Chief Justice, the Honourable Sir Gerard Brennan AC, KBE said that ‘an appreciation of the law (is not) likely to be accurate without an understanding of the cultural and institutional forces which brought it into existence.’<sup>6</sup> A close examination of the passage of the Judges Retirement Bill reveals a process that challenges stereotypes of the legal profession. Traditionally the alliance between government and judiciary is represented as a unified dominant class.<sup>7</sup> This unity is often cited as an oppositional element to working class aspirations. The different values of the two groups produced a particularly tense political and industrial environment in 1917. The idea of an industrial mass battling a legalistic oligarchy of judges and government is repeatedly presented.<sup>8</sup> While it may appear that there were many occasions when the judiciary enthusiastically supported government legislation, such as with the *War Precautions Act 1914*, JM Bennet notes that at the time in question there was persistent ‘unfriendly relations between the government and the judiciary’, which continued into the 1920s.<sup>9</sup> The Judges Retirement Act can be seen as a feature of that tension. The bill fractures the image of a unified dominant group of lawyers operating in unison in government and the judiciary, because, for the most part, the men who drafted and urged the passage of the bill were themselves members of the legal profession.

### ‘A Government of Lawyers’

The Nationalist Government of Premier William Arthur Holman was understandably labeled ‘a government of lawyers’<sup>10</sup>. Premier Holman, and his Attorney General David Robert Hall were both Sydney barristers as was George Warburton Fuller, who was the Colonial Secretary and Acting Premier from April to October, 1917. The Minister for Public Instruction, Augustus Frederick James was also a barrister as were John Garland KC, MLC who was Minister of Justice and Solicitor-General and George Stephenson Beeby, who was Minister for Labour and Industry; John Daniel Fitzgerald, MLC, who was Vice-President of the Executive Council, and Minister for Public Health and Local Government. In all seven out of a ministry of twelve were listed as Sydney barristers. Broughton Barnabas O’Conor, also a Sydney barrister was Chairman of Committees. There were in total of seven barristers in the Legislative Council and six solicitors<sup>11</sup> – 13 lawyers out of 71 Members. In the Legislative Assembly, of 90 members there were five solicitors and six barristers.<sup>12</sup> Yet, despite the preponderance of lawyers, this government passed legislation, which in effect, if not in intention, removed judges from office.

Considering the general congruence of values and actions concerning support for the war between the members of the Holman Nationalist Government and the judiciary it seems difficult to easily understand why they should want to bring in the bill. Both the parliamentary party and many others saw the wartime situation as one in which patriotic concerns should override anything else. Industrial matters were considered of little consequence by many people in comparison to the historic mission against German Militarism despite the genuine hardship caused by the losses in battle and the falling wages and increasing prices.

Support for the bill created a strange alliance of between deeply antagonistic political rivals. On the Nationalist government side, led by Holman<sup>13</sup>, were those who had been expelled from the Labor Party in 1916 and formed the coalition Government, and thereby labeled traitors by their former colleagues. In all, 16 men had been expelled including the three barristers in the Ministry of Holman, Hall and Fitzgerald. The other barrister was the Prime Minister William Morris Hughes. The disbarred solicitor Richard Dennis Meagher was with them. Not for nothing was the Labor Party of the time pilloried for blowing its own brains out. Opposing the Nationalist coalition on most issues were the somewhat romantic but committed members of the Labor party who had stayed faithful to its conference decisions and therefore remained within its organisation. But on the issue of judges' retirement ages these two opposing groups found common ground. There is some mystery as to why such bitter opponents should be in agreement over such an issue. The congruence of aims between the two parliamentary groups against judges challenges the notion of an oligarchic alliance of judges, government and business ruling the state.

### **1917 A time of 'tension, bitterness (and) violence' in New South Wales**

1917 was one of those extraordinary times in State politics. The period was marked by escalating industrial tension, bitterness in public life, and violence at levels rarely seen in modern Australian politics.<sup>14</sup> The Labor party was still raw from the split in 1916 along the issue of Conscription with Holman and Hall expelled; there was the protracted, intense industrial dispute known as 'The Great Strike' and the war ground on through its seemingly endless horrors. Twenty members of the legal profession lost their lives to the war in 1917 or nearly as many as the total number of deaths in the profession for 1914, 1915 and 1916 combined. The battlefield casualties nearly included the State Premier, William Holman. He was on a tour of the Western Front after the election and went for a visit to New South Wales units in the front line. General Holmes was guiding him when they were subject to shellfire. Holmes joked that the enemy had spotted Holman so they moved. Within minutes another shell landed nearby and killed Holmes outright. Holman was badly bruised and shaken by the experience.<sup>15</sup> Amidst all this drama, for some of the murkiest reasons, on 23 October 1917 the Attorney General David Hall stood in the Legislative Assembly and introduced a bill to provide for the retirement of certain judges, and to provide for their pensions on retirement.<sup>16</sup> The intention of the bill was that all Judges should retire at 70 years of age.

The actual reasons behind the introduction of the Bill in 1917 are not clear. Various interpretations have been advanced. HTE Holt in *A Court Rises* stated that it was rumoured to have been to remove Justice Heydon from the Industrial Court<sup>17</sup>. Andrew Frazer, in his profile of Justice Heydon acknowledges this suspicion but emphasises some comments within the parliamentary debate as being references to Justice Simpson who was deaf and no longer able to hear evidence as the impetus for the proposal<sup>18</sup>. HV Evatt in *Australian Labour Leader* wrote that it was to open up judicial positions and allow for the fulfillment of some politically based deals of specifically the appointment of Holman's long term political enemy but necessary ally, Charles Wade KC as a Judge on the Supreme Court to replace Mr Justice Sly who as a result of the legislation was forced off the bench in 1920 when he was at the very height of his powers.<sup>19</sup> There are some hints in the parliamentary debate to

possible deals, but it is hard to discern if these are genuine or simply part of the fabric of heated discussion in the new South Wales Legislative Assembly ó known as "The Bear Pit" for its rambunctious style.

HM Bennett cites the introduction of the bill by David Hall,<sup>20</sup> and quotes Sir Thomas Hughes by way of characterization that the Act was "one of the crudest specimens of injustice that has been presented to us . . . a creature of a momentary panic."<sup>21</sup> The panic may well have been the result of the incident involving Justice Archibald Simpson and Conroy in May. There is some evidence in the parliamentary debate to support any and all of these explanations as well as revealing much about the nature of judicial functions and pressures at the time. The bill came out of a very specific set of circumstances. Whatever the stated reasons for the bill, there were sufficient allusions and references to specific judges and matters to suggest that there were a variety of agendas behind the proposal.

### **Debate in the Legislative Assembly.**

The Attorney General Hall's stated reason for the bill was that: "There must come a time in the life of every man when the passing of the years renders him unfit to continue the work in which he was engaged in earlier life."<sup>22</sup> Hall was of course referring only to men. At the time women were precluded from any legal appointments in New South Wales, although Hall had attempted to remedy that deficiency in 1916. He would be successful in 1918 with the passing of *The Women's Legal Status Act 1918*.

Hall said that when a man "obtains a position on the bench . . . he has reached the end of his hopes and the end of his fears" ó an idea which resonated throughout the debate. The principle which precluded a puisne judge from becoming a chief justice was that "when a man takes a judicial position he must never expect any advantage and never fear any disadvantages."<sup>23</sup> Any suggestion that a judge should be able to remain if he was certified as entitled to do so would "interfere with the entire independence of the judiciary." The idea that he was interfering in the independence of the judiciary by introducing the bill in the first place was not addressed in his speech. He admitted that the measure would mean that some judges "who are so blessed that they go down into old age with an eye undimmed and a brain unclouded by the passing years" but he went on to say that the "principle of a allowing a man to decide for himself when he ought to resign is not a good one." This again basically stated that the reason they should be forced to retire because he thought it was a good idea.

Despite the bitterness of the split in the Labour Party in 1916, which saw Hall and Premier Holman expelled over the Conscription issue, here was a bill that the Labor Opposition, led by John Storey, the Member for Balmain, did not oppose. Support for the Bill came from the oddest collection of normally opposing groups. The members of the Nationalist government led by Holman were in favour as were the Labour Members of the opposition. Everyone seemed to have their own reason.

John Storey was in favour of the bill, but also worried about the possible additional costs extra pensions might bring, thus introducing an issue which would resonate throughout the debate. He also said that: "some judges of 70 years of age may not be

any more deficient mentally than other judges of 45 years of age. He continued: "Judges seem to have their peculiarities and strange ways. If one is to judge by the remarks made by some of them, they ought not to be allowed to reach the age of 70 before being asked to retire. Furthermore he suggested that the only possible reason for the bill while the country was at war was that of making room for a lot of barristers who (had) been working hard, and whose efforts (were) to be crowned with promotion."<sup>24</sup>

Then well known Sydney barrister and newly elected member for the middle class seat of Gordon, Thomas Rainsford Bavin rose to his feet. Bavin was just beginning a political career that would eventually see him made Premier. At the time he was, among other posts, an officer in the Navy Reserve and in charge the Sydney office of Naval intelligence<sup>25</sup>. He was also well connected to the judiciary in a number of organisations and was, not surprisingly, strongly opposed to the bill. He pointed out that it would affect some of the best judges in the state, to which John Cochran, the Labor Member for the working class, harbourside electorate of Darling Harbour interjected, "And some of the worst." A catholic ex labourer and Union official, John Cochran, was introducing a theme, which a number of Labor members would pursue throughout the debate that certain judges were the enemies of the working class. Bavin stuck to his task. He stated that history disproves the proposition that men are too old to perform judicial duties at 70 and referred to the certainty of forcibly retiring men who were thoroughly efficient in their duties. He canvassed issues such as the number of barristers practicing at 70 (not many), the possibility of suggesting that certain men retire if suggested by the government. He suggested that the test should be efficiency, not age. Cochran, the member for Darling Harbour, challenged him again. Cochran was vehement in his opposition.

The interesting aspect is that the Attorney General, David Hall, who had previously been expelled from the Labor in 1916, joined Cochran in his challenging of Bavin. Cochran and Hall were united in their keen desire to have judges retire at 70 years of age. It is hard to believe that they shared exactly the same reasons.

### **'Three score years and ten.'**

Cochran came out and stated that he did not have too great sympathy for those octogenarians who occupy seats on the bench, nor did he have very much admiration for those old gentry in England who it (was) said have given their best services after having attained the age of 70 years. As far as he was concerned the determination of 70 years for retirement was because it was the allotted span of three score years and ten as taken from the Bible. But the truth just seemed to be that he did not like judges with some whose decisions were notoriously out of joint with the times. He was most sympathetic with men who were victims of the spleen and irritability that are inseparable from old age if they are confronted with certain gentlemen on the bench. He used as an example the case of one the storm-tossed human wreckage flung up on the shores of time by the waves of adversity who had been sentenced to ten years jail for receiving stolen chocolate which had been stolen from a wharf. He claimed that legal gentlemen comprised ten out of the eleven in the ministry.<sup>26</sup> He was exaggerating. There were only seven, but they were the top ones. His dislike of judges became more apparent the longer he spoke. Criminal Court judges inflicted injustices on those who came within their clutches. Chief Justice Cullen was drawing two salaries as he was also acting Governor at the time. At which

point the Temporary Chairman Colquhoun ruled he could not discuss the conduct of any judge. Cochran stopped any specific mention but stated that he refused to bow down and worship in the religious atmosphere which (surrounded) a judge and his position. There was more in that vein. Basically he hoped to purge the judicial bench of gentlemen who should long since have retired.

Cochran's bile was not matched by others who supported the bill, but his reference to the biblical three score and ten as a time for retirement did find favour. The solicitor, Thomas Ley, introduced another aspect, which was of interest to some commentators<sup>27</sup>. He mentioned the availability of men at the bar ready to take (the judges') places and do equally good service.<sup>28</sup> His reference echoes the idea that the main reason for the bill was to create space for men at the bar as suggested by HV Evatt.

John McGirr, the Member for Yass had a novel idea that to deal with those judges whose faculties (were) failing before they reach 70 years. His suggestion was that there should be a sliding scale, and that judges should go down the scale as they got older. For example, a Supreme Court judge whose brain was beginning to weaken at 60 years of age should be made a District Court judge; at the age of 64 he should be made a police magistrate; at 65 he should become a justice of the peace; and at 69 his services might be utilised as a policeman. Furthermore, to correct any injustices already done, he suggested that men who have been condemned by judges over the age of 70 years . . . should be liberated and compensated.<sup>29</sup>

The discussion of the bill gave those members who felt so inclined the opportunity to at least allude to some grievances they had against the judiciary. Percival Brookfield the Labor Member for Sturt was another Labour party member to feel the pressure of having to defend himself in front of a judge. He spoke for the bill and said that since the *War Precautions Act* has been in force it has been impossible for any man belonging to the Labour party to speak in the open without the dread of the Act falling upon him.<sup>30</sup> Brookfield was a militant socialist who had been jailed in 1916 for cursing the British Empire and calling William Morris Hughes a traitor, viper and skunk.<sup>31</sup> He would not always be on the wrong side of counsel.<sup>32</sup>

After Brookfield and Bavin engaged in what appears to have been some good hearted banter over whether or not a judge may recognize or enjoy listening a rendition of The Red Flag he was keen to point out that the class he represented came under the ban of the judges more frequently than do members of any other section of the community, and there is a general feeling that both judges and magistrates are allowed to remain on the bench until they become too old. The ideas of old men become warped and out of date, and very few men who reach the age of 70 are able to retain a youthful mind. When challenged by the example of Jabez Wright, the 65-year-old Labor Member for Willyama, Brookfield had a ready answer that Wright was on of those few men who, though old in years, (had) kept his mind evergreen by living with the working-classes. Whether or not Brookfield was being serious, he was clearly putting forward a vigorous assertion of his class interests. It is hard to escape the conclusion that amongst the Labor members the Judges' Retirement Bill was a good opportunity to settle some old scores, real or imagined, genuine or fabricated just or unjust. Brookfield, like McGirr before him enjoyed the chance to score some points over their perceived enemies on the bench. For once their prejudices coincided with

the government, and they could have some fun by both getting a desired outcome in removing the judges they disliked while hammering the government at the same time. It must have been good sport for Labor. They did not let their opponents off the hook. Despite the concordance of interest they were still able to get in some criticism of the detested *War Precautions Act* and perhaps reveal more of the reasons behind the support for the bill

Labor's Jabez Wright appeared to enjoy articulating his interpretation that he believed that the Attorney General Hall had introduced the bill because there was "an immense crop of barristers in Sydney who demand(ed) some recognition on the part of the Government, and that if rumour was not the "lying jade she (was) supposed to be" Hall himself was "seeking a position on the bench." It was the "crop of briefness barristers in Sydney, aspirants for the position of judges (who had) egged Hall on to make room for some of them on the bench." The bill was to "enable some of the Government supporters to win judgeships."<sup>33</sup> However, he was against the law because he believed that a judge should be retired when it was "proved that he was incompetent." He ended by saying that he felt there were "too many laws and too many lawyers. This government is a Government of lawyers."<sup>34</sup> Brookfield took over from this somewhat confused rant by reminding people that Labor welcomed the bill but wanted the age to be 65. Perhaps Jabez Wright was not quit as "evergreen" as Cochran had suggested.

Wright's reporting of the rumours had hit a nerve for some and echoes HV Evatt's belief that the bill was to make room for appointments such as that of Wade in fulfillment of an agreement between him and Holman in 1916 to form the National government.<sup>35</sup>

Valentine Johnstone, a solicitor's clerk and the Member for Bathurst was another who hoped that the bill would get rid of "undesirable" judges. He complained that some were "irritable, irascible, and showed bad temper (and) failed to display that calm judicial temperament which, in conjunction with the law, was one of the reasons which brought about their selection to occupy their . . . high position." He believed it was "better to risk displacing some mental prodigies (than to) risk piling up of bad judgments and bad precedents."<sup>36</sup> Labor members such as FM Burke, Member for Newtown were able to bring out a number of complaints which suggest that the bill was a real rejection of the old, colonial order. His opinion was that Great Britain was lagging behind Australia as far as "democratic ideas" were concerned. But as far as judges were involved was that "when a man reaches the age of 70 he has lost all his democratic ideas, is conservative in his views, and has a tendency to look upon younger members of the community with a very severe eye."<sup>37</sup> It was clear that the Labor party hoped to get rid of those judges with whom they had had bad experiences, and replace them with others more likely to follow emerging principles of workers' rights and be not quite so aligned with the Imperial cause. Furthermore, they were not content with removing the judges, but wanted them to be without pension rights as well.

Mr Stuart-Robertson opposed the bill because he wanted that "at the age of 65 a judge should be subjected to a mental examination" to see if he was "mentally fit" to continue with his duties.<sup>38</sup> He went on to comment that this would "get rid of some of

the difficulties which existed in the courts at that time.<sup>39</sup> Again it is not clear just what he was alluding to but the idea of a tribunal to examine judges at the age of 70 would receive considerable attention in subsequent discussions. The bill then proceeded, but only after a parting shot from Jack Lang (known colloquially as 'The Big Fella') on a procedural matter. He had been unusually quiet so far. He would get his chance later. The House moved on to discuss the pressing issue of Crown grants of land to injured and soldiers and the families of those killed in action.

On 25 October at 2 am the House went into Committee again to consider the bill as well as amendments, which would ensure the preservation of pension entitlements for any judges who may have been unexpectedly retired because of the act before their full entitlements, were established. The judge specifically named in this regard was Justice Heydon. At the time he was one of the most high profile and perhaps controversial judges sitting in New South Wales – especially for Labor supporters. Jack Lang could not resist the opportunity to speak up once Heydon's name was mentioned in relation to what he saw as an extra pensions to Judge Heydon. Lang continued 'Judge Heydon has been one of the bitterest and worst enemies – But then Thomas Bavin raised a point of order:<sup>40</sup> the attack was irrelevant and out of order. The Speaker of the House had already ruled not to mention any individual judges but Heydon was now out in the open. Lang called Heydon 'an enemy of the class' he represented. Furthermore he fulminated that 'this so-called National win-the-war Government (was) going to give a pension to the senior judge of the Industrial Arbitration Court, Mr Justice Heydon, for services rendered.' Bavin got to his feet and challenged these remarks, maintaining that Heydon only enemies were those who attempted 'to destroy the industrial peace a prosperity of the country. Here he was alluding to the treatment meted out by Heydon to those unions, which had been involved in the Great Strike, which had only just finished, as a resounding defeat for the labour movement, largely due to Justice Heydon's strong action.<sup>41</sup>

Mr Stuart-Robertson also supported Heydon as 'one of the very best lawyers in New South Wales' but mentioned that 'some of his remarks from the bench seem to go beyond the actual meaning of the law he is dealing with.'<sup>42</sup> Justice Heydon did tend to make strong comments from the bench. In one judgment he invited a comparison between what he saw as intransigent Union activism and the way 'they must have grumbled in the trenches. But the Germans got nothing out of it: no indeed, never!<sup>43</sup> By late 1917. Justice Heydon was involved in all manner of political, social and judicial issues. As head of the Industrial Court he had the discretionary power to determine which cases he heard as well as their outcomes. He wielded these powers in accordance with his particular worldview of service, loyalty and the need for patriotic restraint. In the war years strikes were seen as treasonous and the responsibility of the appropriate union, whether or not the Executive of the particular union had sanctioned the stoppage or not. Heydon had deregistered 26 unions by November 1917. No wonder the Labor members of Parliament disliked his rulings. He was involved in all manner of controversial issues not just in court. The war provided plenty of flashpoints.

**Justice Heydon – 'A second or third class judge of some kind or another.'**

The campaign for the Second Conscription Referendum had taken place in the second half of 1917. Once again all levels of the New South Wales legal profession supported the cause of Conscription to fight overseas. If anything they were more involved than the first Conscription Referendum in 1916. One of the key opponents of conscription was the feisty Irish Catholic Archbishop of Melbourne, Daniel Mannix. His views were not shared by the Sydney Catholic Establishment, of which two leading lights were Justice Heydon and solicitor and Member of the Legislative Council, Sir Thomas Hughes.

When a new Papal representative, Archbishop Cattaneo, arrived in Australia in early - November 1917 Hughes and Heydon went for a visit at Rockleigh Grange in North Sydney to have, in Hughes's words, "a solid hour of hard talk to ask Cattaneo to suggest to Mannix to moderate his ardour in the anti-conscription cause"<sup>44</sup>. Heydon and Hughes had also approached the previous papal delegate in 1916 regarding the first conscription referendum. Cattaneo, like his predecessor, did not intervene. Mannix persisted in promulgating his position regarding conscription so Heydon, with Hughes's approval wrote a letter to all the daily papers in Sydney. *The Telegraph* passed it on to *The Age* in Melbourne. Heydon did not hold back in accusing Mannix of "faithless disloyalty and enormous folly". In part, Heydon wrote:

"In proclaiming his sympathy with Sinn Fein, in urging us to put Australia first and the Empire second, the Catholic Archbishop of Melbourne has shown himself to be not only disloyal as a man, but I say it emphatically, archbishop though he may be, and simply layman though I be I am untrue to the teachings of the church . . . For a Catholic archbishop to lead his flock along the paths of sedition is to disobey the clearest teachings of the Catholic Church."

There was more in this vein, about the "tyrannical invaders" of Belgium and the abuse of freedom which allowed such ideas to be promulgated, but then there were even darker hints about "the time chosen to inflict this stab in the back of the Empire at this time of strain and difficulty, with the heavy clouds of disaster lowering around. . ."<sup>45</sup> Apart from Sir Thomas Hughes, Heydon was also supported by another leading Catholic jurist, Mr Justice Gavan Duffy of the High Court, whose sons had attended St Ignatius College, Riverview along with those of the Sir Thomas Hughes's family. Heydon's letter was controversial, but Mannix's response sent the argument into overdrive. Mannix was reported in *The Argus* of 21 November as saying that Heydon was a "second or third class judge of some kind or another" and the Catholics whom Hughes and Heydon "led" would comfortably "fit into a lolly shop."<sup>46</sup> The colourful hyperbole led a number of prominent Sydney lawyers, such as Richard Teece, to write letters to the *Sydney Morning Herald* defending Justice Heydon. Justice Heydon was a central figure in New South Wales at the end of 1917.

#### **'A difficult and a delicate matter'**<sup>47</sup>

The next time the bill was extensively discussed was in the Second Reading in the Legislative Council 27 February 1918. It was introduced as a 'difficult and a delicate matter' in a long speech by the Honourable John Garland KC, the Minister for Justice and Solicitor General. It was exceedingly strange to find him in such close agreement

with Laborer Jack Lang of the Legislative Assembly. Garland KC mentioned that there were cases where men (had) lingered superfluous on the bench after their term of usefulness had expired.<sup>48</sup> He cited as precedent the situation of Stipendiary and police magistrates as well as members of the public service. He stated that the constant strain of mental concentration that constitutes the hard and exacting portion of the judicial work. He added little to the specific causes because again the specifics were not mentioned except in reference to deciding when a judge should retire the need for some steps to be taken to prevent a judge from being the judge in his own case.<sup>49</sup> He did however introduce the idea that the bill should proceed with the proviso that any judges forced to retire because of the bill should be entitled to their full pension rights as if they had been on the bench for the necessary number of years.<sup>50</sup> At the time Supreme Court judges retirement benefits were half their annual salary of five thousand pounds, and District Court judges three thousand pounds. One of the side effects of the bill was to bring Justice Heydon to be given the pension rights of a Supreme Court Judge his position of senior judge of the Industrial Arbitration court, (was) that of a District Court Judge, and strictly speaking the pension to which he would be entitled (was) probably only that of a District Court Judge.<sup>51</sup>

Garland KC went on to say of Justice Heydon that he had done great yeoman service and had performed excellent judicial work in his position in the Arbitration Court. Garland KC argued that it was never intended that judges should hold office for life. Rather the intention had been to prevent their arbitrary dismissal by the Crown.<sup>2974</sup> He was keen to address the issue that the proposed bill was a breach of contract with the judges. This issue was another one that kept reoccurring in the debate and the reaction of the various judges to it<sup>52</sup>. Garland KC outlined a number of reasons for the bill: to prevent a judge from being a judge in his own case and the need to say in that prevent the possibility of judicial scandal in the future which could cause the situation that while the public mind is heated in connection with that matter Government may take advantage of the circumstance and pass a much more drastic measure (and) infinitely worse than the one being proposed<sup>53</sup>. He admitted that the bill meant that the state could lose the services of some competent men and that it would be desirable for a way to be found to found that those in the full vigour of their intellect, may be retained by the State. He admitted that the bill entailed some hardship and injustice on the incumbent judges but he completed his speech by saying that on balance it was in the public interest to better the administration of justice and maintain, if not increase the high respect in which the judicial bench has always been regarded in this State.

Next to speak was the influential Sydney Solicitor, Sir Thomas Hughes. He had very close ties to the judiciary as evidenced by his recent public alliance with Justice Heydon against Cardinal Mannix. Hughes spoke of an unfortunate incident in a court of justice six months previous. No doubt he was referring to the squabble between Conroy and Judge Simpson in Equity. Hughes said it was this incident which caused the government of the day to bring in a measure aimed at one man but which hits the wrong man. He mentioned that the notorious bill was not needed because the difficulty had long since disappeared. The John Garland responded that it had disappeared before the bill was introduced. No doubt he was referring to the fact that Simpson had gone on leave in July then resigned in December. Hughes ignored this and stuck to his point that That incident gave rise to the bill, and in that sense the

measure (was) really and truly the creature of a moment—agitation and not the product of calm and deliberate consideration as to what (was) best for the administration of justice. To him the British system avoided such bills but now the government was—introducing in a most insidious way political interference with the office of a judge. To him the bill was clearly intended only to get rid of one man but would sweep up others. As—many men have only attained their full ripeness of judgement when they were approaching the age of 70 years—

The Hon JA Browne interjected that—They were along time learning. And that rather sneering tone would continue with some of the members of council while they pushed the legislation. The tone suggests that they were antipathetic to more than the one judge. Sir Thomas Hughes persisted and stated that—there has been no attempt at legislation of this character to remove existing judges in any part of the British dominions. For that reason alone the legislation should not pass.<sup>54</sup> To him the danger was that the state could get a—venal bench. . . depending upon the favour of any government—and compared the current situation to the United States where—judges (were) often the creatures of a political party. The bill would set a precedent for—political interference—in the bench. He too was in favour of a scheme which would allow competent judges to continue beyond the age of 70 and suggested the establishment of some—neutral body—which would have the—right to report on the fitness of any occupant of the bench. In its intended form the bill was a—breach of contract between the individual judge and the government who appointed him.<sup>55</sup>

The Honourable Thomas Waddell spoke in favour of the bill although he realised it would remove good judges as well as those with failing posers. He was particularly keen to praise Justice Heydon in the Arbitration Court who—in the many difficult questions that have come before him together with the heat and bitterness that have existed in the minds of the contending parties on both sides there never has been a breath of suspicion as to (his) strict impartiality.<sup>56</sup> Not everyone would have agreed with this assessment. To Waddell, the loss of Heydon from the bench was a matter of some regret, not a reason for the passage of the bill. Other speakers such as Joseph Browne addressed the issue of the breach of contract and the possible deafness of judges and the possibility of—mental feebleness—in the face of complicated cases. Browne claimed that there had already been litigants injured by the poor quality of judges and the bill would stoop this he believed. Others such as G Black saw it as an injustice to judges who also favoured an independent body to remove judges who may be incapacitated but one of the most effective opponents of the bill was the newly appointed member, Professor JB Peden of Sydney University Law School. He mounted a well argued defence against the bill citing recent English commission which had—been sitting to inquire into delay in the King's Bench Division.<sup>57</sup> The matter of setting a specific age for the retirement of judges had—been a matter of intense interest in the profession in England—just before the outbreak of the war.<sup>58</sup> Peden reported that the British committee recommended that there should not be—a hard-and-fast age limit, but an age limit subject the qualification that a judge should continue in office as requested to do so for a period determined by a non-political committee. . . constituted of the Lord Chancellor, the Lord Chief Justice, and ex-Lord Chancellors who were still doing judicial duties either in the Privy Council or the House of Lords.<sup>59</sup> He then moved on to suggest that in new South Wales the committee could consist of the Chief Justice, unless it was his own case, then it would be the senior puisne judge, the senior elected member of the bar Council, or the

Attorney General, and the President of the Law Institute. This was an interesting and workable suggestion, in that the proposed committee would be not to get rid of people but to keep them on.. The fact that it was not taken up suggests that the fundamental motivation behind the bill was to rid the bench of judges, not to find ways to keep them on. Some of the interjections were abusive but indicative of the antipathy some members felt towards judges. One Honourable Member suggested the Inspector General of the insane as a possible candidate for the committee. The Parliamentary Record did not name this wit.

There was some discussion over Peden's suggestion and one of the members who questioned the proposal was Mr Richard Denis Meagher. He, among others challenged the idea of judges or prospective judges should not be involved in the process of determining who should stay on the bench after the age of 70 years.. When the identities of possible members of the committee were being discussed he too took the opportunity to interject suggesting the Inspector General of the insane as a possible candidate for the committee.

Richard Meagher is an interesting case of how a man with some dispute with the judiciary was involved in the passing of laws which would affect the composition of the bench. Meagher had been involved in a protracted series of attempts to be reinstated as a solicitor. He had been struck off because of his involvement in the Dean case and been implicated in a land scandal in 190???. On 28 May, 1917, not long after Conroy had been so inflammatory in his conduct in front Justice Simpson in Banco Court, Meagher applied for reinstatement as a solicitor of the Supreme Court of New South Wales, before the Full Court, consisting of the Chief Justice, Sir William Cullen, Mr Justice Pring and Justice Gordon. It had been a very high profile case with a large number of the legal profession in the crowded gallery. The barrister the Honourable John Jacob Gannon KC, a member of the Legislative Council and another well-known barrister, HE Manning, had represented Meagher. The application was made specifically on the grounds of Meagher's conduct in recent years. *The Sydney Morning Herald* had a two full columns devoted to the case, which was understandable as Meagher was the Lord Mayor of Sydney as well as a well-known Sydney identity although he had lost his seat in the recent election. Supporting his application were affidavits from barrister and Member and Speaker of the Legislative Assembly John Jacob Cohen KC, Frederick Flowers, President of the Legislative Council and William Brooks, Member of the Legislative Council. Much emphasis was laid upon his political career as a reason for his readmission.

The Chief Justice Sir William Cullen responded to this point in particular. He asked if success in politics was solid and substantial evidence of a changed character. Counsel said it was. Sir William Cullen had replied: Then it is easier for a successful politician to obtain reinstatement than for an obscure and friendless solicitor? Counsel said that it gave the person a chance to prove his rehabilitation then Sir William Cullen asked: Is the Court to take the opinion the opinion of politicians as evidence guiding its own opinions? Counsel demurred and stated that he was only submitting it as evidence. Sir William Cullen's doubt over the relevance of Meagher's political success as a reason for his readmission was a clear declaration of his opinion that the relative weight political success should not sway judicial power.

Counsel for the defendant, the Incorporated Law Institute, argued that a man must be judged on his whole life and submitted that the affidavits should not be able to sway the judgment. The fact that Meagher was the Mayor and previously the Speaker for the Legislative Assembly should not, according to counsel, sway the Court. Sir William Cullen agreed. The application was refused and within a few weeks Meagher was appointed to the Legislative Council by the Nationalist government and in February 1918 found himself speaking to support a motion to limit set the retirement age of the judges who had so recently sat in judgment over him. He did not miss his chance to respond to the. As a side note the government's apparent tension was not just with judges. The New South Wales Bar Council opposed Cohen KC as an Appointee to the bench, also in May 1917. The Attorney General Hall did not take this well and is reported by HTE Holt to have condemned the Counsel as an irresponsible body.<sup>60</sup> Interesting enough and perhaps in the best tradition of politics there were firm denials in the media in May 1917 that Cohen was even being considered as a judge.<sup>61</sup>

The year, 1917, was very tense in many ways although relations between judges and politicians were not always strained. They appeared together in many patriotic forums. In April 1917 there was farewell luncheon proposed for Premier Holman before his departure overseas. Judge Backhouse spoke saying how much his respect for Holman as a lawyer was real and earnest and that he had done good work in a variety of social fields.

Peden's proposal was that judges would automatically retire at a certain age unless some competent impartial body (was) prepared to take the responsibility of saying that the judge's mental and physical powers (were) so obviously unimpaired that his retirement under the Act would mean the loss of valuable service to the community.<sup>62</sup> Meagher seemed to know that he had the numbers on his side as he engaged with the concept of who would be on the committee. Some suggested medical men. Meagher suggested that in the case of a deaf judge, one member of the commission should be an aurist. Peden did not respond to this but extended the argument into the realm of the bill being a breach of contract with judges who had been given a life office. He noted that no parliament in the British Empire (had) interfered with the tenure of a judge.<sup>63</sup> The New Zealand legislation at the time, which was the only one to come close to, the Australian proposal simply offered the existing judges the chance to retire on a full pension at 72 years of age if they so desired. Peden continued with a well argued defence of his position repeatedly citing British precedent and sticking to his principle that because no case has been made that there are certain judges who should come off the bench (then) the bill should not apply to existing cases.<sup>64</sup> But as the debate wound on the comments gave some indication of what the politicians wanted. Garland was in an exchange with Dr Nash who was concerned that good men would be lost from the bench. Garland exclaimed: It is the only way you will get rid of them! His comment clearly indicates his agenda was to clear the bench of at least some of the incumbents. At the time there were three judges who would be immediately affect by the bill. On the District Court were Judges Docker, and Fitzharding, and on the Industrial Court was Mr Justice Heydon. Dr Nash was one of these with a lurid view of the situation and he considered the proposal to be more extreme perhaps than the Bolsheviks.<sup>65</sup> He feared the bill as attack on men of experience and a risk to the democracy. Peden and Hughes persisted and after some further discussion Garland concede that the idea of some form of committee to keep

intellectually fit judges continuing to render service to the community would remove a blot from the proposal.<sup>66</sup> Garland appeared to be conceding a point to his opponents. Peden's influence in particular was obvious in the subsequent consideration on 5 March 1918.

He stressed the fact that New South Wales was the only Parliament in the British Empire to present such an Act at all apart from New Zealand which did not apply the requirement to existing judges. Garland was now much more firm in his approach. The bill would proceed as intended but ensure that all sitting judges received their full pension entitlements on retirement whether they had qualified for them under the terms of the 1906 Judges Act or not. This was an echo of the New Zealand regulation which gave this right to any sitting judge who retire at the newly set age of 72 even if as sitting judges they were not required to do so under the new legislation. Garland was no longer sympathetic to the idea of a committee. Peden had swayed him the previous committee meeting, but not this one. Arguments such as that of breach of contract were also countered with Garland stating that every judge who accepts office under an Act of Parliament knows that that Act of Parliament may be changed by the power that made it.<sup>67</sup> Despite some protracted argument against the idea of breaking contract, Garland stuck to his position. It was clear that in the interim between the two sessions numbers were firm as was the party line. Sir Thomas Hughes persisted in his concern over the sought of precedent which would be set by the bill and was obviously sympathetic to the sitting judges in particular. JD Fitzgerald took over the case for the bill. The protracted discussion ranged over the same issues which had already been canvassed: breach of contract; citations of influential men such as Gladstone who had been effective beyond 70 years, with counter examples of men such as Henry Parkes who had declined in later life; comparisons with other areas such as coal contracts; bank retirement ages; the role of government and the responsibility to the community. There were some neat debating points and some convoluted and occasionally contradictory arguments but it is fair to say no one indicted that they had changed their opinion. It was a long debate and Peden's proposal to exclude sitting judges from the bill was defeated two to one. Peden tried again. He reiterated his argument that the New South Wales parliament should follow the suggestion of the British Royal Commission to establish a tribunal to deal with the question whether a judge should or should not be asked to continue in office notwithstanding the fact that he had reached a certain age.<sup>68</sup> There was testy exchange with JD Fitzgerald who Peden goaded into admitting out that did not consider all the existing judges competent to perform their judicial duties.<sup>69</sup> Peden persisted and suggesting inserting two sub clauses into the proposed act which would allow for the establishment of a tribunal consisting of the Chief Justice of the Supreme Court, or the senior puisne judge if it was the Chief Justice who was the subject, a practising barrister elected by the bar Council of New South Wales and the president of the Incorporated Law Institute of New South Wales.<sup>70</sup>

There was extended discussion of this proposal. The tenor of the government's comments suggested that the key issue for them was not just that judges should retire but they should not lose control of the process. Garland responded that he did not wish to abrogate the power over judges' tenure to a tribunal and that if the term of office of a judge is to be extended, it should be extended by the Government of the day, and no other body.<sup>71</sup> He was supported by the lord Mayor and recent appointee to the Legislative Council RD Meagher who was no doubt still smarting over the Full

Bench's recent refusal to readmit him as solicitor. He considered the idea of such a triumvirate tribunal as anomalous in the new country where the coalminer of today is the Minister of tomorrow, and where the boilermaker of today is the Premier of tomorrow.<sup>72</sup> Such egalitarian ideals and statements suggest that one of the background causes of the bill was to recognise the changing nature of the newly independent Australia and remove those judges seen as representative of the previous colonial system. Meagher also made the point that such a tribunal could cause great humiliation to those judges who were not invited to extend their time beyond the statutory 70 years. It was during the discussion on the composition of the tribunal that Meagher made his interjection that it should include the Inspector-General of the insane!<sup>73</sup> he clearly had more of an agenda than simply the concern for the well being of the population. But there was little chance of him losing. The few people who opposed the bill apart from Peden, Hughes and Bavin in the legislative Assembly were closely connected to judges in one way or another. Herbert Yule Braddon was the XXXXX. Peden and Bavin were both in the University of Sydney on XXXXX again with judges on the board and Senate.

The next question they dealt with was that of pensions. The 1906 Act had modified the pension provisions of judges from the previous system where any judge who was appointed, even if only for six months qualified for a pension of seven-tenths of his salary. The 1906 Act changed this provision quite significantly limiting the pension entitlements judges could receive if they did not serve fifteen years on the bench. The new bill could therefore prematurely retire some judges before they were entitled to their full pension. Justice Heydon would suffer in particular. Peden proposed that the bill be modified so that any sitting judge should be entitled to the full pension regardless of his length of time on the bench. In the process, Justice Heydon was accorded the same pension as that of a Supreme Court Judge. The Solicitor General Garland agreed to the amendment.

There had been some confusion about his status at the time. There was some debate over the cost of the amendment but with all people in general agreement the report was adopted. The Question resolved in the Affirmative, The Bill read a third time. But then it had to go back to the Legislative Assembly and face the Parliamentary Labour Party representatives there, who could now have a real go at it.

The leader of the Opposition called it "The Judges Protection Act" Brookfield wanted the whole bill debated again and suggested the retirement age as 60 until the Chairman ruled against the discussion. Bavin spoke for it and the amendment was agreed to. And so the bill was finally passed. Other parliaments gradually followed suit. In Queensland, *The Judges Retirement Act* (1921) removed a number of over-age judges.

Justice Heydon was not happy with it and stated that he ÷ While there were those who believed the passing of the Act was most undesirable, there were also other opinions. Justice Heydon was particularly upset. TS Crawford QC was a Crown prosecutor from 1917, the year in which the Bill was enacted. He wrote on the death of Judge Bevan that he (Bevan) "did not belong to the judicial cult which regarded their presence as essential to the maintenance of justice itself.. As a homely man I place him on the bridge connecting the lifelong judges with those who knew that, on attaining seventy years, they rejoin ordinary mortals."<sup>74</sup> Wilfred Shepard writing in the *History of the New South Wales Bar* echoes this opinion of the

some early judges as being lords unto themselves. He wrote that the judges in the early years of the twentieth century – though undoubtedly able, formed two distinct types which either lightened or burdened the labours of counsel. On the one hand were the martinets, survivors of an even stricter age, who believed that cases should be conducted in an atmosphere of severity and strictness. Justice GB Simpson, (no relation to Justice Archibald Simpson) – not only needlessly asked counsel their names, but also how to spell them. Pring. J was as scrupulously strict as he was fair. On the other hand were those who inclined to a more moderate and less formal control of their courts. Gordon, J., was a distinguished example.<sup>75</sup> Such commentary suggests that while the class represented so enthusiastically by people such as Jack Lang had cause to be concerned about their treatment by the judiciary, so did practising lawyers. Over the next few years. John Jacob Cohen was appointed a judge in the District Court. Wade was appointed tot eh Supreme Court in 1920, but died soon after. Beeby was appointed to the Industrial Court..

### Conclusion

The Judges Retirement bill provides a specific example of how government can exert power over the judiciary. The passage of the bill is an example of how laws can be enacted as a result of the intersection of political imperatives, personal agendas and public pressure. In addition the passing of the act is one step in the process of moving away from a domination of the Australian legal system by English precedent. In this case, Australia, specifically New South Wales, set the precedent for the Empire. This situation indicates the evolution of Australia in its relationship to the –Mother country. In addition the implementation of the Act acceralate4d the process by which judges who had been bron and edcuated in England were replaced by those from Australian backgrounds. The majority of the advocates of the law were themselves lawyers who were passionate in their support of the Imperial cause in the war. But their unwillingness to accept English precedent indicates their desire to move from being a derivate emanation of the English system to an equal member of the Empire family. This desire is indicative of the same attitude which the mercurial Prime Minister William Morris Hughes, himself a Sydney barrister, exhibited in his assertion of Australia's right to be represented at the Versailles Treaty Conference and later in the League of Nations.

### Footnotes:

<sup>1</sup> Sir Thomas Hughes *NSWPD* Vol 70., 2975

<sup>2</sup> Sydney Morning Herald 2May 1917, 11.

<sup>3</sup> Justice Simpson had been on the Supreme Court bench since 1896 and had been Vice-Chancellor of the University of Sydney 1902-1904. He lived in Hunters Hill and had already lost one son in the war, killed in the fighting at Lone Pine on Gallipoli.

<sup>4</sup> The incident was widely reported around he country including *The Argus* in Melbourne, *the Adelaide Advertiser* and the *Hobart Mercury*. Conroy did not appear in court the following day and Justice Simpson found for the plaintiff, Conroy's wife.

<sup>5</sup> New Zealand had passed a law limiting the age of judges but it did not apply to those already on the bench.

<sup>6</sup> Sir Gerard Brennan Former Chief Justice High Court Speech to Francis Forbes Society for Legal History Essay Competition Awards Ceremony 25 February 2009 available on <http://www.forbessociety.org.au/documents/brennan.pdf>

<sup>7</sup> Joan Beaumont 'The Politics of a Divided Society' in Joan Beaumont (ed) *Australia's War 1914-18*. 39-41

<sup>8</sup> There are repeated references to the way the two arms combine with business interests to suppress workers, dating from as early as 1909 in William Guthrie Spence's *Australia's . . . Awakening Thirty Years in the life of an Australian Agitator*. Reprinted by *The Workers' Trustees*, Sydney, 1982. See *Law and its Administration* Pp111 Ff as a contemporary example.

<sup>9</sup> JM Bennett *A History of the Supreme Court of New South Wales*, 54-55.

<sup>10</sup> Parliamentary debates.

<sup>11</sup> Although one, Richard Dennis Meagher was disbarred at the time.

<sup>12</sup> There had been a number of high profile lawyers in previous parliaments. Pilcher KC had been a member but had died only recently. So too had Bernard Ringrose Wise who had been a Member of the Legislative Assembly and Minister for Justice, Attorney General and Acting Premier. He had died in 1916. His replacement had been a long standing friend and another barrister: Thomas Rainsford Bavin. In the middle of 1917, Professor John Peden of the Sydney University Law School was appointed a lifetime member of the Legislative Council.

<sup>13</sup> Holman was overseas for the second half of 1917.

<sup>14</sup> Joan Belmont *ibid* 51

<sup>15</sup> Holmes was closely connected with the New South Wales legal profession. He had been a regular correspondent with Justice Ferguson and had been the commanding officer of both of Ferguson's sons - Arthur who had been killed in action in 1916 and Keith. Keith had been severely wounded in action in 1917 in surprisingly similar circumstances to Holman's close shave. Keith Ferguson had been coming back from a battlefield tour with the same General Holmes who lost his life when he had been with the premier.

<sup>16</sup> NSWPD Vol 70 1952

<sup>17</sup> HTE Holt *A Court Rises*

<sup>18</sup> Andrew Frazer 'Charles Gilbert Heydon' in Greg Patmore, (ed) *Laying the Foundations of Industrial Justice*. n 102.

<sup>19</sup> HV Evatt *Labour Leader*

<sup>20</sup> JM Bennett *A History of the Supreme Court of New South Wales* 262n

<sup>21</sup> NSWPD Vol 70., 2975

<sup>22</sup> NSWPD Vol 70., 2029

<sup>23</sup> NSWPD Vol 70., 2030

<sup>24</sup> NSWPD Vol 70 2031

<sup>25</sup> Frank Cain. *The Origins of Political Surveillance*, 1983 Angus & Robertson. Sydney. 32

<sup>26</sup> NSWPD Vol 70 2034

<sup>27</sup> Thomas Ley had a lurid career, eventually found guilty of murder and ended his days in an asylum for the criminally insane. *Australian Dictionary of Biography*

<sup>28</sup> NSWPD Vol 70 2036

<sup>29</sup> NSWPD Vol 70 2037

<sup>30</sup> NSWPD Vol 70 2036

<sup>31</sup> *Australian Dictionary of Biography*. Brookfield, Percival Stanley. 'On 22 March 1921 Brookfield was shot on Riverton railway station, South Australia, while trying to disarm Koorman Tomayoff, a deranged Russian who had already wounded two people; he died that day in Adelaide Hospital and was buried in Broken Hill cemetery, where a memorial headstone was unveiled in 1922. The courageous manner of his death was sufficient answer to those who had attributed his opposition to conscription to cowardice'

<sup>32</sup> In 1918 he was represented by an outstanding silk, Richard Windeyer, in the Royal Commission into the conviction of an IWW member..

<sup>33</sup> NSWPD Vol 70 2039

<sup>34</sup> NSWPD Vol 70 2040

<sup>35</sup> HV Evatt *Australian Labour Leader* 420, 462, 485. Evatt was critical that the bill forced the retirement of very capable men such as Mr Justice Sly .

<sup>36</sup> NSWPD Vol 70 2041

<sup>37</sup> NSWPD Vol 70 2042

<sup>38</sup> NSWPD Vol 70 2042

<sup>39</sup> NSWPD Vol 70 2043

<sup>40</sup> NSWPD Vol 70 2134

<sup>41</sup> NSWPD Vol 70 2134

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- <sup>42</sup> NSWPD Vol 70 2134
- <sup>43</sup> *In re The Australian Society of Engineers and Others* (NSW Court of Industrial Arbitration, Heydon J. 21 May 1918. Private Papers of the Heydon family held in Hunters Hill Historical Society Archive.
- <sup>44</sup> B A Santamaria Daniel Mannix: A biography.84 - 85
- <sup>45</sup> B A Santamaria Daniel Mannix: A biography. 85
- <sup>46</sup> Ernest Scott , 422
- <sup>47</sup> NSWPD Vol 70 2971
- <sup>48</sup> NSWPD Vol 70 2971
- <sup>49</sup> NSWPD Vol 70 2972
- <sup>50</sup> NSWPD Vol 70 2973
- <sup>51</sup> NSWPD Speech by The Hon John Garland 2973 - 2974
- <sup>52</sup> HTE Holt reports that Judge Grantley Hyde Fitzhardinge, who was over 70 years when the Act was passed considered it a scandalous breach of contract and mentioned this opinion in court, comparing it to the German's breach of the scrap of paper 125
- <sup>53</sup> NSWPD Vol 70 2974 - 5
- <sup>54</sup> NSWPD Vol 70 2976
- <sup>55</sup> NSWPD Vol 70 2976
- <sup>56</sup> NSWPD Vol 70 2979
- <sup>57</sup> NSWPD Vol 70 2984
- <sup>58</sup> NSWPD Vol 70 2985
- <sup>59</sup> NSWPD Vol 70 2986
- <sup>60</sup> HTE Holt 166.
- <sup>61</sup> *Sydney Morning Herald* 19 May 1917 'Mr Cohen not resigning' 13
- <sup>62</sup> NSWPD Vol 70 2988
- <sup>63</sup> NSWPD Vol 70 2989
- <sup>64</sup> NSWPD Vol 70 2991
- <sup>65</sup> NSWPD Vol 70 2994
- <sup>66</sup> NSWPD Vol 70 2996
- <sup>67</sup> NSWPD Vol 70 3220
- <sup>68</sup> NSWPD Vol 70 3231
- <sup>69</sup> NSWPD Vol 70 3232
- <sup>70</sup> NSWPD Vol 70 3232-3
- <sup>71</sup> NSWPD Vol 70 3233
- <sup>72</sup> NSWPD Vol 70 3234
- <sup>73</sup> NSWPD Vol 70 3235
- <sup>74</sup> HTE Holt 163.
- <sup>75</sup> Wilfred Sheppard 'The Influence of the Bar in the Twentieth Century' in JM Bennett *A History of the Supreme Court of New South Wales* 266n

## BITS

This tendency amongst lawyers to enter politics is an indication of their sense of social obligation. This sense is reinforced by their willingness to be energetic contributors to charitable causes, their investment of personal energy in supporting the war and their great sense of duty in trying to shape the new country. Occasionally their passion for public spirit led them into strident opposition to left wing political groups.

This reasonable and rational explanation of the motives of the Holman government is supported by Tuwomey in her study of the New South Wales Constitution. But it does not reveal the Labor support for the bill.

The year in which the Bill was proposed was as tumultuous a time as any in New South Wales politics and peculiarly unique in the extent to which it involved the legal profession.

This was possibly unfair on Heydon, despite the judge's propensity to speak openly. The system of Industrial Arbitration was constantly evolving and there were clear issues in trying to resolve the issues of State and Federal responsibility. There had even been some debate over whether or not he deserved to be referred to as

By the end of 1917 the New South Wales legal profession were acting in a manner that showed their powerful sense of loyalty to the cause of service, war and Empire. Yet, despite the congruence of feeling in this regard between lawyers and the judiciary in 1918 the Judges' Retirement bill went to the Upper House of the New South Wales parliament, the Legislative Council.