

After Dinner Speech

(for dinner held at Pee Wee's on the Point
2012 Australian and New Zealand College
of Notaries Conference, Darwin
27 July 2012)

Professor Zabrud, Chairman of the Board of Governors of the Australian and New Zealand College of Notaries, The Honourable Justice Hartmann, Mr Michael Lightowler, honoured guests, ladies and gentlemen.

As I am sure you all know, the office of Public Notary is a very ancient one, dating back to the early days of the Roman republic. Originally, they were mere copiers and transcribers, known as scribae or scribes, who undertook basic secretarial work and drafted deeds, wills, and conveyances. Some acted as permanent court officials, or officials of the Senate, doing what today is done by court transcribing services and Hansard, as well as other functions concerning the keeping of court records. In the first century BC, Cicero employed as his secretary Marcus Tullius Tiro, who is said to have invented shorthand, which he used to take down Cicero's speeches. Cicero himself taught the art of shorthand-writing to a number of scribes working in the Senate House and, as this skill was developed, anyone who adopted it was thereafter

known as a notarius, from which the word 'notary' has originated, as well as a lot of other English words in common use, including 'note', 'notation', 'notice' and even 'notorious'. It was this word 'notorious' which got me thinking – are there any notorious notaries? Now, notaries are not known as notorious no-gooders, nonetheless, and notwithstanding that they are by nature necessarily nonpareil, I wondered what a naughty notary might do which was not normal. This led me to the case of *In re Champion* [1906] P 86, the first decided case I could find which dealt with a notary who was struck off the roll of public notaries. This remarkable case was heard by the Master of Faculties sitting in the Court of Faculties – a Court in England I had not even heard of – but which has a long history. Originally, the Pope exercised the power to appoint notaries in England until 1279 when Pope Nicholas III delegated his authority to the Archbishop of Canterbury. However, King Henry VIII, desirous as he was of severing all connections with the Papacy, arranged for the passage of the *Ecclesiastical Licences Act 1533*, which established this Court and attached it to the Archbishop. So what mischief did Charles Goble Champion get up to? Brooke's Notary, that well known treatise on the office and practice of notaries in England, which was first published in 1839 and is now in its 12th edition, and originally written by Mr Richard Brooke, who it could be said was a notable notary, suggested a number of evil things a notary might do.

- permitting his name to be used by an unqualified person;
- practising outside the area of his district;
- obtaining his appointment by deceit;
- engaging in improper or disgraceful conduct in his practice as a notary (but not, it seems, outside of his practice); or
- wilfully ante-dating or post-dating an instrument in order to deceive (or to avoid stamp duty).

Now, Mr Champion was also a solicitor who had been struck off the solicitors' roll for professional misconduct in relation to property of which he was appointed administrator, according to the report. We are told no more than this, so we are not fully informed about what he was really up to. Mr Champion opposed the application on two grounds. The first raised a question about the courts' jurisdiction to strike him off. The second was that, if the Court did have jurisdiction, his misconduct was not connected with his practice as a notary.

As to jurisdiction, it was remarkable that none of the Statutes dealing with notaries expressly conferred a power on the Court of Faculties to strike off the roll, and, what is more, there was no known case of a notary being struck off in the history of the Court. The Master observed with remarkable lucidity that just because the records have

been well kept since the 16th century, and no case has ever been found, that it is safe to say that it has never happened before. He concluded that he had inherent power to remove from the roll, and that it did not matter that Mr Champion's misconduct had nothing to do with his notarial practice because trustworthiness was the basic requirement for the position, a quality he no longer had, and so an order striking him off was made. Two years later, in 1908, two other notaries were also struck off in similar circumstances. Both were solicitors who had been struck off the roll of solicitors by the King's Bench Division of the High Court of Justice. The first case, *In re Prior* (1908) WN 193, was a solicitor who stole his client's money and got five years penal servitude. The second case, *In re Terrill* (1908) WN 194 was solicitor convicted of forgery and he also got five years. After 1908, I have not been able to find any reported cases.

This led me to wonder if any such case had ever happened in the Northern Territory, which in turn caused me to ponder over the history of notaries in this jurisdiction. Until 1992, notaries were appointed by the Supreme Court under the *Public Notaries Act 1859* (SA), which still remained in force by virtue of s 7 of the *Northern Territory Acceptance Act 1910* (Cth). This Act has an interesting history. From the foundation of the Province of South Australia in 1836, notaries were appointed by

the Governors until the mid-1850s when Governor MacDonnell refused to do so, believing he had no authority to do so. This created doubts about the validity of those notaries who had been appointed by his predecessors, as well as caused great inconveniences. So, to remove those doubts, and to make it easier to become appointed, the 1859 Act was passed. This Act by s 6 expressly conferred a power on the Court to strike off. It also provided for the Court to keep a roll, and so I inspected the Northern Territory roll to see what could be found. The first person to be appointed, according to the roll, was Nathaniel Hargreave of Alice Springs on 28 September 1955. It is possible – indeed probable – that there were notaries in this Territory before that, but no trace of them could I find. I was the 12th on the roll, having been appointed on 9 March 1972. In between Mr Hargreave and myself, there were only two notaries still practising in the Territory, George Cridland (appointed 12 March 1959) and Cecil Albert Black (appointed 7 July 1970), all the others having died, retired or left the Territory. Of course, I have not been able to practise either since my appointment as a Judge on 27 June 1991, but when I retire I could practise again because appointments are for life. Immediately after my name is the name of the first female notary, Nerolie Phyllis Withnall, who was appointed by Forster J on 7 September 1972. Before Nerolie was appointed, I received a phone call from Forster J who asked me,

presumably in my then capacity as secretary of the Law Society, if there was any reason that she might not be appointed. I thought immediately of the decision of the Supreme Court of South Australia in the case of *In re Kitson* (1920) SALR 230 when the Full Court held that there was no power to appoint a woman as a Notary Public, but decided not to draw that to Forster J's attention, and so she was appointed.

In re Kitson turned on exactly the same Act, and the meaning to be given to the word "person" in s 3. Despite the provision in the *Acts Interpretation Act* to the effect that every word of the masculine gender shall be construed as including the female gender, the difficulty was that the word "person" is not gender-specific, although the Act in several different sections referred back to the word "person" with the gender-specific pronoun "he", but such was the case law at that time, that the Court felt constrained to hold that there was an intention to limit the office only to men. Even in 1920, this was not a popular result and, within a few months, the effect of the decision was reversed by the *Sex Disqualification (Removal) Act 1921*, s 2, which expressly provided that a person was not disqualified by sex or marriage from becoming a public notary. That Act, by the way, did not apply in the Northern Territory. I do not know why the words "or marriage" were included. I am unaware of any case which had held that only bachelors could be public notaries.

Anyway, I am glad that I did not tell Forster J about *Re Kitson*. I am sure his Honour would have had a severe bout of apoplexy if he had felt constrained to follow it, although I doubt if he would have. Whatever may have been the case in 1920, times had changed. Women had long been treated as equals. Mrs Withnall was very popular with the legal profession. Her husband, John, was also a practitioner, and her father-in-law was the Crown Solicitor. She was not only a very capable solicitor, but she was young, extremely attractive, and had a slight lisp which enhanced her undoubted charm and enormous sex appeal. In 1979, she became the first woman President of a Law Society anywhere in Australia. It would have destroyed the Territory's image as a "can-do" frontier place if she had been refused because of her sex or marital status.

Returning to the roll, I also discovered that this Court had also appointed possibly four lay persons as public notaries, which surprised me a little, although such appointments are not entirely unknown. There is a reported case of *Bailleau v Victorian Society of Notaries* [1904] P 180, where the Court of Faculties appointed Arthur Sydney Bailleau, a chartered accountant, as a notary for the State of Victoria. Mr Bailleau's application came well prepared. He was supported by a petition from several members of both houses of the Victorian Parliament, by

representatives of leading banks, insurance companies and mercantile houses in Melbourne, by the Chairman of the Melbourne Stock Exchange, by people holding high positions in political and ecclesiastical circles, and by the Attorney-General for the Commonwealth, Mr Isaac Isaacs KC.

One of the gentlemen who was not a solicitor, but who was appointed by Forster J on 12 February 1973, was George Kenneth Slide. There is a note on the roll that Mr Slide held an appointment by the Archbishop of Canterbury dated 28 December 1972, and perhaps this helped him to gain admission. I wondered about this, as I understood that even ecclesiastical notaries were admitted by the Master of Faculties rather than the Archbishop. So far as I know, there are no ecclesiastical notaries in the Northern Territory. Anyway, Mr Slide was well known in Darwin in the 1970s and held in high regard, despite being known locally as “Slippery Slide”. He was a Justice of the Peace who regularly sat in the Court of Summary Jurisdiction. He had retired from the Australian Army in 1958 with the rank of Captain. He was a public servant, a civil marriage celebrant, local manager of a life insurance company and, in 1978, he was appointed a special magistrate – the last such appointment ever to be made in the Northern Territory. After he retired, he married in Manila in 1988 and settled in Angeles City

where he established a local branch of the RSL, and reputedly ran a rather seedy bar. He might be considered a notable notary.

Even so, I doubt if a layman could be appointed today. The *Public Notaries Act*, which came into force in 1992, repealed and replaced the 1859 Act. Although the Act does not, by its express terms, require that an applicant have any legal qualifications, s 7(c) of the Act confers on notaries the powers and authorities exercised by a Public Notary in the United Kingdom. According to Brooke's Notary, this includes the power to draw, attest or certify, under his official seal, for use anywhere in the world, deeds and other documents, including wills or other testamentary instruments, conveyances of real and personal property, and powers of attorney, as well as many other things. In a recent South Australian case, *Re Bos* (2003) 89 SASR 1, Debelle J held that, as a general rule, an applicant should be a legal practitioner of several years standing with a sound working knowledge of Australian law and commercial practice, and only in exceptional circumstances would a non-lawyer be admitted. As far as I can see, a notary is not precluded from drawing wills, conveyances, powers of attorney, probate applications and the like which are intended solely for domestic use, and are not precluded by from doing so by s 18(1) of the *Legal Profession Act* (see s 18(2)(a)). The *Legal Profession Act* refers only once to notaries. Section 525(5)(e)

empowers the Disciplinary Tribunal to order a practitioner to cease to accept instructions as a public notary in relation to notarial services. Otherwise, it seems that the office is not regulated to any real extent. There are, for instance, no statutory requirements relating to trust accounts, fidelity schemes or compulsory insurance. The *Public Notaries Act*, by the way, is only 11 sections long. Compare that with the *Legal Profession Act*, which has 760 sections and makes a very good door stop.

In most states of the United States and most provinces of Canada, there is what is called 'lay notaries', who are basically restricted to taking acknowledgments and oaths and who have very little legal authority. Each state and province has its own statutory requirements which can vary quite a bit, and a number of actors, including Jennifer Lopez, and even an astronaut have been appointed. We do not have such notaries in Australia, but I wondered what might have motivated Mr Hargreave of Alice Springs to become a notary. He was already a legal practitioner. But he did not have any difficulty drawing contracts, or wills, or powers of attorney, or engaging in conveyancing. At that time, there was no Act or Ordinance in force in the Northern Territory regulating the practice of solicitors. Anyone could call themselves a Solicitor. The *Supreme Court Ordinance* did provide for the admission of practitioners to the roll, but,

after 1930, the Court did not even keep a roll, until 1966 when Blackburn J decided that there should be one. Prior to 1966, it was very hard to strike someone off the roll if there was not one, although there was such a case in 1926, when a Victorian lawyer called Frank Ernest Bateman was struck off only 67 days after he had been admitted – surely an Australian record. It does not appear that Mr Bateman was a notary. In Alice Springs, there was little likelihood of a need to take a protest from the master of a ship, or the noting and protesting of a bill of exchange. Perhaps he had some clients with business overseas. Returning to the subject of notable notaries, Klaus Hergeschiema of Massapequa, New York, had the distinction of being the first notary to be commissioned in all 50 states. I am not aware of anyone who has achieved this feat in Australia. The possibility exists of seeking registration elsewhere under the *Mutual Recognition Act 1992 (Cth)*, although I wonder if this would apply to Queensland where, as I understand it, appointments are still made by the Master of Faculties in the United Kingdom. I am told by your President that the *Mutual Recognition Act* does not apply to notaries as it is an office, not a profession, but s 4A of the Northern Territory Act specifically seems to contemplate otherwise.

Another notable notary was John Calvin Coolidge from Vermont, who swore in his son, Calvin Coolidge as the 30th President of the United

States of America in 1923 by the light of a Kerosene lamp. However, as there was doubt about the authority of a state notary to administer the presidential oath of office, President Coolidge took the oath again when he returned to Washington. President Coolidge was well known for his quips, and also as a man who said very little. He said on one occasion, that if you don't say anything, you won't be called upon to repeat it. His main political genius was his talent for doing absolutely nothing. At a dinner party, a young woman said to him that she would bet that she could get three words of conversation out of him. He replied, "You lose."

Not having found anything notorious about notaries in the case law, I turned to literature, but even here the cupboard was bare. In Shakespeare's play, *The Merchant of Venice*, Shylock, who agrees to lend 3000 ducats to Antonio, says, "Go with me to a notary; seal me there your single bond." Antonio, who entrusted all his borrowed fortunes into bottoms, was later to be told that his ships had foundered and was called upon to pay up on the bond, which provided for a pound of flesh to be taken nearest to the heart in the event of default. Clearly, the notary who prepared the bond did not, as is expected of a notary today, ensure that the transaction was fair to both sides – unless he was only acting for Shylock. And if that were the case, he ought to have advised Shylock that, by the laws of Venice, if he took one drop of blood,

all his lands and goods were forfeited to the state. Clearly, this notary was neither notorious nor notable, but he may have been negligent.

So I think the result is that history and literature have proved that notaries are not notorious. Rather, they are practitioners of probity, pristine properness and proven propriety. On that note, I ask you to fill your glasses and toast: 'To the notaries of Australia and New Zealand.'