

A HISTORY OF THE NATAL PROVINCIAL DIVISION OF THE SUPREME
COURT OF SOUTH AFRICA DURING THE JUDGE PRESIDENCY OF
RICHARD FEETHAM (1930-1939); WITH PARTICULAR REFERENCE TO
THE BENCH AND BAR.

BY

MARINA DE BEER

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ABSTRACT

Richard Feetham was Judge President of the Natal Provincial Division from 1 May 1930 to 18 July 1939. He succeeded Dove Wilson who was an able but not a very learned or dynamic Judge President. Thus, at the time of his appointment the Natal Court and its judgments were treated with little respect by the other provincial divisions.

Feetham JP, unlike his predecessor, was not only a scholar with a towering intellect but a man endowed with outstanding leadership qualities. He was thus ideally suited to bring about a change for the better in the status of the Natal Court. He did this by taking a dynamic lead and presided over and delivered a high proportion of the courts' judgments. He also set his brethren an excellent example by the high standard he set for himself and his court and which they emulated. This thesis thus also covers the careers of these puisne and acting puisne judges and their contribution towards the better administration of justice in Natal.

In 1930 there existed in Natal a disinct system of dual practice with a de facto Bar. This system had been a vexed question in the minds of Natal lawyers for two decades but when Feetham JP was confronted with it he immediately addressed the controversial issue and brought about the necessary reforms to divide the legal profession and bring Natal into line with the rest of South Africa. This reform raised the quality of pleading and manner in which the law

was presented. It also provided the Natal Bench with able personnel for the future from within Natal. Accordingly this thesis also assesses the careers of the main legal practitioners of that period and their contribution towards the development of the administration of justice in Natal.

In less than ten years Feetham JP thus transformed the Natal Provincial Division from being weak and ineffectual to a position where it became a division respected for its Bench, judgments and legal profession.

During the course of time history has confirmed the overall significance of Richard Feetham's Judge Presidency.

PREFACE

I would like to express my appreciation to the people who have assisted me with my research. The staff of the Killie Campbell Africana Library, the Don Africana Reference Library, the Durban Municipal Library and the Natal Society Public Library in Pietermaritzburg who ably and expeditiously complied with my many requests for newspapers. The staff of the GMJ Sweeney Law Library, the Durban-Westville University Law Library and the University of Natal Main Library and Architectural Library were also very helpful.

I am greatly indebted to the late Honourable Mr Alexander Milne, the Honourable Mr Neville James, the Honourable Mr Dennis Fannin and Mr Douglas Shaw QC for their willingness to talk to me and provide me with valuable information about an era they knew well. I am deeply grateful to them and believe their observations and insights have enhanced my thesis. I am also indebted to Mr Justice Hilary Squires for making available to me the Report of the Committee of Inquiry into the Legal Profession in Rhodesia of 1979.

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Finally I record that this thesis is substantially my own work, save in the respects I have acknowledged above. I also declare that this thesis has not been submitted for a degree at any other University.

M DE BEER

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CHAPTER 1
I N T R O D U C T I O N

1.1 THE NATAL PROVINCIAL DIVISION IN 1930

In 1930 the Judge President of Natal, Sir John Dove Wilson, retired. He had been on the Natal Bench for twenty-six years, twenty of which were spent as Judge President.¹

Sir John was a member of the Scottish Bar for 16 years, and held the degrees of MA (Aberdeen) and LLB (Edinburgh) when he was recruited to the Natal Supreme Court in 1904.² His rise through the judicial ranks was swift, and, on the departure of Bale CJ in 1910 he assumed the Judge Presidency of the Natal Provincial Division.³ Sir John, as he was affectionately referred to by the Press, was a well-liked figure in Natal, and "his learning as a lawyer did not cloud his common sense as a man of the world".⁴ Thus when Dove Wilson was recruited from the Scottish Bar he was welcomed as promising the rescue of judicial affairs in Natal from what the South African Law Journal termed "to say the least of it a languishing condition"⁵ but Hahlo and Kahn state:

"Able as he was he was an isolated appointment, and the old condition was hardly ameliorated. Thus Carter, Attorney-General, an attorney with no paper qualifications, secured his own elevation to the

¹ Natal Witness 30 April 1930.

² Ibid.

³ 1910 NLR 296 and P R Spiller A History of the District and Supreme Courts of Natal 1846-1910 1 ed (1986) 52.

⁴ Natal Witness 30 April 1930.

⁵ (1904) 21 SALJ 374.

Bench three days before Union and his inevitable loss of a political office. The judgments of Connor and Dove Wilson apart, the light of learning shone dimly, if at all, from the poorly printed pages of the Natal Law Reports."⁶

But during his long Judge Presidency of twenty years Dove Wilson did a great deal to improve the status of the Natal Provincial Division and his judgments, in particular his ex tempore judgments, will live in the history of South African jurisprudence. According to Broome⁷ he was pre-eminent in trial cases and his ability to marshall the facts of complicated cases was unequalled.

By many accounts Dove Wilson's Judge Presidency was a hard act to follow and early in 1930 speculation was rife as to who would succeed him as Judge President of Natal. The first puisne judge at the time was Thomas Fortescue Carter who was not only too old to be promoted,⁸ but in the words of Frank Broome:

"The best that I ever heard said of him was that he was 'good on fact', that is to say that he had the qualities of the ordinary man-in-the-street jurymen. I do not grudge him that praise. I would class him as the worst judge to sit on the Natal Bench this century, but it is only fair to say that his integrity was never questioned."⁹

The second puisne judge was Frederic Spence Tatham, a very worthy contender, having been on the Natal Bench for twelve

⁶ HR Hahlo and E Kahn South Africa : The Development of its Laws and Constitution 1 ed (1960) 222.

⁷ F N Broome Not the Whole Truth 1 ed (1962) 114.

⁸ As a pre-Union judge he was not subject to any age limit.

⁹ Broome op cit 112.

and a half years, but unfortunately already sixty-five years old.

The third puisne judge was Ernest Lewis Matthews who came from the civil service with no experience of private practice at the Bar and little experience of advocacy.

Frank Broome says:

"One was always conscious of his civil service background. As a judge he lacked 'Bench personality' and his command of ex tempore English was poor. But for all that he was a good judge and the quality of his judgments improved as he got older."¹⁰

It was thus quite clear that Dove Wilson's successor would have to be appointed from outside Natal.

On 28 January 1930 the Natal Witness reported that great secrecy was being preserved by the Minister of Justice regarding the appointment of a Judge President for Natal. The suggestion that Mr NJ de Wet KC, then the leader of the Transvaal Bar, and later Judge of Appeal and Chief Justice of South Africa from 1939 to 1943,¹¹ would be appointed to succeed Sir John Dove Wilson received very little credence in Natal.¹²

A close observer of current events suggested that the choice would finally be narrowed down to Tindall and Feetham JJ, either of whom would be most acceptable to the Natal Bar.¹³ But Feetham J was at the time in Shanghai

¹⁰ Broom op cit 113.

¹¹ De Rebus August (1980) 404.

¹² Natal Witness 28 January 1930.

¹³ Ibid.

where he was devising a scheme for the future status of that city which would be equally acceptable to both European interests and the Chinese government.¹⁴

One lawyer laughingly said that:

"The great objection to the appointment of Mr Justice Feetham is that he has become so much in demand overseas that we might expect to see very little of him in Natal."¹⁵

However, on 17 March 1930 it was announced that Feetham J was to be Sir John Dove Wilson's successor and the next Judge President of Natal. As with Dove Wilson JP's appointment this was another exceptional appointment to the Natal Bench from outside the province. But unlike Sir John, who was a direct import from Scotland, Feetham J was already a seasoned South African having arrived here in November 1902 to take up an appointment as Deputy Town Clerk of Johannesburg and subsequently became Town Clerk from 1903 to 1905.¹⁶ He formed part of Lord Alfred Milner's "Kindergarten", charged with the task of reconstituting local government in the Transvaal.¹⁷ In 1905 he resigned in order to practice at the Bar in Johannesburg and took silk on 5 July 1919 and on 16 August 1923 he was elevated to the Transvaal Bench from where he was appointed Judge President of the Natal Provincial Division with effect from 1 May 1930.¹⁸

Unlike Dove Wilson JP, Feetham JP was not a genial

¹⁴ Ibid.

¹⁵ Natal Witness 18 January 1930.

¹⁶ Anonymous (1966) 83 SALJ 1.

¹⁷ Dictionary of South African Biography (4) 155.

¹⁸ Anonymous (1966) 83 SALJ 1.

extrovert but rather a quiet man with a towering intellect and a passionate zeal for service to his country, his fellow men and his profession. Frank Broome, who was an advocate during their respective Judge Presidencies and thus knew them both well compared them as follows:

"While Dove Wilson maintained the dignity of the Court by sheer personality Feetham did so with icy and rather terrifying efficiency. Sometimes he was irritable, usually because he had difficulty in finding the ready word to express what he wanted to say, but often his equanimity, was undisturbed in circumstances warranting extreme exasperation. I never enjoyed appearing before him perhaps because in my young days I had based my forensic methods on what I knew Dove Wilson expected and I could not accommodate myself to different circumstances. I am sure he did not enjoy having me appearing before him, but on the Bench he was incapable of showing, or probably of feeling, any personal dislike. It has been said that fluency of expression depends upon the speaker having the vocabulary of words which he readily uses developed to a higher degree than his intellect. This, it is said, explains the eloquence of the uneducated mob-orator and the tongue-tiedness of many learned professors: the former cannot conceive an idea which he has not words to spare to express, whereas the latter has such a wide range of ideas that he runs out of words in which to clothe them. This may explain why Dove Wilson was a fluent and eloquent speaker while Feetham was not, and why Dove Wilson delivered many ex tempore judgments which were a joy to listen to while the relatively few which Feetham delivered were halting and sometimes almost painful to hear. Dove Wilson was a well educated and cultured man, but Feetham was far more than that: he is a scholar who is as at home in Greek and Latin as he is in English."¹⁹

Flowing from this quotation several observations can be made. First, regarding Feetham's terrifying efficiency; it has been said that even the great Mackeurtan²⁰ did not dare use his colossal (in more senses than one), personality and wit to beguile the Court when Feetham JP presided. Secondly, whereas the Bar could base their forensic skills

¹⁹ Broome op cit 115/6.

²⁰ See below.

on what they knew Dove Wilson expected, Feetham JP was not a judge to whom the Bar could cater. Each point taken had to be argued and won on merit. Neville James is adamant that no advocate ever left Feetham JP's Court without knowing that every point he made was understood and assessed and if Feetham JP was in any doubt as to the point the advocate was trying to make, he would make him argue it until he was satisfied that he knew exactly what the advocate was trying to put across.²¹ This could perhaps be one of the reasons why Broome never enjoyed appearing before him. Another leading advocate during the Judge Presidency of Richard Feetham put it thus:

"Wholly incapable of shabby conduct of any kind himself, he gave reason to those who crossed his path and did not conform to the standards in which he believed, to think him hard, but his hardness on himself was far greater than any he showed to others. The only indulgence he allowed himself was, exercise of the power to do right, but that was hardly an indulgence."²²

Thirdly, having drawn an analogy between the uneducated mob-orator and the tongue-tied professor to explain why Dove Wilson was a fluent and eloquent speaker while Feetham was not, Broome seems to find it necessary to water down this analogy by then going on to say that Dove Wilson's ex tempore judgments were a joy to listen to while Feetham's were sometimes almost painful to hear. This sentiment of Broome's was and is certainly not subscribed to by anyone else, rather the contrary. Mr Justice Fannin says that

²¹ Personal interview with the Honourable Mr Neville James now retired Judge President of Natal.

²² (1966) 83 SALJ 1.

Feetham JP's English was "a joy to listen to and his judgments were to the point, concise and in perfect, lovely English."²³

Fourthly, there was indeed much more to Feetham JP than being a well educated and cultured man. Apart from his towering intellect and numerous talents he was a classical scholar of note, being proficient in both Latin and Greek; for this reason he had no difficulty in grasping and applying Roman-Dutch law. As early as 1903, soon after he arrived in South Africa in November 1902, he completed a revision of Crawley's translation of Thucydides' Peloponnesian War and later after his retirement from the Appellate Division he wrote several pamphlets on law and constitutional issues for an organisation known as The Defenders of the Constitution. All these pamphlets contained forthright and courageous criticism of government policy as it affected voting rights and the Courts.²⁴ By contrast, Dove Wilson JP was not a scholar at all, and in fact disclaimed being a student.²⁵ The Honourable Neville James confirmed this and said

"He did not have a thorough grounding in Roman-Dutch law nor did he ever find an urgent need to master its details."²⁶

²³ The Honorable Dennis Fannin : personal interview.

²⁴ See: The High Court of Parliament Act and the Rule of Law (1953); Political Apartheid and the Entrenched clauses of the South Africa Act (undated), The "Suspended" Bill (not dated); Then (1931) and Now (1955); Guarantees and National Unity (1956); The Rule of Law - our Ancient Right (1952). All published by The Defenders of the Constitution.

²⁵ Natal Witness 25 April 1935.

²⁶ Unpublished speech 1 November 1979.

While Dove Wilson JP was a master of the spoken judgment, Feetham JP was a master of the written judgment, Broome said:

"All Feetham's written judgments were in the top class. Any anthology of South African judgments as literature would contain as many extracts from his judgments as from those of any other judge."²⁷

Mr Justice DOK Beyers of the Appellate Division agreed with this and said "some of Feetham JP's judgments on the Bench stand as beacons"²⁸ But Feetham JP was not only a master of the written word but also of the spoken word. In the South African Law Journal the following comment appeared:

"Mr Justice Feetham, with his splendid voice and complete command of diction, was always listened to in the House with great respect, particularly on matters relating to the native question and the Asiatic question. In recognition of his services as legal advisor to the High Commissioner he was, in January 1924, created a Companion of the Order of St Michael and St George.

The outstanding success of Judge Feetham is based upon his clarity of mind, dispassionate and keen judgment, wide sympathy and almost passionate devotion to duty, which mark him as one who is entitled to the highest honours as the natural reward for his outstanding merit."²⁹

At the time of his appointment Feetham JP was thus already an outstanding success as a politician, negotiator, innovator, legislator, public figure and as a Judge. He was not only an eminent jurist, but a man who had already served his country in many ways and his talents and zeal for service left an indelible mark on his time. If Dove Wilson JP's retirement was a loss then Feetham JP's

²⁷ Broome op cit 116.

²⁸ (1966) 83 SALJ 2.

²⁹ (1928) 45 SALJ 181.

appointment was an enormous gain to the Natal Provincial Division. James sums it up as follows:

"It would not be unfair to say that in 1929 anyone who referred to a Natal judgment in any other provincial division was in danger of being, if not laughed out of court, at least treated with patronising tolerance, but within ten years all this had been reversed, and within a few years thereafter Natal judgments were being accorded respect that I believe had been fully earned."³⁰

Thus during the course of this study it will be shown how Feetham JP transformed the Natal Provincial Division from a condition where its Bench and judgments were regarded with disdain in other provinces to a situation where it took its rightful place as a division respected for the quality of its Bench, judgments and legal profession.

It will also be shown how Feetham JP, endowed with outstanding leadership qualities, tackled the controversial and central issue of the 1930's in Natal and brought about reforms which ended Natal's distinctive system of dual practice.

This study will also reveal how Feetham JP by setting and maintaining an extremely high standard for himself virtually compelled his colleagues and all the advocates appearing before him to do likewise. There were very few dissenting judgments during his judge presidency and this can be attributed to pre-judgment discussions to resolve differences because for Feetham JP truth and justice were

³⁰ Unpublished speech 1 November 1979.

the ultimate goals in every case. This was confirmed by Mr Justice Milne, who knew Feetham JP well, when he said:

"He was a man of outstanding intellect which he put to the sustained service of an enduring passion for truth and for justice."³¹

1.2 THE COURT HOUSES

The seat of the Natal Provincial Division was at Pietermaritzburg where legal proceedings were conducted in what is to-day referred to as the "old Supreme Court Building".³² In 1864 plans for the historic old building were prepared and in 1865 the foundation stone was laid but only one man was kept working on site and only three years later was work on the building actually begun.³³ The structure of the building was finally completed in 1871 but the central hall, which was to be the principal courtroom was far from ready and work continued on the building, much to the dismay of the judges, until its completion in 1875.³⁴

The building was in the Renaissance pavilion style, with an attractive arcaded front and not only accommodated the Supreme Court and the Natal Parliament, until the latter was moved to its own building, but rooms were made available as the General Post Office.³⁵ During the Zulu War of 1879 the old Supreme Court building formed the

³¹ (1966) 83 SALJ 2.

³² Natal Mercury 23 July 1974.

³³ Ibid.

³⁴ B Kearney Architecture in Natal 1824 to 1893 (1973) 22.

³⁵ Natal Mercury, 23 July 1974.

central complex of the capital's defence system.³⁶

In general the new court house was well received but a major difficulty was the initial sharing by the Supreme Court of its premises with the Legislative Council which caused the interruption of Supreme Court sittings and the postponement of cases.³⁷ This problem was solved in the late 1880's when the Legislative Council moved to the new Parliament Building.³⁸

Thus it can be said that, after the initial teething troubles complaints about the chief seat of the Supreme Court of Natal, and after Union in 1910 the seat of the Natal Provincial Division, were few and far between.

From unpublished reports of young legal practitioners practising at the time of Feetham JP's appointment in 1930 the building and its amenities were quite adequate. The Honourable Mr Justice Alexander Milne, at the time a busy young advocate described the building as nice and cool and added "it is still a nice building today."³⁹ The Honourable Mr Justice Neville James, who was a young articled clerk in 1930, commented that the chief seat of the Natal Provincial Division was a remarkable old building because of its historic connotations. Apart from the many uses already mentioned it was apparently also used as a

³⁶ Natal Mercury 25 July 1974.

³⁷ Natal Mercury 23 December 1886.

³⁸ B Kearney op cit 50.

³⁹ Personal interview with the Honourable Mr Alexander Milne.

hospital during the Boer War. Although there was really only one good court in the building the judges could cope because there was a Native High Court building in College Road where most criminal cases involving "natives" were heard. Apparently the old Supreme Court building was hardly ever used for criminal trials simply because there was not enough room.⁴⁰

In 1977 Mr Justice James, then Judge President of Natal, said that the old court building had played a key role in the history of Pietermaritzburg and that he would be sad to leave it for the new building still to be constructed in the city.⁴¹ He went on to say that he hoped that when the judges vacated the building it would be cherished and cared for and that it would be used for some useful and dignified public purpose.⁴² It is thus altogether fitting that the old Supreme Court building be preserved as an art gallery.⁴³

Besides administering law in the Supreme Court in Pietermaritzburg the judges were required to go on circuit. The most important Circuit Court sessions were those held in Durban as it was the seat of the Durban and Coast Circuit Local Division. Until the end of 1932 the Natal

⁴⁰ Ironically, to-day this old building is often used in criminal and particularly treason trials because it is easier to protect than the much larger and more luxurious new Supreme Court building which was inaugurated in 1983.

⁴¹ Natal Mercury, 6 July 1977.

⁴² Ibid.

⁴³ Ibid.

Law Reports speak of Durban and Coast Circuit Local Division but in 1933 the title page of the South African Law Reports (NPD) reads: "Reports of cases decided in the Natal Provincial Division (including the Durban and Coast Local Division) of the Supreme Court of South Africa."⁴⁴ The word "circuit" was thus suddenly dropped but it reappeared again in 1936⁴⁵ and again in 1940.⁴⁶

Prior to 1933 all the judges of the Natal Provincial Division lived in Pietermaritzburg and commuted to Durban to attend Circuit sessions, but on 15 February 1933 Arthur Edward Carlisle was appointed acting puisne judge and he lived in Durban. Carlisle AJ (infra) was thus the first judge of the Natal Provincial Division to reside in Durban.⁴⁷ Whether this had anything to do with the deletion of the word "circuit" is unclear but what is certain is that Durban was with effect from 31 May 1910 in terms of Section 98(2) of the South Africa Act of 1909 a recognised Local Division of the Supreme Court of South Africa. In 1932 G.N. No. 425/1932 dated 1 April 1932 rescinded former Order 111 of the Supreme Court rules relating to the sittings of the Court. The new rules provided inter alia for the following sittings of the

⁴⁴ Natal Law Reports 1933 title page.

⁴⁵ When Government Gazette No 2328/1936 dated 24 January 1936 proclaimed the amendment of the Rules of Court of the Natal Provincial Division and the Durban and Coast Circuit Local Division of the Supreme Court of South Africa.,

⁴⁶ When Government Gazette No. 2723 dated 19 January 1940 proclaimed that Durban and Coast Circuit Local division of the Supreme Court of South Africa was authorised to act as a Prize Court during World War II.

⁴⁷ Unpublished memoirs of the Honourable Mr D G Fannin.

Durban and Coast Local Division regarding civil business:

8. (1) The Durban and Coast Local Division will sit at Durban for the dispatch of civil business in the months of March, May, July, September and November.⁴⁸

(2) Each sitting shall commence on the third day of each month and shall continue until the last day thereof or until such earlier day as the business set down for such sittings shall have been completed.⁴⁹

Regarding criminal sessions section 11 provided as follows:

Criminal Sessions in the Durban and Coast Local Division will be held at Durban so as to commence on the first Wednesday in the month of February and on the first Tuesday in the month of May, August and November. Subject to any order of adjournment, postponement or change of venue made by the presiding judge, such sessions will continue until the completion of every trial for which the proper notice of trial at those sessions has been given.⁵⁰

In addition these rules now provided for a Registrar of the Supreme Court in Pietermaritzburg and an Assistant Registrar in Durban.⁵¹

In the 1930's legal proceedings in Durban were conducted in the law courts on the Durban Esplanade, which are still in use to-day and which were declared a national manument in terms of the National Monuments Act No. 28 of 1969 on 22 August 1980.⁵²

In 1910 the Natal Mercury reported that there was now a concrete promise of these new law courts in "quiet and

⁴⁸ LR Caney and JR Brokensha Rules of the Natal Provincial Division of the Supreme Court of South Africa 1 ed (1933) 4.

⁴⁹ Ibid.

⁵⁰ Caney & Brokensha op cit 5.

⁵¹ Caney & Brokensha op cit 3 & 4.

⁵² Government Gazette No. 7187 Government Notice No. 1710 dated 22 August 1980.

healthy" premises on the Victoria Embankment.⁵³ The site itself of the Durban law courts, situate at 151 Victoria Embankment (19 Masonic Grove), is historic, as the Natal Government Hospital was built there in 1861 and was used as such until 1879.⁵⁴ Between 1880 and 1894 it was the site of Durban High School where Harold Graham Mackeurtan was a student.⁵⁵ From 1895 to 1907 it was occupied by a portion of the Durban Boys' Model School whose old Boys' Association has erected a plaque at the entrance.⁵⁶

The architect of the Durban law courts was George Stanley Hudson who was born in 1876 in Sussex, England⁵⁷ and died in Durban in 1928.⁵⁸ He was a partner in the firm Woollacott, Scott and Hudson of Johannesburg and Bulawayo before moving to Durban in 1904 after winning a competition for the new Durban Town Hall which he completed in 1910 before commencing work on the Durban Law Courts.⁵⁹ The law courts were designed and executed in an interesting 'Colonial' court-yard design, with a good relationship to the Esplanade and fine details in neo-classical style.⁶⁰

In January 1913 the press noted that "to those whose

⁵³ Natal Mercury 16 March 1910 and 15 April 1910.

⁵⁴ Natal Mercury 7 February 1981.

⁵⁵ HD Jennings The DHS Story 1866-1966 1ed (1966) 69. (Mackeurtan wrote in The School Record "The rodents were more numerous than the boys.")

⁵⁶ Natal Mercury 7 February 1981 and A First Listing of the Important Places and Buildings in Durban 1 ed (1974) 21.

⁵⁷ The Natal Who's Who (1906) 97.

⁵⁸ R.I.B.A. Journal Vol. XXXVI 3rd series (1929) 212.

⁵⁹ Natal Mercury 10 June 1910.

⁶⁰ A First Listing of the Important Places and Buildings in Durban op cit 10.

fortune or misfortune it is to attend daily at the present law courts, the rapid completion of the new law courts on the Durban Esplanade has been vividly brought home in the present hot weather".⁶¹ Completion was, however, not anticipated until mid-year as designs were also being prepared for the furniture and various court conveniences. Clearly the Durban law courts were to be one of the finest buildings of its kind in the Union. Thus it struck many people as strange that no public ceremony of any kind accompanied the transference of the law courts from their ramshackle old quarters in Aliwal Street to their "sumptuous new domicile"⁶² on the Esplanade. The press pointed out that although the new edifice was already in practical use it is not too late to arrange even yet some worthy formal inauguration.⁶³ But further speculation in this regard was futile and public business commenced in the new Durban law courts on 25 June 1913 without any public fanfare or ceremony.⁶⁴

During the 1930's all the courts of law in Durban were accommodated in this stately building. This resulted in rather cramped conditions and one leading advocate at the time described it as a "slum"⁶⁵ because of the overcrowded conditions. The Honourable Mr Fannin recalls the Durban law courts on the Esplanade with three big Magistrates'

⁶¹ Natal Mercury 9 January 1913.

⁶² Natal Mercury 25 June 1913.

⁶³ Ibid.

⁶⁴ Natal Mercury 26 June 1913.

⁶⁵ Personal interview with the Honourable Mr Justice Fannin.

Courts downstairs and the Native High Court in one corner. Upstairs there were two court rooms for the Supreme Court with the result that it was sometimes necessary to sit in the Native High Court when they were not busy. On these occasions it was necessary for the judges and legal practitioners to push through the public along the corridor to get in and out of the courtroom which was a very unsatisfactory arrangement indeed from a security point of view.⁶⁶

Thus this gracious structure housed the Supreme Court in Durban throughout the Judge Presidency of Richard Feetham and continues to do so to this day.

⁶⁶ The Native High Court was eventually abolished on 15 December 1954 and in 1975 the regional and district Magistrate's courts were moved to new premises in Somtseu Road leaving the historic building for the exclusive use of the Durban and Coast Local Division of the Supreme Court of South Africa. Natal Mercury, 7 February 1981.

CHAPTER 2

THE BENCH

2.1 The Judge President

Richard Feetham donned the robes of office as Judge President of the Natal Provincial Division on 4 August 1931.¹ Natal had waited fifteen months for the Judge President to arrive from duties abroad. Reservations expressed by lawyers on his appointment that they may see very little of him in Natal were justified. Such was Feetham JP's reputation as an arbiter and handler of delicate negotiations that during his Judge Presidency there was only one year, 1937, that he could render uninterrupted service on the Natal Bench. This, however did not diminish or detract from the enormous impact he made and the overall excellence of his Judge Presidency.

Richard Feetham was born at Penrhos, Monmouthshire, England on 22 November 1874.² He was educated at Marlborough and New College, Oxford, where he graduated in 1897. On 26 April 1899 he was called to the Bar at the Inner Temple, London, and was a member of the Oxford Circuit until 1902 when he volunteered for service in South Africa with the Inns of Court rifles. After the Anglo Boer War he formed part of the famous coterie who assisted Lord Milner with the administration of the Transvaal.

¹ Natal Witness 5 August 1931.

² Biographical information is derived from: (1928) 45 SALJ 179; Dictionary of South African Biography 4 (1981) 155; 1933 SALT 23; (1966) 83 SALJ; Roberts op cit 359/60 SESA 4 (1971) 461; The Daily Dispatch 18 July 1961.

At his death The Sunday Times in paying tribute to Feetham, ran the headlines "Milner 'Kindergarten' stayed with Feetham. Historic stone house was cradle of ideas."³ Apparently soon after the South African War, Sir Herbert Baker - architect of inter alia the Union Buildings - built a large rough stone house for his friend Richard Feetham in Parktown, Johannesburg. It was called "Moot House"⁴ and became the general headquarters of Lord Alfred Milner's 'Kindergarten', a group of brilliant young Oxford graduates, charged with the task of reconstituting local government in the Transvaal after the war. Feetham was a bachelor⁵ and most of the young men⁶ who stayed at "Moot House" were senior civil servants. There they discussed the affairs of the young State in the form of an Essay Society which also existed at Oxford.

It was at Moot House that Richard Feetham read a paper to the 'Kindergarten' on the desirability of closer union between the four South African states. This paper later became the basis of the famous Selbourne Memorandum - the

³ Sunday Times 21 November 1965.

⁴ Ibid.

⁵ He married Miss Leila Christopher of Ladysmith in 1920 when he was 46 years old.

⁶ Inter alia Geoffrey Lawson, Phillip Kerr, Lionel Curtis, RH Brand and Patrick Duncan, who later became Governor-General of South Africa. With the latter Feetham formed an abiding friendship and of the members of the 'Kindergarten' they were the only two who remained in South Africa after Union. Feetham kept in close touch with Lionel Curtis and Lord Brand who became a distinguished banker. Feetham who died at the age of 90, however, outlived them all.

first overt move towards the Union of South Africa.⁷

In 1903 Feetham became the first town Clerk of Johannesburg and in this capacity was returning officer for the first Johannesburg Municipal elections held in November 1903.⁸

In his book With Milner in South Africa Lionel Curtis remarked that Mr Feetham "ruled the Council with a rod of iron for several years."⁹

Having gained considerable experience and insight into municipal administration Feetham relinquished his appointment in 1905 to return to the Bar having been admitted in the Transvaal on 29 January 1903. He received the junior and subsequently the senior retainer for the Johannesburg Town Council and gained recognition as a legal authority on municipal matters including rating.¹⁰ In addition he also acted as Legal Adviser to the High Commissioner for South Africa from 1907 to 1910 and again from 1912 to 1923 in recognition of which he was made a Champion of the Order of St Michael and St George.¹¹

As a politician Feetham was an ardent Unionist. In 1907 he was nominated a member of the Transvaal Legislative Council

⁷ Sunday Times, 21 November 1965.

⁸ Natal Witness 6 November 1965.

⁹ Ibid.

¹⁰ This expertise manifested itself also in the Natal Court of Electricity Supply Commission v Estcourt Town Council and Others 1932 NPD 631; Woolworths (Pty) Ltd v Durban City Council 1936 NPD 591; Kharwa v Inspector of Police Durban 1931 NPD 197 where Matthews AJP at 203 referred to the judgment of Feetham J in Farah v Johannesburg Municipality [1925] TPD 173.

¹¹ (1928) 45 SALJ 179.

under responsible government and held this post until Union in 1910. In South Africa's first general election in 1910 he unsuccessfully contested Jeppe for the Unionist Party. In October 1915 he stood for Parktown and was elected to the House of Assembly as a front benchner for the Unionist Party and in 1920 he was returned unopposed for that constituency as a member of the South African Party.¹² As a member of Parliament he had the rare distinction of single-handedly defeating the Prime Minister, General Louis Botha, on a budget vote. Botha, however, did not resign. Because Hansard ceased publication during the Great War there is no official record of Feetham's parliamentary achievements.¹³ From all reports he was a first class politician.¹⁴

Some of Feetham's legislative achievements include the leading role he played in piloting the private Act which transformed the University College of Johannesburg into the University of the Witwatersrand. The Government at the time opposed the move but Feetham fought vigorously from 1916 until the University of the Witwatersrand Bill, which he introduced into the House of Assembly in 1921, was passed. Feetham, who was not only a jurist but a scholar, retained a life-long association with this University. In 1938 when he became a member of the University Council he was immediately elected Vice Chancellor and in 1949 he became Chancellor and was accorded an honorary LL D

¹² Dictionary op cit 155.

¹³ Sunday Times 21 November 1965.

¹⁴ Fannin op cit 3.

degree.¹⁵ Feetham staunchly upheld the principle of academic autonomy and opposed legislation prohibiting the admission of non-white students.

Thus when Natal University similarly honoured him with an LL D degree in 1958, his laudation stated that he "has throughout his life been an undoubted protagonist of the basic principles of justice, liberty and democracy."¹⁶

In the conference between the senior members of the Universities of Cape Town and the Witwatersrand Feetham also played a leading role which led to the publication of a booklet The Open Universities of South Africa in 1957.¹⁷

At the age of eighty-seven Feetham resigned from the Chancellorship in 1961 and from the University Council two years later when he was eighty-nine - an age when most men have long since ceased to play an active part in public life - and yet "he still remained zealous, energetic and alert to anything which challenged the ideals and principles of the University."¹⁸ Such was Feetham's devotion to duty that he never missed a single university council meeting in his twenty-five years as member and Chancellor even though he had to travel from Pietermaritzburg to attend.¹⁹ Of his attitude to students

¹⁵ Natal Witness 6 November 1965.

¹⁶ Ibid.

¹⁷ Dictionary op cit 155.

¹⁸ University of the Witwatersrand Gazette 21 December 1961 (3) 2.

¹⁹ Sunday Times 21 November 1965.

Professor Le May said:

"It was part of his code of ethics to get every student smiling as the degree was conferred. It must have been a great strain to think of a few words to say to each of them."²⁰

Various tributes were paid to Dr Feetham at Wits. On the occasion of his retirement as Chancellor in 1961 the Chairman of the University Council, Mr BL Bernstein, lauded him for his reputation as a scholar, his impeccable dignity and attainment of universal respect and said:

"Many men in the course of an active public life achieve status, honour and position in a variety of spheres. Dr Feetham did this and more than this. He achieved universal respect for his qualities of character, for his integrity and for the high standards he set. Conscientious and zealous to a degree, untiring and unswerving in his attachment to principle, he was throughout, the epitome of the wise man of affairs, understanding the human frailties, repudiating compromise as a policy - clearly aware of the difficulties of conflicting situations but quite fearless and relentless in applying objective and just solutions."²¹

However, Feetham's work as a scholar did not begin and end at Wits. As stated, in 1958 the University of Natal also honoured him with an LL D degree. His revised edition of Crawleys' translation of Thucydides was used as the basis of the shortened edition published in "The World's Classics" in 1943.²² In 1961 he was given an ad Protas reception at Michaelhouse, an honour rarely bestowed, when tribute was paid to him for his thirty-one years of service to the school as member and vice-chairman of the Board of

²⁰ Sunday Times, 21 November 1965. As Chancellor he conferred up to 400 at a single graduation and in addition he usually delivered the address at the March graduation ceremony.

²¹ University of the Witwatersrand Gazette op cit 2.

²² Natal Witness 6 November 1965.

Similarly Feetham's legislative achievements were not confined to the establishment of Wits nor was his interest in the youth of South Africa confined to the school and university level. Indeed, as a member of the Transvaal Legislative Council in 1909 he drafted and secured the passage of the Infant Life Protection Act.²⁴ After Union, as a member of the Children's Aid Society of Johannesburg, he drafted and was instrumental in the culmination of a very important and far-reaching piece of legislation namely the Children's Protection Act of 1913. Feetham also drafted and introduced into the House of Assembly the Children's Adoption Act which was placed on the Statute Book in 1923.²⁵ In this way Feetham's deep interest in child welfare and his broad humanity manifested itself. He also assisted in the formation of the Hope Training Home in Johannesburg and was Chairman of the Cripple Care Association of the Transvaal.²⁶ After his retirement Feetham was elected President of the National Council for the Care of Cripples in South Africa.²⁷

Of Feetham it can therefore truly be said that "he served and lived to serve his fellow men".²⁸ Existing South African legislation governing the welfare and protection of

²³ Ibid.

²⁴ (1928) 45 SALJ 180.

²⁵ Ibid.

²⁶ Dictionary op cit 155.

²⁷ Natal Witness 6 November 1965.

²⁸ Ibid.

children is based on earlier acts of the Transvaal Colonial Legislature and the Union Parliament of which Feetham was the chief architect.

At this point one can begin to understand what Broome meant when he said:

"It would be quite impossible for me to attempt any estimate of this outstanding public figure, ... But the reader must bear in mind when I deal with him as a judge I am touching only a single facet of a many-sided man."²⁹

One would think that life as an advocate, legal adviser, legislator and politician would be enough for anyone - but not for Feetham. During the First World War Feetham was on active service as a commissioned officer of the First Battalion of the Cape Corps in East Africa and later in Palestine.³⁰ He was never forgotten by his coloured comrades-in-arms, and in 1962 was given honorary life membership of the Coloured Ex-Servicemen's League.³¹

While in Egypt in 1918 he received news of his appointment as Chairman of the Southborough Committee on constitutional reform in India, for which service Feetham received high praise. After the passing of the Government of India Act in 1919 he returned to South Africa to take silk and continue his practice at the Bar. In 1923 Feetham resigned as member of Parliament for Parktown on his elevation to the Transvaal Bench. But the Transvaal Court saw as little

²⁹ Broome op cit 115.

³⁰ 45 (1928) SALJ 179.

³¹ Natal Witness 6 November 1965.

of Feetham as the Natal Court was to do. Being held in high esteem in South Africa and abroad, Feetham J's natural administrative ability and his "flair for handling delicate negotiations"³² was now not only nationally but internationally recognized. The British Government called on him time and again to preside over important committees and commissions for example the Southborough Committee in 1918-1919.³³ In 1924-1925 the British Prime Minister, Ramsay MacDonald again borrowed Feetham J from the South African Government to preside over the Irish Boundary Commission. This was "a thorny assignment which he handled with diplomacy and ability."³⁴ The Commission's findings were never made public for political reasons and because the two sides reached agreement, but Feetham J won admiration for his tact and skill in handling that difficult task.

Feetham J was hardly back on the Transvaal Bench when six months later in 1926 he was appointed Chairman of the Local Government Commission in Kenya and was away on special leave until February 1927. Two years later he was again 'lent' to the British Government to lead the Commission on the International Settlement in Shanghai, China (1929-1931). His report was internationally hailed as a statesmanlike document and special thanks from the Shanghai Municipality was conveyed to him via the Prime Minister.³⁵

³² (1966) 83 SALJ 1.

³³ Supra.

³⁴ (1966) 83 SALJ 1.

³⁵ Natal Witness 6 November 1965.

It was while he was thus "Shanghaied" that he was appointed Judge President of the Natal Provincial Division.

Feetham J also served on various commissions in South Africa³⁶ prior to his appointment as Judge President of Natal. During his Judge Presidency he served as Chairman of the Transvaal Asiatic Land Tenure Commission (1932-1935).³⁷

What manner of man was the new Judge President of Natal? By all accounts he was impressive - not only because of his impeccable credentials, national and international prestige but also his appearance. He was tall and dignified with a fine voice and a magnificent grasp of language. The son of an Anglican clergyman there was in his own appearance and manner, according to one writer, "a great deal to suggest the ecclesiastic."³⁸ A lawyer once remarked after a drinks party at Feetham JP's house that receiving a whiskey and soda from Richard Feetham was like being given holy communion by an archbishop.³⁹ He could be imagined as a medieval abbot, ascetic, spare of figure, severe in aspect and yet there was in him a great fund of human sympathies, as his life-long interest in child welfare and cripple care demonstrated. However, his broad humanity was overlaid by a somewhat uncompromising exterior, which was due strangely

³⁶ Including the Transvaal Indigency Commission 1906-1908; The Small Holdings Commission 1912-1913 and the Transvaal Local Government Commission 1913-1915.

³⁷ And after his retirement from the AD in 1944 as Chairman of the Witwatersrand Land Titles Commission (1946-1949).

³⁸ Anonymous 1933 SALT 23.

³⁹ James op cit 7.

"to a misleading, yet pleasing, kind of shyness."⁴⁰

According to Neville James his most obvious qualities were his tremendous dignity, aloofness and determination that nothing would divert him from what he believed was the correct course - all admirable judicial qualities but they did not make for easy comradeship. Feetham JP "was an impressive, indeed, frightening man",⁴¹ and to illustrate this point James tells of an occasion in 1932 in the aftermath of the sensational Mallalieu⁴² murder trial, which was front page news every day of the trial and the social event of the Pietermaritzburg year. The Court was as usual packed with smartly-dressed, excited, even giggling spectators, who had had a relaxing time in the main trial before Matthews J, when Feetham JP took his seat to deal with the second accused, Miss Tolputt, against whom the Crown was withdrawing its case. He directed his eyes slowly around the Court like a searchlight and as they fell upon successive sections of his audience they simply froze. He made a single comment - "I have given instructions to the ushers that if anyone disturbs this court in the slightest degree he will be detained and I will deal with his offence summarily."⁴³ The audience instantly froze in silence in every kind of position, some with mouths open, and thus they stayed rigid until ten minutes later, his

⁴⁰ Anonymous 1933 SALT 23.

⁴¹ James op cit 7.

⁴² Ex parte Mallalieu : In re Rex v Mallalieu & Tolputt;
Ex parte Attorney-General : In re Rex v Mallalieu and
Tolputt 1932 NPD 80.

⁴³ James op cit 7 and Natal Witness 25 March 1932.

business done, the Judge President departed, and an enormous communal sigh of relief filled the Court. This also illustrates very well what Broome meant when he said that Feetham JP maintained the dignity of the Court "with icy and rather terrifying efficiency."⁴⁴

Feetham JP's shortcoming was thus that to the legal profession as a whole he appeared to be a somewhat austere and rather unapproachable man. To the public at large he was a frightening man.⁴⁵ But those who were privileged to know him well and were amongst "his family circle were much more aware of his very human qualities".⁴⁶ On the Bench Feetham JP was also always reasonable and in deserving cases a very humane streak manifested itself.⁴⁷

What is unanimously agreed on in Natal is that Feetham JP was not only a very able and distinguished Judge President but that it was undoubtedly he who raised the standards of the judgments of the Natal Supreme Court. Most

⁴⁴ Broome op cit 115.

⁴⁵ Cf the unreported case of Rex v. Florens Brothers, Natal Witness, 6, 10, 11 and 12 November 1936. The two brothers were charged with culpable homicide and the one testified that his brother had told him "just casually" that his wife had left. The Judge President said "here was a man whose life had been wrecked with the loss of his wife and children. Yet you say he told you "just casually" ... how can you expect me to believe anything you say when you tell me that he spoke of it "just casually". The next day in a Court packed to the doors but listening in complete silence Feetham JP found James Florens guilty of culpable homicide and sentenced him to two years hard labour and in addition guilty of assault with intent to do grievous bodily harm and sentenced him to a further six months hard labour for that.

⁴⁶ James op cit 4.

⁴⁷ cf Incorporated Law Society v Farrer 1936 NPD 527 and Rex v Rajkoomar 1931 NPD 494.

practitioners were terrified of appearing before him, not only because to be caught wanting in open court was a nightmare, but because not even the most senior advocate could get past Feetham JP with a shabby argument or unsubstantiated legal point. He was "the most meticulous of mentors"⁴⁸ and as a result the Natal Courts' judgments were, by the time he was elevated to the Appellate Division, receiving the respect they deserved. But Feetham JP was always fair, and ready to give credit when credit was due. In Ex parte Stuart and Geerdts he said:

"... We desire to acknowledge the value of the assistance we have received from the arguments addressed to us both by counsel for the applicant and by counsel for the Minister, and especially to express our appreciation for the thorough manner in which the historical part of the case has been prepared by both sides, so as to enable us to trace the sequence of the various Statutes and Rules which have been taken into account."⁴⁹

As Judge President of Natal Feetham JP was faced with the onerous task, not only of having to raise the standard of the court's judgments, but, of raising the status of the Natal Court itself. Prior to his appointment the Natal Court, and, in particular the judgments emanating from it, were not held in high esteem by the legal fraternity in South Africa. But under Feetham JP's leadership all that was changed within ten years.

⁴⁸ James op cit 7 and cf African Life Assurance Society Limited, African Guarantee and Indemnity Co. Ltd, African Consolidated Investment Corp. Ltd v Robinson & Co. Ltd and CNA Ltd 1938 NPD 277 and the Natal Witness of 10 and 11 August 1938 where Feetham JP questioned Rambottom KC, Mackeurtan KC and Shaw KC closely on their arguments and contentions.

⁴⁹ 1936 NPD 57 at 66.

In the first instance it can be said that he enhanced the status of the court with his own prestige and stature. Held in high esteem both in South Africa and abroad Feetham JP was a judge who, at the time of his appointment, had already been accorded the highest honours for his outstanding merit both on and off the bench. His judicial experience was both varied and extensive and he had established leadership qualities. Thus his very presence at the helm of the Natal Court raised its status.

Feetham JP took a dynamic and forceful lead as Judge President. Despite his many absences⁵⁰ a concrete illustration of his leadership is the high proportion of judgments over which he presided. During his first month in office, namely August 1931, he not only presided over nine of the eleven cases reported but delivered the main judgment of the court in seven of them. In February 1937 Feetham JP presided over all eight reported cases and delivered the courts' judgment in seven of them. During his last two and half weeks on the Natal Bench, in July 1939, Feetham JP again, not only presided over, but delivered the Courts Judgment in three out of the six reported cases. On his last day as Judge President, namely 18 July 1939, he presided over and delivered the courts

⁵⁰ When he acted as Chairman of the Transvaal Asiatic Land Tenure Commission 1932-1935, and accepted acting appointments on the AD Bench namely from 16 September 1936 to 31 October 1936 and from 1 March 1938 to 31 May 1938.

judgment in two cases.⁵¹ This survey thus shows Feetham JP was clearly the major presence on the Natal Bench. Even when he concurred but thought that a special issue, for example, race, was raised in a case he would set out his own views on the main questions involved.⁵²

Feetham JP's leadership extended beyond the Natal Provincial Division and he gave direction to the lower courts whenever he could.⁵³ He had an enduring passion for truth and justice and was thus assiduous that justice be done not only in the Supreme Court but in all the Courts of Natal. Thus when a case came up for review he expressed his agreement with the judgment of Carlisle J and added:

"I want to add a general remark because the case seems to me to illustrate the necessity for great caution in accepting pleas of guilty from natives. What I shall say is no reflection on the magistrate ... because for all I know the precautions may have been taken ... but it does seem worthwhile to stress the importance of great caution to be taken in recording pleas of guilty from native accused ... (who) often plead guilty to a charge without any real appreciation of the admissions which a plea of guilty involves. ..."⁵⁴

Also in the case of Zulu v Rex⁵⁵ where three "natives" were convicted of public violence and the record showed that they had pleaded guilty and no evidence was lead on their behalf, Feetham JP held that as they had not intended to

⁵¹ Dougall and Dougall and Munro v Commissioner of Inland Revenue 1939 NPD 272 and Odendaal v Registrar of Deeds 1939 NPD 327 which was a thirty-six page judgment dealing inter alia with the application of Roman Dutch Law in Natal.

⁵² cf Gora Mahomed v Durban Town Council and Others 1931 NPD 598.

⁵³ Cf Meer v Lockhat Brothers and Co Ltd 1932 NPD 144.

⁵⁴ Natal Witness 9 April 1935.

⁵⁵ 1936 NPD 434.

plead guilty the whole proceedings against the three accused must be set aside so that the whole case might be dealt with afresh. During the course of his judgment Feetham JP said:

"... it is quite clear from the native's story that he could never have intended to plead guilty to the charge"⁵⁶

In another unreported case Feetham JP gave two natives on appeal the benefit of the doubt and criticised the magistrate for his attitude to their alibi evidence thus:

"(His) attitude was: 'I have frequently found that native witnesses who give evidence in support of an alibi are liars and in view of that experience and of the nature of the Crown evidence, I am not prepared to regard the evidence given as worthy of serious attention.' In other words he rejected the evidence on a priori grounds and did not consider it on the merits. However strong the impression of guilt produced by the Crown evidence, it was the duty of the judge or magistrate to consider on its merits, any evidence brought forward on behalf of the defence, and not to close his mind to such evidence in advance. Otherwise there was a failure of justice, owing to disregard of the essential and universal rules embodied in the maxim 'audi alteram partem'. "⁵⁷

As to sentence Feetham JP also gave direction whenever he could as illustrated in the case of Rex v Rajkoomar⁵⁸ where the appellant had hired out his motor lorry for a fixed price and the hirer carted his own goods. The appellant was convicted of contravening the Motor Carrier Transportation Act 39 of 1930 and sentenced to four months hard labour. When the case came before Feetham JP on review he said:

"The magistrate did not give the accused the option of a fine but he gave him four months hard labour,

⁵⁶ At 437.

⁵⁷ Natal Witness 6 July 1938.

⁵⁸ 1931 NPD 495.

the maximum period under the Act being six months ... this seems to me to be an astonishingly severe sentence in respect of a statutory offence committed by an accused who has no previous convictions against him ... The question of reducing the sentence does not now arise, as we are allowing the appeal and setting the conviction and sentence aside, but in view of the possible bearing of this case on other cases, I have thought it necessary to deal with the matter."⁵⁹

The above brief survey illustrates some of Feetham JP's leadership qualities and the high standard he set. It also confirms the opinion that "by nature he was the embodiment of the judicial oath to do justice according to law without fear and without favour."⁶⁰

Feetham JP enhanced his judicial status and thus indirectly that of the Natal Court by accepting the Chairmanship of the Transvaal Asiatic Land Tenure Commission⁶¹ and acting appointments to the Appellate Division.⁶² Both events were headlined in the local press.⁶³ In regard to his acting appointments it is clear from reported cases that he made a notable contribution⁶⁴ for which he received high praise. On the occasion of his death during a special sitting of the Appellate Division the Acting Chief Justice Mr DOK Beyers paid tribute to him saying inter alia:

"To every task to which he addressed himself he brought to bear a clear and perceptive mind, a

⁵⁹ At 498/9.

⁶⁰ (1966) 83 SALJ 2.

⁶¹ 1932-1935.

⁶² From 16 September 1936 to 31 October 1936 and from 1 March 1938 to 31 May 1938.

⁶³ Natal Witness, 28 February 1935; and Natal Witness 16 September 1936 respectively.

⁶⁴ For example during the first acting period of one and a half months in 1936 Feetham AJA, appeared in ten out of the eleven reported cases and delivered judgments in four of them.

detached objectivity, and an incisive judgment. He had a towering intellect. Some of his judgments on the Bench stand as beacons. Nor was he lacking in the humanities. He had a lifelong interest in child welfare work; and beneath a seemingly reserved manner there was a kindness to which many could bear witness."⁶⁵

Feetham JP set an excellent example for his brethren in the high standard he set for himself and his Court and so simply took them along with him. Thus by 1938 one could say that Hathorn J was almost as meticulous as Feetham JP himself.⁶⁶ On several occasions Feetham J and JP's judgments were referred to in the Natal Court.⁶⁷ To his brothers Feetham JP was not overbearing or intimidating. This can be illustrated by the fact that on occasion he was even dissented from.⁶⁸ Feetham JP, on the other hand, never dissented in any reported case but almost always contributed, especially when he thought that the law or a particular issue which was raised in the case required further clarification.

In Natal, Feetham JP thus distinguished himself not only

⁶⁵ (1966) 83 SALJ 2. This tribute presumably covered both his acting appointments and his permanent appointment from 19 July 1939 to 31 November 1944.

⁶⁶ See Natal Witness 8,9,10 and 11 August 1938 and Natal Mercury case 938 NPD 277.

⁶⁷ Cf Kharwa v Inspector of Police 1931 NPD 197 at 203 Mathews J referred to Feetham J's judgment in Farah v Johannesburg Municipality 1925 TPD 173//4 and The Flower Sellers Test case (unreported) published in the Natal Mercury 19 August 1931 where JD Stalker, a dual practitioner, referred to Feetham J's dicta in Anthony v Benoni Municipality.

⁶⁸ cf Rex v Pickup 1932 NPD 216 where Lansdown J dissented and Dougall and Dougall and Munro v Commissioner for Inland Revenue 1939 NPD 272 where on a stated case Hathorn J dissented from Feetham JP's majority judgment. Selke J concurred.

for his leadership qualities and the enormous contribution he made to the stature of the court, but also very quickly demonstrated that he was an innovator and reformer of note. Almost immediately after assuming his duties as Judge President, he was assiduous in promoting legal reform, and several new Rules of Court, badly needed, were issued under his aegis. On finding the Natal Court congested and in need of change he immediately did something about it. The Natal Witness⁶⁹ headlined: "Supreme Court changes. Innovation for new term". These changes meant that two courts would sit simultaneously. One would be a 'Full Court' and presided over by three judges and the other a 'Motion Court' presided over by one Judge. Occasionally the 'Motion Court' would be replaced by a 'Divisional Court' presided over by two judges meaning that on such occasions only two judges would sit in the 'Full Court'. This reorganisation was based on the Transvaal Court model.

The most important Rules of Court issued under Feetham JP's aegis, and for which he is probably best known, were those which dealt with the division of the legal profession and thus bringing Natal into line with the rest of the Union. When Feetham JP assumed office in Natal there existed a distinctive system of dual practice which allowed attorneys to practice as advocates and vice versa. However, the possible division of the Natal Bar had been a vexed question in the minds of Natal lawyers for more than two

⁶⁹ Natal Witness 29 September 1931.

decades. Hathorn J testified⁷⁰ that around 1907 Tatham, later Tatham J,⁷¹ started the movement to divide the Bar in Natal but was opposed by Hathorn J's father and initially Hathorn junior himself. Around 1916 Hathorn changed sides, influenced by Tatham and Mackeurtan who practiced solely as advocates. Feetham JP was thus confronted with this burning issue when he took office in Natal. Yet he was accused of forcing the Rule on his colleagues. Feetham JP testified that it would be a great mistake to assume that, adding: "It was done with the knowledge and approval of my three colleagues ... I can assure you definitely I was not the discoverer of the objections to the dual system as it existed in Natal at that time."⁷² Hathorn J in his testimony also made reference to the fact that he had heard it stated that Feetham JP came from the Transvaal to Natal determined to divide the Bar but that, that, was not the true position adding:

"When Mr Justice Feetham arrived in Natal he found an old question which had been a burning question at times but had always been in the back of our minds. That question happened to be ripe for solution and the Judge President being by nature a reformer and having sympathetic colleagues, it was natural that he should at once tackle the question after he had some experience of the working of the dual system."⁷³

Hathorn J then went on to explain why this question was not addressed earlier:

⁷⁰ Before the Select Committee on the subject of Natal Advocates and Attorneys Preservation of Rights Bill (1939) 150/1.

⁷¹ Infra.

⁷² Report of the Select Committee op cit 136/7 - The three colleagues being Mathews, Lansdown and Hathorn JJ. Carter J resigned two months after Feetham JP's arrival and therefore did not take part in this reform.

⁷³ Report of the Select Committee op cit 151.

"Two conditions are necessary for reform. First you must have four judges who favour the alteration, and secondly you must have a Judge President who is prepared to take the initiative. I do not think either condition existed when Sir John Dove Wilson was Judge President."⁷⁴

Under the strong leadership of Feetham JP new Rules of Court were issued which provided that in future Natal attorneys will no longer be entitled to practice as advocates and vice versa and existing practitioners had five years to elect which branch of the profession they would confine themselves to. The new rules were not popular, especially amongst attorneys but in keeping with his personality nothing would divert Feetham JP from what he believed was the correct course, and certainly not considerations of popularity. The new rules were a model of precise draughtmanship and withstood attacks on their validity in the Natal Court and an appeal and effected a historic change in legal practice in Natal.

To this day Feetham JP is praised for his leadership and firm actions and is credited with the vast improvement in the quality of the judgments produced by the Natal Court.⁷⁵ His appointment indeed proved to be an enormous gain for the Natal Provincial Division. There is no doubt that he made an enormous contribution to the stature of the Natal Court and the last word on this comes from one who appeared before him many times and later stood in his shoes:

"While he was with us as Judge President he made an indelible contribution to the stature of this Court

⁷⁴ Ibid.

⁷⁵ Cf James infra.

of which we cannot ever fail to be mindful."⁷⁶

The above survey shows that, seen in the context of his entire working life, Feetham JP spent only a fraction of his time as Judge President of Natal.⁷⁷ In this wider context there is also no doubt about the indelible impression he made. It was said of him that:

"... our future as a nation would be brighter to-day if there were men of his integrity, humanity and selflessness and yet profound knowledge and stern objectivity, charged with the task of resolving the existing tangle in our human relations."⁷⁸

On his death the Natal Witness summed up his life in the headline: "A life of service ends at 90".⁷⁹ The same report referred to him as "one of South Africa's most distinguished citizens"⁸⁰ and concluded by saying:

"In all his years he never was inactive. He served and lived to serve his fellow men."⁸¹

Yet, however able, strong and distinguished Feetham JP was he did not run the Natal Court single-handedly, and I now turn to consider the puisne and acting puisne judges during his Judge Presidency.

2.2 The Puisne Judges

The fact that Richard Feetham was on special duty in

⁷⁶ Milne JP (1966) 83 SALJ 2.

⁷⁷ Namely nine years out of a very productive working life of sixty-four years, forty-five of them in full-time service of the law.

⁷⁸ University of Witwatersrand Gazette 3 (1961) 2.

⁷⁹ Natal Witness 6 November 1965.

⁸⁰ Ibid.

⁸¹ Ibid.

Shanghai, China, at the time of his appointment as Judge President of Natal on 1 May 1930 occasioned the appointment of Frederick Spence Tatham⁸² as acting Judge President. After a long and distinguished career, spanning forty-five years, at the Bar and on the Bench it was entirely fitting that he should end his judicial career in this position.

At the time of his appointment Tatham AJP appeared to be an energetic sixty-five years old and during his acting judge presidency of fourteen months he not only presided over the majority of reported cases but delivered the court's judgment in twenty-seven out of the forty-six reported cases for the period 1 May to 15 December 1930. According to Mathews J, however, he was in reality a sick man and only his high sense of public duty combined with his indomitable spirit kept him from earlier retirement.⁸³

Tatham AJP was the first true blue Natalian to preside over the Natal Provincial Division. He was born in Pietermaritzburg on 15 April 1865 and died there on 26 November 1934.⁸⁴ At his death he was lauded as a "notable Natalian" and as "a distinguished son of Natal ... who served his province and his country as a soldier, statesman, advocate and judge."⁸⁵

As a soldier Tatham held the rank of Lieutenant-Colonel and

⁸² Biographical details derived from Roberts op cit 378; (1918) 35 SALJ 389; 1934 SALT 237/8.

⁸³ Natal Witness, 28 November 1934.

⁸⁴ Ibid.

⁸⁵ Ibid.

fought in the First World War,⁸⁶ was awarded the DSO and on his retirement from active service in February 1918 he was made an honorary major of the British Army.⁸⁷

As a statesman Tatham also shone from an early age. At twenty-seven he was elected to the Natal Legislative Assembly and represented Pietermaritzburg from 1893 to 1907.⁸⁸ After his retirement from Parliament in 1907 he subsequently became a member of the Natal Provincial Council. During his years in Parliament he strongly opposed the introduction of Indians into Natal and in 1894 it was said his "intolerance of the Asiatic was only exceeded by his distrust of the Natives"⁸⁹ - this was in sharp contrast to the older Tatham who was lauded for his sympathy with the underdog and for his unstinting service and upliftment of the black people.⁹⁰ In recognition of this the Tatham Memorial Pavillion at a new sports ground for blacks was erected in Pietermaritzburg.⁹¹

A bronze tablet unveiled by Mrs Tatham read:

"In memory of Frederick Tatham, KC, DSO, Judge of the Supreme Court and a friend of the native people."⁹²

Tatham's long and distinguished career at the Bar commenced

⁸⁶ Where he lost two sons within three days of each other.

⁸⁷ Dictionary of South African Biography (3) 779.

⁸⁸ Natal Witness, 24 November 1934 and Dictionary of South African Biography 780.

⁸⁹ Spiller op cit 57 and Dictionary of South African Biography 780.

⁹⁰ Natal Witness 24 November 1934 and Natal Witness 28 November 1934.

⁹¹ Natal Witness, 21 May 1936.

⁹² Natal Witness 29 July 1937.

when he entered the legal profession on 13 July 1886 as an admitted attorney. On September 1, 1898 he was also admitted as an advocate. Initially he practiced at Ladysmith but in 1890 moved to Pietermaritzburg to head a firm of lawyers - Tatham, Wilkes and Shaw.⁹³ In 1903 he was appointed a KC and was President of the Natal Law Society for nine years from 1905 to 1914, inaugurating a system of legal education in Natal which is still in force.⁹⁴ Tatham ran an extensive practice and became the leading advocate in Natal - a position he held without challenge for many years. According to Frank Broome he was so pre-eminent as an advocate that lawyers had no hesitation in retaining him to conduct their cases in Court despite the fact that he was in direct competition with them in his dual practice. Further, Broome regarded him as:

"supreme ... a magnificent orator with an immense public appeal ... In the true sense of the word he was brilliant - not like so many of his successors: successful, sound and dull. Tatham would have shone in any company."⁹⁵

Assessments of Tatham's supremacy as an advocate are unanimous - he was outstanding.

Tatham's judicial career commenced in 1918 when he was appointed second puisne judge and from 1 May 1930 until his retirement at the end of June 1931 he was acting Judge

⁹³ Dictionary of South African Biography 780. This firm, which later became Tatham, Wilkes and Co., is still in existence today and two of Tatham AJP's grandsons and one of his great-grandsons are co-partners in it. Tatham thus founded a legal dynasty.

⁹⁴ (1918) 35 SALJ 391.

⁹⁵ Broome op cit 117.

President of the Natal Provincial Division. On this occasion public tribute was paid to him not only by the newspapers but by the legal profession and the Attorney-General for "unfailing patience, kindness, courtesy and consideration."⁹⁶

As Acting Judge President Tatham initially showed remarkable leadership of the court. He not only presided over, but delivered the court's judgment in the majority of reported cases.⁹⁷ In 1931 Tatham AJP's health was clearly becoming a factor and he only took the bench four times in Durban during the six months before his retirement in June.

Assessments of Tatham as a judge are varied. Neville James, retired Judge President of the Natal Provincial Division and a young articled clerk in the firm Tatham, Wilkes and Shaw in the early thirties says Tatham had a "direct military approach to legal problems".⁹⁸ Broome regarded him as:

"... something of a disappointment as a judge. His quick brain and eloquent tongue were of little value on the Bench without the ballast of a judicial temperament."⁹⁹

This is in sharp contrast to what Broome KC had to say in 1934, when he paid tribute to Tatham on behalf of the Natal Society of Advocates:

"We mourn our loss, but the memory and example of his courage at the Bar and on the Bench is our possession

⁹⁶ Natal Witness 23 June 1931.

⁹⁷ Supra.

⁹⁸ The Honourable Mr Justice Neville James' unpublished speech, 1 November 1979.

⁹⁹ Broome op cit 114.

for all time ... [Tatham J] has been the great ideal in eyes of what an advocate and judge should be."¹⁰⁰

On Tatham's death at sixty-nine striking tributes were paid to him from as far afield as Ladysmith and Dundee. In the Pietermaritzburg Supreme Court Lansdown J, who was on the bench with Carlisle J and notably Carter J, praised Tatham as a worthy son of Pietermaritzburg, of Natal and South Africa, and delivered an eloquent eulogy remarking that:

"with F S Tatham there passes a great mind and soul brimful of human charity, a charming and lovable personality ... his career will ever be to us an inspiring example of public service and devotion to duty ... he had a thirst for righteousness, and a burning zeal for truth and justice and a very deep sense of the obligations of the office of a judge."¹⁰¹

In Durban Mathews AJP expressed similar sentiments and added that "fearlessness" was another outstanding quality Tatham possessed and that "his courage was both physical and moral."¹⁰² Matthews AJP also referred to Tatham's strong, sound common sense and his kind and generous nature..

Instances of Tatham's kindness and generosity abound¹⁰³ but a particularly touching example was the one mentioned by Mr P Gordon, speaking as vice-president of the Incorporated

¹⁰⁰ Natal Witness 28 November 1934.

¹⁰¹ Ibid.

¹⁰² Ibid. On a personal note Matthews AJP remarked that it gave Tatham great pleasure when his only surviving son (two died in World War 1 and another in infancy) became President of the Incorporated Law Society, an institution that owed its incorporation as a statutory body mainly to Tatham's efforts.

¹⁰³ Cf Broome op cit 123.

Law Society, of how he entered Tatham's firm as an office boy and when Tatham learnt in France that Gordon had also signed up and was in England earning a shilling a day, he sent him a cheque to provide himself with adequate clothing for the English winter.¹⁰⁴

As far as Tatham's judicial temperament went there was no evidence of impulsiveness, martial spirit or impatience either in thought or action during his acting judge presidency. Matthews AJP observed that:

"to all larger issues involved on legal rights, and illegal wrongs, he brought to bear, both as an advocate and a judge, a very high sense of responsibility of his position"¹⁰⁵

On the Bench Tatham AJP displayed a great deal of humanity. In the case of Weston v Daddy Bros & Johnstone (Pty) Ltd¹⁰⁶ Tatham AJP came to the assistance of a sixteen year old pauper who wanted to sue his employers for damages. The application was resisted on the ground that the minor's father was not a poor man within the meaning of the rules. Tatham AJP held that while the financial position of the guardian of a pauper minor was an element to be taken into account it was not the governing principle and granted the application.

The Natal Witness wrote:

"As a judge he was known for the clarity of his viewpoint ... The tempering of justice with mercy was

¹⁰⁴ Natal Witness 28 November 1934.

¹⁰⁵ Natal Witness, 28 November 1934.

¹⁰⁶ 1930 NLR 133; see also Ex parte De Souza 1930 NLR 221.

no more phrase to him - he practiced rather than preached it."¹⁰⁷

Tatham AJP's kind and generous nature and his concern for the welfare of all people in particular the Native, the poor and the oppressed, made him intolerant of people who acted with callous indifference to others, but never at the expense of justice. The case of Rex v Khan,¹⁰⁸ where Khan was charged with culpable homicide and applied for further and better particulars, illustrate both these characteristics. Tatham AJP held that notwithstanding that an indictment for culpable homicide complied with section 135 of Act 31 of 1917 and contained the particulars contemplated by s127, the Court had power to direct the supply of such further particulars as it considered ought to be supplied in order that the accused person might properly prepare his defence. Tatham AJP put it thus:

"After all what we must look at in a matter of this kind is whether or not the accused person has in truth been furnished with such information as to the circumstances in which he is said to have committed the crime as will enable him to repel the charge."¹⁰⁹

But having given his judgment Tatham AJP turned to the accused and said:

"I cannot part with this case without telling you there is one feature of it for which, if I had been free to punish you for it, I should have sent you to prison without the option of a fine, and that is your callous indifference in leaving those two children prone on the ground and going off to save yourself. You did not know if either was dead - one in fact was - and your duty was to render aid to them. I cannot punish you for your indifference, but I wish I could."¹¹⁰

¹⁰⁷ Natal Witness, 24 November 1934.

¹⁰⁸ 1930 NLR 151.

¹⁰⁹ At 153.

¹¹⁰ At 156/7.

A sketch of Tatham would be incomplete without mentioning the distinguished part he played in public affairs, notably the welfare of the black people; the care of the poor and needy; "the upliftment of the fallen and the promotion of education and art".¹¹¹ A keen educationist Tatham was one of the founders of Michaelhouse and was for several years on its Board of Governors. In a prize-giving day speech on 1 December 1930 Tatham explained what a public school meant thus:

"... a school at which there is inculcated a public spirit as distinguished from a narrow and devastating spirit of selfishness which was destructive to both the individual and the national character ... the greatness of a nation did not depend on the strength of its armaments, still less did it depend on its wealth. It depended on the character of its people ... Michaelhouse stands for the inculcation of a spirit which would scorn the use of power to oppress or exploit others of whatever station in life, of whatever race, creed or colour".¹¹²

Tatham was also a member of the Board of Governors of Cordwalles School since its foundation and the founder and for five years president of the Pietermaritzburg Technical College.¹¹³

From very humble and poor beginnings Tatham was a self-made man whose name was known and honoured legally, socially, politically and as a soldier throughout his life. At his death the flags in Pietermaritzburg were flown at half-mast and at his funeral a great crowd representing every phase of provincial and city life, paid tribute to a

¹¹¹ Natal Witness 24 November 1934.

¹¹² Natal Witness 2 December 1930.

¹¹³ Dictionary of South African Biography 780.

man loved and respected by all.¹¹⁴

The first puisne judge during Tatham's acting Judge Presidency was Thomas Fortescue Carter¹¹⁵ who was born in England on 2 March 1856, was educated at Buckfast Abbey, Devonshire, and arrived in Natal in 1879 as official shorthand writer of the Natal Parliament. During the First Anglo-Boer War Carter was a reporter for several newspapers. He was present at the battles of Laingsnek and Amajuba and subsequently published A Narrative of the Boer War, an impartial book of his experiences. After the war he edited the Times of Natal, which he converted from a weekly to a daily newspaper. In 1885 Carter was admitted as an advocate without having written or passed a single law examination but by merely sitting the required number of terms in court. After his admission as a notary and attorney in 1887 he practiced in Ladysmith where he appeared in several treason trials. From 1904 Carter represented Kliprivier in the Natal Legislative Assembly, becoming Minister of Justice and Public Works in 1906, and Attorney-General in 1907 when he prosecuted Dinizulu for his share in the 1906 Bambatha Rebellion. On 28 May 1910 Carter was appointed to the Natal Bench.

As a Judge Carter J was not highly respected. Frank Broome regarded him "as the worst judge to sit on the Natal Bench

¹¹⁴ Natal Witness, 29 November 1934.

¹¹⁵ Biographical information is derived from Roberts op cit 351;(1926) 43 SALJ 247; Dictionary of South African Biography (3) 136.

this century",¹¹⁶ Milne¹¹⁷ declined to comment on Carter J as a judge and according to Fannin "some irreverent articulated clerks used to call him Mr Justice Necessity."¹¹⁸ Thus while commentators were unanimous that Carter J was "not a great jurist".¹¹⁹ they do point to his masterly analysis of evidence, "his shrewd common sense, his kindness and his sense of humour."¹²⁰ He was also respected for his practical knowledge of prison conditions having had himself shut up in a solitary cell to experience first hand what solitary confinement entails. He was also known for giving the plausible rogue short shift.

Fannin recalls the time when he sat with Carter J as an assessor and the latter found the accused guilty on twenty-four counts of housebreaking and theft. The evidence established that the accused not only ran a gang which operated up and down the Natal coast but also that he had several previous convictions, thus, when it came to sentencing him Carter J said:

"I sentence you to one year imprisonment (long pause) on each of twenty-four counts (long pause) the sentences will run (long pause) consecutively."¹²¹

It is a matter of opinion whether this can be considered an

¹¹⁶ Broome op cit 112, 114. Broome also recounts the amusing and rather pathetic incident when arguing a complicated case before him he had to push a pile of books to the floor at 1 p m to arouse Carter J from his midday slumber to adjourn the Court.

¹¹⁷ Personal interview with the Honourable Mr Justice Milne.

¹¹⁸ Mr Justice Fannin The Supreme Court of South Africa from 1910 onwards (unpublished memoirs) 1986.

¹¹⁹ Dictionary of South African Biography op cit 136.

¹²⁰ (1926) 43 SALJ 249F.

¹²¹ Fannin op cit 7.

example of Carter J's sense of humour or as an illustration that he was a "severe criminal judge."¹²²

Stories about Carter J, who was on the Natal bench for 31 years, are legion. Neville James recalls a running-in between Carter J and a leading dual practitioner, a Mr Janion, who when cross-examining a witness called Carter J's attention to the fact that the witness said he was surprised when confronted with a new set of facts. Carter J intervened and said:

"Come, come Mr Janion, there is nothing in being surprised. I'm sure you've been surprised by remarks I've made on the Bench."

Mr Janion responded:

"Painted, pained, my Lord, but surprised - never"¹²³

On another occasion Mr Janion took one of Carter J's judgments on appeal and on boring the AD with the elementary principles of Contract the Chief Justice intervened and said:

"Mr Janion you must give the Court credit for knowing the elementary principles of contract."

Mr Janion replied:

"Yes, my Lord, that was the mistake I made in the Court below".

and Mr Janion continued to quote the law from Maasdorp Vol 3, p 12 ... He won his appeal.¹²⁴

Both on and off the Bench Carter J was intensely interested

¹²² Ibid.

¹²³ Mr Justice Neville James, retired Judge President of Natal, unpublished Bar Dinner Speech (1979) 6.

¹²⁴ Ibid.

in "machinery and manual crafts".¹²⁵ His hobbies were road-making on his property¹²⁶ of fifty acres overlooking Pietermaritzburg, and mechanical work in his workshop. He was one of the first men in Natal to own a motor car and his old Buick, NP1, "was a familiar sight about town".¹²⁷

While Carter J was a colourful personality he was not of much assistance on the Bench and Tatham AJP used him as little as he could. From 1 May 1930 to 30 September 1931 when he retired, Carter J delivered the court's judgment in only three reported cases.¹²⁸ Usually he concurred, occasionally he added some remarks, and on two occasions he dissented.¹²⁹ The last time Carter J officiated was on 2 April 1931,¹³⁰ he concurred in the court judgement and thereafter simply faded from the law reports. He never officiated after Feetham JP took up his appointment on 1 August 1931 even though he only officially retired on 30 September 1931.

It is thus easy to see why the second puisne judge, Tatham J, was appointed over the head of the first puisne judge as

¹²⁵ (1926) 43 SALJ 250.

¹²⁶ Presently owned and resided at by the Honourable Neville James.

¹²⁷ (1926) 43 SALJ 250.

¹²⁸ Abdool v Slade 1931 NLR 4; Chipps v Rex 1931 NLR 18; Rex v Vinnicombe 1931 NLR 31. The latter was an automatic review.

¹²⁹ Cf Mitchell v Rex 1930 NLR 187; Ex parte Nederduits Hervormde of Gereformeerde Gemeente van Vryheid 1930 NLR 193 at 198 where Carter J said: "It may be remarked that my objections are sentimental. It may be true, for half the world indeed is largely governed by sentiment."

¹³⁰ Bramdaw v Union Government 1931 NLR 57.

acting Judge President in 1930.

Mathews J, the third puisne judge, went on long leave for six months from 2 May 1930 to 2 November 1930 and during this period, in particular, Tatham AJP was greatly assisted by the services of two acting judges namely Hathorn and Ivan Grindley-Ferris AJJ.¹³¹

On his return from long leave in November 1930 Matthews J assumed a full load of judicial work and after Tatham J's retirement he was acting Judge President for one month before Feetham JP's arrival. This was good experience and a foretaste of things to come. During the first part of 1931 when Tatham AJP was ill and Carter J not of much assistance, the bulk of the reported cases were heard by Matthews and Hathorn JJ. On 1 July 1931 Hathorn J was permanently appointed second puisne judge to fill the vacancy left by Tatham J's retirement.

When Feetham JP took up office the first puisne judge was Ernest Lewis Matthews who was elevated to this position¹³² on the retirement of both Tatham and Carter JJ.¹³³ His acting Judge Presidency for the month preceding Feetham JP's arrival¹³⁴ was the first in a long line of acting appointments as Judge President when Feetham JP was absent

¹³¹ A thorough biographical study and evaluation will be found later in this chapter.

¹³² From being third puisne judge in 1930.

¹³³ On 30 June 1931 and 30 September 1931 respectively.

¹³⁴ Namely 1 July 1931 to 1 August 1931.

on special duty.¹³⁵

Ernest Lewis Matthews¹³⁶ was born at Gloucester, England on 12 April 1871. He was educated at Kings College, London, and Balliol College, Oxford where he graduated in history in 1892. On 18 November 1895 he was called to the Bar at the Inner Temple and after going on the Oxford Circuit arrived in South Africa in April 1902. In the Transvaal he was admitted on 5 June 1902 as an advocate and then obtained the appointment of Assistant Legal Adviser¹³⁷ and in 1907 that of Senior Legal Adviser to the Transvaal Government. After Union in 1910 he became senior legal adviser to the Union Government and continued in that capacity until 1926. During this time he was responsible for the codification and unification of the statutes of the four former colonies and examples of such unified statutes were inter alia the Administration of Estates Act, the Insolvency Act, the Criminal Procedure and Magistrates Court Act. Many of the most important statutes of the Union were thus the result of his labours. He worked closely with Generals Botha and Smuts and for about two years under General Hertzog, the first Minister of Justice in the Union cabinet, who appointed him a KC in 1912. In 1914 he was made a CMG on the recommendation of General Botha.

¹³⁵ From 13 October 1932 onwards; during 1933 and 1934 Matthews J was cited as acting Judge President during the year; from 17 February to 11 June 1936 and from 16 September 1936 to 31 October 1936.

¹³⁶ Biographical details derived from (1927) 44 SALJ 309; Roberts op cit 871; 1932 SALT 79.

¹³⁷ At a salary of 1 000 pounds per year.

Mathews J had his first judicial experience in 1918¹³⁸ and between August 1919 and October 1923 he was appointed as acting judge in Natal on four occasions. When he thus received a permanent appointment from Mr Tielman Roos,¹³⁹ the then Minister of Justice, as third puisne Judge from 14 April 1926 he was already well-known in Natal and his appointment welcomed.

Matthews J was a very active judge and apart from frequently acting as Judge President he carried a full load of judicial work. During June 1931 he delivered the court's judgment in nine out of the ten reported cases and concurred in the other one with comment.¹⁴⁰ In February 1936 Matthews AJP delivered the court's judgment in six out of the nine reported cases and presided over eight of them. But in October 1936, although Matthews AJP presided over nine out of the fifteen reported cases and delivered the courts' judgment in eight of them, he was slowing down and his health was becoming a factor to contend with. Like Feetham JP, Matthews J was not a dissenting judge preferring pre-judgment discussion to iron out differences and thus almost always concurred with his brothers adding his own views when he considered them necessary. From the above limited survey it can be seen that Feetham JP had no hesitation in using Matthews J on the Bench and was very

¹³⁸ Sitting as a special Criminal Court in SWA for three months.

¹³⁹ Who later appeared before him as counsel for the appellant in the case of Taylor v Commissioner for Inland Revenue 1933 NPD 753.

¹⁴⁰ Cf Clark and Another v Rex 1931 NPD 176.

appreciative of his services and help and said so in a tribute read on his behalf on the retirement of Matthews J:

"... I should like to say that when I was appointed to this Division in 1930, it was a very great satisfaction to me to know that I should have him at my side as a colleague, and should thus be able to renew my earlier association with him, which dates back to pre-Union days in the Transvaal; ... as Judge President I have benefitted in full measure from his generous help and wise counsel. I am deeply grateful to him."¹⁴¹

On this occasion Feetham JP also drew attention to the "great debt South Africa owes to him for all the constructive work he accomplished in building up the fabric of our statute law during more than twenty critical years as law adviser and Government draftsman."¹⁴²

On the Natal Bench Matthews J's judicial experience was varied and extensive. He presided over some of the most sensational criminal trials¹⁴³ in Natal during the 1930's and adjudicated on a wide variety of civil cases¹⁴⁴ calling for the exercise of the highest powers. Having regard to his past career it was well established that he was an

¹⁴¹ Natal Witness 2 April 1938.

¹⁴² Natal Witness 2 April 1938.

¹⁴³ Cf Ex parte Mallalieu: In re Rex v Mallalieu and Tolputt; Ex parte Attorney General: In re Rex v Mallalieu and Tolputt 1932 NPD 80; Rex v Worthington (unreported) Natal Witness 13 June 1936. Rex v van Rooyen (unreported) Natal Witness 16, 17, 18, 19 June 1936; Rex v Torlage (unreported) Natal Witness 17 June 1936; 21, 22, 25, 26, 28 August 1936.

¹⁴⁴ Cf Kharwa v Inspector of Police 1931 NPD 197; North England Steamship Co Ltd v East Asiatic Co Ltd 1932 NPD 1; Incorporated Law Society v Stalker 1932 NPD 594; Estate Donaldson v Knight 1933 NPD 46; Knight v Findlay 1934 NPD 185. Platt v Commissioner of Inland Revenue 1934 NPD 74 where the AD dismissed an appeal against Matthews AJP's judgment.

authority on the interpretation of statutes.¹⁴⁵ The writer in the South African Law Journal noted that "he seems to carry most of the statute book in his head and if counsel omits to refer to any relevant section of any law, [he] will assuredly supply the omission."¹⁴⁶ This writer surmised that:

"it must sometimes be provoking for him to hear a construction contended for which he knows was never intended. But in such a case, as always, he is invariably attentive to the Bar and very anxious to understand fully the points that counsel is trying to make."¹⁴⁷

In fact so much so that on one occasion the case¹⁴⁸ turned on the interpretation of section 3 (4) (1) of the Death Duties Act 1922 and Matthews J gave judgment in favour of the taxpayer. Afterwards he apparently said to Mackeurtan (the taxpayers counsel):

"When I drafted the Act I intended it to bear the meaning contended for by the Commissioner for Inland Revenue, but after hearing your argument I am satisfied that the true meaning of the words I used was that contended for by you."¹⁴⁹

Broome allowed that this did "great credit to his judicial open-mindedness".¹⁵⁰ Fortunately or unfortunately the case went on appeal to the Appellate Division which unanimously decided that the section meant exactly what Matthews J intended it to mean when he drafted it. Broome felt that this did "great credit to his skill as a draughtsman"¹⁵¹

¹⁴⁵ Cf Incorporated Law Society v Van Aardt 1930 NLR 69 (confirmed on appeal). Taylor v Commissioner of Inland Revenue 1933 NPD 753.

¹⁴⁶ (1927) 44 SALJ 312.

¹⁴⁷ Ibid.

¹⁴⁸ Commissioner for Inland Revenue v Estate Greenacre 1936 NPD 225.

¹⁴⁹ Broome op cit 113.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

but James is of the opinion that "his draftsmanship was exonerated at the expense of his judicial skills."¹⁵²

Matthews J did have shortcomings. The most important one probably being his lack of "Bench personality"¹⁵³ which could in some measure be attributed to the fact that he never¹⁵⁴ practiced in the Supreme Court and had a purely civil service background. He was thus not a confident and forceful judge and on the Bench he appeared somewhat "tentative and uncertain".¹⁵⁵ In discussing Matthews J Fannin also refers to the case of Mallalieu v Tolputt,¹⁵⁶ described by the South African Law Times as "one of the most sensational criminal trials ever heard in South Africa."¹⁵⁷ The facts were briefly that these two young people, Richard Lewis Mallalieu, the son of a wealthy English member of Parliament, and Gwendolyn Tolputt eloped and went all over the country defrauding banks and people and eventually landed in Pietermaritzburg where they were charged with the murder of a taxi driver, one Arthur Kimber. The State had a strong case because the couple were away from their hotel at the time of the murder and their desperate financial position which suddenly improved within hours of the murder appeared to be the motive.¹⁵⁸

¹⁵² Op cit 6.

¹⁵³ Broome op cit 113.

¹⁵⁴ Except for a few years in England prior to coming to South Africa in 1902.

¹⁵⁵ James op cit 5.

¹⁵⁶ Supra.

¹⁵⁷ 1932 SALT 79.

¹⁵⁸ On the night of the murder they had only 5s 3d between them but early the next morning they had 1 pound to send a cable to England to request more funds. The murdered man was also robbed.

The trial took place before Matthews J and a Jury at the criminal session in Pietermaritzburg over a period of fifteen court days. On the first day of the trial Advocate HH (Harry) Morris KC, appearing for both the accused, applied for a separation of trials under section 217 of the Criminal Procedure and Evidence Act on the ground that Tolputt had made an admission to a fellow prisoner that she and Mallalieu were responsible for the murder, and that such evidence was inadmissible against the latter. Matthews held that in interpreting section 217 of Act 31, 1917, being a Union Act, the courts should be guided by the authorities in the South African courts rather than by English practice, that each case must be considered on its own facts and that as there was a reasonable probability of prejudice to Mallalieu, if a joint trial took place, the application for a separate trial should be granted.

On a further application by Morris KC that Mallalieu be tried first Matthews J rejected the contention that the Attorney-General was vested with the sole discretion of presentment of cases to the court saying:

"I have yet to learn, after examination of the provisions of the Criminal Procedure and Evidence Act that the Attorney-General has ... any greater rights or privileges in this Court than any other counsel,"¹⁵⁹

and that in any event the Court had power under s145 to postpone any trial before it where necessary or expedient and had inherent jurisdiction to control the order of proceedings before it, and thus granted the application for

¹⁵⁹ Mallalieu case op cit 85.

the postponement of the trial of Tolputt so as to give effect to the order for the separation of trials coupled with an order that Tolputt's trial was not to commence until after that of Mallalieu was disposed of.

Thereupon the Attorney General, Lennox Ward, applied for the reservation of a question of law as to whether the Court had power to postpone one trial pending before it until another also pending had been disposed of, and, that the trial of Mallalieu be postponed until it was ascertained if the Minister would apply to the Appellate Division for the consideration of a special case and the adjudication thereon. Matthews J refused both these applications holding that the first application was premature as a question of law could only be reserved on conviction, and, that any ruling given by the Appellate Division could only be operative for future guidance and could not affect the Court's decision in the present proceedings. Fannin¹⁶⁰ doubts whether as a matter of law Matthews J was right in granting separate trials and even more so in directing the Attorney-General which of the accused should be tried first.¹⁶¹ However, the writer in the South African Law Times commented that the separation of trials was in accordance with the usual practice as it

¹⁶⁰ Op cit 2.

¹⁶¹ Ibid. Fannin recalls that when Lennox Ward was President of the Native High Court some years later he applied to him for a separation of trials in exactly the same circumstances as those in Mallalieu's case and even though Ward JP kept him arguing until seven at night he rejected his application the next morning contra the decision of Matthews J. Fannin believes Ward J was correct.

"ensures the absence of prejudice against either accused person on account of evidence against the other of them."¹⁶² After a fifteen day trial, dominated by headlines and spectators packing the court to the doors every day, the Attorney-General concluded with a seven hour address, yet the jury found Mallalieu not guilty after a brilliant defence by Morris KC and Frank Shaw.¹⁶³ Thereupon the Attorney-General, Lennox Ward, withdrew the charge against Tolputt¹⁶⁴ and no appeal was lodged against Matthews J's judgment.

By all accounts Matthews J was a very able and popular judge. On the Bench he extended kindness and courtesy to everyone, including accused persons.¹⁶⁵ His judicial temperament and character was a combination of "impartiality, scholarly attention to detail and clear thinking".¹⁶⁶ In giving judgment Matthews J was always careful to set out the facts and define the issues before giving his decision and he always dealt with the points made by the side against which he gave judgment, he did not merely ignore these arguments. Off the Bench Matthews J was a delightful gentleman. On the occasion of his

¹⁶² 1932 SALT 54.

¹⁶³ On the ground that the identity of the couple in the taxi was not established. Mr Douglas Shaw QC recalls that after the trial Mallalieu wished to shake hands with Morris to thank him but Morris refused saying "I don't shake hands with murderers."

¹⁶⁴ Supra. Mallalieu was a month later found guilty and convicted of fraud, forgery, uttering and theft by false pretenses. Both he and Tolputt were deemed prohibited immigrants and deported from the Union.

¹⁶⁵ Natal Witness 22 March 1932.

¹⁶⁶ (1927) 44 SALJ 312.

retirement the acting Judge President Hathorn J said:

"From the time he first came to Natal until the present day he has continued to inspire confidence in everyone with whom his duties brought him in contact - his colleagues, the public, the Bar and the Side Bar - and he leaves the Bench with a reputation for integrity, impartiality and patience which any judge might envy, and his judgments have enriched our law reports. In those of us who know him best ... his modesty, his kindness and his humanity have created a feeling of deep affection. All of us regret not only his retirement but also its cause ..."¹⁶⁷

Frank Broome KC speaking on behalf of the Bar said:

"Mr Justice Matthews had been a judge of outstanding ability and integrity, and his patience and courtesy was never failing ..."¹⁶⁸

And so the judge who never made an enemy either on or off the bench passed on his robes to a man who had often appeared before him namely Selke J, who was welcomed to the Bench on the same occasion.

Natal's second puisne judge Alexander Anthony Roy Hathorn,¹⁶⁹ who filled the shoes of Tatham J, was born on New Years day 1882 in Pietermaritzburg, the third son of Judge KH Hathorn¹⁷⁰ who added the name Roy to his sons Christian names by deed-poll because of his red hair and consequent nickname Roy or Rooikop. Hathorn J was educated at Hilton College, Natal, Lansing College in Sussex and Caius College, Cambridge where he obtained a BA degree in

¹⁶⁷ Natal Witness 2 April 1938. Matthews J was only 57 at the time and died on 23 December 1941, in Johannesburg at the age of 60.

¹⁶⁸ Ibid.

¹⁶⁹ Biographical details derived from Roberts op cit 362; Dictionary op cit 379; (1931) 48 SALJ 413; (1951) 68 SALJ 264; (1957) 74 SALJ 255.

¹⁷⁰ Who retired from the Natal Bench on 29 March 1926 and died in Pietermaritzburg on 3 April 1933 when Matthews AJP paid tribute to him in the Supreme Court. Natal Witness, 4 April 1933.

1903. On 26 January 1904 he was called to the Bar at the Inner Temple and in April the same year he was admitted as an advocate in Natal where he joined his father's firm Hathorn, Cameron and Co. in Pietermaritzburg. In 1910 when Hathorn senior was elevated to the Bench, he became a partner in the firm and practiced both branches of the profession until 1921 when he began to practice exclusively as an advocate. It took him two years to come to this decision because he was abandoning a flourishing attorneys' practice, of which he and his brother Howard were then the sole partners, for the unknown and hazardous venture of the Bar. But under the influence of Mackeurtan, who had five years earlier taken the same plunge, he took chambers in Durban and Maritzburg and was made a KC on 29 July 1922.

As an advocate Hathorn displayed a fighting spirit and was particularly interested in running down cases and testamentary disputes. In court he was conspicuously fair in presenting the facts of the case and he spent a great deal of time and effort in trying to increase his knowledge of Afrikaans. He had a great interest in the Incorporated Law Society of which he was one-time President and of which he drew up the original constitution with HG Mackeurtan and others. Broome regarded him as an excellent advocate who perhaps "lacked the quality of 'showmanship' which an ideal leader should have."¹⁷¹ His approach to problems was direct and practical and he knew as much law as he needed to know. As a competitor he was easy to deal with except

¹⁷¹ Broome op cit 137.

when it came to settlement discussions when "his idea of a fair compromise was usually the unconditional surrender of his opponent."¹⁷²

He had acting appointments to the Natal Bench from 2 May to 2 November 1930 and from 19 January 1931 until his permanent appointment on 1 July 1931. The writer in the South African Law Journal commented that:

"no appointment could have been more popular, but once Mr HG Mackeurtan KC was of his own choice out of the running, there was a certain inevitability about it as, if any member of the Natal Bar was to be appointed, Hathorn was obviously the man."¹⁷³

In integrity and character Hathorn J was all that a Judge should be and it was accepted that he deserved the position he had long hoped to attain.

On the whole opinions of his ability as a judge are praiseworthy. Mr Justice Fannin refers to him as a "very pleasant, good-natured man, an able lawyer, but it was said that his weakness was that he found it difficult to believe that a woman could tell a lie".¹⁷⁴ In Cronje's case¹⁷⁵ the Crown after establishing a prima facie case called the native woman with whom the accused was alleged to have had illicit carnal intercourse. She said the accused had external but not internal carnal connections with her but the Magistrate rejected her evidence and convicted the

¹⁷² Ibid.

¹⁷³ (1931) 28 SALJ 413.

¹⁷⁴ Cf Tregea and Another v Godart & Another 1939 AD 17 where the AD by a majority decision reversed his decision given in the D&CLD, Tindall J dissenting.

¹⁷⁵ Cronje v Rex 1934 NPD 41.

accused. On appeal Hathorn J held that as the Magistrate's reasons for rejecting the woman's evidence were not sound, it must be accepted, that such evidence disclosed no offence and thus allowed the appeal. Hathorn J stated:

"... the prosecutor wrongly ... sought to discredit the girl ... he ought to have applied to have her declared a hostile witness, but he was not entitled to endeavour to discredit her without taking that course. Mr Broome made no protest against the admission of this evidence but it is an unsatisfactory feature of this case."¹⁷⁶

This case also illustrates Hathorn J's penchant for conspicuous fairness. According to Fannin Hathorn J was easily moved by tragedy and was altogether an admirable man. "I appeared before him many times¹⁷⁷ and always enjoyed doing so."¹⁷⁸ Mr Justice James remembers him as a "kindly, warm-hearted common sense sort of man who expected simple and direct argument, feared subtlety, was interested in people and got the best out of them."¹⁷⁹ In keeping with his personality Hathorn J adopted an open-door policy and was of the opinion that people came to Court because they wanted the Court to help them and that the Judge should go out of his way to do so and that this would be much easier if advocates knew their briefs and were able to give the Judge a reliable assurance that the papers were in order. This is a view most judges heartily endorse. Because of his kind and generous nature Hathorn J also came

¹⁷⁶ at 43.

¹⁷⁷ Eg in the cases of Prospecton Sugar Estates v Commissioner for Inland Revenue 1932 NPD 68 where Fannin appeared as junior with JC de Wet. Fannin was, like everyone else at that time, a dual practitioner. Platt v Commissioner for Inland Revenue 1934 NPD 74, where Fannin was again a junior to JC de Wet.

¹⁷⁸ Fannin op cit 3.

¹⁷⁹ James op cit 15.

to the assistance of convicted persons. Thus in the case of Ballantyne¹⁸⁰ he suspended a sentence of eighteen months imprisonment with hard labour for three years on condition that Ballantyne made restitution to the pensioner and partially to the Insurance Company he had defrauded and stolen money from but warned that his action should not be seen as setting a precedent saying:

I do not wish it to be understood that any man convicted of the serious crime of which you have been convicted - forgery and theft - can expect to be treated as leniently, but I regard yours in many ways a very special case, and I have formed a favourable view of your character, apart from your actions which have brought you before me. I think it is better for both you and the State that you should have the opportunity, not only of rehabilitating yourself, but also of complete reparation (plus interest) to Samuel Hardman, and partial reparation to the assurance society."¹⁸¹

As a judge Broome had only one criticism of Hathorn J, namely that as a young judge he "too often tried to be clever,"¹⁸² thus ignoring the straightforward common sense approach in favour of more devious and subtle solutions which sometimes involved his express disagreement with all previous judicial pronouncements on the subject. Thus in the case of Kharwa v Licensing Officer, Ladysmith¹⁸³ he not only disagreed with Matthews J but also with a long line of Natal cases, decided since 1918, which laid down that the Courts powers relating to an appeal under section 2 of Act 22 of 1909 regarding the renewal of trade licenses were

¹⁸⁰ Natal Witness 4 March 1937 (unreported)

¹⁸¹ Ibid.

¹⁸² Broome op cit 137.

¹⁸³ 1931 NPD 243. Also in the case of Dunning v Union Government 1932 NPD 700 he regretted to dissent from the majority judgment.

restricted as on review. Hathorn J disagreed with this, holding that it was an appeal in the ordinary sense. He agreed with the order Matthews J made but for different reasons adding:

"I state my opinion with great diffidence. Unhappily it is at variance with every opinion expressed by every Judge of this Court - both majority and dissenting - in reported cases decided subsequent to 1918. But in spite of that I hold my opinion so firmly that I deem it my duty to express it..."¹⁸⁴

Throughout his judicial career Hathorn J held firm opinions and expressed them, as above. He did not float in a sea of indecision and was definite in his findings even if this meant dissenting from his brothers. Thus in the case of Platt v Commissioner for Inland Revenue¹⁸⁵ Hathorn J dissented from the majority judgment of Matthews AJP regarding the meaning of the words "future benefit" in a stated case under section 60 of the Income Tax Act of 1925, but an appeal against the decision of Matthews AJP was dismissed by the Appellate Division.

Similarly in the case of Dougall & Dougall & Munro Ltd v Commissioner for Inland Revenue,¹⁸⁶ concerning a stated case by the Special Income Tax Court, Hathorn J dissented from Feetham JP's majority judgment, stating that he preferred his view inter alia because, regarded generally, it was "more equitable ... and more reasonable than the result of the other view."¹⁸⁷

¹⁸⁴ At 260.

¹⁸⁵ 1934 NPD 74.

¹⁸⁶ 1939 NPD 272.

¹⁸⁷ At 286.

If Hathorn J had shortcomings, he was the first to admit them. Thus when he took his seat on the Natal Bench the first time he assured the members of the profession that while he knew some of his judgments would be wrong that position would not be caused because he would not listen to all the arguments addressed to him or not give cases his best consideration but would be caused "entirely by my own limitations ..."¹⁸⁸

Although subtlety and a towering intellect were never dominant traits in his judicial career, and he himself often asserted that he was not a very learned judge, the South African Law Journal said of him:

"... he is a man foursquare without a flaw, and the Supreme Court of South Africa is fortunate in having Mr Justice Hathorn just as he is."¹⁸⁹

The same writer confidently predicted that Hathorn J

"will be dignified without being arrogant or aloof; will be friendly to the profession without forgetting all that is due to a Judge; will be courteous to the court without failing to insist on efficiency in those who appear before him and will suspend judgment in any matter till the end of a case without leaping in limine to conclusions ... He will not lean towards subtle distinctions and he is not an intellectual prodigy."¹⁹⁰

But because his life had not been secluded¹⁹¹ or studious and because he had much to do with people both as an

¹⁸⁸ Natal Witness 1 July 1931 and Broome op cit 137.

¹⁸⁹ (1931) 28 SALJ 413.

¹⁹⁰ At 416.

¹⁹¹ Hathorn married Miss Scott in 1907, and had two sons, Anthony who followed in his father's footsteps and David who died during World War II. He was the founder of the Hiltonian Society and served on the board of governors of Hilton College ... He was one time president of the Natal Lawn Tennis Association, and a soccer enthusiast.

advocate and as an attorney, he knew human nature which enabled him to assess credibility and the inherent probabilities of a case. Thus according to Broome "he soon came to realize that common sense was his long suit and subtlety was not, and from then on his judgments became difficult to fault in any way."¹⁹² Even during his acting appointments Hathorn J did his share of judicial work. Thus during 1931 he sat with Matthews J on all ten reported cases and delivered judgment in one of them. After his permanent appointment he often sat with either Feetham JP or Matthews J and occasionally with Landsown J except during full Bench trials when three judges were present. Characteristically when either Feetham JP or Matthews J presided, they also delivered the court judgment. However, there were numerous occasions¹⁹³ when Hathorn J was called upon to give judgment. Feetham JP clearly had no hesitation in using him and he carried, from the outset, his fair share of judicial work, and was always ready to make a contribution even when he concurred.¹⁹⁴

Also on the question of race Hathorn J was always ready to speak out if he suspected that there could possibly be prejudice. Thus in the unreported case of Hofmeyr¹⁹⁵ in

¹⁹² Broome op cit 137.

¹⁹³ Cf Estate Bazley v Estate Arnott 1931 NPD 481; Sohadeo v Paruk & Others 1932 NPD 40; Anderson v Green 1932 NPD 241; Bassa v East Asiatic (SA) Co Ltd 1932 NPD 386; East Asiatic (SA) Co Ltd v Hansen 1933 NPD 297.

¹⁹⁴ Cf Gora Mahomed v Durban Town Council 1931 NPD 598; Ngidi v Rex 1932 NPD 22; Hargreaves v Nisbet 1932 NPD 125; Incorporated Law Society v Stalker 1932 NPD 594; Natal Mercury case 1938 NPD 277.

¹⁹⁵ Natal Witness 3 March 1938.

which a European candidate attorney was charged with culpable homicide arising from the death of two Indian pedestrians he instructed the Jury as follows:

"We know perfectly well in this country that there is such a thing as colour prejudice. It is possible that during a case like this you will have a sub-conscious prejudice in favour of the accused because the persons killed were coloured. You must on no account do that - you must judge the case on the facts."¹⁹⁶

In another unreported case that came before him on appeal concerning illicit intercourse the Native girl was sentenced to six months imprisonment and the man to only four months. The Attorney-General Mr CC Jarvis drew the Court's attention to the fact that the legislature had made the male liable to a greater penalty and so Hathorn J, dismissing the appeal by the man, expressed the hope that the magistrate concerned will remember that principle in passing sentence.¹⁹⁷

After Matthews J retired on 1 April 1938, Hathorn J acted as Judge President during Feetham JP's acting appointments to the Appellate Division. When Feetham JP was elevated to the Appellate Division with effect from 19 July 1939, Hathorn JP was a very worthy and popular successor and both men judicially speaking came into their own. He was the first born and bred Natalian to hold this office permanently and set a precedent in this regard which has not been departed from to this day.¹⁹⁸

¹⁹⁶ Ibid.

¹⁹⁷ Natal Witness 31 October 1933.

¹⁹⁸ With the exception of Williamson JP who served on the Natal Bench during 1961.

On the occasion of his retirement various tributes were paid to him to which he modestly responded: "I have learned for the first time to-day that I was a much better judge than I thought I was, and a much better Judge-President."¹⁹⁹ On the occasion of his death Fannin QC paid tribute to him saying:

"He believed with all his generous heart in the principle that justice must be done and must manifestly be seen to be done. In his court one was always conscious that he kept that ideal steadfastly before him. None could be kinder or gentler with a nervous witness or a litigant who needed the court's sympathetic attention and help. Yet he hated prevarication and untruthfulness, and could and did strike terror into the hearts of the dishonest."²⁰⁰

As a man Hathorn J was loved for his kind, generous and emotional nature, his good fellowship and his inviolable and deep humanity. He was thus the complete antithesis of his predecessor both in temperament and approach. Although not a very learned judge Hathorn J was a wise and a good one and Broome opines that:

"however eminent he was as an advocate and as a puisne judge, it was as a Judge President that he was pre-eminent."²⁰¹

The vacancy created by the retirement of Carter J was filled by Charles William Henry Lansdown²⁰² who took the oath on 1 October 1931 as Natal's third puisne judge. He

¹⁹⁹ (1951) 68 SALJ 264 at 269.

²⁰⁰ (1957) 74 SALJ 255.

²⁰¹ Broome op cit 137.

²⁰² Biographical details derived from Dictionary of South African Biography op cit 301; Roberts op cit 369; Cape Times 9 January 1957; RF Olsen Who's Who in Natal (1933) 146.

was born near Bristol, England, on 10 June 1874 and came to South Africa with his parents in 1884. At the age of fifteen, on 1 March 1889, he joined the Cape Civil Service as a railway clerk, later transferring to the Cape Colonial Service and in 1894 joined the Cape Law Department. He was appointed private secretary to the attorney-general of the Cape in 1894 and three years later his chief clerk. He was educated at the University of Cape Town where he took a BA with honours in 1902 and his LLB by private study in 1905 winning the Chalmers prize. In 1907 he was called to the Bar and in 1910 he was the sole British counsel in the Anglo-German arbitration dispute for the Walfish Bay Territory which was decided in favour of the British contentions. Later he was seconded to the Department of Justice where he held various posts until he became law adviser to the Union Government on 1 August 1918. During 1921 he was acting attorney-general in Natal, took silk on 9 June 1924, and in 1926 was appointed attorney-general of the Cape. In 1927 he became senior law adviser and parliamentary draftsman to the Union Government.

On the Bench Lansdown J held several acting appointments prior to and during his permanent appointment to the Natal Bench. In 1918 he was acting judge of the Special Criminal Court of the High Court of South West Africa, and acting judge of the Supreme Court of the Orange Free State in 1928 and of the Eastern Districts Local Division in 1929 and 1933.

In Natal Lansdown J served from 1 October 1931 to 1 August 1937 with absences on special duty during 1935, 1936 and 1937. He was a great authority on the criminal law and as such the joint author of South African Criminal Law and Procedure, a standard textbook quoted daily in our Courts. Among his other authoritative publications were The South African Liquor Law and the South African Criminal Procedure Acts.

Lansdown J also served on numerous commissions which was largely due to the fact that, aside from his legal interests, he was also greatly concerned with political and social issues. Thus he advised the select committee on the Liquor Act in 1927-28, and served as chairman of inter alia the Company Law Commission (1935), of the South African Police Commission Inquiry during 1936-1937 and of the 7th and 8th Delimitation Commissions in 1937 and 1942.²⁰³ During 1931 he also chaired a conference for the consideration of the Insolvency Laws of the Union.

Lansdown J was regarded as one of South Africa's most distinguished jurists and his judgments and legal works did much to clarify and consolidate the Union laws and were a major contribution to the South African legal system. In recognition for his services to the law Rhodes University conferred on him an honorary LLD in 1947, an outstanding achievement for a man who commenced his career as a

²⁰³ After his departure from Natal, in 1943, he also acted as Chairman of the Witwatersrand Mine Natives' Wage Commission.

railways clerk at the tender age of fifteen and was largely self educated.

Despite his full public life Lansdown J was also a devoted family man²⁰⁴ and in Natal served as Chairman of the Council of the Natal University College and as member of Council of the Durban Technical College.

Given his credentials the Natal Bench was fortunate to acquire the services of Lansdown J. He was a few months older than Feetham JP and very nearly as energetic. With a dynamic team consisting of Matthews, Hathorn and Lansdown JJ, Feetham JP, the born leader could effect the necessary reforms which enhanced the status of the Natal Court. In common with Feetham JP, Lansdown J was at the time of his appointment already recognized as one of South Africa's leading jurists and had also served on various commissions both at home and abroad. In 1931 he was a member of the permanent commission constituted under the United States of America - Switzerland Treaty for inquiry into disputes between these two countries and he also represented the Union at the League of Nations Conference for the codification of International Law in 1930.

From the law reports it is clear that Feetham JP had no hesitation in using Lansdown J, who was known as an "indefatigable worker who always tried, not always

²⁰⁴ After his first wife, Dora, died in 1916 leaving him with four sons he married Louise Rothchild in 1918 and they had a son and a daughter.

successfully, to drive his staff as hard as he drove himself."²⁰⁵ Yet he was generally popular because of his genial friendliness. Given his knowledge and expertise in the criminal law and procedure he presided over numerous criminal trials on the Natal Bench²⁰⁶ including some very sensational ones.²⁰⁷ In the case of Rex v Knight,²⁰⁸ which was another sensational criminal trial in Durban during the 1930's, Dr Wilfred Knight was charged with seven counts of procuring abortion and one count of culpable homicide arising from the death of a female as a result of criminal abortion. Harry Morris KC., of Mallalieu fame, appeared for Dr Knight who was a well-known medical practitioner in Durban and a member of the Durban Town Council. In those days it seems that criminal trials were second to none as a major public attraction and the court was packed every day throughout the fourteen day trial; to such an extent that some people, who stood all day, fainted and the court had to be cleared to get them out. Lansdown J, however, kept a tight reign on proceedings warning tittering men that the court would deal with them if they continued. At one stage the dead girl's mother accused Morris KC of bullying her and said she would not answer any further questions unless he spoke to her like a gentleman. Lansdown J intervened, resulting in the press headline: "Judge rebukes counsel for

²⁰⁵ Broome op cit 114.

²⁰⁶ Cf Rex v Mgeza 1931 NPD 401; Rex v Petoli 1932 NPD 186; Rex v Freeman 1931 NPD 460; Rex v Pickup 1932 NPD 216.

²⁰⁷ Cf Rex v Adey (unreported) Natal Witness 6 December 1934; Rex v Knight (unreported) Natal Witness 19 May to 9 June 1932.

²⁰⁸ Natal Witness, 19 May to 9 June 1932.

the defence"²⁰⁹ to which Lansdown J responded that the words did not accurately convey what was said and transgressed "the area of mere reporting, and came dangerously near comment,"²¹⁰ and that what he had in mind was to "give counsel a word of advice on how to handle a witness who was in the circumstances not unnaturally excited and overwrought."²¹¹ But from this it must not be surmised that Lansdown J was the kindest and most patient of judges with a nervous witness as the very next day he rebuked a young married woman who gave evidence saying: "Pull yourself together and don't be so emotional."²¹² Later in the case he also instructed Dr Knight, who was a real showman, to refrain from making comment and to confine himself to direct replies.

Regarding the usefulness of African witnesses Lansdown J was ambivalent. Thus in the case of Freeman²¹³ he said:

"The two natives Phalemon and Isaac were unable to give much assistance ... as might be expected from witnesses of this class, they could give no accurate estimate of the rate of speed."²¹⁴

But in the case of Adey²¹⁵ he specifically drew the jury's attention to the evidence of a native witness saying:

"I want you to pay attention to the evidence of this "native", whose evidence is important, for the defence will be that the deaths were not caused by the accused's car, but by Kirkwood's car."²¹⁶

²⁰⁹ Natal Witness 20 May 1932.

²¹⁰ Natal Witness 21 May 1932.

²¹¹ Ibid.

²¹² Natal Witness 24 May 1932.

²¹³ 1931 NPD 460.

²¹⁴ At 466.

²¹⁵ Natal Witness 6 December 1934.

²¹⁶ Ibid.

However, both on and off the Bench Lansdown J displayed a sense of humour. Thus in Adey's case when the accused gave evidence that prior to the accident he had been to the Star and Garter where he played poker at 3d a time, Lansdown J laughingly said: "I am afraid some have not a technical knowledge of the game."²¹⁷ To which the Attorney-General, Mr CC Jarvis, later an acting Judge in the Natal Court responded: "As for me, I prefer to remain in ignorance."²¹⁸ When opening the Spring show of the Horticultural Society in Maritzburg, Lansdown J remarked: "If your husbands ... sometimes tries your patience, cultivate flowers; you will find it a wonderful relief, and you will come by and by to find beauty even in him. In my own best interests I am ever encouraging my wife to cultivate flowers."²¹⁹ On a more serious note he also said that the cultivation of flowers could be a sweet antidote for much of the sordid and unlovable side of human nature with which lawyers are brought into contact.

On the Bench Lansdown J was not always in agreement with his brothers as his dissenting judgments show.²²⁰ Thus in the case of Pickup²²¹ Feetham JP held that an examination of the relationship between the two acts of Parliament showed that the magistrate was correct but if such

²¹⁷ Ibid.

²¹⁸ Ibid.

²¹⁹ Natal Witness, 6 October 1932.

²²⁰ Rex v Pickup 1932 NPD 216; Torquay Hotel v Thompson 1933 NPD 371.

²²¹ 1932 NPD 216.

examination showed that there was an ambiguity which left doubt as to the intention of the legislature the benefit of the doubt must be given to the subject and against the legislature. Unfortunately Lansdown J dissented from this equitable judgment but in Limbada v Principal Immigration Office^{2 2 2} he quoted with approval from the judgment of Feetham JP in Dhamibhai and Others v Principal Immigration Officer.^{2 2 3}

Regarding civil cases Lansdown J was always adequate and delivered many important judgments.^{2 2 4} Thus In re Estate Cullingworth^{2 2 5} he cut through lengthy arguments advanced by no less than three KC's namely Mackeurtan, Broome and Selke, to come to the simple conclusion that effect must be given to the testators intention which was to keep the property in question in the family.^{2 2 6} It was, however, primarily in criminal cases where Lansdown J was prepared to make a contribution even when he concurred.^{2 2 7}

During 1936 Lansdown J went on leave from June 11 to November 4 and from then on was absent on special duty concerning the report of the Police Commission and thereafter undertook chairmanship of the 1937 Delimitation Commission. This resulted in his name not appearing on the

^{2 2 2} 1933 NPD 146 at 151.

^{2 2 3} 1931 NPD 411.

^{2 2 4} Cf Gebela v Banks 1931 NPD 346; Goss Estates Ltd v Durban Borough Council 1931 NPD 335; Reddy v Chinasamy 1932 NPD 461; Funeral Services (Pty) Limited v Dove 1935 NPD 527.

^{2 2 5} 1936 NPD 251.

^{2 2 6} Infra and Broome op cit 150.

^{2 2 7} Cf Burwood v Rex 1931 WPD 573; Rasool v Rex 932 NPD 112.

list of judges for the Natal Provincial Division for 1937. In this year he was transferred to the Eastern District Local Division in Grahamstown where he assumed the office of Judge President on 1 August 1937.²²⁸

Lansdown J's successor as third puisne judge was Arthur Edward Carlisle²²⁹ who was born on 30 April 1882 in Durban. He was educated at Durban High School and at the South African College, Cape Town, where he obtained a BA and in 1904 an LL B degree coming first in the law examination that year. On 13 November 1900 he entered into articles of clerkship at Goodrickes and on 3 April 1905 was admitted as both an attorney and an advocate on the same day. After practising in Pietermaritzburg, where he built up an extensive practice, he entered into a partnership with GHH Goodricke in 1909 under the name of Goodricke and Carlisle. This partnership was dissolved in 1919 when Carlisle went to practice solely at the Bar becoming one of the founding members of the Society of Advocates of Natal. On 17 April 1927 he took silk and received his first acting appointment on the Natal Bench from 15 February 1933. He held acting appointments during 1934, 1935 and 1936 and was eventually permanently appointed third puisne judge from 1 August 1937 on the departure of Lansdown J.

At the Bar Carlisle was regarded as a sound and experienced

²²⁸ A post he held until his retirement in 1944.

²²⁹ Biographical information derived from E Goetzsche A Bold Hand (1974) 70; Spiller op cit 118; Roberts op cit 351; Olsen op cit 46.

lawyer whose advice was much sought after by his colleagues. He was the editor of the Natal Law Quarterly and the Natal Law Magazine. In court, however, he lacked a fighting spirit and if his arguments were not readily accepted or if he was vigorously opposed he simply let the truth prevail without asserting himself or his argument.

On the Bench too Carlisle J's kindly, unassertive personality came to the fore. He never dissented from his brothers and seldom made a contribution when he concurred. During his acting appointments he was the least active of the judicial personnel but after his permanent appointment there was a marked increase in his judicial activities. According to James he was a likeable but not strong judge.²³⁰ Broome opines that Carlisle J served his country well on the Bench and that in criminal trials he was as good a judge as any. He presided over many difficult criminal trials²³¹ none of these decisions were overturned. Carlisle J also presided over some important civil cases²³² and delivered good judgments but not all of them were confirmed on appeal.²³³ Another stumbling block was the lack of consensus between Carlisle J and Selke J who often

²³⁰ Private interview with the Honourable Mr Neville James.

²³¹ Dwarika v Rex 1936 NPD 371; Rex v Tshabalala 1936 NPD 364.

²³² McCalman v Thorne 1934 NPD 86; Greatrex Limited v Greatrex Footwear 1936 NPD 292.

²³³ Cf Helps v Natal Witness Ltd and Another 1936 AD 45 where Stratford ACJ, Tindall and Feetham AJJA reversed his decision in the Durban & Coast Local Division; Armstrong v Commissioner for Inland Revenue 1938 AD 343 where Stratford CJ, de Villiers, De Wet and Tindall JJA & Feetham AJA reversed the decision of Hathorn and Carlisle JJ.

sat together after the latter's elevation to the Bench.²³⁴ Thus according to Broome Selke J regarded Carlisle J as "quick and superficial"²³⁵ while the latter regarded Selke J as "unendurably slow and meticulous".²³⁶ But although working at different speeds they were both regarded as good judges.

Carlisle J was first puisne judge for fifteen years but was passed over for Judge President when Hathorn JP retired as he had nearly reached retirement age himself. He thus remained a puisne judge until his retirement in 1954. On his death in January 1966 Caney J paid tribute to him in the Durban and Coast Local Division saying he was "one of the eminent lawyers of his day - a man who had a firm grasp of affairs and understanding of the ways of man."²³⁷

The early retirement of Matthews J resulted in the elevation of Edmund Adolphe Selke²³⁸ to the Natal Bench where he took the oath of office on 1 April 1938. He was born on 16 July 1890 in England and was educated at St Peters in York and at St Johns in Johannesburg where he matriculated in 1908. He then proceeded to Hartford College, Oxford, where he obtained a legal BA degree and was called to the Inner Temple on 16 June 1915. He practiced solely as an advocate in the Natal Provincial

²³⁴ cf Tathiah v Rex 1938 NPD 387 Carlisle J presiding; Bower v Hearn 1938 NPD 399 Selke J presiding.

²³⁵ Broome op cit 140.

²³⁶ Ibid.

²³⁷ E Goetzche op cit 71.

²³⁸ Roberts op cit 380.

Division from 12 February 1917, second only to Mackeurtan in doing so, and took silk on 26 November 1929.

Selke J was thus no stranger in Natal when he took his seat on the Natal Bench. In fact Hathorn AJP in bidding him welcome said:

"We are old friends. Many a time he has crossed forensic swords with Mr Justice Carlise and myself, when we were all members of the Bar. He was then a learned friend. Today he is our brother and I venture to predict that, with his keen intellect and his other qualities, he will prove to be a source of strength to the judiciary."²³⁹

Indeed Hathorn J was the presiding judge when Selke and Mackeurtan crossed forensic swords in East Asiatic Co Ltd v Hansen²⁴⁰ which Hathorn J later described as Mackeurtan's greatest triumph. The case involved the installation of machinery in a ship called the "Pickle" and afforded Mackeurtan an opportunity of introducing not only an element of humour into his argument but also an opportunity to ridicule Selke. According to Broome the two men were great friends when they first started out at the Bar in 1916/17 but when Selke began to exert professional independence the friendship ended as Mackeurtan liked to be in control of everyone at the Bar. Nevertheless the case involved an important point of law, namely the doctrine of fictional performance, with Selke's client claiming that the machinery was defective while Mackeurtan's client's defence was that he had offered to test the plant and put

²³⁹ Natal Witness, 2 April 1938.

²⁴⁰ 1933 NPD 297.

it right but was prevented from doing so. Mackeurtan had a good case and Selke came off second best in that skirmish.

Similarly Selke and Broome also started out as best friends, while the latter was a dual practitioner, but when Broome decided to go to the Bar Selke gave him a cold reception and they drifted apart. Had Broome not put himself out of the running by going to Parliament it would have been a close call as to who of the two would have been Matthews J's successor. As it happened Broome was the one who welcomed Selke to the Natal Bench on behalf of the Bar saying:

"We know you possess all the qualities of a great judge. We are happy at your appointment and assure you of our every co-operation."²⁴¹

Broome regarded Selke J as a man of "deep culture, a scholar and a jurist."²⁴² But he also observed that:

"his lack of some of the secondary and less academic qualifications for advocacy unfitted him for the rough and tumble of the Bar and deprived him of its highest prizes. This same deficiency unfitted him for the drudgery which comprises so much of the work of a puisne judge. Like Feetham his right sphere was the Appellate Division ... At the Bar and on the Bench he was apt to fall in love with some obtuse legal conundrum and would spend hours in discussing it without regard to the practical aspects of the case".²⁴³

On the Bench Selke J thus tended to be very slow and indecisive. He did not like to be rushed, talked a lot on the Bench and did not like cases to finish. It is said he

²⁴¹ Natal Witness, 2 April 1938.

²⁴² Broome op cit 138.

²⁴³ Ibid.

once remarked: "I've looked at the case this way, and that way - I haven't been able to make up my mind so I think I'll go fishing and let my mind make itself up".²⁴⁴

Once when he and Mackeurtan were working together on a case Mackeurtan apparently said: "That's enough of waiver and estoppel. Let us now get to the blood and guts."²⁴⁵

Both on and off the Bench Selke J was an appalling time-waster because he had absolutely no sense of time. Tea-time was usually fifteen minutes but when Selke J got interested and started to talk about some abstract legal point the time would run on to twenty-five minutes and eventually the usher would come in and say: "The Court is ready", and his stock reply was "The Court is always ready, I'm not ready."²⁴⁶

In keeping with his personality he was very patient on the Bench and would let advocates hang themselves. Thus if they did or said something ridiculous he would not jump on them but would let them carry on until what they were saying was manifestly demonstrated to be absurd.²⁴⁷ He was, however, a likeable person and his judgments mostly very good. And after the appointment of Broome J, as Judge President over his head in 1950, he even acquired a semblance of punctuality and a sense of time as he followed the Judge President into Court on the dot of 10 o'clock.

²⁴⁴ Private interview with the Honourable Mr Neville James.
²⁴⁵ Broome op cit 138.

²⁴⁶ The Honourable Mr Justice James who was appointed in his place when he retired and got his red robes.

²⁴⁷ Ibid.

He remained second puisne Judge until his retirement before reaching the age limit and according to Broome "the Bench lost something of dignity and culture that it could ill afford."²⁴⁸

2.3 The Acting Puisne Judges

The acting appointments of Hathorn and Carlisle AJJ, have already been referred to. It now remains to consider the other judicial personnel who acted in the Natal Provincial Division during the 1930's.

Ivan Grindley-Ferris acted as a judge in the Natal Provincial Division²⁴⁹ on several occasions. He was particularly of great assistance to Tatham AJP during the first nine months of his acting Judge Presidency. During this period Grindley-Ferris J sat with Tatham AJP in thirty-one out of the thirty-six reported cases over which the latter presided. On the Bench the two men saw eye to eye and neither dissented from the other's judgment.

Ivan Grindley-Ferris²⁵⁰ was born at Port Elizabeth on 18 April 1876, matriculated from Diocesan College, Rondebosch, and obtained a degree in mathematics and science at Cape Town University. He went to Kings College, Cambridge where he obtained a BA and LL B in 1900 and was called to the Bar

²⁴⁸ Broom op cit 139.

²⁴⁹ From 1 May 1930 to 18 January 1931 and from 1 October 1932 to 14 February 1932.

²⁵⁰ Biographical details derived from Roberts op cit 262; (1932) 49 SALJ 1; 1933 SALT 114.

in the same year. In 1901 he returned to Cape Town, practiced at the Bar for a few months and then went to India as censor and interpreter in Boer prisoner of war camps for a year. In 1902 he returned to commence practice at the Bar in Pretoria, reported for the Transvaal Law Reports from 1905 to 1923 and took silk on 1 December 1922. He had a successful career as an advocate and had the Law Society retainer for many years and did a great deal of opinion work on trade marks and argued several immigration cases.

His judicial experience was varied and wide. He acted as President of the Income Tax Court, as Judge in South West Africa, in Natal and in the Transvaal. In 1929 he acted in the Native High Court in Natal and was permanently appointed as Judge President of that Court on 13 March 1930 although he did not take up that appointment until 19 January 1931 because of his acting appointment on the Natal Bench from 1 May 1930 to 18 January 1931. On 15 February 1932 he again took up an acting appointment on the Transvaal Bench, which appointment was made permanent in February 1933.²⁵¹

As a judge Grindley-Ferris was:

"eminently kindly and approachable ... Those appearing before him know that they will receive unvarying attention and courtesy but that they will not be able, from his air of inscrutable reserve, to

²⁵¹ According to the Natal Witness of 16 February 1933 he was succeeded by Mr Lennox Ward KC, the Attorney General of Natal, who prosecuted in the Mallalieu case as Judge President of the Native High Court.

draw any inference about his impressions of the case. When he has pronounced judgment both the accused and his counsel are satisfied that they have had a fair and full hearing ..."²⁵²

In addition to displaying these admirable judicial qualities Grindley-Ferris AJ was also a good lawyer and one of the few Natal judges who referred to American authorities²⁵³ as well as to the original Roman Dutch authorities.²⁵⁴ When a case, however, required that exclusively Natal law be applied Grindley-Ferris AJ did just that and the ratio of his decision in Parak v Reynhardt & Co Ltd²⁵⁵ still stands to-day.²⁵⁶ This case also illustrates that Grindley-Ferris AJ could not be swayed by persuasive arguments and his judgment in this case, like others, was concurred in by Tatham AJP.

Grindley-Ferris AJ delivered judgment in a wide variety of cases²⁵⁷ and his acting appointment to the Natal Bench was certainly to that court's advantage.

²⁵² (1932) 49 SALJ 3.

²⁵³ Cf Lavery and Co v Jungheinrich & Co 1930 NLR 208 at 216.

²⁵⁴ Cf Olufsen v Fielder 1930 NLR 260 at 263.

²⁵⁵ 1930 NLR 254 to the effect that in Natal the holder of a registered notarial bond without delivery is entitled to prevent an attachment in execution of the movables covered by his bond, notwithstanding the provision of Act 29, 1926 s3(b) (Insolvency Act).

²⁵⁶ Another interesting aspect of this case was that JD Stalker, an active dual practitioner, who appeared for the appellant and in whose favour Grindley-Ferris AJ found, was subsequently struck off and later reinstated on the roll of attorneys while FN Broome, a leading advocate and later judge and Judge President of Natal had to be satisfied with a "full and fair hearing".

²⁵⁷ Cf Dekker v Rex 1930 NLR 162; Reich v Hathorn Syndicate 1930 NLR 233; Dalys Ltd v Gumtuala 1930 NLR 300.

In 1935, Christiaan Lourens Botha²⁵⁸ was appointed acting judge from August 1 to 31 and from 1 October to 31 December. He was born at Kroonstad on 19 September 1869 and was educated at Grey College, Bloemfontein, and Victoria College, Stellenbosch where generals JBM Hertzog and JC Smuts were his contemporaries. He obtained an LL D in 1892 from the University of Amsterdam in the Netherlands and was called to the Middle Temple on 26 April 1893. On his return to South Africa he was called to the Cape Bar on 5 December 1893 and practiced as an advocate in Johannesburg until 1899 and thereafter as an attorney in Bloemfontein when he recommended to the Colonial Secretary that the separation between the Bar and the Side Bar should be abolished. On 5 July 1919 he took silk and was appointed to the Orange Free State Bench on 22 June 1927. At the time of his acting appointment on the Natal Bench he was first puisne judge in that Division and on 1 August 1938 he became its Judge President.

Botha AJ acted in the Natal Provincial Division for a total of four months during which time he officiated fourteen times in reported cases, sat with Feetham JP seven times and delivered the Courts judgment six times. He was the most senior judge from another division to act on the Natal Bench and was not only a jurist par excellence but also an authority on language²⁵⁹ and world history. He also had

²⁵⁸ Biographical details derived from Dictionary op cit 40; 1933 SALT 92.

²⁵⁹ Having translated the old Free State Code of law into English which later received official recognition.

the ability to set aside, whenever possible and where it would serve the interests of justice, obsolete concepts of Roman Dutch Law. In an amiable and efficient manner he meted out justice to all. Mr Justice Fannin recalls a matter he took on appeal as a matter of principle²⁶⁰ with Botha J presiding. According to Fannin, then a young advocate, he did not have a chance on the merits of the case but when it came to the question of sentence Botha J immediately said: "Sit down Mr Fannin"²⁶¹ and turned to the Attorney-General and said: "What do you have to say about this ridiculous sentence?"²⁶² The Attorney-General replied that he could not support it. Botha J then upheld the conviction but the sentence was altered to a caution and discharge.

During 1936 Percy Ulrich Fischer²⁶³ acted in the Natal Provincial Division from 16 November to 15 December. He was, like Botha J, a Free Stater being born in Bloemfontein on 22 March 1878²⁶⁴ and educated at Grey College, Bloemfontein, SA College in Cape Town, and took the Law Tripos at Trinity Hall, Cambridge. On 27 June 1900 he was called to the Middle Temple and on his return practiced

²⁶⁰ It concerned an African who was found guilty of a pass offence and was given a heavy fine, alternatively a prison sentence. Fannin said he'd take the matter on appeal for 1 guinea and the attorney said he would do it for nothing.

²⁶¹ Fannin op cit 8.

²⁶² ibid.

²⁶³ Biographical details derived from Roberts op cit 360; 1933 SALT 229; (1930) 47 SALJ 1.

²⁶⁴ The son of Abraham Fischer, Prime Minister of the Orange River Colony and Minister of Lands in the first two Union ministries.

successfully in Bloemfontein until his elevation to the Orange Free State Bench on 9 September 1929. Fischer J was quiet and retiring in manner and did not indulge in "fireworks"²⁶⁵ With his solemn demeanour and serious turn of mind Fischer was the complete opposite to his father who had a cheerful disposition. Residents used to say when father and son walked down the street together, "here comes young Fischer and old Percy."²⁶⁶ In the Natal Provincial Division Fischer J officiated and delivered the courts judgment in only two reported cases.²⁶⁷ He was considered a sound, thorough and capable judge and succeeded Botha JP as Judge President of the Orange Free State Provincial Division on 19 September 1939.

In 1937, Percival Carleton Gane²⁶⁸ was appointed acting judge from 3 August to 15 October while Matthews J was on leave. He was born in North Walsham, England on 9 November 1874 and received his education at Kingswood school, Bath, and obtained a MA degree from Jesus College, Oxford. After his arrival in South Africa in 1897 an LL B degree was conferred on him by the South African College, Cape Town in 1902. He was called to both the Cape and Transvaal Bars in 1903 and settled in Grahamstown where he started a legal practice, taking silk in 1919. He was appointed to the Eastern Districts Bench in 1934 and remained there until his retirement on 7 November 1944. On the Natal Bench Gane

²⁶⁵ 1933 SALT 229.

²⁶⁶ Ibid.

²⁶⁷ Knox v Mathias 1936 NPD 667; Van Aardt v Hazel 1936 NPD 699.

²⁶⁸ Dictionary op cit 172; Roberts op cit 361.

AJ sat as well as delivered the Court's judgment in four reported cases. He was regarded as a good lawyer rather than a great judge. As the author of two great translations,²⁶⁹ one from Dutch and the other from Latin he secured a permanent place in our legal annals and was awarded an honorary LL D degree by Rhodes and Cape Town Universities.

Finally, there were the acting appointments of Cyril Chester Jarvis, the former attorney-general of Natal, in 1938 from 1 April to 31 May and from 4 August to 15 December while Feetham JP was on duty in the Appellate Division and again in 1939 from 1 May onwards. In welcoming him to the Natal Bench Hathorn AJP warned him that, as the former Attorney-General of Natal, he would probably find himself employed mainly on criminal business because of the high reputation he gained as a criminal lawyer. Thus out of the twenty-four reported cases where Jarvis AJ officiated in 1938 only eleven were civil matters and out of the ten judgments he gave only two concerned civil matters. Jarvis AJ was never permanently appointed to the Natal Bench.

Natal could probably be said to have had mixed fortunes regarding its judicial officers during the first two

²⁶⁹ In 1938 his translation of U Huber's De Hedendaagse Rechtsgeleerdheyt was published under the title The Jurisprudence of our Time. Between 1955 - 1957 his translation of Johannes Voet's Commentaries ad Pandectas was published in seven volumes as The Selected Voet, being the commentary on the Pandects.

decades after Union in 1910 which persisted even during the transition period prior to Feetham JP taking up his appointment. On the one end of the spectrum there was Tatham AJP who made a valuable contribution until his health broke down and on the other end of the spectrum there was Carter J who should never have been appointed a judge.²⁷⁰

However with the appointment of Feetham JP the 1930's heralded in a change of fortune for the better for Natal. Under his strong leadership, not only much needed reforms were effected, which raised the status of the court, but, by setting an extremely high standard for himself his puisne judges had no alternative but to follow suit. He was thus ably assisted by Matthews and Hathorn JJ and Landsown J during the first half of the 1930's and Carlisle J thereafter. Of course none of them was perfect, each had minor faults, including Feetham JP, but their overall contribution was solid and praiseworthy.

In less than a decade Feetham JP and his colleagues ensured that Natal judgments would no longer be treated with disdain in the other provinces but with the respect they deserved. The most significant change in the Natal Court was, however, that in 1930 only Tatham J was a Natal man, but in 1939 when Feetham JP departed for the Appellate Division the entire Natal Bench consisted of Natalians,

²⁷⁰ Cf Fannin's interesting history of his appointment op cit 1.

including its Judge President.

Thus under the meticulous guidance of Feetham JP the Natal Bench began its march into the sunshine.

CHAPTER 3

THE LEGAL PROFESSION

3.1 The History of the Natal Legal Profession

In her cradle days Natal, like the Transvaal and Free State, had an acute shortage of qualified legal practitioners. As a necessary expedient therefore advocates and attorneys were permitted to act in dual capacities under certain circumstances. In Natal the first legislation in this regard was Cape Ordinance 14 of 1845, dated 16 October 1845.¹ Section 15 empowered the Court to admit and enrol as advocates and attorneys "such persons as shall have been admitted, or shall by law be admissible to practise as such advocates or attorneys respectively in the Supreme Court of the Colony of the Cape of Good Hope, or in the Circuit Courts of the said Colony." Section 16 made special provision for the admission as attorneys of the court of "persons of good fame and repute" so long as there was not within the district seven advocates and attorneys or seven advocates or attorneys, admitted and enrolled under Section 15. Advocates and attorneys were also permitted to act in each others' professions so long as these were under three professional men in the town or place where the court was held.¹

The next relevant legislation were the first five rules in the Schedule to Cape Ordinance 32 of 1846 which appeared

¹ Section 19 of Ordinance 14 of 1845.

under the heading: Rules as to the Admission of Attorneys before the District Court of Natal. Rule 2 stated that "So long as there shall not be practising before the Court seven advocates or attorneys or seven advocates and attorneys" the court will admit, approve of and enrol as attorneys "before the court such persons of good fame and credit as shall, after examination by the Court, be found qualified to act as such attorneys." Rule 4 provided that as long as there were no more than seven advocates practising before the Court duly enrolled and admitted, attorneys could conduct proceedings before the Court in the capacity both as attorneys and advocates.

Law 10 of 1857, a Natal Ordinance, repealed Ordinance 14 of 1845 and established the Supreme Court and opened entry to the profession to English and Cape practitioners and others who were qualified in terms of the Rules of Court. Law 10 of 1857 also conferred upon the Supreme Court of Natal the power to make certain Rules of Court and in the exercise of this power rules² were framed which permitted dual practice as long as the profession numbered under fourteen men.

Rules of Court of 7 April 1863 expressly permitted dual practice subject to the proviso "... unless and until it shall be otherwise ordered by the court or this rule be repealed".³ However, admission was still to a particular branch of the profession and separate rolls were kept.

² Rules of Court of 28 December 1859 (Natal Archives).

³ Rule 22 (Note no restriction on the number of practitioners in Natal).

These rules provided that persons who were not United Kingdom, Cape or Natal advocates could be admitted to the Natal Bar if they attended the sittings of the Supreme Court for a prescribed period of time, namely, one year where the applicant had a university degree⁴ and two years if the applicant had no degree⁵. Regarding attorneys persons, other than United Kingdom or Cape attorneys, could be admitted as such only if they had served articles with a practising attorney of the Supreme Court for one year where the candidate had a degree⁶ and two years where the aspiring attorney had no degree.⁷ There were no examinations to be passed and the great bulk of lawyers and many future judges including Thomas Fortesque Carter, "qualified" in this way. These rules remained largely in force until 1893, except that Rule 2 of 17 September 1877 required an attorney to practise as an advocate for at least three years before admission to the Bar.

The right of dual practice was firmly established when in terms of Rules of Court of 2 January 1893 the proviso, that dual practice could be ended at the direction of the Court, as embodied in the Rules of Court of 7 April 1863, was abolished.

It was at this time too that examinations for the legal profession were prescribed for the first time. A local

⁴ Rule 5 of Rules of Court of 28 December 1859 (Natal Archives).

⁵ Rule 6.

⁶ Rule 11.

⁷ Rule 12.

Board of Examiners, appointed annually by the Court was established and candidates had to begin by passing a local preliminary examination in basic skills or had to provide proof that they had passed its equivalent. After the examination there followed articles of clerkship for four years, and two years if the candidate had served articles in the United Kingdom or if he held a degree.⁸ In terms of Rules 10 and 42 the candidate had to pass a final examination in Roman Law, Roman-Dutch Law, Natal law, statutes and evidence before he could be admitted as an attorney and such admission had to take place within six months after the termination of articles. Thereafter he was free to practise also as an advocate, but if he desired formal admission he was required to practise as an advocate for at least three years and pass a higher examination for advocates.⁹

On 19 December 1906 the Court made a completely new set of Rules, classified in 44 "Orders"¹⁰ which remained in effect until the system of dual practice ended in 1932. Order XXXII of these Rules was headed: Admission of Advocates, Attorneys and Candidate Attorneys. In rules 6 to 14 of this Order provision was made for Natal advocates' preliminary and final examinations, to which, no candidate could be admitted unless he had already been admitted as an attorney of the Supreme Court. Provision was also made in

⁸ Rules 4 and 16.

⁹ Rules 18 and Spiller op cit 55. Harold Graham Mackeurtan was admitted under these rules on 3 April 1906.

¹⁰ Which came into operation on 1 January 1907.

this Order as to the qualifying examinations for candidate attorneys and required aspirant attorneys to attend a minimum number of lectures on the subjects examined.¹¹

Admission of advocates and attorneys with extra-Natal qualifications, however, remained liberal. Rules 32 and 38 provided that an advocate or attorney of the United Kingdom or the Transvaal or, subject to certain conditions, of any British Colony, could qualify for admission in Natal without serving articles or passing examinations. These rules were happily amended on 1 May 1909 so that a person with non-South African qualifications could practise only in the branch to which he had been admitted unless he had served an eighteen month period of articles in Natal.

The most salient rule for the purposes of this chapter was probably Rule 47 of the Order XXXII¹² which provided that:

"Any person admitted as an attorney may also practise as an advocate and any person admitted as an advocate may also practise as an attorney, provided, however, that this rule shall not prevent attorneys so admitted applying for admission as advocates in terms of Rules 36 and 37."¹³

In November 1909, as a result of a letter received from the Secretary of the Order of Advocates of the Transvaal, convening a meeting of Bar delegates at Pretoria, a Congress of the profession was held in Pietermaritzburg. A

¹¹ Rules 1-14 and 26-7 of Order XXXII of 1906. These rules also renamed the prescribed examinations the Natal Law Certificate for attorneys, and the Natal Advocates Examination respectively.

¹² Referred to as the "dual practise rule".

¹³ Rules 36 and 37 provided for the admission as advocates of attorneys who had passed the advocates examinations prescribed by Rules 6 to 14.

resolution was proposed by Tatham¹⁴ affirming the principle of division, but leaving existing rights unimpaired. Writing in the 1910 Union Law Review¹⁵ Tatham, a former President of the Natal Law Society, reported that the majority took the view that whether desirable or not, a division was inevitable under the Union of South Africa.

At this early stage the wisdom and desirability of a divided legal profession was thus seriously considered within Natal itself. Tatham¹⁶ referred to the fact that since 1904 there was a growing feeling that the Natal Bar could never rank in all respects with the Cape and Transvaal Bar until it had divided. Certain prerequisites, however, had to be satisfied before progress could be made towards division and Tatham maintained that by 1910 these had been satisfied in that the educational needs of the profession had been met in 1893 with the institution of qualifying examinations for the first time. To this end Tatham, when elected as President of the Natal Law Society in 1906, established a system of legal education to enable students to pass their examinations.¹⁷ The educational needs of students were also provided for with the establishment of law lectures, and libraries and the institution of a chair of law at the Natal University College in January 1910, thus putting Natal students on an equal footing with their peers in the other provinces. The

¹⁴ Later Tatham J and AJP.

¹⁵ See "De Rebus" July 1981 315.

¹⁶ 1910 "Union Law Review" Vol 1 13-16.

¹⁷ Frank Broome was one of his students. See Broome op cit 30.

discipline necessary for a successful profession was to some extent provided by the incorporation of the Natal Law Society in 1907¹⁸ which had the effect of bringing every practising attorney under its control. The foundation was thus laid for the raising of standards within the profession itself and the subsequent division, more than two decades later, along traditional lines. Tatham concluded his article by saying:

"... He must indeed be a blind man who fails to see that Natal cannot continue an amalgamation of the professions under the changed conditions which will inevitably flow from the Union of South Africa."¹⁹

Quite clearly the issue which was uppermost in the minds of Natal practitioners in 1910 was the possible division of the Natal Bar. However, vested interests, the pecuniary disadvantages of division for Natal advocates, tradition and the lack of a strong Judge President to take the initiative combined to delay division until the 1930's.

Before dealing with the actual division of the legal profession in 1932 it is necessary to consider briefly the interim period and more particularly the organization of the legal profession up to that time. In 1910 all the business at the Bar was carried out by dual practitioners with WB Morcom KC being the only exception, practising solely as an advocate at Pietermaritzburg.²⁰ Tatham was a dual practitioner but was so pre-eminent as an advocate that attorneys had no hesitation in retaining him to

¹⁸ Act 10 of 1907.

¹⁹ 1910 Union Law Review 16.

²⁰ (1943) 60 SALJ 129.

conduct their cases in court. According to Broome²¹ he was supreme during the first fifteen years of the 20th century, but before a battle for supremacy could erupt between Tatham and Mackeurtan the former went to fight in the Great War in 1915 and then went to the Bench. This left the field wide open for Mackeurtan, one of the greatest advocates in South African legal history, under whose leadership a de facto Bar developed in Natal from 1916 onwards. Like all other lawyers, he had practised for some ten years as a dual practitioner before leaving Shepstone and Wylie, where he was a partner, to set up practice solely as an advocate. He was soon followed by a small band of other practitioners, notably Selke, Carlisle, Sissen, Roy Hathorn, Henochsberg and Milne,²² all of whom had some years of experience in dual practise before making the move to the de facto Bar.

Hathorn thus unambiguously assents that, "Mackeurtan created and bequeathed to South Africa one permanent institution, namely the Natal Bar."²³ He did this by persuading others to follow his example, as Hathorn did in 1921 after much soul searching, until the nucleus became strong enough to form a voluntary association. Thus when the Society of Advocates was formed in 1929 sixteen advocates signed the Constitution²⁴ ten of whom later

²¹ Broome op cit 117.

²² Broome op cit 118. All later became judges except Sissen who did not want to.

²³ (1943) 60 SALJ 136.

²⁴ Ibid. Inter alia by Mackeurtan, Roy Hathorn, Carlisle, Sissen, Selke, Henochsberg, JC de Wet, A Milne, FN Broome, WE Thrash, Herbert H Janion, TB Horwood and

became judges either of the Natal Provincial Division or the Native High Court or both. The editor of the 1932 South African Law Times observed that for about six years or so these advocates had "rigidly followed the rules of etiquette prevailing in England and in the rest of the Union." and urgently counselled practitioners "to support a reform which will enhance the status of the legal profession in Natal."²⁵ Thus in 1932, when Feetham JP drafted and promulgated Rules of Court to end Natal's distinctive system of dual practice, there prevailed a system of partial fusion with a de facto Bar.

3.2 The Division of the Natal Legal Profession and the reasons therefor

In January 1932 at a Judges Conference held in Cape Town the problem of the organisation of the legal profession in Natal was discussed. This conference was initiated by the then Minister of Justice, Mr Oscar Pirow KC and was attended by Sir John Wessels (the then acting Chief Justice) who presided, EG Gardiner JP (Cape), Feetham JP (Natal) and Mr Justice de Wet, as a former Minister of Justice, was also present in an advisory capacity. The conference discussed the abolition of civil imprisonment, proposed Insolvency law amendments and, important for our purposes, the relations of the Bar and Side-Bar. As a result of these deliberations a draft resolution was passed in the following terms:

"The Conference is of opinion that subject to due

Lennox Ward.

²⁵ 1932 SALT 53.

provision being made for the interests of existing practitioners, it is desirable in the public interest that the present system under which in Natal, persons admitted as attorneys are entitled to practice as advocates and vice versa should be terminated as soon as may be reasonably possible, so that the distinction between the two branches of the legal profession may be as fully recognised in Natal as in other provinces of the Union."²⁶

It was now left to the Judges of the Natal Provincial Division to give effect to this resolution and according to Feetham JP, after careful consideration, draft rules were forwarded on 20 February 1932 to the Incorporated Law Society of Natal and to the Society of Advocates of Natal with identical covering letters inviting confidential criticisms or suggestions from the respective councils.²⁷ In issuing these Rules the Judges, being in full agreement with the Judges conference resolution and recommendation that the change was "desirable in the public interest", acted under the powers conferred on them by Section 69 of the Supreme Court Act 39 of 1896 which provided as follows:

"The Supreme Court may from time to time make such rules, orders and regulations touching and concerning any of the following matters in connection with the Supreme Court....

the examination and admission of advocates, attorneys ... or other persons desiring to practice in the said Courts, and the conditions under which they may practice as such."

Section 70 provided that: "The rules, orders and regulations touching and concerning the matters referred to in the preceding section at present existing, shall remain in force until and save so far as the Supreme Court may from time to time repeal or vary same."²⁸

²⁶ Natal Witness, 10 March 1932 and 49 (1932) SALJ 491 and Report of the Select Committee on the subject of the Natal Advocates and Attorneys Preservation of Rights Bill 69.

²⁷ Natal Witness, 10 March 1932 and Select Committee Report op cit 79 and (1932) 49 SALJ 490.

²⁸ Ex parte Stuart : Ex parte Geerdts 1936 AD 418.

In the case of Ex parte Stuart and Geerdts²⁹ it was argued that the powers here conferred did not include the power to make a rule depriving practitioners of their previously acquired right of dual practice. Feetham JP held that as the right in question was conferred by rule it could be terminated by rule, "and if the rule is a rule which the rule-making authority has power at any time to amend or repeal, the right must be as temporary as the rule."³⁰

On 10 March 1932 the Judges draft rules were published in the press³¹ for the information of all interested parties and for consideration by the profession. At a meeting held by the Law Society of Natal on 23 March 1932 it was decided by an overwhelming majority to support the principle of a division of the Bar of Natal provided that the rights of existing practitioners were preserved for life.³² Representations on the subject of the proposed draft rules were made by both branches of the profession in Natal resulting in certain amendments, the most important of which was that the period which was to elapse before existing rights of dual practice under Rule 47 were withdrawn was extended from three to five years, terminating on 30 June 1937. On 1 June 1932 Feetham JP announced in open court that the new rules had been made by

²⁹ 1936 NPD 57.

³⁰ At 82 and upheld on appeal Ex parte Stuart : Ex parte Geerdts 1936 AD 418 at 441 per Stratford JA.

³¹ See Natal Witness, Natal Mercury and Natal Advertiser of 10 March 1932.

³² Natal Witness, 23 March, 1932. Along the lines suggested by the former Minister of Justice, Mr Tielman Roos (supra) in 1924 as was the course adopted in the OFS and the Transvaal when the profession was divided.

Order of Court to take effect on 30 June 1932 and would be duly gazetted.³³

When the new rules³⁴ were made a Memorandum, signed by the four Judges (namely Feetham JP, Matthews, Hathorn and Lansdown JJ) who took part in the making of the rules, was issued for the information of the legal profession and the public generally. This memorandum was described as disclosing "the degree of care, thought and deliberation with which the Judges have discharged the duty undertaken by them, for the drafting of the Rules has been no easy task."³⁴ The Memorandum emphasised the view of the Judges that the separation of the two branches in Natal was in the public interest and comprehensively dealt with the provisions which had been made for the interest of existing practitioners.³⁵

The effect of the new Rules may be summarised as follows:

- (i) Rules 36, 37, 38, 39 and 54 of Order XXXII which dealt with the admission of advocates were repealed and four new rules substituted ie rules 36, 37, 38 and 39 which prescribed various alternative qualifications the possession of which would entitle a person to admission as an advocate. Existing provisions enabling an attorney to become qualified for admission as an advocate were in substance retained. It was stipulated that before an attorney could be admitted as an advocate he must have had his name removed from the roll of attorneys and must further have, subject to certain exceptions in favour of attorneys then practising and papers already admitted as candidate attorneys, ceased to practise as an attorney for a period of six months.

³³ Union Gazette, 3 June 1932 (GN No 697)

³⁴ 1932 SALT 129.

³⁵ Cf (1932) 49 SALJ 489 FF.

- (ii) In new Rule 35 converse provision was made enabling an Advocate to become an attorney, subject to his first having had his name removed from the roll of advocates and to his having served eighteen months articles with an attorney.
- (iii) The existing Rule 47 of Order XXXII which enabled attorneys to practise as advocates and vice versa was repealed and a new Rule 47 was substituted which provided that, subject to certain exceptions, after 30 June 1937, a date referred to in the Rule as the "appointed day" no person enrolled as an advocate would be entitled to practise as an attorney and vice versa. Special provision was however made conferring on persons who had hitherto enjoyed the right of dual practice to elect to which branch of the profession they wished to belong, and also rights as to the transfer from one branch of the profession to the other.³⁶

A great part of the Memorandum was devoted to examining the proposals submitted on behalf of the Natal Law Society, that all existing dual practitioners should retain rights of dual practise for life and also all persons serving as articled clerks at the date when the new rules were made should on admission to practise enjoy similar right for life. The judges did not regard these suggestions as consistent with the policy to which the new rules were intended to give effect and therefore rejected them, stating that instead of terminating the system of dual practice "as soon as may be reasonably possible"³⁷ this course would extend it over something like half a century and would unfairly handicap a class of junior practitioner which would be coming into existence.

In support of their submissions the Incorporated Law Society placed reliance on precedents drawn from laws

³⁶ Natal Witness, 2 June 1932 and (1932) 49 SALJ 490.

³⁷ Ibid.

regulating other professions and further that existing practitioners had hitherto been justified in assuming that the right of dual practice under Rule 47 would be permanent and would never be taken away.

The learned judges also rejected these contentions, observing that "this division has always been recognised in Natal Statutes ever since Natal first became British territory in 1845, and that provisions such as those now contained in Rule 47, enabling attorneys to act as advocates were, when first enacted before the middle of last century, avowedly intended merely as a temporary expedient ..."³⁸ Feetham JP reiterated this view in the case of Ex Parte Stuart and Geerdts³⁹ when he stated that "from 1845 onwards the distinction between the functions of advocates and attorneys has been clearly recognized by statutes in force in Natal; that the system of dual practice was, at its inception in 1845, a temporary expedient adopted to meet the difficulties caused by the dearth of professional men ..."⁴⁰ In 1937, the Judges of the NPD again made the point in a Memorandum that the right to dual practice was a temporary right created by a rule which the rule-making authority had power at any time to amend or repeal.⁴¹

³⁸ (1932) 49 SALJ 491.

³⁹ 1936 NPD 57 at 75 and Report on the Select Committee on the subject of Natal Advocates and Attorneys Preservation of Rights Bill 78.

⁴⁰ Ibid.

⁴¹ (1937) 54 SALJ 326 The Termination of the System of Dual Practice in Natal.

Clearly the most difficult problem the Natal Judges had to deal with in the 1930's was "the question of the provisions to be made for the interests of existing practitioners."⁴² There were at this time two groups of "existing practitioners" - those whose rights of dual practice depended on the provisions of the existing Rule 47 and these practitioners who had actually been admitted as both advocates and attorneys. The Judges decided that the existing rights of dual practice of practitioners formally admitted and enrolled in both capacities on 30 June 1932 should be preserved. With the exception of this particular group, all rights of dual practice should cease on 30 June 1937 referred to as "the appointed day",⁴³ After this date practise had to be restricted to one branch of the profession only. The separation of the Bars was thus not to be effective until a lapse of five years dating from 30 June 1932, by which time every practitioner who possessed dual rights had to make an election to follow one branch of the profession or the other. If a practitioner did not elect he was deemed to have elected that branch in respect of which he was admitted to practice.⁴⁴

According to AS Hoppenstein "the new rule roused the opposition of many Natal attorneys"⁴⁵ and in January 1936 two practitioners namely Mr HJ Stuart an attorney and Mr C E Geerdts an advocate of the Natal Provincial Division made

⁴² (1932) 49 SALJ 491 and (1937) 54 SALJ 324.

⁴³ New Rule 47 (2).

⁴⁴ Ibid.

⁴⁵ (1959) 76 SALJ 298. "Fusion. The Answer to the high cost of Litigation".

applications to that Court for declarations that the new Rule 47 of Order XXXII was ultra vires and invalid in so far as it purported to deprive them of their rights of dual practice. These applications were brought in anticipation of the effect of the new Rule 47 after 30 June 1937, under the provisions of Section 102 of General Law Amendment Act 1935⁴⁶ for a declaration of rights.

On 14 February 1936 Feetham JP gave the Court's judgment upholding the validity of the rule and dismissing both applications.⁴⁷ An appeal against this decision was also dismissed by the Appellate Division on 4 May 1936 per Stratford JA⁴⁸ holding that Rule of Court No 47 (Natal) published under Government Notice No. 697 of 1932 which had the effect of abolishing the system of dual practice as from 30 June 1937 is not ultra vires of the provisions of Act 39 of 1896 (Natal) or of section 115 (2) of the South African Act nor is the rule void for unreasonableness.

It was contended by OH Hoexter KC for the appellants that Rule 47 of Order XXXII of 1 June 1932 is ultra vires of section 69 of Act 39 of 1896 and also ultra vires of section 115(2) of the South Africa Act and void for unreasonableness. Regarding the first contention Stratford JA quoted the answer given by Feetham JP "that as the right (of dual practice) was conferred by rule it could be terminated by rule." The second contention had no bearing

⁴⁶ Act 46 of 1935.

⁴⁷ Ex parte Stuart and geerds 1936 NPD 57.

⁴⁸ Ex parte Stuart; Ex parte Geerds 1936 AD 418.

on the matter and regarding the third contention Stratford JA quoted the policy which the new rules were designed to carry out and remarked that:

"Now the reasonableness of this policy was not challenged. No word was said in favour of the old system of dual practice. The argument was only that the Judges of Natal had not effected the change in a reasonable way."⁴⁹

Referring to the particular complaint made against the preservation of rights of persons actually admitted as advocates and attorneys Stratford JA quoted item 5 from the Judges Memorandum issued in 1932 to the effect that:

"a distinction must be drawn between persons whose rights of dual practice depend on the provisions of the existing Rule 47, and persons who have been actually admitted both as advocates and attorneys ... and (the Judges) have decided that the existing rights to dual practice of persons who have been formally admitted to practise in both capacities should be preserved."⁵⁰

and Stratford J A remarked that it seemed "fantastic to suggest that the decision here expressed is unreasonable."⁵¹ He also went on to say that it was difficult after reading the history of the whole question as set out in the judgment and particularly the memorandum annexed to it to take the argument of unreasonableness seriously.

This daunting judgment did not deter the Natal Law Society from making further representations to the Judges and on 14 November 1936 its President, Mr GAF Brett presented to Mr Justice Matthews AJP an informal petition signed by 214

⁴⁹ At 443.

⁵⁰ Ibid.

⁵¹ Ibid.

members of the legal profession, requesting the judges to amend Rule 47(2) of Order XXXII so as to enable existing dual practitioners to continue to practise in both capacities until death or retirement. The Judges refused this proposal.

In 1937 the Natal Advocates and Attorneys Preservation of Rights Bill⁵² was introduced in the House of Assembly by Mr OR Nel. On 5 June 1937 the President of the Natal Law Society addressed a letter to the Registrar of the Supreme Court calling for the suspension of the operation of Rule 47 in view of the fact that this Bill had already been passed by the House of Assembly and would come up for further consideration by the Senate at the next session of Parliament.⁵³ A copy of this letter was in turn submitted to the Natal Society of Advocates for comment. In a letter dated 11 June 1937 the President of this Society, Harold Mackeurtan KC, advised that his Council was "respectfully but very strongly opposed to any suspension of the rule in question."⁵⁴

On 14 June 1937 the Judges reply to the proposed suspension of the Rule was given in the form of a Memorandum read in Court that day by Feetham JP and signed by the Judge-

⁵² The object of which was to protect the vested rights of dual practitioners.

⁵³ (1937) 54 SALJ 322 "Termination of the System of Dual Practice in Natal".

⁵⁴ Ibid.

President, Matthews and Hathorn JJ and Carlisle AJ⁵⁵ and published in the 1937 South African Law Journal.⁵⁶ In this Memorandum the Judges recalled their 1932 Memorandum and expounded their reasons for being unable to adopt the proposals forwarded by the Incorporated Law Society and their reasons for not wishing to suspend the operation of Rule 47. The Natal Witness reported that the Court was crowded with advocates, attorneys and the general public.⁵⁷

The Judges pointed out that if existing practitioners were to retain the right of dual practice for life the result would be that all young men admitted to either branch of the profession would be at a disadvantage in competition with their seniors who would remain in possession of special privileges which they could not share. It was further emphasised that the object of the Rules was to put all members of the profession, after 30 June 1937, on an identical footing regarding rights of practice.⁵⁸

A further consideration was that Rule 47 included a fixed time limit, in this case five years, which practically debars alteration as any alteration would involve a breach of faith with those practitioners who might have, in the interim, acted in reliance on the time limit being adhered to and that full effect would be given to the change made

⁵⁵ Lansdown J who was away on special duty was aware of the contents of the Memorandum and wished to be regarded as a signatory to it.

⁵⁶ (1937) 54 SALJ 322 and Natal Witness, 15 June 1937.

⁵⁷ Natal Witness 15 June 1937.

⁵⁸ (1937) 54 SALJ 326.

when the fixed transition period expired. There was evidence that since June 1932 eleven attorneys with dual rights had ceased to practise as such and had become advocates.⁵⁹

In view of these considerations the Judges concluded that until Parliament intervened to alter the law the responsibility for making Rules of Court for Natal on this subject of dual practice was vested, under the Supreme Court Act of 1896, in the Natal Provincial Division of the Supreme Court. The Judges asserted that they were unwilling to believe that Parliament would intervene to divest the Courts of their responsibility or to set aside Rules validly made in discharge of that responsibility.⁶⁰ The Judges also regretted to learn that the Law Society even contemplated the possibility of a "double change" ie the repeal or modification of Rule 47(2) as it stood by Parliamentary action after it had come into full operation and emphasized that responsibility for the consequences of such action would not rest on the Court and that the Law Society itself could, by using the influence which it was presently in a position to exert, do much to avert any risk of such action.⁶¹

⁵⁹ Ibid.

⁶⁰ (1937) 54 SALJ 327 and Report of Select Committee op cit 75. Time was, however, to prove the Judges wrong and the Legislature did in fact intervene in the form of the Natal Advocates and Attorneys Preservation of Rights Act No 27/1939 which had the effect of neutralizing the Rule terminating the system of dual practice in so far as it affected vested rights. See below.

⁶¹ (1937) 54 SALJ 327.

There was clearly not much love lost between the Judges and the Law Society and all in all it was a very unsettled time indeed for the legal profession in Natal. In his evidence before the Select Committee on the subject of Natal Advocates and Attorneys Preservation of Rights Bill, Feetham JP testified that in the latter part of June 1937, the last month of the interim period of five years, twenty-two advocates gave notice of their election to practice in future only as attorneys and four attorneys gave notice of their election to practice in future only as advocates.⁶² Mr Justice James recalls being in Court one day when advocate Cress applied to be put on the roll of attorneys and attorney Arthur Syme Knox, well-known for his legal and even more for his illegal activities, applied to be placed on the roll of advocates. RL Golding and Frank Shaw sat next to each other waiting for their cases to be called when the former passed a note to Frank Shaw reading:

"The Bar to-day has suffered shocks at losing Cress and gaining Knox."

Frank Shaw immediately wrote under it: ...

"The side bar has been hurt much less at losing Knox and gaining Cress."⁶³

It was obviously a time when wit and sense of humour were valuable assets because feelings were running high. According to Mr Justice John Milne, Feetham JP stated that he did not want attorneys to greet him in the street.⁶⁴ Feetham JP was also accused of being inflexible but on 15

⁶² Report op cit 75.

⁶³ The Honourable Neville James, Bar Dinner Speech, 1 November 1979.

⁶⁴ Address at seminar on "Fusion" at University of Natal, Durban on 15 May 1987.

September 1937 he announced in the Supreme Court in Pietermaritzburg that a new and additional sub-section (8) be inserted in Rule 47 of Order XXXII giving any Judge of the Natal Provincial Division or the Native High Court the discretion to allow an attorney(s) to appear as an advocate in any part of Natal other than the cities of Pietermaritzburg and Durban and provided that there was not in that town or place three or more advocates competent and willing to appear in those proceedings.⁶⁵

This concession was already suggested to Feetham JP by Grindley-Ferris, Judge President of the Native High Court, in a letter dated 19 May 1932 in which he also expressed the opinion that the interests of the administration of justice and of accused blacks demand that the rights of practitioners should be the same in the Native High Court as they will be under the proposed new rule in the Provincial Division.⁶⁶ Co-incidentally on the same day, 19 May 1932, a letter written by Mr Justice Tatham appeared in the press in which he reiterated his view, held for more than twenty-five years, that a divided bar is preferable in the interests of the profession and of the public but expressed his disapproval of the proposed methods of dividing the professions in particular the deprivation of acquired rights which ought never to be passed unless public interest demands it and then only if compensation is paid.⁶⁷ In their evidence before the Select Committee

⁶⁵ Natal Witness, 16 September 1937.

⁶⁶ Report of the Select Committee op cit 93.

⁶⁷ Report of the Select Committee op cit 5.

Feetham JP, Hathorn J and Neville Holmes referred to this letter but disagreed with him holding that no permanent system of dual practice was ever established.

In his evidence before the Select Committee Hathorn J was unequivocally for the division of the Bar and rejected the contention that the Judges did not have the power to amend the Rules of Court. He pointed to the case Incorporated Law Society of Natal v van Aardt⁶⁸ where an attorney on qualifications obtained outside Natal was admitted to practice in Natal and desiring to obtain the right to practice as an advocate under Rule 47 of Order XXXII purported to enter into articles with his partner for eighteen months and the Law Society applied to the Supreme Court for an order interdicting him from practising as an advocate. Matthews J granted the order holding that the articles were bad and that the amending rule was validly passed under Act 39 of 1896 section 69(1) and that the amending rule of 1923 was not ultra vires section 118 of the South Africa Act, nor did it unduly discriminate against attorneys qualified in other provinces. This judgment was upheld on appeal and referred to in Ex parte Stuart and Geerdts.⁶⁹

Hathorn J in testifying before the Select Committee said:

"The Law Society cannot have it both ways. They cannot say in 1930 repeal for our benefit and re-enact and then in 1932 you cannot repeal because you

⁶⁸ 1930 NPD 69.

⁶⁹ 1936 NPD 57.

are causing us damage."⁷⁰

Given the main objections of the Incorporated Law Society to the new Rules and the Judges response thereto one must attempt to gauge the course followed by the majority of practitioners in the five year period from 30 June 1932 to 30 June 1937, the latter being the "appointed day" when all rights of dual practice were to effectively cease.

Contrary to the initial assumption that there would be a flood of attorneys electing, during the interim period, to practice solely as advocates,⁷¹ the records of the Incorporated Law Society showed that in 1932 there were 279 attorneys on the Roll and that this number had increased to 293 in 1937.⁷² In 1929 when the Society of Advocates was formed sixteen advocates signed the constitution while ten years later in 1939 there were thirty persons practising exclusively as advocates.⁷³ It can thus be concluded that very few admitted attorneys, who were no doubt exercising their dual rights before the "appointed day", elected to practise solely as advocates.

This paucity was probably due to the fact that the battle for the preservation of the dual right of all practitioners, regardless of whether or not they were

⁷⁰ Report of the Select Committee on the Subject of the Natal Advocates and Attorneys Preservation of Rights Bill SC No. 4 of 1939 158.

⁷¹ 1932 SALT 129.

⁷² Report op cit 18.

⁷³ Report op cit 43.

admitted and enrolled in both capacities on 30 June 1932,⁷⁴ was still raging both in Natal and in Parliament.

Following the Judges rejection of the proposal submitted by the Incorporated Law Society for the suspension of the operation of Rule 47 until Parliament had spoken on the matter, the Society recorded "an emphatic protest"⁷⁵ and the meeting further recorded the society's determination, fortified by the passing of the Natal Advocates and Attorneys Preservation of Rights Bill, to continue to use every endeavour to preserve the rights of all those affected by the operation of Rule 47 and resolved to send copies of the above resolution to each Senator and member of Parliament and the press.⁷⁶ About 250 practitioners were affected by the rule of court and one of them remarked to the press that the meeting was astonished that the expressed will of the House of Assembly had apparently received no consideration at all from the Judges.⁷⁷

During the second reading of the said Bill in February 1937 Mr OR Nel⁷⁸ had secured a large majority of sixty-seven votes to eighteen⁷⁹ despite the opposition of the then Minister of Justice, General JC Smuts, who based his

⁷⁴ Eg Mr FH Lowe, the Secretary of the Natal Law Society, had an application pending on 30 June 1932 which was simply stopped. Hathorn J called this a "hard case" in his evidence before the Select Committee of Report op cit 11 and 163..

⁷⁵ Natal Witness 20 July 1937.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ United Party MP for Newcastle and himself a legal practitioner.

⁷⁹ Natal Witness 11 February 1939.

opposition on the fact that the Natal Court acting within its jurisdiction, and upheld by the Appeal Court, had decided that the right of dual practice should be abolished and Parliament would be going very far if it revised the position and that if it passed the Bill it would be acting as a superior court which was an unheard of thing.⁸⁰

When the indefatigable Mr Nel reintroduced the Bill in February 1939 he announced that he was so sure of his case that he was prepared to let his Bill be referred to a Select Committee and pointed out that there had been no public demand in Natal for a divided Bar, that even the press supported the Bill, that dual practice had been in force in Natal for 90 years, that the Supreme Court of Natal in 1930 revised and re-enacted the right of dual practice, that the Natal Agricultural Union had passed resolutions supporting the right of dual practice in 1932 and 1937, the Bill had the support of the four Law Societies of South Africa and finally that the Bill was not an attack on the Natal judiciary but merely sought to revise a rule of court.⁸¹ Frank Broome, a member of the Natal Bar and also of the select committee, opposed the Bill remarking that passing the Bill into law would interfere with the prestige of the judiciary of South Africa.⁸²

⁸⁰ Natal Witness 6 February 1937. Was this a foretaste of things to come in the 1950's?

⁸¹ Natal Witness 22 April 1939.

⁸² Ibid. He was supported in this by the chairman of the Select Committee, JH Hofmeyr who contended that the Court which had given the privilege of dual practice was entitled to take it away and this was proved by the 15

However, basing his case on justice and equity Mr Nel won the sympathy of the laymen in the House and beat the lawyers to the tune of 62 votes to 18 resulting in the passage of the Natal Advocates and Attorneys Preservation of Rights Act No. 27/1939. Most of the pressure to have the Bill written into law was exerted by older practitioners who had built up large divorce practices as attorneys and by exercising their rights of dual practice carried the case to its conclusion in the Supreme Court. Many younger practitioners also supported the Bill as they did a certain amount of motion work in the Supreme Court as dual practitioners and stood to loose these fees if the Bill was not passed.

The passage of Act 27 of 1939 was thus welcomed by the majority of practitioners in Natal despite the unsuccessful opposition of the advocates of the day and came into operation on 1 January 1940. Section 1 of the Act provided that:

"Any person who was, on the 29th day of June 1932, entitled to practice both as an advocate and an attorney in the Natal Provincial Division of the Supreme Court of South Africa or who became entitled so to practise at any subsequent date not later than the thirtieth day of June 1937 shall not be debarred by any rule of Court from practising both as advocate and as an attorney in any Court in which he was entitled to practise on that date."

practitioners who had paid double fees of 50 pounds to be enrolled in both capacities. Mr A Goldberg (Durban Umlazi MP) interjected that they did it because they desired the higher status.

Act 27 of 1939 thus had the effect of neutralising the Rule terminating the system of dual practice in so far as it affected vested rights and the Natal Judges were proved wrong when they asserted in 1937 that they did not believe that Parliament would intervene to alter rules validly made by them in the discharge of a responsibility vested in them by the Supreme Court Act of 1896. The practical result was that from 1937 onwards, with the exception of a diminishing number of practitioners with vested rights of dual practice for life,⁸³ the legal profession in Natal could be described as one divided on traditional English lines on the same basis as that pertaining in the rest of South Africa.

The Reasons for Division in 1932.

The resolution passed by the Conference of Judges President in Cape Town in January 1932 referred to the proposed division being desirable so that the distinction between the two branches of the legal profession may be as fully recognized in Natal as in the other provinces of the Union, and as being "in the public interest". Neither the Report of this Conference which was laid before Parliament nor the Memorandum on the new Rules issued by the Judges of the Natal Provincial Division expanded or elaborated on these themes of public interest and uniformity.⁸⁴

Regarding uniformity an attempt to bring the profession in

⁸³ For example The Honourable Neville James and Dennis Fannin.

⁸⁴ (1932) 49 SALJ 489.

Natal into line with the other provinces could be discerned as early as 1904 when qualifying examinations were placed in the hands of the University of the Cape of Good Hope thus bringing the Natal qualifications into line with the rest of South Africa. The advent of Union in 1910 resulted in pressure being exerted on the amalgamated legal profession in Natal to conform with its counterpart in the other provinces⁸⁵ and at a Bar conference held in Pretoria in 1910 General JC Smuts expressed the hope that all the Bars including Natal could come into line in one Order of Advocates for South Africa.⁸⁶ Thus in 1932 when the Natal Judges formed rules of Court dividing the legal profession in conformity with the other provinces they were merely giving effect to a movement for uniformity predating Union, and so conformity as a reason for their decision cannot be considered a novel concept originating at that time. It was a factor but not an overriding reason from the judges point of view.

An attempt must thus be made to explain the phrase "in the public interest" and to ascertain the various factors the Judges took into consideration to conclude that the new Rules would be in the interest of the public.

At the time of Union in 1910 it was generally accepted that the standard of the legal profession in Natal was low. Factors giving rise to this were inter alia the lax

⁸⁵ Ibid.

⁸⁶ Ibid.

requirements for admission prior to 1893, the very low tariff of fees to which the Natal lawyers were tied forcing them into dual practice and the fact that Natal was regarded as a remote outpost of the British Empire offering few opportunities for advancement and so it did not attract the better qualified practitioners.⁸⁷ This situation persisted with some notable exceptions, during the Judge Presidency of Sir John Dove Wilson. Regarding the abuses arising from the dual practice system, Roy Hathorn confirms that these existed throughout the Dove Wilson Judge Presidency but that nothing was done because the necessary requirements for reform were lacking namely a Judge President who was ready and willing to take the initiative and the unanimous support of all the Judges.⁸⁸

This state of affairs was radically altered with the arrival of Feetham JP, a natural leader and reformer, who found himself confronted with an old problem now ripe for solution. After experiencing the operation of the dual practice system for a short while he concluded that it did not conduce to efficiency in the administration of justice and that as long as it continued there was no prospect of an adequate junior bar being built up. He found the case of Van Aardt v Natal Law Society⁸⁹ where Curlewis JA made it quite clear that, notwithstanding the provisions of section 118 of the South Africa Act, the Natal Provincial

⁸⁷ Spiller op cit 56/7.

⁸⁸ The Honourable Mr Justice Hathorne testifying before the Select Committee 151 and Supra.

⁸⁹ 1930 AD 385 at 392.

Division still retained the power to amend the rules of Court dealing with dual practice. In addition, Feetham JP was approached, within the first two months of taking up office in Natal, by both the Natal Law Society and the Natal Society of Advocates on the subject of dual practice, all of which persuaded him that the question of the division of the legal profession was a burning one which needed to be confronted without delay.⁹⁰ In this Feetham JP was fully supported by all his colleagues and in particular Hathorn J was adamant that the dual practice system must be abolished.⁹¹ In January 1932 Feetham JP brought the matter before the Judges Conference held in Cape Town culminating in a resolution resolving that the system of dual practice be terminated as soon as reasonably possible in the public interest.

But what were the abuses and shortcomings of the dual practice system? Hathorn J⁹² was in an exceptionally good position to express an opinion on these matters as he was admitted as an advocate in 1904, practised as a dual practitioner for seventeen years, then as an advocate for nine years and at the time of testifying before the Select Committee was already on the Natal Bench for nine years. According to Hathorn J the main abuses were "the dummy junior", the solicitor junior and the speculative litigant.⁹³ The malpractice regarding the dummy and

⁹⁰ Report of the Select Committee op cit 123.

⁹¹ Report op cit 162.

⁹² Testifying before the Select Committee at the suggestion of Feetham JP.

⁹³ Report of the Select Committee op cit 162.

solicitor junior started when Harold Mackeurtan went to the Bar in 1917 and was not stopped because the Bench, as it was then composed, was not prepared to take action.⁹⁴ Hathorn J explained that dual practitioners always did their own court work if they possibly could, not only to earn the fees but also to avoid introducing the client to a rival who might be preferred in the future. However, when a dual practitioner did brief a senior, he appeared as junior, but in the majority of cases he did no advocates work at all. The attorney junior "looked like an advocate for he was gowned and sat next to his senior but he remained the instructing solicitor and little else."⁹⁵ Then there was the "dummy junior" who made his appearance mostly in appeals and would be, for example, the Maritzburg agent of the instructing attorney in Durban. He literally did no work and simply sat in court next to his senior looking like an advocate.⁹⁶ Feetham JP also referred to this abuse as "the habit of attorneys briefing themselves to appear in court as junior counsel",⁹⁷ but simply sat in Court and appeared to be doing nothing and in many cases they were not earning their fees. Feetham JP testified that he found it distressing to see "this farce enacted in Court"⁹⁸ and to realize that there were young men who were trying to make a living at the Bar who were not considered. James recalls a time when he was a typical "dummy junior" to Frank Shaw - put in by his firm of

⁹⁴ Ibid.

⁹⁵ (1943) 60 SALJ 129.

⁹⁶ Ibid.

⁹⁷ Report of the Select Committee op cit 133.

⁹⁸ Ibid.

attorneys to skim off a little of the cream for them from the litigation in return for gathering books, soothing witnesses and pretending to them that he knew something about the case. He readily admits that he can claim no credit for the fact that they won.⁹⁹

Hathorn J felt so strongly about these unsatisfactory features of the dual practice system that in 1930, when Tatham AJP wanted to give the attorneys a new tariff, he declined to have anything to do with it until the dummy junior was gotten rid of which meant dividing the Bar.¹⁰⁰ What particularly upset the Judges about the "dummy junior" was the fact that he was entitled to a fee equal to two-thirds of that charged by the leader, who was often a KC, without doing anything to earn that fee.¹⁰¹ The system of dual practice thus also resulted in attorneys briefing counsel of a more senior or expensive type than the case really justified. Hathorn J also mentioned speculative litigation and speculative appeals as reasons for considering the division of the Bar in the public interest but conceded that these two malpractices were not confined to the dual practice system nor Natal.¹⁰² Another factor was that the other provinces never thought anything of Natal lawyers and Judges or its law reports because according to Hathorn J "they were contemptuous of the dual

⁹⁹ Bar Speech 2 and cf Bazley v Bongwan Gas Springs 1935 NPD 247.

¹⁰⁰ Report of the Select Committee op cit 162.

¹⁰¹ Op cit 154.

¹⁰² Report of the Select Committee op cit 155.

system".¹⁰³

Given the above considerations and if the judges, through the division of the profession along traditional lines, intended to raise the standard of the profession in Natal, their decision can be said to have been taken in the "public interest". It is submitted that in the early 1930's , and given the factors pertaining then, a divided profession served the public better in that the advocate, not burdened with an attorneys practice, could devote more time to researching his cases and thus acquiring a greater theoretical knowledge of the law and giving legal advice of the highest quality appropriate to the complexity of the case. Moreover, the Judges would be greatly assisted in reaching a correct and fair decision through the skilful presentation of cases before them. Balanced against this is the fact that the advice might not always be given in the shortest possible time and at the lowest possible cost because there is invariably duplication in the divided system in the form of attendances at Court in support of counsel, consultations with the advocate and the perusal of draft pleadings and advices on evidence from counsel, all of this at the client's expense. It can however, be argued that time and expense must be sacrificed for the resultant fair decision and achievement of justice. Considering the above it may well be argued that the Judges decision to separate the legal profession in Natal was indeed taken in the "public interest".

¹⁰³ Op cit 161.

In the case of Ex parte Stuart and Geerdt¹⁰⁴ Feetham JP noted that " ... the system of dual practice was, at its inception in 1845, a temporary expedient adopted to meet the difficulties caused by the dearth of professional men ..." It can thus be argued that the "fusion" of the legal profession in Natal took place in the light of the public need for legal services and was merely a temporary expedient to meet the needs and circumstances of the day and early legislation serves to confirm that fact. In 1932 the general consensus was, however, that the acute shortage of legal practitioners had indeed been overcome and there was no necessity for attorneys and advocates to act in each others' professions any longer. As pointed out earlier there were nearly three hundred legal practitioners of both branches of the profession serving Natal in 1932, and this was probably another factor taken into consideration by the Judges in their deliberations leading to the enactment of the new Rules of Court.

It has been contended¹⁰⁵ that Natal, due to the prevalent dual practice system of the time, found it difficult to acquire a satisfactory legal reputation throughout South Africa. More important and serious, however, was the fact that the absence of a recognised Bar in Natal resulted in Judges being appointed from outside the province. A quick glance at the members of the Natal Bench in 1932 confirms

¹⁰⁴ 1936 NPD 57 at 65.

¹⁰⁵ Supra and cf The Honourable Neville James op cit 7.

this. Feetham JP, Matthews and Lansdown JJ and Grindley-Ferris AJ were all admitted in other jurisdictions. Hathorn J was the only exception having practised both branches of the profession in Maritzburg until 1921 when he began to practise exclusively as an advocate. He was permanently appointed to the Natal Bench in 1931 and became Judge President in 1939.¹⁰⁶

The significant point Hathorn J made was that the sixteen signatories of the Constitution of the Society of Advocates in 1929 included all the members of the Natal Bench in 1943, two former judges of the Native High Court and one of its existing Judges.¹⁰⁷ Hathorn J attributed all this to the efforts of Mackeurtan maintaining that "but for Mackeurtan's example, persuasion and encouragement in bringing about the formation of the Natal Bar not one of these appointments would have gone to Natal men ..."¹⁰⁸

Mr Justice James also points to the dramatic change in the composition of the Natal Bench in 1929 as compared to 1939 but gives all the credit to Feetham JP¹⁰⁹ who with his strong leadership and actions framed the new Rules of Court giving formal recognition to the distinction between the two branches of the profession and opening the way for future Judges to be appointed from the ranks of the

¹⁰⁶ Roberts op cit 363.

¹⁰⁷ (1943) 60 SALJ 136.

¹⁰⁸ Op cit 137.

¹⁰⁹ Bar Dinner Speech 1 November (1979) 4 on the occasion of the "50th Anniversary of the Great Secession" of the Advocates in 1929.

advocates from within the province of Natal. In 1929 the Natal Bench consisted of Dove Wilson JP, Carter, Tatham and Matthews JJ each of whom had considerable shortcomings and Tatham J was the only Natal man. In 1939 the Natal Bench consisted entirely of Natal men namely Hathorn JP, Carlisle, Selke and Broome JJ and advocates like de Wet, Shaw, Holmes, Milne, Caney and Henochsberg waiting in the wings ripe for appointment. According to James "... everyone of them had a rich experience at the Bar and every one had been through the discipline of arguing cases before Feetham JP the most meticulous of mentors ..."¹¹⁰

As already mentioned at the time of the division of the legal profession in 1932 a de facto Bar had been in existence for some sixteen years. It was a measure of the calibre of these independent advocates who started the de facto Bar and their confidence in their ability as forensic experts that the majority of them eventually became Judges of the Natal Provincial Division and/or the Native High Court. According to Hathorn J there were no complaints from the public in Natal that they did not get justice under the dual system nor was there any agitation from the public for a divided Bar. Why then, if the public was content with the dual system and well served by the de facto Bar did Feetham JP promulgate rules of Court for the division of the legal profession?

The Committee of Inquiry into the Legal Profession of

¹¹⁰ Op cit 7.

Rhodesia was also concerned to know the answer to this particular question and accordingly corresponded with Broome who replied that the menace of the "dummy junior" in cases tried by Feetham JP must have fortified the latter's intention to divide the Bar. But the last word appears most succinctly from the evidence of Feetham JP himself before the Select Committee when he said:

"A very short experience was sufficient to show me that the system of dual practice as prevailing in Natal did not conduce to efficiency in the administration of justice, and it was clear that, so long as the system of dual practice continued, there was no prospect of an adequate junior Bar being built up in Natal, because, owing to the extent to which Bar work suitable for juniors was done by attorneys, young advocates, who confined themselves to practising as such, did not get enough work to enable them either to earn a living, or to gain the experience they needed."¹¹¹

3.3 The Advantages and Disadvantages of a Divided Legal Profession

The whole question of the organisation of the legal profession must be considered in the light of the public need for legal services. It was accepted by the Commission of Inquiry into the Legal Profession of Rhodesia (now Zimbabwe), which relied very considerably on the Natal experience and in particular the reasons for the division of the profession here, that there should be available legal advice of the highest quality appropriate to the complexity of the case which should be given in the shortest possible time and at the lowest possible cost and where the case has to go to Court it should be presented

¹¹¹ Report of the Select Committee op cit 68.

with skill before a judiciary of the highest calibre.¹¹² To meet these requirements it is necessary to weigh the pros and cons of a divided legal profession,¹¹³ as is presently the case throughout South Africa, as opposed to a fused or partially fused system as prevailed in Natal at the time of Feetham JP's appointment.

One of the most important factors to be taken into account in arriving at a decision is efficiency. By his own evidence it did not take Feetham JP long to conclude that the dual practice system as it prevailed in Natal was not conducive to "efficiency in the administration of justice."¹¹⁴ When questioned on the steps taken to ascertain the view of the public on the matter¹¹⁵ he replied:

"The judges in this particular matter are the appointed guardians of the public interest, because we are in a position to know what is conducive to the efficient administration of justice in the Courts. We also knew that a large number of dual practitioners were not really qualified to handle cases in Court, either because they did not get sufficient court work to enable them to gain the necessary experience, or for other reasons. That made it extremely difficult for the Court to do justice to their clients."¹¹⁶

¹¹² Provisional Report of the Commission of Inquiry into the Legal Profession of Rhodesia April (1978) 61.

¹¹³ Other organisations of the legal profession in various countries can be classified as:

- (a) Complete division on traditional lines as we have in South Africa;
- (b) Complete fusion as exists in the USA and Canada;
- (c) Partial fusion with a de jure Bar;
- (d) Partial fusion with a de facto Bar.

¹¹⁴ Report of the Select Committee op cit 68.

¹¹⁵ Report of the Select Committee op cit 163.

¹¹⁶ Report op cit 136 and supra Feetham JP's "enduring passion for the truth and for justice".

It is submitted that in the light of all the circumstances prevailing in the early 1930's the advantages of a divided legal profession outweighed its disadvantages and was clearly conducive to greater efficiency in that the advocate became a specialist in the forensic arts of advocacy and techniques of litigation. Specialisation enabled him to devote more time to cases than an attorney could, to present them more ably and in a shorter time. It could thus be argued that a busy practitioner was not able under the dual practise system to discharge the two full-time tasks of advocate and attorney in a competent manner. Hathorn J asserts that "you are apt to be a little dismayed when after a trying day in court you return to your office to find clients waiting, letters to be answered, documents to be drawn and the rest."¹¹⁷

Mr Justice Fannin, who was a dual practitioner at the time, recalls taking a difficult civil case in the Magistrate's Court and losing because he did not have enough time to prepare his case. It was not a matter of incompetence as he won handsomely when he took it on appeal but this time around he took the time to prepare his case properly. This exercise, however, involved his client in additional expense and therefore he never again, as a dual practitioner, took a defended case himself.¹¹⁸ Coming from a distinguished advocate and Judge this really says it all

¹¹⁷ (1943) 60 SALJ 130.

¹¹⁸ Private interview 10.

for specialization which conduces to efficiency and ultimately even economy in both time and money.

A less cogent advantage of a divided profession was that the advocate's approach to a case was likely to be more objective than that of an attorney as he is not so intimately involved in the preparation of the case and is thus less reluctant to give unfavourable advice for fear of antagonizing an old client and consequently gave a more detached opinion.¹¹⁹

At the time the general consensus was that practice at the Bar was an ideal training ground for appointment to the Bench and the scores of highly respected and distinguished judges appointed from that field confirms this. In 1939 all the members of the Natal Bench had been signatories to the Constitution of the Society of Advocates formed in 1929.¹²⁰ A divided profession thus leads to a separate and able Bar which would provide good candidates for the judiciary. Mr Justice James is "absolutely convinced that you cannot have a good Bench unless you have a good Bar qualifying itself through experience for ultimate appointment to the Bench."¹²¹ Experience at the Bar thus produces men whose calibre and independence of mind had been tested and proved in open Court under the critical eyes of the public and their colleagues. The expertise of

¹¹⁹ See counter argument to this below.

¹²⁰ Note this was under a fused system with a de facto Bar and see below.

¹²¹ Bar Dinner Speech 7.

the advocate is likely to be of great assistance to a Judge trying a case and the latter is therefore less likely to err in his judgment. This argument applied to the able advocate possessing extensive experience has significant force. Thus when a new Judge is welcomed by the Bar he usually says that he looks forward to the co-operation of the members of the Bar in the administration of justice. According to Feetham JP this is no empty phrase but "a fact that Judges do rely on, and are assisted in carrying out their work by, the co-operation they receive from members of the Bar."¹²²

However, for almost every argument in favour of a divided legal profession there is also a counter argument, pointing to its disadvantages, and favouring of a fused profession. Regarding specialization it was pointed out that even in a completely divided system there are many tribunals in which attorneys have an equal right of audience with advocates and in the view of those presiding at these tribunals or magistrates courts how well the case is presented depends on the intrinsic ability of the individual legal practitioner concerned and not on whether he practises at the Bar or Side-Bar.¹²³ According to Mr Justice Mostert quoting the views of Sir Richard Wild, the Chief Justice of New Zealand "... there is nothing to choose between the leading solicitor specializing in trial work and the

¹²² Report of the Select Committee op cit 138.

¹²³ Report of the Committee of Inquiry into the Legal Profession of Rhodesia (1979) 105.

barrister in quality of workmanship."¹²⁴

A distinct advantage of the dual practice system is the thorough knowledge each practitioner has of every aspect of practice. Attorneys are concerned with cases from the time the original instructions are taken until the judgments are satisfied. They understand, as no advocate does, the practical effect of an order for costs and in addition handle deeds of transfer, mortgage bonds, promissory notes, bills of exchange, leases, Wills and numerous other documents that come into an attorneys office. Hathorn J expressed the opinion that "So great is the advantage which this practical knowledge gives the dual practitioner over the advocate in many respects, that it would be a great improvement in our legal system of education if no advocate was permitted to practice at all until he had served in a solicitor's office for a substantial period."¹²⁵

The practical and background knowledge of the dual practitioner thus counters the argument of the advocates objectivity. In fact many clients dislike having to tell their whole story twice - first to the attorney and then to the advocate. The conscientious attorney would not hesitate to express his own honest opinion and would not give incorrect advice merely to please his client. Sir David Napley sums up this argument by saying:

"Solicitors are generally just as objective (as advocates); a high percentage of their cases do not

¹²⁴ Report op cit 107.

¹²⁵ (1943) 60 SALJ 130.

involve consultation with barristers at all. The vast bulk of litigation is compromised, without their intervention. This requires more, and always as much, objectivity as is required to conduct trials in court."¹²⁶

Advocates of the fused system do not deny that practice at the Bar is an ideal training ground for appointment to the Bench but they point out that it is not the only one. In South Africa and indeed in Natal judges have been appointed from advocates who did not receive the bulk of their training in private practice. The majority of judges appointed in New Zealand and the majority in many Australian states have not been appointed from members of the de facto Bar in those countries but from members of firms of solicitors and barristers. The Chief Justice of Australia, the Hon Sir Garfield Barwick, who has had a wealth of experience in all the states and thus of both the fused and divided systems said:

"... I can see no reason why members of the Bar should have a monopoly on the conduct of litigation. We have had a long and, I think, satisfactory experience in Australia of solicitors having and exercising a right of audience in the courts and, indeed of solicitors being eligible for appointment to the Bench including the bench of the highest courts in the Commonwealth and in the States."¹²⁷

AS Hoppenstein sums up the objections to a divided legal profession as occasioning unnecessary expense and to a lesser extent delay, resulting in a denial of recourse to law for a large section of the population and, finally, it

¹²⁶ Report of the Committee of Inquiry into the Legal Profession, Rhodesia Vol. 1 (1978) 108.

¹²⁷ Report of the Commission of Inquiry into the Legal Professions Rhodesia. (1979) 106.

"breaks the link between the client and his adviser at the moment when the latter's affairs have reached the culminating point of a Supreme Court hearing."¹²⁸

The case for fusion was ably and succinctly stated by the late Lord de Villiers CJ in a letter addressed in 1888 to Chief Justice Kotze of the South African Republic saying:

"... It has often struck me that the separation of the duties causes a great waste of time and energy, and consequently an unnecessary expenditure of money ... On principle there seems to be no objection to an attorney and an advocate entering into partnership together. But in no case do I think ought costs to be allowed upon a footing of a separation of the functions. ..."¹²⁹

The Honourable Mr Justice James makes the significant point that in the early 1930's the members of the two professions had grown up together and they understood each other's problems. There was a tremendous spirit of co-operation between the professions and the awareness that they belonged to the same great calling was invaluable to them all. He concluded by saying:

"The message of brotherhood was well understood in 1939. It is time to proclaim it once again."¹³⁰

History has shown that Feetham JP's leadership had indeed established a strong and prosperous Bar which has, as he envisaged, consistently fed the Natal Bench with able and

¹²⁸ (1959) 76 SALJ 298.

¹²⁹ Op cit 302 and Report of the Select Committee op cit 15.

¹³⁰ Bar Dinner Speech (11 November 1979) 8. Mr Justice James also went on to say that the Bar (in 1979) has never been so large or more prosperous in fact it "has become somewhat opulent." Clearly a far cry from the time Feetham JP thought they could not earn a living.

experienced personnel.

Times, however, change and society and its needs evolve, with the result that today the question of a fused or divided legal profession is still the subject of debate.¹³¹ But it has been shown over time that the efficient administration of justice depends on a respected and independent Bar and that judges may frequently be reminded of their duties and even assisted in their judgments by submissions of counsel or the weight of the authorities produced by them. I therefore now turn to consider the main legal practitioners of the 1930's.

3.4 The Main Legal Practitioners

At the time of Feetham's JP's appointment the pre-eminent advocate in Natal, if not in South Africa, was Harold Graham Mackeurtan (26.2.1884 - 18.12.1942).¹³² He matriculated from Durban High School with a first class pass at the age of fifteen. From Trinity College, Cambridge, he obtained an LL B degree with a double first in the law subjects and was called to the Bar by the Inner Temple on 26 January 1906. On his return to his beloved Natal he was admitted as an advocate of the Supreme Court

¹³¹ Cf Lord Benson's conclusions and 1988 De Rebus 169 where Advocate HP Viljoen SC, the Chairman of the General Bar Council of South Africa expresses his views. See also 1987 De Rebus 335 for the views of Mr GC Cox and Professor DJ McQuoid-Mason.

¹³² Dictionary op cit 422.

of the Colony of Natal on 3 April 1906. After entering the employ of Shepstone, Wylie and Binns in 1906, as a dual practitioner, he successfully reorganised the entire firm and in 1909, when it became Shepstone and Wylie with Wylie as the only partner, he became manager and shortly afterwards Wylie's partner. From 1910 onwards MacKeurtan did almost all the firm's court work where his ability was quickly recognised by the judges and his colleagues. It was during this time that he caused a sensation in the legal world by beating the formidable Tatham to absolution, of all things, in the case of King v Lane and Co Ltd.¹³³ MacKeurtan was so proud of this victory that he even mentioned it in a speech when Tatham J retired in 1931.

At the end of 1915 he left Shepstone and Wylie to commence practice solely at the Bar at the beginning of 1916. This was a courageous leap into the dark but he was realizing his ambition to be an advocate and was amazingly successful. As a dual practitioner he appeared in about five reported cases per year but during his second year at the Bar (1917) those figures rose to an astounding 31 in the Natal Provincial Division and nine in the Appellate Division.¹³⁴ By 1918 MacKeurtan had established for himself a reputation not only in Natal but in South Africa's largest legal centre namely the Witwatersrand

¹³³ 1912 NPD 325.

¹³⁴ (1943) 60 SALJ 1311. The total number appearing in the Natal Law Reports exceed two hundred and sixty-five and those in the Appellate Division exceed seventy which according to Hathorn J loc cit are staggering figures considering his health problems during the 1930's until his death in 1942.

Local Division when he was briefed to appear in the case of Robinson v Benson and Simpson.¹³⁵ In 1919 he took silk. At all times brilliant in commercial suits he was at his best in East Asiatic Co. Ltd v Hansen,¹³⁶ and in Hathorn J's view he was more knowledgeable about that branch of the law than anyone in the Union including the Judges.¹³⁷

In Natal the trend in licensing cases caused concern until Mackeurtan appealed successfully in Kharwa v Licensing Officer, Ladysmith¹³⁸ thus restoring the right of appeal in renewal applications to its rightful place whereas before it had been watered down to an ordinary right of review. In 1934 he appeared before the Privy Council as junior to Sir William Jowitt KC in Pearl Assurance Co Ltd v Government of the Union of South Africa.¹³⁹

Mackeurtan was admitted in several jurisdictions¹⁴⁰ other than the Natal Provincial Division and in this wider context a struggle for supremacy developed between him and James Stratford - the leading advocate in South africa - until the latter accepted a seat on the Bench in 1921. Hathorn JP thus avers that Mackeurtan became the leading advocate in Natal after Tatham left the Bar and likewise in

¹³⁵ 1918 AD 493.

¹³⁶ 1933 NPD 297 and supra.

¹³⁷ (1943) 60 SALJ 133.

¹³⁸ 1931 NPD 243.

¹³⁹ 1934 AC 570, which was the last South African case to go to the Privy Council.

¹⁴⁰ Transvaal Provincial Division, 2:5:1918; Eastern Districts Local Division 12:9:1918; Cape Provincial Division 15:3:1921; and High Court of Southern Rhodesia 27.10.1932.

South Africa from the time Stratford¹⁴¹ became a judge and that he held this position unchallenged until his death.

Mackeurtan had no ambition to excel in political life but considering it his duty to support General JC Smuts he stood unsuccessfully in 1920 for the Point constituency but was returned as South African Party member for Umbilo the following year. However, his heart was not in politics, it interfered with his beloved practice, held no prospects for him¹⁴² and consequently he did not seek re-election in 1924.

By contrast he had a pronounced interest in literature and was the inaugurator of the Durban High School Magazine in 1901 and its first editor, and, later at Cambridge he edited the university's prestigious Granta magazine and published University Sketches. His literary talent led to the publication in 1926 of some poetry under the title Slender Sketches of a Stout Gentleman. He was also a keen collector of Africana and in 1930 his witty and very readable Cradle Days of Natal 1497-1845 appeared in London revealing his scholarly gifts. His greatest work was, however, The Sale of Goods in South Africa first published in 1920 and the second edition appeared in 1935 with the assistance of T B Horwood. Hathorn JP considered this work

¹⁴¹ Later Stratford J, JA and CJ 1938-1939. It is said that Stratford resented the brilliance of the young upstart. Cf Broome op cit 118.

¹⁴² Broome op cit 119 observes that Smuts, then Prime Minister, could "like the Turk bear no brother near the throne" and Mackeurtan was certainly not his or anyone's idea of a more faithful adjutant.

a "masterpiece"¹⁴³ and indeed it still is a standard authority on the subject.

Besides his work in Court Mackeurtan was standing counsel for the Durban Corporation from 1919 until his death which gave him many briefs before Select Committees of the Natal Provincial Council and even of the House of Assembly. His greatest triumph for the Durban Corporation was when the Government desiring to expropriate the municipal telephone system for about half a million pounds, he framed a claim for more than three times that amount, went overseas to research his case and supported his claim so well that the Government simply withdrew rather than face arbitration.¹⁴⁴ Also his services to the South African Sugar Industry were and are praiseworthy. Thus he was instrumental in bringing about the Fahey Conference Agreement, the Sugar Act and the Sugar Agreement, all of which contributed to peace and prosperity within that industry.

Another very important example of Mackeurtan's non-litigious work was the creation of Durban North. With his courage, vision, wisdom and personality he prevailed on Durban North Estates Ltd to construct the Athlone Bridge over the Umgeni river, at a cost of over 60 000 pounds, and thus turn a disused sugar estate into a town. Yet lest it

¹⁴³ (1943) 60 SALJ 144. Mackeurtan also inspired and encouraged his colleagues to write legal textbooks for example LR Caney acknowledges this in the preface to his book The Law of Suretyship in South Africa. Juta and Co Ltd 1970.

¹⁴⁴ Op cit 142.

be assumed that everything Mackeurtan touched turned to gold. Hathorn JP mentions the Nkwaleni Valley Cotton Co. Ltd., which failed because the climatic conditions of Zululand were unfavourable to that particular crop.¹⁴⁵

No sketch of Mackeurtan would be complete without alluding to his wit, charm and almost overwhelming personality. It has been said that his success as an advocate was primarily attributable to his colossal personality which appeared to enable him to impose his will, not only on the Court, but also on his opponent. Broome says:

"Whenever I fought a case against him during his prime I seemed to find that in no time he and the judges were ganged up against me. Against him one seldom felt at one's best. Fighting cases against advocates of the class of Frank Shaw, Schreiner, Ramsbottom, Millin and Holmes I felt stimulated by the prowess of my adversary; against Mackeurtan I usually felt bewitched and bewildered."¹⁴⁶

Anecdotes about Mackeurtan's wit abound. At a Bar dinner given for Broome J when he was elevated to the Bench in 1939 all the Judges were invited and all of them, including Hathorn JP, were Mackeurtan's recruit to the Bar, so he let fly with one of his priceless remarks "We are all anxious to see how the new Broome gets on with the old sweeps."¹⁴⁷

Like every human being he had shortcomings. He was the founder of the Natal Bar and he expected to be regarded as such. He was grossly overweight,¹⁴⁸ due to some glandular

¹⁴⁵ (1943) 60 SALJ 143.

¹⁴⁶ Broome op cit 117/8.

¹⁴⁷ Broome op cit 179 and (1943) 60 SALJ 6.

¹⁴⁸ Apparently he was so large during the later 1930's that he was permitted to be seated while addressing the Court and a car had to be specially built so that

disorder, and often joked about his "superabundant flesh"¹⁴⁹ but intensely disliked any reference to his figure by others. But these minor faults were vastly overshadowed by his goodness of heart, his friendliness, kindness and unfailing courtesy. According to Hathorn JP he was "a most lovable man,¹⁵⁰ who carried with him wherever he went the lamps of wit and fellowship.

Mackeurtan's most outstanding characteristics were no doubt his great intellect, priceless instinct for knowing from the very outset how a case should go, an impressive personality and a deep appreciation of the duties and arts of an advocate. With all this talent he was the most sought after advocate in South Africa and had a vast practice. He made a fortune - lost some of it in outside ventures and made a lot more in others. Through ill health he was forced to spend a whole year in bed and he was believed to be a dying man - yet he made five thousand guineas¹⁵¹ that year lying on his back giving opinions, consulting and drafting pleadings. He was assisted in this by Fannin, and others,¹⁵² who devilled for him and regarded it a great privilege to work under him because he always took the trouble to explain why he came to his opinions and so they learned from him.¹⁵³ He was extremely industrious,

he could fit into the back seat.

¹⁴⁹ Broome op cit 120, and cf Slender Verses by a Stout Gentleman
¹⁵⁰ (1943) 60 SALJ 144.

¹⁵¹ Approximately R120 000,00 in to-day's money.

¹⁵² Notably Neville Holmes, later Judge of Appeal, and Anton Hathorn, Roy's son, who became acting Chief Justice of Rhodesia.

¹⁵³ The Honourable Mr Dennis Fannin - private interview.

working long hours every day and with his quick brain at a fantastic rate. He seemed able to give adequate attention to several things at the same time, his mind working on a wide front, without any apparent effort and his irrepressible sense of humour simultaneously operating on the same wide front. His arguments were precise in thought and expression and his pleadings short and to the point but flexible enough to allow him to shift the centre of gravity of his case during the trial. To the Bench he was always polite, patient and good-tempered. To his colleagues he was a most formidable opponent. According to Hathorn he always felt as though he was "waging the unequal struggle of a mere man against a master".¹⁵⁴ He was, however, always scrupulously fair to his opponents and to the Court and anxious that the Court should have the best materials available to decide a point of law. Moved by this idea and his innate kindness he actually once prepared Carlisle's argument as well as his own.¹⁵⁵

Considering his intellectual qualities and great legal knowledge Mackeurtan was never over technical - he was in fact as practical as could be - which made his loss to the Bench even greater. He often said: "I can tell you what the law is but I can't tell you what his Majesty's judges will say it is"¹⁵⁶ It was an open secret that had his

¹⁵⁴ (1943) 60 SALJ 4.

¹⁵⁵ Carlisle, later Carlisle J, had taken ill during the night. The next day Mackeurtan persuaded him to go back to bed and provided him with the argument he (Carlisle) delivered the next day. The case was In re "Gwydyr Castle" 1920 NPD 231 and Cf (1943) 60 SALJ 141.

¹⁵⁶ The Honourable Mr DG Fannin - personal interview.

health permitted and he lived he would have been appointed to the next vacancy in the Appellate Division.¹⁵⁷ Thus the story has it that he was offered the Judge Presidency of Natal which he rejected with amusement as being subordinate to the Appellate Division - the members of which he had often instructed in their business.

Mr Justice Fannin recalls his fantastic photographic memory and how, when he was devilling for him he instructed Fannin that he had seen a case in point ten years earlier while arguing an appeal in Bloemfontein "1926 Appeal Court p 534 I think" he said. "Anyway it is on the right hand side of the book - halfway down the page."¹⁵⁸ Fannin duly found the case exactly where McKeurtan had indicated it would be, even though MacKeurtan told him he had not seen or thought about it for ten years. Mr Justice Fannin declares that the four years he devilled for MacKeurtan was a tremendous training ground and great experience and that his success as a lawyer was largely due to the influence of MacKeurtan who said: "Look for the odd point my boy",¹⁵⁹ and who never forgot his responsibility to his juniors and wrangled briefs for them whenever he could. No wonder Mr Justice Fannin concludes: "We all worshipped him unhesitatingly and sat at his feet absorbing the wisdom and knowledge of this really great man."¹⁶⁰

¹⁵⁷ (1943) 60 SALJ 142.

¹⁵⁸ The Honourable Mr DG Fannin op cit 5.

¹⁵⁹ Ibid.

¹⁶⁰ Fannin Op cit 6.

If the Durban Bar was well served by the eminent Mckeurtan, who lived and practised there, then Pietermaritzburg was at least equally well served by two outstanding advocates, namely Frank Shaw and Frank Broome, who practised at that centre. Although Frank Broome was eight and a half years older than Frank Shaw the latter matured early and for 11 years these two brilliant practitioners were in direct competition at the seat of the Natal Provincial Division. In the words of Broome "Frank Shaw was as formidable a competitor as I might have prayed not to have ..." ¹⁶¹ Indeed in the early 1930's Frank Shaw's name was mentioned in the same breath as Mackeurtan's. Mr Justice Blackwell of the Transvaal Bench reportedly told Dennis Fannin at that time:

"I have never thought much of your Natal court, but you have produced two of the greatest advocates that I have ever heard, one Graham Mackeurtan and the other Frank Shaw. I have just had Frank Shaw before me in the Transvaal making the whole of the Transvaal Bar look like a twopenny." ¹⁶²

Frank Shaw was born in Pietermaritzburg on 17 September 1899. ¹⁶³ He matriculated from Maritzburg College at the age of fourteen and at this tender age signed up to fight in the First World War. From 1914 - 1918 he was in the United Kingdom where he was commissioned to the 7th London Rifles. ¹⁶⁴ On his return to South Africa he was articled to Dacre Shaw and qualified as an attorney before coming of age and thus had to wait until 5 October 1920 before

¹⁶¹ Broome op cit 129.

¹⁶² The Honourable Mr Justice Fannin op cit 4.

¹⁶³ Natal Witness 2 April 1955.

¹⁶⁴ Ibid.

actually being admitted as such. He immediately started his own firm, Shaw and Company, and practised as a dual practitioner in Pietermaritzburg.

On 26 February 1931 Shaw was admitted as an advocate¹⁶⁵ and thereafter confined himself to practice solely at the Bar. Thus in the sensational Mallalieu case, referred to in chapter two, he was not only the instructing attorney but appeared with HH Morris KC for the defence. Together they conducted Mallalieu's case so well that the jury found him not guilty. Frank Shaw was a very versatile lawyer. In an analysis of reported cases during the 1930's his name appears with equal regularity in both criminal and civil cases. He conducted a vast practice and had a reputation for winning cases.¹⁶⁶

When the Second World War broke out he again joined in the ranks in 1940 and was commissioned before leaving the Union. It is said that after a viva voce examination before a board of officers one of them remarked "I think we got through that quite well, don't you."¹⁶⁷ In 1944 he was demobilized and brought back to South Africa to become legal adviser to the Department of Defence with the rank of

¹⁶⁵ Report of the Select Committee op cit 106. He was thus one of the select few who held dual rights for life by virtue of his admission both as attorney and as an advocate on 30 June 1932.

¹⁶⁶ See Knight v Findlay 1934 NPD 185; African Life Assurance Society (et al) v Robinson and Co Ltd and Central News Agency Ltd 1938NPD 277. But Cf Tregga and another v Godart and Another 1939 AD 17 where he crossed swords with Alexander Milne who appeared for the appellants.

¹⁶⁷ Broome op cit 130.

Lieutenant Colonel.¹⁶⁸ Shortly before the end of the war he was released and with his family left Pietermaritzburg to settle in Durban¹⁶⁹ Frank Shaw also founded a legal dynasty and his only son Mr Douglas Shaw QC¹⁷⁰ not only served with him in World War II but is to-day a senior advocate of the Natal Bar.

In addition to being a brilliant advocate and fine soldier Frank Shaw was also a great athlete and a Rhodes Scholarship would have been his for the asking had he not considered it his duty to his parents to become self-supporting as soon as possible. He excelled at cricket and tennis and became tennis doubles champion of South Africa in 1931 with FH Lowe.¹⁷¹

After taking silk in 1938 Shaw became one of the most sought after advocates in the Union. According to Fannin he was one of the most brilliant advocates Natal has ever seen, second only to Mackeurtan. In cross-examination he was deadly and could put any argument across

¹⁶⁸ Natal Witness, 2 April 1955 and personal interview with Mr Douglas Jamieson Shaw QC, born 18 April 1926, who is presently a senior advocate at the Natal Bar. Mr Douglas Shaw alludes to the interesting fact that he and his father served together in the Second World War, just as Tatham J and his sons did in the First World War.

¹⁶⁹ Frank Shaw was married twice. His first wife died early after giving birth to Mr Douglas Shaw and his sister. In 1936 he married again and two daughters were born of this second marriage.

¹⁷⁰ Who was educated at Michaelhouse and St Johns, Cambridge was admitted as an advocate of the Natal Provincial Division in October 1949.

¹⁷¹ Natal Witness 2 April 1955 and Broom op cit 130.

beautifully.¹⁷² In addition Broome says "he had a genius for finding authorities as helpful to his case as if he had manufactured them himself."¹⁷³ As an advocate Frank Shaw was thus superb with a clear logical mind and with the ability to work rapidly he had the potential of a real money-earner. Broome opines that he was "lucky to have such a redoubtable adversary"¹⁷⁴ to keep him on his toes and concedes that many good briefs came his way purely because he had gained a reputation for being able to stand up to Shaw. However, during their many years of bitter forensic battle they not only remained good friends but often found themselves collaborating or acting together in some very important cases. One such case concerned a flamboyant medical practitioner who in 1932 was convicted and sent to gaol for two and a half years on six counts of procuring abortion and one count of culpable homicide arising out of the death of one of the girls after such an operation.¹⁷⁵ Neither Shaw nor Broome was concerned with the matter at that stage as the doctor was defended by Harry Morris.¹⁷⁶ On his release from prison Knight set about recovering medical fees due to him inter alia by Estate Donaldson. Knight had in the meantime been struck from the medical register¹⁷⁷ with the result that when he sued the executors of the joint estate of Mr and Mrs

¹⁷² The Honourable Mr DG Fannin op cit 4.

¹⁷³ Broome op cit 145.

¹⁷⁴ Broome op cit 129.

¹⁷⁵ See Rex v Knight (unreported) and supra.

¹⁷⁶ Of Mallalieu fame supra and one of South Africa's greatest defenders inter alia also of Daisy de Melker.

¹⁷⁷ Both Shaw and Broom were later involved in his attempt to be reinstated. See below.

Donaldson the plaintiff was described as "formerly a medical practitioner."¹⁷⁸ In the Magistrates Court he claimed 55pounds 10s 6d for attendances and two operations on the wife who died after the second operation. Defendants attorneys filed a plea repudiating the claim on the ground that the plaintiff performed the first operation so carelessly and unskillfully that he ruptured the deceased's bowel, and that he performed the second operation without the husband's or the deceased's consent in order to try and overcome the evil results of his own carelessness and unskillfulness and that on the second occasion the plaintiff was intoxicated and operated so carelessly and unskillfully that the patient died. In the Magistrate's Court judgment was given for the plaintiff but on appeal to the Natal Provincial Division Matthews AJP held that a summons by a medical practitioner for recovery of fees for professional services rendered which does not allege that he is registered discloses no cause of action and that exception to this should have been taken in the Court below.¹⁷⁹ Matthews AJP held further that the court will mark its disapproval of the conduct of a successful appellant in placing scandalous charges on record in the court below without making any attempt to substantiate them by making no order as to costs of the appeal and said:

"... these are extremely serious allegations to place upon a record and should never have been put forward unless the defendant was prepared to substantiate them by evidence. At the commencement of the trial the magistrate ruled that the defendant shall begin, that is to say, that he should substantiate the

¹⁷⁸ see Estate Donaldson v Knight (1) 1933 NPD 46 at 47.

¹⁷⁹ Ibid.

allegations made in his plea. The defendant's attorney, after protest, immediately said that he was calling no evidence. At the very commencement of the trial, therefore, he abandoned those extremely serious charges against the plaintiff that he had placed upon the record."¹⁸⁰

Knight was not only litigious but a real fighter with the result that four months later the same case¹⁸¹ was again before the Natal Provincial Division. In this case Matthews AJP held that after being penalised in previous proceedings between the same parties for placing scandalous charges on record without making any attempt to substantiate them, the appellant in the subsequent and present proceedings repeated those charges again leading no evidence to support them the court will mark its disapproval of appellants conduct by ordering that the respondent be awarded the costs for this appeal as between attorney and client and he observed that:

"...The appellants and their advisers seem to have learned nothing from the Court's previous order or the Court's observations on that occasion."¹⁸²

But the redoubtable ex-doctor did learn and take note of the court's disapproval and it was about instituting an action against the appellant's attorney for damages for the defamatory allegations made in his plea that he enlisted the services of Shaw and Broome.¹⁸³ This raised a hairy

¹⁸⁰ Ibid at 51. Appellant's attorneys were Findlay and Sullivan of Durban.

¹⁸¹ Estate Donaldson v Knight (11) 1933 NPD 407 where Knight successfully appealed for the amount of his fees on the ground that he had satisfied the court on the evidence that his fees were fair and reasonable.

¹⁸² Estate Donaldson v Knight (11) 1933 NPD 407 at 413.

¹⁸³ Knight v Findlay 1934 NPD 185.

and very difficult question because communication between attorney and client are said to be privileged and therefore an attorney is normally not liable for damages for defamatory words written or spoken during court proceedings. Broome conceded that from a tactical point of view it was far and away the most interesting and difficult case he was ever involved with in the Natal Court.¹⁸⁴ He and Shaw had endless discussions before and during the trial on how to deal with emergencies that were sure to arise and after a twelve day trial succeeded in obtaining substantial damages, 250 pounds, for the ex-doctor with costs.¹⁸⁵ Matthews AJP, also held that in Roman-Dutch law the immunity from liability in respect of words used in the course of judicial proceedings is qualified and not absolute.¹⁸⁶ An appeal to the Appellate Division from this judgment was dismissed.

However, Shaw and Broome's joint efforts on behalf of the ex-doctor were not yet at an end. Knight ardently desired to get back on the medical register but with convictions for abortion and culpable homicide standing against him he had no hope. Frank Shaw and Broome were thus asked to prepare a petition to the Governor-General for a free pardon. When the petition was complete the Minister

¹⁸⁴ Broome op cit 146.

¹⁸⁵ Knight had sued for 1 000 pounds damages and Matthews AJP stated that but for the fact that at the time the statement was made Knight was not a medical practitioner the full amount claimed would have been awarded

¹⁸⁶ Knight v Findlay 1934 NPD 185 at 186. It is submitted that this case is essential reading for every law student and legal practitioner.

directed that they had to first argue the case before a Government law-adviser prior to it being forwarded to the Governor-General. This they did before "a quiet, courteous young law-adviser called Steyn"¹⁸⁷ little knowing that this same Steyn would in due course jump to the very highest judicial office in South Africa.¹⁸⁸ Nor was this the last Frank Shaw heard of the colourful ex-doctor. In August 1938 after Broome went to Parliament and Shaw had taken silk Knight, now practising as a dietician, was again arrested for procuring illegal abortions.¹⁸⁹ After another well-publicised trial lasting sixteen days and during which the prosecutor described Knight as a "public danger"¹⁹⁰ he was found guilty and ordered to pay 75 pounds or go to gaol for four months. When this case came up for review Frank Shaw KC, this time with Neville James, launched a strong attack on the credibility of the complainant and her husband but to no avail. Selke J confirmed the conviction stating that the sentence was on the lenient side considering Knight's previous conviction for a similar offence. But the Knight saga had an unusual conclusion-the publicity hungry ex-doctor insisted on having the last word and in July 1939 he was again in the Magistrates Court - this time as the complainant and testified against two

¹⁸⁷ Broome op cit 148, whose report must have been adverse as the free pardon was refused.

¹⁸⁸ Lucas Cornelius Steyn was Chief Justice of South Africa from 1959 - 1971.

¹⁸⁹ He was this time represented by ER Browne and AS Knox and even brought an application against the Magistrate when the latter, on the application of the prosecutor ordered the proceedings to be held in camera see: Knight v Additional Magistrate, Durban 1938 NPD 361. Knight wanted the proceedings to be held in public.

¹⁹⁰ Natal Witness 21 October 1938.

young European women who were charged with inciting to procure abortion and were found guilty.¹⁹¹

On his return to practice after the second World War Shaw's health began to fail and after several acting appointments he was appointed permanently to the Natal Bench in November 1950.¹⁹² Frank Shaw was an excellent judge with a fine penetrating mind and a tremendous grasp of detail. Broome JP for example gives him full credit for the reserved judgment delivered by himself in Dominion Insurance Co of SA Ltd v Pillay¹⁹³ where Shaw J sat with him. Broome JP admits to being in a complete fog when it came to drafting this judgment. He went to Shaw J, who was lying on his couch looking very ill, and the latter immediately, without opening a book or a note on the case, gave him a clear and masterly exposition of the problem and its solution.¹⁹⁴

As a man and a judge Frank Shaw was also endowed with deep wisdom and "insight into humanity's troubles."¹⁹⁵ His early death, while on sick leave in Europe in 1955, was regarded as a great loss and tragedy. A hard inner core of reserve prevented Shaw from ever seeking public office or having many friends and his sharp tongue made a few enemies, yet he was very popular and sought after. From a tender age he burned the candle at both ends but according

¹⁹¹ Natal Witness 14 July 1939.

¹⁹² Natal Witness 2 April 1955. He filled the vacancy occasioned by the early retirement of Hathorn JP.

¹⁹³ 1954 (3) SALR 967 which was approved by the Appellate Division and subsequently followed in other provinces.

¹⁹⁴ Broome op cit 130.

¹⁹⁵ Natal Witness 2 April 1955.

to Broome, his friend and rival, "it gave a lovely light".¹⁹⁶

Frank Broome, by contrast, was a confident extrovert and public figure, a brilliant advocate and linguist, a true leader who not only sought, but, held various public offices including that of Member of Parliament for Pietermaritzburg District. He was the son of a judge, William Broome J, who founded a legal dynasty,¹⁹⁷ and was from the outset destined for the highest offices.

Frank Napier Broome¹⁹⁸ came into the world on 19 January 1891 in Pietermaritzburg. After matriculating from Hilton College he was a Rhodes scholar at Oriel College, Oxford from 1909 to 1912 and was called to the Inner Temple on 17 November 1913. Broome's legal career commenced in January 1914 in Pietermaritzburg when he entered the employ of Tatham Wilkes and Co.¹⁹⁹ His qualification as a barrister entitled him to admission as an advocate in South Africa²⁰⁰

¹⁹⁶ Broome op cit 131.

¹⁹⁷ William Broome J was a judge of the Natal Supreme Court from 1 December 1904 to 31 December 1917. His son Frank Broome was appointed a judge of the Natal Provincial Division on 19 July 1939 and became Judge President of Natal in 1950; his grandson John Broome was appointed a judge in the province in 1976. Thus for the last 80 years at least one or more Broome was actually engaged in the law which constitutes a great legal tradition.

¹⁹⁸ Biographical details derived from: AA Roberts A South African Legal Bibliography 351; F N Broome Not the Whole Truth 287/8; (1951) 68 SALJ 264.

¹⁹⁹ Broome op cit 67. He was articled to Tatham J later Tatham AJP at a salary of five pounds per month.

²⁰⁰ Provided he passed an examination in local statute law which he duly did.

and he was admitted as such on 1 April 1914²⁰¹ on the application of F S Tatham KC.²⁰² However, the dual practice system was then in vogue and in order to practise as an attorney he had to serve articles for eighteen months which he immediately entered into after admission as an advocate.

On 4 August 1914 the First World War broke out and according to Broome his "complacency was shattered never to be restored."²⁰³ He served first as a trooper in South-West Africa and later as an artillery officer in France and was awarded the Military Cross in 1918.²⁰⁴

After the war²⁰⁵ he returned to Natal on 21 March 1919 and immediately again joined Tatham, Wilkes and Co as a clerk, where he was admitted as a partner after fifteen months.²⁰⁶ With his ambitions running towards the forensic side of the profession he did mostly court work but concedes that the first important case he conducted by himself in the Supreme court was an "unmitigated disaster".²⁰⁷ It was a defamation case turning purely on fact and at the end of the arguments Dove Wilson JP rebuked both counsel for not

²⁰¹ Report of the Select Committee op cit 106.

²⁰² Broome op cit 120.

²⁰³ Broome op cit 68.

²⁰⁴ Who's Who in Natal (1933) 35.

²⁰⁵ To which he went at the age of twenty-three and single and now returned at the age of twenty-eight with a wife. He had married his provocative blonde cousin in England during the war. See Broome op cit 101.

²⁰⁶ His father lent him the cash required to buy himself into a one-third interest and the balance was paid out of his share of the profits which were considerable in the post-war boom years. See Broome op cit 101.

²⁰⁷ Broome op cit 122/3, yet his client won despite this.

giving the court the assistance which it was entitled to expect. Broome was shattered and called on Tatham J for advice, and the latter obliged with the best advice Broome ever received on the art of advocacy and what a judge expects from counsel in order to give judgment in his favour. Already in the early 1920's Broome made his first appearance in the Appellate Division in the case of McKenzie v Farmers Co-operative Meat Industries Ltd²⁰⁸ Broome's association with his firm and as a dual practitioner lasted nearly nine years until 1927 when he decided to practise solely as an advocate.²⁰⁹ On 1 January 1928 he thus began living on his wits²¹⁰ and initially had chambers in both Pietermaritzburg and Durban. This plan was abandoned after six months and henceforth Broome had chambers permanently only in Pietermaritzburg.

After three years of practice solely as an advocate Broome was exhausted and decided to take silk on 22 July 1931.²¹¹ Broome KC built a large practice and from the law reports it is clear that he had as much work as he could handle. He never forgot Tatham J's valuable advice that what the court requires from an advocate is an argument that can be taken down and, if accepted by the court, be given back in the form of a judgement.²¹² Broome thus always presented

²⁰⁸ 1922 AD 16. This case was later applied by Feetham JP in Hargreaves v Nisbet 1932 NLR 125. See also 1932 SALT 120.

²⁰⁹ Natal Witness 17 January 1961.

²¹⁰ In 1927 he was lucky to be appointed law reporter for the Natal Law Society which provided him with a welcome addition to his income.

²¹¹ Roberts op cit 351 and Broom op cit 136.

²¹² Broome op cit 123.

his arguments to court in an orderly, clear and concise manner. His conciseness of expression, which was part of his literary equipment, and his method of presenting cases are well illustrated in the case of Baikie v Commissioner of Inland Revenue²¹³ where he stated: "The facts are 1-4. I submit the following propositions of law 1-6. Applying these propositions of law to the facts of the case 1-5. The propositions of law stated above and their application to the facts are all concluded by authority",²¹⁴ and he then cited one Appellate Division case and one Natal Provincial Division case. Matthews J applied the two cases and found for Broome's client thus basing his judgment on Broome's argument which judgment was affirmed on appeal.²¹⁵ Broome thus set a standard of forensic skill and thoroughness in preparation which was an inspiration to others. He was one of the founders of the Natal Bar on 30 May 1929 and during the 1930's became the leader of that Bar when Mackeurtan's health failed. Neville James said:

"His appearance in court compelled attention and his integrity shone forth for all to see. He was in every sense a leader."²¹⁶

The Honourable Mr Justice Roy Hathorn JP, as he then was, expressed similar sentiments on the occasion of handing over the Judge Presidency to Broome J on his retirement in 1950 when he recalled how he told his colleagues on the Bench after hearing a good argument by Broome KC's

²¹³ 1931 NPD 135.

²¹⁴ At 136.

²¹⁵ See also Kharwa v Inspector of Police, Durban 1931 NPD 197 for a further illustration of Broome's forensic methods in setting out his argument in point form.

²¹⁶ Natal Witness 20 March 1980.

opponent:

"That sounds all right, but wait until you have heard Frank Broome, he will shake you up, and he always did. So much so that I think he was the best advocate I have ever heard in a difficult case."²¹⁷

Mr Justice Fannin concurs saying that Broome had a distinguished career at the Bar and had "brilliance or flashes of it"²¹⁸ with his sharp and clear-minded arguments in court.

As a person Frank Broome was courteous and dignified in all his dealings whether legal, professional or social and according to Mr Justice Neville James "he was held in the highest respect by all who knew him"²¹⁹ However, he did acquire a reputation of being somewhat reserved and remote, even cold, particularly after he was elevated to the Bench. Yet there was about him "a generosity of spirit, a warm humanity and a readiness to advise and encourage that belied this view of him."²²⁰ Thus it was Frank Broome who appeared pro amico for Dennis Fannin when the latter applied for a refund of 25 pounds as he no longer wished to be admitted as an attorney having already been admitted as an advocate.²²¹ Neville James, as he then was, to-day still gratefully recalls how Broome inspired and encouraged him to become an advocate and concedes that if it was not for Broome's influence his life would probably be

²¹⁷ (1951) 68 SALJ 271.

²¹⁸ Fannin op cit 4 and personal interview 19.

²¹⁹ Natal Witness 20 March 1980.

²²⁰ Ibid.

²²¹ Ex parte Fannin 1930 NPD 381. Under the rules then existing he could in any event act as both.

different.^{2 2 2} Thus when Broome became a member of Parliament in 1938 he lent his chambers in Pietermaritzburg to Neville James and when he was appointed a judge in 1939 he also gave his set of Appellate Division Reports to him in recognition for James' unselfish help in devilling opinions for him while a junior. But one good turn deserves another and the happy sequel was that when Neville James became a Judge he gave the same set, with all the further volumes added, to Broome's son on the latter's admission as an advocate.^{2 2 3}

From his biography^{2 2 4} it appears that Frank Broome had a great zest for life. He enjoyed dances, parties, people, travel, hiking, golf, politics and above all his legal career from dual practitioner to Judge President. It is also clear that he had a keen sense of humour and he mentions at least two cases in which he was involved for their amusing features. In the Cullingworth will case,^{2 2 5} which was an action for the interpretation of a will, Broome KC, with Milne, represented one group and Selke and Mackeurtan each another group of beneficiaries. A granddaughter of Cullingworth was a member of the group represented by Broome and also happened to be a friend of the family. At a party shortly before the case was due to be heard she told Broome that the vital thing to remember about her grandfather's Will was that his paramount wish

^{2 2 2} He would probably have been an attorney and never a judge or Judge President. Personal interview 9.

^{2 2 3} Broome op cit 154.

^{2 2 4} Not the Whole Truth.

^{2 2 5} In re Estate Cullingworth 1936 NPD 251.

was that his property remain in the family. Realizing that Broome probably did not pay too much attention to the vital information she gave him at the party she followed this up with a letter repeating the same information. Broome still did not pay much attention, regarding it as a purely legal question, and spent days researching the old Roman-Dutch authorities on Wills and prepared a long learned argument full of technical legal terms. The court listened to these well prepared arguments with great attention but when judgment was delivered²²⁶ there was no mention of the ancient Roman-Dutch authorities or the highly technical legal terms - the court simply decided that effect must be given to the testator's paramount intention, namely to keep the property in the family. Broome concluded that if he had listened to his client he could have saved himself a great deal of time and effort.²²⁷

The other case Broome refers to was the "bad ham case"²²⁸ which involved a twenty-five day trial with Feetham JP presiding.²²⁹ The plaintiff established a Christmas Hamper Club in 1932 whereby each member, who had by a given date made the requisite payment, received a hamper containing, if required, one ham. In 1933 sixty dozen hams were again ordered from the defendants because the previous years' hams were completely satisfactory. Unfortunately things went wrong with the hams in 1933 and Feetham JP held that

²²⁶ After twenty-one days - judgment having been reserved.

²²⁷ Broome op cit 150.

²²⁸ Broome op cit 150.

²²⁹ Bower v Sparks, Young and Farmers' Meat Industries Ltd
1936 NPD 1.

on the facts the defendants, for whom Broome KC and Henochsberg appeared, had committed breach of contract by supplying defective hams not fit for human consumption and were therefore liable to the plaintiff in damages amounting to 650 pounds with costs. Broome concedes that they were soundly beaten by Selke KC, retained by the plaintiff, but the case had a very amusing aspect in that when Broome KC called as a witness the manufacturer's chief bacon-curer, a Portuguese gentleman, his spoken English was such as to make Feetham JP restive and he indicated that he was not prepared to continue with this witness unless an interpreter was found. At lunchtime the Portuguese Consulate was contacted and could provide an interpreter. Unfortunately this interpreter and the witness turned out to be the same person.²³⁰

As a senior silk Frank Broome was naturally engaged in many cases of great legal interest and importance. I have already referred to the very important case of Knight v Findlay²³¹ which dealt with the qualified privilege of legal practitioners in South African law but there were many others.²³² Broome KC twice represented the South

²³⁰ Broome op cit 151 could not recall how they got out of that dilemma.

²³¹ 1934 NPD 185 where Broome KC according to the Natal Witness on 18 April 1934 concluded a seven hour address in the Supreme Court in support of Knight's claim for damages for defamation. Broome KC with Frank Shaw and ER Browne won their client's case in the NPD and also on appeal to the Appellate Division where Matthews AJP's judgment as upheld.

²³² Ex parte Stuart and Geerdts 1936 NPD 57 where he appeared with Mackeurtan and de Wet for the Minister of Justice and Ex parte Stuart : Ex parte Geerdts 1936 AD 418 at 428 where Broome's contentions, succinctly

African financier Schlesinger. The first case never went to trial and was remarkable only for the manner in which it was settled. The second case was also settled on terms never made public but contained legal arguments of great interest and generated enormous publicity. During the 1930's Schlesinger had approximately a hundred companies with different boards of directors under his control. An eminent economist investigated the affairs of these companies and published a circular criticising their financial dealings and set-up. What caused Schlesinger to sue was a leading article published in the Natal Mercury^{2 3 3} drawing attention to these criticisms and saying that a detailed investigation and rebuttal was necessary as it had "become very much a matter of national concern."^{2 3 4} Schlesinger decided the criticisms were defamatory, and so three of his companies each sued the first defendant as owner and printer and the second defendant as a distributor in three separate actions for 25 000 pounds damages. This action resulted in no fewer than five eminent Kings Counsel being engaged. Mackeurtan KC and Frank Shaw KC appeared for the first plaintiffs, Broome and Shaw for the second plaintiffs and Frank Shaw KC alone for the third plaintiff. Broome concedes that it was difficult to frame a watertight

enumerated in point form, as usual, were referred to; Ex parte Stalker 1935 NPD 61 where he successfully applied for Stalker's reinstatement on the roll of attorneys.

^{2 3 3} On 21 January 1938 headed "The Schlesinger Group".

^{2 3 4} African Life Assurance Society Ltd.

African Guarantee and Indemnity Co Ltd.

African Consolidated investment Corporation Ltd v Robinson and Co Ltd and Central News Agency Ltd 1938 NPD 277.

cause of action as the Natal Mercury was not the originator of the criticisms nor had it adopted the circular in its article, it merely drew attention to them. Moreover, the Natal Mercury was also led by a formidable team viz Sisson KC, Ramsbottam KC²³⁵ and Fannin which excepted to the plaintiff's declarations as disclosing no cause of action in that mere publication of the leading article could not in law amount to publication of the circular. Feetham JP, who presided, questioned Ramsbottam mercilessly²³⁶ but the latter ably stood his ground.²³⁷ Mackeurtan in turn argued forcibly for publication by "mere reference",²³⁸ citing cases in which drawing attention to libellous matters or its libellous meaning or by mutely pointing to a libelous poster had been held to be publication.²³⁹ Both Broome and Shaw adopted these arguments and added their own.²⁴⁰ Shaw found the case of Hird v Wood,²⁴¹ where the

²³⁵ Then one of the leaders of the Transvaal Bar, shortly afterwards elevated to the Transvaal Bench and later one of South Africa's ablest Appellate Division Judges.

²³⁶ Cf Natal Witness 8,9,10, and 11 June 1938.

²³⁷ Arguing that there was no publication in that there was no invitation to the reader to read the circular that the contents of the circular could be rebutted, and that the reader does not know the contents and does not know that the circular accused Schlenszenger of fraud.

²³⁸ Natal Witness 10 June 1938 where Feetham JP rejected the expression of "mere reference" saying that there was a description of the contents of the circular and that, that was what excited curiosity.

²³⁹ Natal Witness 9 June 1938 and Natal Mercury case at 284.

²⁴⁰ Shaw at 287 distinguished between those readers of the leading article who had already read the circular and those who be reason of the terms of the article were induced to read the circular. In the first case the effect of the leading article is to remind readers of the contents of the circular which is publication of defamatory matter and in the second the leading article operates exactly as the "pointing finger" did in the case of Hird v Wood 1894 Solicitors Journal 234.

²⁴¹ 1894 Solicitors Journal 234.

person sued was "proved to have sat on a stool near a publicly-exposed placard, defamatory of the plaintiff and to have drawn the attention of passers by to it by mutely pointing to it and these facts alone were held on appeal to constitute publication in law"²⁴² which was quoted with approval by Feetham JP.²⁴³ The court applied this principle and held that there was publication by reference in that the Natal Mercury by drawing attention to the pamphlet, had published the criticisms contained in it.²⁴⁴

There was much more to Broome than his life in the law. He was a man with a social conscience and as early as 1931 he declared at public meetings that the "so-called native problem"²⁴⁵ was in fact an economic problem and that the only way to overcome it was to educate the blacks and to instil into their minds the "dignity of labour".²⁴⁶ Broome was of the persuasion that the British Empire was built on the principle of regarding the welfare of the natives as a sacred trust.

In 1938 Broome was elected a member of Parliament and represented Pietermaritzburg District²⁴⁷ in the crucial

²⁴² Natal Mercury case 307.

²⁴³ Ibid.

²⁴⁴ An appeal was not proceeded with.

²⁴⁵ Natal Witness 18 December 1931.

²⁴⁶ Ibid.

²⁴⁷ He was fort-six years old and made the decision to let his name go forward for nomination only after deep soul-searing and an assurance from Matthews J that he would not retire early as Broome was not prepared to give up the hope that he would eventually be appointed a judge. However, Matthews J's health broke down and he retired on 1 March 1938 and Selke KC was appointed in his place.

days at the beginning of World War II when South Africa's future hung on the balance. Broome's election was not surprising as he was already a well-known and respected public figure and a most persuasive and influential speaker. He made numerous speeches on wide ranging subjects²⁴⁸ and in a speech on the taxation of bachelors the Natal Witness reported that "he spoke with considerable satire and kept the audience rollicking with laughter".²⁴⁹ He put great effort into the preparation of his speeches and opened his campaign with a brilliant speech on his main plank "racial co-operation".²⁵⁰ All Broome's speeches were delivered extempore thus when he compiled his book on Speeches and Addresses²⁵¹ he reconstructed these from notes and press reports.

Frank Broome had many talents and his autobiography - Not the whole truth - attests to his literary ability. In addition he also had a wide range of intellectual interests and played a prominent role in his old school Hilton College where he was Chairman of the Board of Governors and

²⁴⁸ See Natal Witness 28 July 1937; Natal Witness 14 February 1933; Natal Witness 23 April 1938.

²⁴⁹ Natal Witness, 6 December 1934.

²⁵⁰ Natal Witness, 16 March 1938. Significantly in those days "racial co-operation" meant between English and Afrikaans speaking South Africans and had nothing to do with colour. He also advocated "God save the King" be preserved as our national anthem and a Union of South Africa within the British Empire. He stood for the United Party and was a strong supporter of General Smuts.

²⁵¹ F N Broome Speeches and Addresses 1 ed 1973 Schuter and Shooter.

the Natal University College²⁵² which honoured him with an honorary doctorate.²⁵³ At the graduation luncheon Broome, with characteristic humour, explained that he did not use the title doctor because he lived near a main road and if called to attend to a road accident casualty it would be "too humiliating to have to explain that I am the sort of doctor who preaches but doesn't practice".²⁵⁴ Broome's involvement with Natal University College stemmed from his gratitude for the support he received from its students during his election in 1938 and which he never forgot. Thus during his short term in Parliament he interested himself in the foundation of an Agricultural Faculty in Pietermaritzburg but the project was shelved when the war broke out and in any case he was elevated to the Bench. However, after the war he was appointed to the Natal University Council of which he was deputy chairman and was present at the University's inauguration in 1949 which he describes as a "great occasion."²⁵⁵

When Broome entered politics he had no ambition to make it his career²⁵⁶ - he was wedded to the law with the result that when Feetham JP was elevated to the Appellate Division

²⁵² At the end of the war Broome J was approached to become principal of Natal University College but after due consideration he reluctantly declined. It was his friend Ramsbottom J who persuaded him that once a man is appointed to the Bench he must regard himself as out of the running for appointment in any other field for not to do so would be to undermine the independence and prestige of the judiciary.

²⁵³ Natal Witness 13 April 1973.

²⁵⁴ Ibid.

²⁵⁵ Broome op cit 196.

²⁵⁶ Broome op cit 177. Although on his own admission the prospect of a Cabinet post made it very attractive.

he decided to accept the offer to fill the vacancy thereby occasioned on the Natal Bench. He took his seat for the first time on 25 July 1939²⁵⁷ and received an "exceptionally warm welcome"²⁵⁸ from the Durban Bar and side Bar.

Broome J proved to be a judge of outstanding quality. He not only looked every inch a judge but was indeed just that. His door was always open and his passion for punctuality caused the wheels of justice to move smoothly and particularly after he became Judge President in 1951 punctuality became second nature to all who worked with him.²⁵⁹ The Honourable Mr Justice Neville James had the following to say about him as a judge:

"He presided in his court with natural dignity and a scrupulous courtesy to all, which became a byword ... He could not abide an ill-prepared or emotional argument, or vague and amorphous submissions. His judgments ... were noted for a disciplined clarity of expression and a persuasive logic, lit up on occasions by flashes of dry wit. He did not hedge in his judgments with reservations and qualifications and each point followed upon the other in logical sequence until he arrived at his conclusion, which then appeared to be inevitable."²⁶⁰

Broome J thus gave his judgments in the same clear, concise and orderly manner as he presented them as a senior silk.

Like Feetham JP he lived a long, productive life, full of achievement, even after his retirement²⁶¹ and died in his

²⁵⁷ Natal Witness 25 July 1939.

²⁵⁸ Ibid. Less than two months later on 4 September 1939 the Second World War broke out.

²⁵⁹ See supra.

²⁶⁰ Natal Witness 20 March 1980.

²⁶¹ On 18 January 1961.

ninetieth year in March 1980.²⁶²

Among other leading advocates Alexander Milne came strongly to the fore during the 1930's. The son of a seafaring captain he was born in Aberdeen, Scotland on 3 November 1899 and came to South Africa in 1907 with his parents.²⁶³ After receiving his early education at Harrismith in the Orange Free State he went to Exeter College, Oxford in 1919 to study law. In 1922 he was called to the Bar by the Middle Temple, London and commenced practising in Natal in 1925.²⁶⁴ Like Shaw and Broome he too served in both world wars. During World War I he served in the East African Campaign and in World War II he commanded the Seventh Brigade Signal Company, and later the Fourteenth South African Motor Brigade Signal Squadron.²⁶⁵

Milne was admitted as an advocate on 11 April 1923²⁶⁶ and was one of the signatories when the Society of Advocates was formed in 1929. He was from the outset an advocate of the first order and practised solely as such. He had a vigorous mind, could think on his feet and stand his ground not only against severe questioning by the Bench but against any opponent. Thus against the advice of Mackeurtan, who was then leader of the Bar, he took the Tregea²⁶⁷ case on appeal when he lost against Frank Shaw in

²⁶² Natal Witness 20 March 1980.

²⁶³ Natal Mercury 3 June 1987.

²⁶⁴ Ibid.

²⁶⁵ Ibid.

²⁶⁶ Report of the Select Committee op cit 106.

²⁶⁷ Tregea and another v Godart and another 1939 AD 16 and supra.

the Natal court. The case concerned the validity of a Will executed by Vanderbeke approximately two hours before his death leaving his house in Durban North and one half of his estate to sister Tregea who nursed him for six months before his death. The original heirs, represented by Shaw KC contested this Will on the ground that the testator was unconscious on the day the Will was executed, alternatively that he acted under undue influence. The trial judge, Hathorn J, unreservedly accepted Tregea's denial of undue influence and also found it proved that the testator was conscious at the material time. But as he doubted whether the testator had the necessary capacity to make a will the case had to be decided on the onus of proof and held that by virtue of the provisions of Law 17 of 1859 (Natal) the English law relating to onus of proof in such cases applied and that under English law the burden of proof rested on the defendants to prove testamentary capacity and that they had not discharged such onus. The Appellate Division held by a majority that Law 17 of 1859, applying English rules of evidence to Natal, had no application in the present case and that the burden of proof was on the plaintiffs who attacked the validity of a Will regular on the face of it and that they had not discharged such burden. Sister Tregea thus walked away with a substantial inheritance and on the question of onus Milne had a winning case. But according to Fannin²⁶⁸ everyone knew that Tregea was not a truthful witness and Shaw KC demolished her in

²⁶⁸ Mr Justice Fannin - personal interview 5.

cross-examination²⁶⁹ but the trial judge could not find that she was a liar and decided the case on the question of onus. This case illustrates not only Milne's fighting spirit but also the fallibility of triers of fact. It is also a glaring example of the unnecessary application of English law by the Natal court during the 1930's.

Another interesting case where Milne came up against Shaw and won was in Dymes v Natal Newspapers Ltd.²⁷⁰ Milne appeared for Dymes, a well-known attorney in Durban, who sued the Sunday Tribune for 5 000 pounds damages for defamation for publishing a statement that eleven members of the New Guard, a secret society, were ejected for "serious misdemeanors"²⁷¹ and the plaintiff, as chairman, was one of them. Milne relied inter alia on Knight's case²⁷² but as the defendants admitted liability his argument was directed primarily at the quantum of damages. Shaw argued ably in mitigation of damages with the result that Carlisle AJ held that the plaintiff was entitled to substantial damages but that 5 000 pounds was extravagant and awarded 300 pounds plus costs.²⁷³

During the 1930's Milne built up a substantial practice. As a diligent, dedicated practitioner his rise to eminence was predictable. He took silk in 1943 and acted as a judge

²⁶⁹ Natal Witness, 13 September 1938.

²⁷⁰ 1937 NPD 85.

²⁷¹ Ibid.

²⁷² Knight v Findlay 1934 NPD 185 where Dymes was the instructing attorney for Knight.

²⁷³ The plaintiff's attorneys were Hathorn and Fannin, see below.

from 1947 to October 1954 when his appointment to the Natal Provincial Division became permanent.²⁷⁴ Milne had a passionate belief in the proper administration of justice as the cornerstone of an orderly, civilized society. Of his unsparing devotion to the law Mr Justice Leon said:

"The law is a pitiless mistress and I don't think the law has ever had quite such a dedicated servant ... He went to endless trouble to get to the bottom of every case and always faced up to problems square-on."²⁷⁵

As a person Sandy Milne was respected and loved. He was endowed with enormous dignity, infinite patience and courtesy.²⁷⁶ Mr Justice Leon described him as a "wonderful human being and friend; warm, generous, loyal and concerned."²⁷⁷ He was also a devoted family man and immensely proud of the achievements of his two sons in their respective professions.²⁷⁸

Of Milne as a judge it was said that he "had an outstanding ability to deliver an extempore judgment on the most

²⁷⁴ Daily News 8 June 1987.

²⁷⁵ Natal Mercury 3 June 1987. Mr Justice James also alluded to his thoroughness and almost insatiable curiosity and gives the example of how Milne J once solicitously enquired from a lady in an undefended divorce case, who complained that during an argument her husband had thrown a glass of wine in her face, whether the wine was white or red.

²⁷⁶ To these attributes I can personally attest after an interview with him before his death.

²⁷⁷ Daily News 8 June 1987.

²⁷⁸ His eldest son Alexander John Milne, born in 1929, followed in his father's footsteps and became Judge President of Natal in 1982 and was recently elevated to the Appellate Division. His second son David Lindsay Milne born in 1932 is the general manager and director of several companies.

complex and intricate questions of law"²⁷⁹ and according to Mr Justice Leon he had never seen Judge Milne surpassed and seldom equalled in this respect.

Even in his retirement Judge Milne remained vigorous and clearminded. He was made a member of the Courts of Appeal in Swaziland, Botswana and Lesotho and set himself the task of editing the third edition of Henochsberg on the Companies Act and three succeeding editions thereof.²⁸⁰ He was honorary vice-president of the General Bar Council since 1955. Of Milne it can truly be said that he built well on the foundation laid during the 1930's.

JJL (Jim) Sisson was another leading advocate of this period and his name featured prominently in the law reports. He was educated at Michaelhouse and was the first Natal Rhodes scholar.²⁸¹ He was admitted as an advocate on 27 April 1908²⁸² - a contemporary of Mackeurtan and like him also chose a life at the Bar rather than on the Bench. At the beginning of 1919, after returning from the first World War Mackeurtan persuaded him to join the Bar, but Sisson found it irksome to devil for Mackeurtan and resumed the dual practice. However, in 1921, according to Roy Hathorn²⁸³ Sisson returned to the Bar and they compete for fifth place of seniority in the creation of the nucleus which formed the Natal Bar. Sisson was thus a signatory to

²⁷⁹ Daily News 8 June 1987.

²⁸⁰ Natal Mercury 3 June 1987.

²⁸¹ Fannin op cit 14.

²⁸² Report of the Select Committee op cit 106.

²⁸³ (1943) 60 SALJ 136/7.

the constitution of the Society of Advocates which was formed in 1929.²⁸⁴

Sisson never married. According to Broome he was "from his young days a kindly, whimsical old bachelor"²⁸⁵ whose needs were few and simple and consequently he never did more work than was necessary to satisfy them adequately. In addition he did not like stress and strain so that when life became too pressurised he simply went fishing²⁸⁶ and thus lacked any real ambition. Other colleagues described him as "a bit eccentric but a brilliant wit who made marvellous after-dinner speeches"²⁸⁷ He was noted for his generosity and kindness. Fannin recalls how Sisson brought him into the Natal Mercury case and how much this meant to his embryonic practice at the time. On the practical side Broome recounts two occasions when Sisson was a "good Samaritan"²⁸⁸ to him. Once when he was struck with a migraine headache in court and the other when the sharp edge of an open window cut his forehead open. On both occasions Sisson took charge and had him in Court on time.²⁸⁹

As an advocate Sisson conducted a good practice which could have been much bigger had he wished. It has been said that

²⁸⁴ Ibid.

²⁸⁵ Broome op cit 131.

²⁸⁶ Mr Justice James believes the remark about Selke of going fishing and letting his mind make itself up was also apposite to Sisson.

²⁸⁷ Fannin op cit 14.

²⁸⁸ Broome op cit 131.

²⁸⁹ Ibid. On the latter occasion Broome was already on the Bench.

at times he had "flashes of brilliance"²⁹⁰ but unfortunately he was unpredictable and could not always be relied on to exert himself to win. He was, however, a talented and versatile lawyer as the wide variety of cases he appeared in illustrate. In the Natal Mercury case²⁹¹ which dealt with defamation by reference he led the case for the excipient/defendant. In Bramdaw's case²⁹² he successfully pleaded estoppel against the Crown for wrongful dismissal. Isaacson's case²⁹³ dealt with estate agents commission but he successfully appealed, distinguishing the rule in MacDuff's case²⁹⁴. In the interesting case of Wallace²⁹⁵ he again successfully appealed against Wallace's conviction of exceeding the speed limit of 15 miles per hour. Feetham JP held that the conviction and sentence must be set aside as the evidence of the rate of speed was based on that of one person only using two stopwatches.²⁹⁶

Sisson always spurned any suggestion of going to the Bench, but in later life he spent much time compiling a South African Legal Dictionary.²⁹⁷

²⁹⁰ Fannin op cit 14.

²⁹¹ Supra.

²⁹² Bramdaw v Union Government 1931 NLR 57.

²⁹³ Isaacson v Commercial Services Corporation of SA 1931 NPD 80.

²⁹⁴ MacDuff & Co Ltd v Johannesburg Investments Co. Ltd 1924 AD 573 ie the doctrine of fictional fulfillment.

²⁹⁵ Wallace v Inspector of Police, Durban 1931 NPD 282.

²⁹⁶ In 1936 the Union criminal figures showed that 3 685 Europeans were convicted in that year for reckless driving, thus motor vehicles were already rather common in the 1930's.

²⁹⁷ Broome op cit 131.

Other leading advocates, practising solely as such, during the 1930's were ES Henochsberg, TB Horwood, LR Caney and J C de Wet. All four of them became judges of the Natal Provincial Division and/or the Native High Court. Moreover, three of them either produced or assisted in revising authoritative legal textbooks in specialised fields which are still in use today.

Edgar Samuel Henochsberg was a born and bred Durbanite. Born in 1894 on the 16th February he was educated at Natal University College and in Liverpool, England.²⁹⁸ At the tender age of fourteen he was employed by George Goodricke, later Goodricke and Carlisle, where he served articles and was admitted as an attorney in 1915.²⁹⁹ During the First World War he served on the Western front, through Delville Wood, and was granted a commission. On his return to Durban in 1919 he resumed practice as an attorney but in 1922 began to "devil" for Mackeurtan and on 27 February 1923 he was admitted as an advocate.³⁰⁰ Hereafter he practised solely as such and also distinguished himself as a lecturer in legal subjects at the Natal Technical College.³⁰¹

Early in 1930, due to an "official blunder"³⁰² it was announced by the Natal Witness that Henochsberg was

²⁹⁸ Goetzsche op cit 71.

²⁹⁹ Ibid. On reaching the required age of twenty-one.

³⁰⁰ He was one of the signatories when the Society of Advocates was formed in 1929.

³⁰¹ Natal Witness 11 March 1930.

³⁰² Natal Witness 12 March 1930.

appointed the new Judge President of the Native High Court. The very next day the matter was put right when it was announced that Henochsberg's appointment was only a temporary one of puisne judge to that court. The Natal Witness went on to speculate that TB Horwood would probably be the next permanent appointment to that court, as soon as he had completed his seven years at the Natal Bar as required by the Native High Court Act,³⁰³ at which time Henochsberg would retire. Henochsberg thus served as judge of the Native High Court during February and March 1930.

Combined with these acting appointments Henochsberg ran a respectable practice during the 1930's. He was regarded as "a most pain-staking chap"³⁰⁴ and a very good company lawyer. However, in the case of Alper³⁰⁵ where the accused were charged as individuals in their capacities as directors for offenses committed by the company under the Companies Act³⁰⁶ he appealed with only partial success. With Feetham JP presiding Hathorn J held that notwithstanding that no proceedings had been instituted against the company nominatum, the evidence having proved that the company was guilty, the first accused, as the person on whom rested the duty of complying with the requirements of section 26, was sociis criminis, and had

³⁰³ Natal Witness 12 March 1930. This Act insisted that at least one member of the Native High Court Bench should have practised for at least seven years at the Natal Bar.

³⁰⁴ Fannin op cit 19.

³⁰⁵ Alper and Alper v Rex 1931 NPD 429 which is still cited authoritatively today.

³⁰⁶ 46 of 1926.

been rightly convicted, but that the second accused, not being sociis criminis should have been acquitted.

In 1939 Henochsberg took silk but joined the artillery when World War II broke out and later, like Frank Shaw, was appointed Senior legal adviser to the Department of Defence.³⁰⁷ After the war he resumed his practice and also devoted a great deal of time to charity work. He became a member of the South African Scout Council, was one time chairman and trustee of the Educational Trust Fund of Adams College and president of the Durban Bantu Child Welfare Society.³⁰⁸

After several acting appointments from 1947 onwards Henochsberg was elevated to the Natal Bench in July 1955 and retired in 1964 on reaching the age limit.

Henochsberg was a sound advocate and judge but his legacy to Natal and South Africa is his book Henochsberg on the Companies Act first published in May 1953 and which is still to-day a standard textbook on the subject in South Africa.

Thomas Berridge Horwood was born in Oxfordshire, England on 3 January 1888 and came to Natal with his parents in 1894.³⁰⁹ He was educated at Maritzburg College and went to

³⁰⁷ Goetzche op cit 171.

³⁰⁸ Ibid.

³⁰⁹ Who's Who in Natal (1933) 129.

Oxford with a Natal Rhodes Scholarship from 1906-1911.³¹⁰ He excelled in the examination for the Indian Civil Service where he served from 1911-1919 when he resigned for health reasons and returned to Natal.³¹¹ He was admitted as an advocate of the Natal Provincial Division on 26 April 1923.³¹²

Horwood was regarded as a great intellectual by his colleagues yet he was "not an outstanding success at the Bar,"³¹³ finding it difficult to argue cases and taking punishment in court. However, the law reports show that in the early 1930's he was quite active as an advocate. More often than not he came up against either Sisson, Henochsberg or Broome in court but in Patterson v Reyburn and Others³¹⁴ he put up a vain struggle against Mackeurtan. In this case the court applied purely South African law and referred to the "Dutch" version of the ordinance to arrive at its true construction.

Broome alludes to the fact that Horwood's opinions were so learned that his clients could not make head or tail of them. Looking at the pages of authorities he cited in many of his cases one can easily understand that. In the case

³¹⁰ Ibid.

³¹¹ (1943) 60 SALJ 137.

³¹² Report op cit 106. He was thus also a signatory when the Society of Advocates was formed in 1929.

³¹³ Broome op cit 106.

³¹⁴ 1930 NLR 223.

of Bramdaw³¹⁵ he cited three typed pages of authorities as opposed to Sisson's single paragraph and still lost.

However, Berry Horwood was a man of learning and a Roman-Dutch scholar of the first order. He not only assisted Mackeurtan with the second edition of the Sale of Goods in South Africa, published in 1935, but himself published several articles in the South African Law Times. In Some Notes on Aedilitian Remedies³¹⁶ he referred extensively to the Roman-Dutch authorities and in another article he dealt with "The effect of delay on rescission of Contract".³¹⁷

Horwood was a bachelor and, like Sisson, had no financial or family responsibilities or constraints. He would have been an excellent law professor but instead accepted an appointment to the Native High Court Bench. Here Horwood's agile brain and scholarly attributes were largely wasted as he was mostly occupied with criminal trials.³¹⁸ According to Broome he was a "lovable character"³¹⁹ and a person who could have done great things in a more congenial environment. He died in harness in 1938 long before his time.³²⁰

Lionel Rhodes Caney³²¹ was also a born and bred Durbanite.

³¹⁵ Bramdaw v Union Government 1931 NPD 57 at 128, which involved an action for damages for wrongful dismissal and estoppel.

³¹⁶ 1932 SALT 83.

³¹⁷ 1932 SALT 130.

³¹⁸ Fannin op cit 7.

³¹⁹ Broome op cit 141.

³²⁰ Natal Witness 23 November 1938.

³²¹ "Leo" to his friends and colleagues.

He was born here on 29 July 1898³²² and went to school at Durban High School. After qualifying as an attorney he was admitted on 13 December 1920. He became a partner in the firm Henwood, Britter and Caney, which still exists today, and built up a large practice qualifying also as a conveyancer and notary public.³²³ He was chairman of the Durban Legal Association and captain of the Durban Rowing Club. Caney also qualified as an advocate and was admitted as such on 10 October 1927.³²⁴

In the mid 1930's he elected to practice solely as an advocate and this was confirmed by the list of professional licences issued in 1936 and submitted by Feetham JP to the Select Committee.³²⁵ Caney thus also went through the discipline of arguing cases before Feetham JP and one such case was that of Ditz v Attorney General and Another.³²⁶

In this case Ditz, an attorney, was consulted by a client who was involved with manufacturing forgeries of 5 pound notes and wanted to use the information to obtain immunity if the whole process was disclosed to the Reserve Bank. Ditz was subpoenaed to testify in the Magistrate's Court and instructed Caney to apply to the Natal Provincial Division for an order to set aside the Magistrate's decision that the communication was not privileged. Caney argued that English law applied and cited numerous authorities but Feetham JP held that whilst the privilege

³²² Who's Who in Natal (1933) 45.

³²³ Ibid.

³²⁴ Report of the Select Committee op cit 109.

³²⁵ Cf Report op cit 111.

³²⁶ 1936 NPD 345.

attaching to communications between attorney and client can in certain cases be claimed on behalf of an unnamed client, a communication made in furtherance of an illegal purpose is not privileged and therefore Ditz's application for an order declaring that he was entitled to refuse to give the identity of his client must fail.³²⁷ Caney thus lost this case on the merits and not because he didn't present his case very well. A right to appeal was allowed but not prosecuted.

Caney had a good practice at the Bar, devoting much time to, and specialising in, opinion work. As an advocate he was according to Fannin a bit "over elaborate, taking too many points - both good and bad"³²⁸ and thus lacked selectivity. He was however a very persuasive arguer on the law and a valuable advocate in a difficult legal case but he was not an outstanding trial lawyer.

In 1954 Caney QC was elevated to the Natal Bench and on his retirement on 29 July 1968³²⁹ Milne JP said that Caney J would be remembered for "his gentleness and wisdom at all times" and that "he was relentless in his work and more than most judges would reserve judgment to consult authorities for full analyses."³³⁰ Fannin agrees that Caney J was "an extremely painstaking but good judge,"³³¹ not nearly in the same class as Feetham JP but probably a

³²⁷ Ditz v Attorney General 1936 NPD 345 at 356.

³²⁸ Fannin op cit 14.

³²⁹ Natal Witness 30 July 1968 on his 70th birthday.

³³⁰ Ibid.

³³¹ Fannin op cit 14.

better lawyer than Hathorn J.

Caney's contribution as an advocate and judge of the Natal Provincial division was thus sound and praiseworthy, but his greatest contribution to the legal profession and lawyers and law students in general in Natal and in South Africa was his book The Law of Suretyship in South Africa first published in 1936. This was his great legacy to our legal literature. At the request of the Natal Law Society Caney and JR Brokensha also compiled and edited in 1933 the Rules of the Natal Provincial Division of the Supreme Court of South Africa.

At the time of his retirement Caney indicated that he would act as an editor of the Prentice Hall law reports and that he would work on the second edition of his book on The Law of Suretyship in South Africa which was in fact published in 1970. In the preface he said "the book was intended for the use of the practical lawyer, whether judge, advocate, attorney or law student". His book is presently still an authoritative textbook and in daily use by all lawyers.

During the 1930's one of the most well-loved advocates in Natal was JC (Piet) de Wet. Originally he practised as an attorney in the Orange Free State³³² and after reading law at Oxford he practised in Johannesburg where he also became

³³² Broome op cit 128. His father was the brother of General Christiaan de Wet, the famous Boer War leader, but a schism developed in the family when his father became a follower of General Louis Botha.

a South African Party Official. On marrying a Durban lady³³³ he migrated to Natal where he practised in partnership with Jim Hathorn.³³⁴ After a period of dual practise in Durban, having been admitted as an advocate of the Natal Provincial Division on 20 April 1925,³³⁵ he decided to practice solely as an advocate. Piet de Wet was a modest man and Fannin recalls that he had a very good attorneys practice but that he always denied this saying he had some very good cases.³³⁶ At the Bar and later on the Bench he was noted for his sound common sense and instinct for the right answer. Broome opines that it was one of the great privileges of his life that Piet de Wet became his dearest friend throughout his short lifetime.³³⁷ Of his talents as an advocate Broome says:

"He was a good advocate but his inability to express himself clearly in English prevented him from being brilliant. He had a sounder judgment than any man I ever met, and when I was in any sort of a difficulty it was always to him that I turned."³³⁸

In 1938 de Wet also stood for Parliament, like Broome, but was unsuccessful. Broome admits that had they gone down to Cape Town together his life would probably have been different as one of the reasons why he resigned his seat and went to the Bench in 1939 was that he never found a

³³³ Fannin op cit 3. He married the sister of the wife of JA Hathorn the elder brother of Hathorn J supra.

³³⁴ The firm name being Hathorn and de Wet.

³³⁵ Report of the Select Committee op cit 106.

³³⁶ See Prospecton Sugar Estates v Commissioner of Inland Revenue 1932 NPD 68 where Fannin appeared as de Wet's junior.

³³⁷ Piet de Wet died in 1954 long before his time. Broome op cit 129.

³³⁸ Ibid.

soul mate in Parliament.

After his appointment to the Natal Bench in 1945 de Wet made an excellent judge.³³⁹ Although he found it difficult to express his reasons he had a flair for giving the right decision and no one ever complained that they did not get justice from him.

Dennis Fannin succeeded Piet de Wet as Jim Hathorn's partner and they founded the firm Hathorn and Fannin which still exists in Durban to-day. Fannin, born 3 October 1907, was a vigorous young practitioner in the 1930's. He matriculated from Hilton College in 1924 and obtained a law degree from the Natal University College in 1928.³⁴⁰ He was articled to Von Gerard and Chapman in Pietermaritzburg for five years³⁴¹ but found a precedent for the proposition that if he was admitted in the Transvaal as an advocate he could apply for admission as such in Natal after serving only eighteen months of articles. He duly cancelled his articles after eighteen months and was admitted in the Transvaal in October 1930 and likewise in Natal on 1 December 1930.³⁴² As the dual practice system prevailed at the time it was quite obviously no longer necessary for Fannin to be admitted as an attorney and so on 15 December

³³⁹ According to Mr Justice James, de Wet J was a charming man and because he was the fifth judge on the Natal Bench he referred to himself as the fifth wheel on the wagon.

³⁴⁰ Personal interview with the Honourable Mr Justice Fannin.

³⁴¹ As required by the Supreme Court Rules prevailing at that time.

³⁴² Report op cit 107.

1930 he unsuccessfully applied for a refund of the 25 pounds he paid to the Natal Law Society as a candidate attorney.³⁴³ Thus in the Prospecton Sugar Estates case³⁴⁴ he was both the instructing attorney and JC de Wet's junior. He was a dual practitioner with James Adrian Hathorn until July 1935 when he decided to practice solely as an advocate. He found that under Feetham JP's leadership the Bar was becoming not only stronger but more respected. His name appeared regularly in the Natal Law Reports for the rest of the 1930's.³⁴⁵ From 1940 to 1945 he fought in World War II. On his return he resumed his practice, took silk in 1950 and became MPC for the Point constituency in Durban. He acted as judge from 1955 and was permanently appointed as such in 1958. Fannin retired in July 1977 after nineteen year service.³⁴⁶

Neville James was another young lawyer who emerged during the 1930's and later made his mark in Natal. He was born in Stanger in 1911 and educated at Michaelhouse.³⁴⁷ After school he joined Tatham Wilkes and Co in Pietermaritzburg as an articled clerk while studying part-time.³⁴⁸ After five years of articles he qualified and was admitted as an attorney in 1935. In 1936 he read for the Bar in London, spending six months in the chambers of Lord Denning.³⁴⁹ In

³⁴³ Supra and ex parte Fannin 1930 NPD 381.

³⁴⁴ 1932 NPD 68.

³⁴⁵ Cf ex parte Helps 1938 NPD 143, Natal Mercury case 1938 NPD 277.

³⁴⁶ Personal interview with Mr Justice Fannin.

³⁴⁷ Natal Witness 1 October 1982.

³⁴⁸ Ibid.

³⁴⁹ Personal interview with the Honourable Mr Neville James.

1938 he was called to the Bar at Grays Inn which fortunately also paid his fees.³⁵⁰ On his return to Natal he was admitted as an advocate and elected to practice solely as such on 2 August 1938.³⁵¹ Despite this his right of dual practice was entrenched³⁵² and Neville James and Dennis Fannin are probably the only two lawyers alive today in South Africa with these rights. They are also the two people best qualified to express an opinion on the quality of the judge presidency of Richard Feetham and about this they are unanimous - he set a very high standard for himself, his Bench and the legal profession and was the motivating force in bringing about the necessary changes to achieve this for the better administration of justice in Natal.

Neville James thus also went through the arduous discipline of arguing cases before Feetham JP and according to his own testimony this laid a sound foundation for his future career. Like most of his colleagues his career was also interrupted by service in World War II from 1940-1945. On his return he resumed his career at the Bar, taking silk in 1954. He was elevated to the Natal Bench in 1957 and became Judge President on 3 November 1969.³⁵³ He retired in October 1982 after more than twenty-six years on the

³⁵⁰ Ibid.

³⁵¹ Report op cit 107 and see above. Broome's influence and support.

³⁵² By the Advocates and Attorneys Preservation of Rights Act 17 of 1939.

³⁵³ On the retirement of Milne JP.

Natal Bench.³⁵⁴

Two lawyers who were also prominent during this era, though more for their political acumen rather than their legal pursuits were OR Nel and WE Thrash. Overbeeck Radyn Nel, a qualified attorney turned politician, was hailed a hero by Natal dual practitioners for piloting Act 17 of 1939 through Parliament. Not only had Nel's perseverance paid off but he had beaten Broome, a leading and brilliant advocate in the art of parliamentary skill, oratory and lobbying. By Broome's own admission he was no match for Nel in these categories.³⁵⁵ Nel was born in the Natal Midlands on 11 September 1883 and after serving his articles with Kenneth Hathorn in Pietermaritzburg he practised as an attorney in Greytown from 1906 to 1924. He founded the firm Nel and Stevens which still exists today.³⁵⁶ As a member of Parliament for Ladysmith Nel often tackled the Minister of Justice regarding the special qualities required for judges of the Native High Court. He advocated that these judges ought to have knowledge of native custom to prevent miscarriages of justice.³⁵⁷

The appointment of Walter Ernest Thrash to the Native High Court Bench in 1938³⁵⁸ was accordingly an excellent choice

³⁵⁴ Even in his retirement he is still active presently chairing the James Commission of Inquiry into Irregularities in the House of Delegates see Daily News 3 and 28 August 1988.

³⁵⁵ Broom op cit 172.

³⁵⁶ Who's Who in Natal (1933) 181.

³⁵⁷ Natal Witness 2 May 1930.

³⁵⁸ Natal Witness 7 December 1938 to fill the vacancy caused by Barry Howard's death.

as he was a native linguist of exceptional ability and he also had an intimate knowledge of their laws and customs. Thrash was born at Umlaas Road, Natal on 1 October 1885 and educated at Maritzburg College and Christ College, Cambridge.³⁵⁹ He was called to the Bar at the Inner Temple in 1908 and was admitted to the Natal Bar on 29 April 1909.³⁶⁰ He practised first at Camperdown and Richmond³⁶¹ and from 1921 solely as an advocate in Pietermaritzburg. He was organizing secretary for the South African Party for the Natal Midlands until 1929 when he was elected a senator for Natal.³⁶² In this year he was also a signatory when the Society of Advocates was formed but his political acumen and associations always eclipsed his legal pursuits.³⁶³ Thrash succeeded Lennox Ward as Judge President of the Native High Court and died in harness.

The 1930's also produced some remarkable legal personalities inter alia Herbert Janion who practised exclusively as an advocate.³⁶⁴ He had a biting tongue and a great sense of humour. According to Fannin a magistrate once referred to the statement of a witness being pregnant

³⁵⁹ South African Who's Who (1938) 239.

³⁶⁰ Ibid.

³⁶¹ His partner at that time was Burchell later the well-known Professor Exton Burchell of Pietermaritzburg University and the firm's name was Burchell and Thrash.

³⁶² Natal Witness 7 December 1938. Thrash was also an elected member of the Natal Provincial Council.

³⁶³ Thus the then Minister of Justice, General JC Smuts had to defend his appointment to the Native High Court Bench. The opposition regarded it as a political appointment cf Natal Witness 29 March 1939.

³⁶⁴ Mentioned in chapter two and was a signatory when the Society of Advocates was formed in 1929.

with possibilities. On appeal Janion argued that that was a misconception on the part of the magistrate which led to a miscarriage of justice.³⁶⁵ Janion was notable for his alcoholic consumption and it was said that he spent his last days on an unbroken diet of champagne. Eugene Renaud was another remarkable character. He had a great criminal practice and was regarded as one of the 1930's best criminal lawyers although not all his cases bore close scrutiny. He was a dual practitioner but at the age of seventy decided he wanted to practice at the Bar and persuaded Mackeurtan to recommend him for silk.³⁶⁶ On the day of his appointment as KC he was conducting a conference with a group of his more notorious litigants. He pointed out to them that he was now a KC which was a very honourable appointment and that therefore he would no longer tolerate any prevarication or untruthfulness from them, but, after a pause added "Well, now that's understood, please listen carefully while I recite to you what the truth is."³⁶⁷ As he himself told the story the inference cannot confidently be drawn that he actually constructed their defences.

As in every profession there were inevitably some casualties among legal practitioners during the 1930's. The Natal Law Society kept a tight reign on all practitioners and in 1932 brought an application for JD Stalker, a very active dual practitioner, to be struck off

³⁶⁵ Fannin op cit 4.

³⁶⁶ Fannin op cit 16.

³⁶⁷ James Legal Profession Speech 1979.

the roll for unprofessional conduct.³⁶⁸ In granting the application Matthews AJP took into account that he had a previous warning and held that the onus was on him to prove that he lawfully retained trust monies and in particular that he was grossly negligent in respect of illiterate native clients where he was in a special position of trust. Stalker was regarded as "one of the best known members of the legal fraternity"³⁶⁹ and was so highly regarded as an advocate that other attorneys actually briefed him to argue their cases in court.³⁷⁰ CH Hills³⁷¹ and LR Caney³⁷² were the only other dual practitioners who were thus briefed by their colleagues in the early 1930's. In 1935, two years and three month later, when Stalker successfully applied to be reinstated³⁷³ the Law Society did not oppose the application, which Hathorn J regarded as important as it was "the guardian of the honour of the profession."³⁷⁴ In February 1937 Stalker elected to practice solely as an advocate and was thereafter no longer under the watchful eye of the Natal Law Society. Stalker's case also highlights one distinct disadvantage of the fused system namely the inability of one person to competently carry out both the functions of an attorney and an advocate in a busy

³⁶⁸ Natal Witness, 21 October 1932 and Incorporated Law Society v Stalker 1932 NPD 594.

³⁶⁹ Natal Witness 21 October 1932. But Fannin recalls that Stalker came to court in such a tattered gown that Fannin's father, a magistrate, once sent him home to go and dress properly.

³⁷⁰ Cf Andreassen v Kowula 1932 NPD 27.

³⁷¹ cf Middleton v Automobile Association of South Africa 1932 NPD 451.

³⁷² Supra.

³⁷³ Ex parte Stalker 1935 NPD 61.

³⁷⁴ At 63.

practice.

There were a few other mishaps and casualties³⁷⁵ but on the whole the legal profession during the 1930's was of a very high standard and most of the main practitioners were truly outstanding.

A feature of the legal profession was that during the early 1930's dual practitioners usually handled their client's divorce cases, and applications for summary judgment, default judgment and provisional sentence and like applications in the Supreme Court themselves. After Feetham JP's rules came into effect in 1932 fewer and fewer attorneys argued their cases in court themselves. Notable exception were C Cowley, CH Hills, LR Clark, A Finlay and EP Fowley who continued to exercise their rights of dual practice to the end of their days. Men like Caney, Von Gerard and Eugene Renaud who had large litigation practices elected in the mid-1930's to practice solely as advocates.

A conclusion that can confidently be drawn about the legal profession during the 1930's is that the dual practice system separated the men from the boys. This era produced advocates, judges and Judges President of outstanding ability and quality and all of them achieved what they did through sheer courage, determination and hard work. They had to comply with the high standard set by Feetham JP and

³⁷⁵ Cf Natal Witness 27 August 1932; Natal Witness 7 September 1935; Natal Witness 21 April 1936; Natal Witness 24 June 1936.

enjoyed no monopoly of Supreme Court work as advocates do today. Their achievements were based on merit which it is submitted is the ultimate test to be applied in selecting the custodians of our great legal heritage.

Another conclusion that can be stated is that the 1930's had and produced some of the most outstanding advocates Natal and South Africa has known and history salutes them.

CHAPTER 4

CONCLUSION

In this thesis I have sought to record and reveal facts and material about Richard Feetham, the Natal Bench and legal profession which had hitherto been unknown or unexplored. I have also attempted to show the significance and contributions made by the Judge President himself, his court and the various members of the legal fraternity. In this process the various facets of the careers and personalities, both judicial and otherwise, of Richard Feetham and all the puisne and acting puisne judges of the Natal Provincial division during the 1930's were briefly evaluated. Similarly the careers and personalities of the leading members of the Natal legal profession were revealed and assessed.

After tracing the history of the Natal legal profession I attempted to show how Richard Feetham, with characteristic determination and fearlessness, tackled the central issue of the Natal legal fraternity during the 1930's and brought about a divided profession, in line with the rest of South Africa. The pro's and con's of such a division were briefly discussed. There can be no doubt that the changeover raised the standard of pleading and the law presented in the Natal Provincial Division and provided the Natal Bench with able and outstanding judges and Judges President for the future. It can thus be said that one of Richard Feetham's best known legacies to Natal was undoubtedly the division of the Natal Bar.

It now remains to assess the extent of the legacy of Richard Feetham and his Court to South African law and more specifically the legal process in Natal. In realistic terms Feetham JP bequeathed a small legacy compared to that left by for example Lord de Villiers. It must also be remembered that Richard Feetham officiated and delivered judgements in three different superior courts in South Africa.

Thus judgements delivered by Feetham J on the Transvaal Bench were not only referred to by the Natal Court but are to this day standing authorities of the law as revealed in current South African legal texts.¹

There can be no doubt that the judgments delivered by Feetham JP during his judge presidency in Natal have played a significant role in the development of Natal and South African law. Thus in the case of Potgieter v Rex.² Hathorn J followed Feetham JP's judgment in South African Railways and Harbours v Acutt and Worthington.³ Also Feetham JP's judgment in Lower Umfolozi District Memorial Hospital v Lowe⁴ was followed in St. Augustine's Hospital (Pty) Ltd v Le Breton.⁵ Other judgments have remained stated authorities as shown in current South Africa legal

¹ LG Baxter Administrative law (1984) 441 and cf Farah v Johannesburg Municipality 1928 TPD 169.

² 1938 NPD 272.

³ 1935 NPD 319.

⁴ 1937 NPD 31.

⁵ 1975 (2) SA 530 (N) Although these judgments are at variance with those of the Transvaal Courts.

textbooks. Hoffmann in his book on the law of evidence,⁶ in discussing the court's reluctance to order the Receiver of Revenue to produce tax documents in ordinary litigation, points out that the only reported case where leave was refused was in Silver v Silver⁷ and quotes Feetham JP's reasons for such refusal: "It is obvious that if the Courts were in the habit of making orders requiring such information to be disclosed in suits between private individuals there could be no guarantee at all as to secrecy, and the difficulties of the Department of Inland Revenue would be greatly increased."⁸ The same author quotes Feetham JP's judgment in Maharaj v Parandava⁹ as the leading case for the proposition that evidence in seduction cases must not only confirm the plaintiff's story in a material respect but also implicate the defendant. H v R¹⁰ is another judgement of Feetham JP which this author quotes as the leading case on uncorroborated evidence in sexual offences. Smith¹¹ refers to Feetham JP's ratio decidendi in Paruk v Bacus¹² to the effect that in an insolvent estate where there are a number of creditors with competing claims there is "a definite advantage to creditors that the estate should be administered under the Insolvency Act, instead of each creditor being left to pursue his own claim."¹³ In discussing an ambiguity which left doubt as

⁶ LH Hoffmann and DT Zeffertt The South African Law of Evidence (1983).

⁷ 1937 NPD 129.

⁸ Hoffman op cit 226.

⁹ 1939 NPD 239.

¹⁰ 1937 NPD 1.

¹¹ C Smith The Law of Insolvency (1973).

¹² 1938 NPD 242.

¹³ Smith op cit 59.

to the intention of the legislature, Henochsberg¹⁴ quotes Feetham JP's ipsa dixit in R v Pickup¹⁵ to the effect that in such cases "the benefit of the doubt should be given to the subject and against the legislature."¹⁶

As a known expert on administrative law it is not surprising that Baxter¹⁷ referred to Feetham JP's judgment in Natal Organic Industries (Pty) Ltd v Union Government¹⁸ no fewer than five times in his book on this subject. In discussing the courts refusal to recognise the validity of delegations of wide and unguided discretionary powers Baxter quotes what Feetham JP had to say in this regard: "Really the effect of the regulation is to make the Commissioner the legislator on the particular point with which the regulation seeks to deal and such delegation of authority is not good delegation."¹⁹

Of the many judgments delivered by Feetham JA in the Appellate Division I will mention only one referred to by Hoffmann namely R v Gumede²⁰ where Feetham JA drew attention to the difficulties faced by the court when a confession was tendered without any evidence of how the accused came to make it as there may have been earlier improper inducements acting upon his mind "which may not come to light owing to the dropping of a veil between the

¹⁴ ES Henochsberg Henochsberg on the Companies Act (1975).

¹⁵ 1932 NPD 216 at 223.

¹⁶ Henochsberg op cit 429.

¹⁷ Baxter op cit 440, 479, 496, 527, 703.

¹⁸ 1935 NPD 701.

¹⁹ Baxter op cit 440.

²⁰ 1942 AD 430.

previous interrogations by the police and the subsequent appearance of the interrogated person before a magistrate."²¹

However, to lend credibility to the above impression, it must be stated that not all Feetham JP's judgments were followed. Thus his judgment in R v Ngedlane and Roux²² was reversed by the Appellate Division on appeal.²³

In fairness to the puisne judges of the 1930's it must be pointed out that several of the judgments of Matthews J are still to-day authoritatively cited in leading textbooks²⁴ as well as those of Hathorn, Lansdown, Carlisle and Grindley-Ferris JJ.²⁵ In fact Hahlo²⁶ not only cites Lansdown J's decision in Carrol v Carrol²⁷ regarding proof of adultery but also quotes what Lansdown J had to say regarding the question of onus. Clearly Feetham JP and his court made a significant and valuable contribution to South African law.

Regarding an evaluation of Feetham JP's work in the Natal Provincial Division it was stated in the introduction to this thesis that it will be shown how he transformed the

²¹ Hoffman op cit 188.

²² 1935 NPD 638.

²³ 1936 AD 271.

²⁴ Cf Baxter op cit 649, 732; Hoffmann op cit 82, 110, 466; Wille and Millin's Mercantile Law of South Africa (1980) 662.

²⁵ Wille and Millin op cit 246, 248; Hoffman op cit 25, 167, 183, 315, 456/7, 467.

²⁶ HR Hahlo The South African Law of Husband and Wife (1975).

²⁷ 1933 NPD 96.

Natal Bench from being weak and even ineffectual and its judgment virtually ignored by the rest of South Africa to a position where its Bench and judgments are today treated on an equal footing with any other provincial division of the Supreme Court of South Africa. It is submitted that this has been clearly established and the above exposition serves as additional proof thereof. It can thus confidently be stated that, judging from the frequency with which the Natal court's judgments of the 1930's are presently still cited and referred to in leading South African textbooks, Feetham JP made an indelible contribution to the stature of the Natal Court and in the process ensured a place in the sun for it.

This impression of excellence was confirmed in an unpublished speech in 1979, forty years after Feetham JP's departure, when Mr Justice Neville James, the then Judge President of Natal said:

"... we can thank him that the Natal Supreme Court decisions are now treated with respect throughout the land whereas before they certainly were not. They are now to be found in the correct place - the Book of Judges whereas before it was said that they were only found in the Book of Revelations."²⁸

The history of the Natal Provincial Division during the dynamic Judge Presidency of Richard Feetham is thus significant because it heralded in an era where the Natal Court took its rightful place with its sister provincial

²⁸ The Honourable Mr Neville James Legal Profession Speech 7.

divisions and commenced to play a part in the legal process in South Africa and has continued to do so.

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