# DINNER SPEECH

***George Barton QC****

This conference, now ending, has provided a special opportunity for those who have long admired Sir Ivor Richardson to celebrate his outstanding contribution to New Zealand, over many decades. All of those who have taken an active part in the Conference will have been honoured to co-operate in such wonderful *festschrift*. It has been like basking in reflected glory!

On occasions like this, it has become almost traditional practice to recapitulate the biographical data of the guest of honour. The temptation to follow the standard practice should be resisted. Sir Ivor needs no reminding that he was born in Ashburton, was a pupil at Timaru Boys' High School, graduated in 1953 with an LLB degree from Canterbury University College of the University of New Zealand - and so on! Indeed, being constantly reminded of the basic facts in dinner-speech after dinner-speech, Sir Ivor might well be justified in drawing the inference that doubts are held about his ability to recall the most elementary facts about his own life. It is sometimes said that a mandatory age of retirement is explained as a kind of statutory presumption of senility. There is no room for such a rationalisation in Sir Ivor's case. But it must be acknowledged that mandatory retirement does avoid the kind of problems that seem to have arisen in the past when some Judges were able to remain on the Bench until their 80s, or even their 90s. One remarkable example was Salathiel Lovell, who was on the verge of 90 years of age when, in 1708, *he was appointed* a Baron of the Court of Exchequer in England. Having arrived, so to speak, he sat on that Bench for the next 5 years, but from his extreme age could not be of much use to his colleagues. It was said that he was "distinguished principally by his want of memory".

But there is one thing that can be said about statutory provisions for compulsory retirement. At least the holder of judicial office knows well in advance when he (or she) will no longer be entitled to exercise jurisdiction as a Judge. How different things were in 1922 for the Lord Chief Justice of England, the 77 year old Mr Justice A T Lawrence, who, in the previous year, had been appointed to replace Lord Reading, who had become Viceroy of India! The then Attorney-General, Gordon Hewart, had wanted the post of

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* Barrister, Wellington.

Lord Chief Justice for himself, but the British Prime Minister, Lloyd George, could not spare him. So an arrangement was reached whereby Hewart was to remain in the House of Commons on the Prime Minister's assurance that the post of Chief Justice would become available to him when political considerations allowed. To formalise the arrangement, the Prime Minister procured from the new Chief Justice, now Lord Trevethin, a letter of resignation at the very same time as his commission on appointment. One day, after a year in office, while crossing Fleet Street in front of the Royal Courts of Justice, he knew his time was up: He read the billboard announcement, "Chief Justice resigns!".

It is most appropriate that this Conference in honour of Sir Ivor has been organised by the Faculty of Law and the New Zealand Centre for Public Law at Victoria University of Wellington. It is now thirty-five years since Sir Ivor was appointed to be Professor and Head of the Department of England and New Zealand Law at this University. During the next six years he exercised a great influence both in the life of the University, as a whole and in the Faculty of Law.

First and foremost, of course, were the profound changes that he initiated in the approach to the teaching of revenue law. On his own confession, Sir Ivor is "at heart a tax lawyer". Even in his Invercargill years, as a partner in Macalister Brothers, he had encountered tax issues. Indeed, it was his handling of tax cases for Revenue that had first attracted the attention of Sir Richard Wild, then Solicitor-General, and later Chief Justice. It was he who persuaded Sir Ivor to join the Crown Law Office here in Wellington in 1963. His arrival boosted the morale of the Inland Revenue Department, and at the same time was a cause of concern to some taxpayers and their counsel, notably to Europa Oil, and those who appeared for that company in the long running Europa Oil litigation. It was he, more than any other, who breathed new life and efficacy into the tax avoidance provisions of the revenue legislation. For years they had been relics of fiscal impotence: now they became fearsome weapons in the Commissioner's arsenal.

Building on his unrivalled experience as a revenue law practitioner, Sir Ivor brought to the teaching of taxation a freshness of approach which transformed the subject from a dry catalogue of rules of varying degrees of incomprehensibility into an academic discipline worthy of University study. Taxation was an optional subject for the LLB degree; but such was Sir Ivor's reputation as teacher and scholar that his classes were among the most popular of the elective courses for the undergraduate degree. Again and again, former students have spoken of the way in which Sir Ivor made the subject come alive.

But it was not only at the undergraduate level that he influenced students. Perhaps even more importantly, his special expertise as teacher attracted graduate students of very high ability, some of whom became academic colleagues; others became leading practitioners in the tax field; and others again eminent in the world of business. His courses at the LLM level in taxation law and in the law of trusts and estates provided a

fertile field for student writing and research of high quality. At least, on one occasion in later years, when Sir Ivor was still in practice, after having left the University, the published paper of one of his former students called for a serious response in argument in Court. It is characteristic of Sir Ivor that he addressed that task with respect and civility.

Indeed, civility has been one of Sir Ivor's enduring qualities. It played an important part in his time as Dean of the Law Faculty. Those were the years of participatory democracy in universities. Launched dramatically on the Berkeley campus of the University of California, it spread like wild fire throughout the academic world. Victoria University of Wellington did not escape the ferment. Sir Ivor was the ideal person to lead the Faculty in accommodating the new age. He took the initiative in consulting with junior colleagues and student representatives: he was always prepared to listen, not just as a matter of form but in a process of engagement with those who were advancing some point of view. As Dean of the Faculty of Law, he was both its leader and its servant.

That was shown in a dramatic incident shortly after he became Dean. It was at the time of the growing and increasingly bitter controversy over the question whether the New Zealand Rugby Football Union should respond to an invitation to send a representative rugby team to play against apartheid South Africa. At the height of the controversy the Wellington Rugby Football Union held a centenary dinner and invited as its guest speaker Sir Richard Wild, then Chief Justice and, as Solicitor-General, Sir Ivor's former employer. In the course of the speech, which was widely and enthusiastically quoted, Sir Richard Wild referred to the controversy about the proposed visit of the All Blacks to South Africa and proclaimed "they *must* go: they *will* go".

Whatever views may be held now about the wisdom of such remarks by a Chief Justice, at the time they evoked an outburst of criticism within the University, of which Sir Richard was a graduate, and particularly within the Faculty of Law. Some members of the Faculty were sufficiently provoked to present a motion calling on the Faculty to condemn the Chief Justice for his remarks and for involving the judiciary in a matter of bitter public controversy. There were some, indeed many, in the Faculty who agreed with the sentiments of the motion; but had strong reservations about its propriety. In their view, the proper course was for the Faculty to recommend to the University Council that Council should express its disapproval of the Chief Justice's intrusion into the public debate. But the Faculty resolution, as finally passed, went even further. It *instructed the Dean* to convey to the Chief Justice personally the Faculty's disapproval of his conduct. Throughout the discussions at the meeting, Sir Ivor had been a model Chairman, indicating his own personal views against the motion, but allowing ample opportunities for comprehensive debate. And then, when the motion was eventually passed - all, or nearly all of the professors dissenting - Sir Ivor carried out what must have been for him the most uncongenial task of conveying to the Chief Justice the content of the Faculty

resolution. The way in which Sir Ivor discharged his functions in that delicate and difficult situation only enhanced his moral stature among students and colleagues. Quite clearly, he did not fall into disfavour with the Chief Justice who warmly welcomed him on his appointment as a Judge of the High Court in 1977.

There can be very few Judges, certainly few in New Zealand, who have been able, as Sir Ivor has, to straddle successfully the responsibilities of the judicial function with service to the country on a broader front. One enterprise stands out for special mention - his work over the years 1986 to 1988, as Chairman of the Royal Commission on Social Policy. The task to which Sir Ivor and his fellow Commissioners dedicated their energies called for imagination, sensitivity, and insight, all qualities which one associates with Sir Ivor. Questions of social justice trouble democratic societies and certainly do not yield to any easy analysis much less to a solution broadly acceptable to the people as a whole. Sir Ivor's Commission embarked upon a comprehensive and patient examination of deep issues of universal and continuing importance to this country. His leadership as Chairman of the Commission and his contribution to its Report show him to be an outstanding New Zealander with "rich powers of mind and feeling".

Reports can sometimes spark heated controversy. One does not associate Sir Ivor with polemics: rather his approach is irenic, peaceable, avoiding confrontation, seeking widespread agreement. But on one occasion, his Report met with strong opposition expressed in unruly street marches. How is it that the Report provoked civil disturbance? It came about this way. Many years ago, Sir Ivor was asked by the Government of Mauritius to present proposals for the reform of the tax laws of that country. In that jurisdiction, as had for many years been the case in New Zealand, where a tax assessment had been the subject of an objection, liability to pay tax was suspended until the final hearing and determination of the objection. Human nature being what it is, many taxpayers, especially businessmen, lodged objections to their tax assessments, and then by a process of studied procrastination obtained considerable advantages from the deferment of their tax liabilities. Sir Ivor clearly thought that this was too much of a good thing! In his report and in the draft tax legislation, he recommended a fundamental change: now the lodging of an objection should not operate to defer payment of the assessed tax; but if the objection should ultimately be upheld, the assessed tax should then be refunded to the taxpayer with interest. Sensible and pragmatic as this may sound to our ears, it did not go down at all well with the business community in Mauritius. There was a public outcry, public demonstrations, and civil commotion. In the result, the Government's cerebral acceptance of Sir Ivor's recommendation turned to political rejection. The *status quo* was quickly restored.

One of Sir Ivor's early writings was on Religion and the Law. That book was published in 1962 at the time when the Joint Commission on Church Union (of 5 Protestant

Churches) was working towards the final text of a Plan for Union. Under that Plan, as in any Church union, it was necessary to address and to make provision for church property of the individual negotiating churches. It is a matter of prime importance to identify the trusts upon which such property is held with a view to determining whether those trusts would allow the church property in question to be held for the benefit of the United Church resulting from the union. For almost 100 years, such questions have been overshadowed by the famous decision of the House of Lords in *General Assembly of the Free Church of Scotland v Overtoun*.[1] That case arose out of the union in 1900 of two Presbyterian Churches in Scotland, namely the Free Church of Scotland and the United Presbyterian Church. The new united body was named the United Free Church of Scotland. In the United Presbyterian Church, the union had been agreed to unanimously. But in the Assembly of the Free Church of Scotland some of its members (27 out of 670) had disapproved of the union. After the consummation of the union, the dissentient minority of the Free Church, commonly known as Wee Frees, brought proceedings in the Scottish Courts in respect of the property of the Free Church of Scotland. The basis of the decision in the House of Lords was that, notwithstanding the substantial majority in favour of union, the Free Church of Scotland had done what it had no power to do where property was concerned, namely to alter or to vary certain doctrines of the Church, as formulated in the agreement for union. The judgment has been trenchantly criticised. In a famous comment, the great legal historian, Maitland, said of it: "The dead hand of the law fell with a resounding slap on the living body of the church". Whatever may be said about the actual decision in the case itself, the principle upon which it proceeded applies to all trusts. Indeed, it has a contemporary relevance - in respect of any differences of opinion that may emerge about the application of funds held for the purposes of the Alliance Party, the decision may well become more than of academic interest to the Deputy Prime Minister and to Mr McCarten!

In order to ensure that under the Plan for Union there should be machinery for resolving the kinds of difficulties that had arisen as a result of the *Overtoun* case, the Joint Commission established a working committee of lawyers to make recommendations.

Sir Ivor willingly responded to an invitation to contribute to the work of that legal committee. Characteristically, he made many positive contributions to its work, advancing creative suggestions for improvement and gently suggesting restraint when the Committee seemed to be heading off in the wrong direction. The result, reached after many years of consideration and planning, was that the recommendations of the Committee provided a means for ensuring that, in the event of ultimate union, there would be provision for

1 *General Assembly of the Free Church of Scotland v Overtoun* [1904] AC 515 (HL).

ensuring that all problems relating to trusts and property of the negotiating churches could be resolved equitably and fairly.

There is nothing insular about Sir Ivor's approach to the law. His experience at the Law School of the University of Michigan provided the first full exposure to differences in the common law world. Not surprisingly, his early biographical writing, as a joint author of a book on the life of Sir Robert Stout, emphasises the significance of Stout's frequent references to, and reliance on, American writings. Then too, it was only natural that Sir Ivor's presentation to a legal forum shortly after his return to New Zealand (the Christchurch Law Conference in 1957) was the delivery of a paper on the law and nuclear energy with references to International Law and to the implications for New Zealand law. The paper is remarkable for its thoughtful and prophetic insights: some of Sir Ivor's speculations in that paper about future problems have come true: others have continuing relevance.

Sir Ivor was an early advocate of academic migration. It was during his years at the Faculty of Law that young American graduates were invited to take up short-term teaching appointments here in Wellington. And, in its turn, that development encouraged graduates from Victoria University of Wellington to consider postgraduate work and teaching in North America.

As a further strengthening of Sir Ivor's link with American law, he was elected a member of the prestigious American Law Institute, the body that is responsible for the magisterial Restatement of the Law. Only two other serving New Zealand Judges are members of that Institute (both of them in this Hall this evening).

It is not uncommon for an interest in taxation to be linked with an interest in business. And to be successful, business requires efficiency. Here, Sir Ivor is pre-eminent. His approach to university administration played a major role in enhancing the stature of the Faculty of Law during his term as Dean. The Vice-Chancellor of the University about the time of Sir Ivor's appointment as a law professor was Dr James Williams, the Editor of *Salmond and Williams on the Law of Contract* (1945). He was so impressed by Sir Ivor's legal and administrative skills that, when he moved to Sydney as part of the Butterworths' empire in Australia, he invited Sir Ivor to join him there. We can be profoundly grateful that Sir Ivor resisted Dr Williams' blandishments: Australia, it is true, would have been the richer - but New Zealand definitely the poorer. And, after his return to law practice, Sir Ivor continued to serve the University on the University Council, and later as Chancellor. In the judicial office, and especially as President of the Court of Appeal, Sir Ivor has applied his great administrative skills to the orderly dispatch of appellate business. It is enough to peruse the Court of Appeal Report for 2001 and, reading between the lines, to see Sir Ivor's hand at work.

Sir Ivor is very much a numerate person. Numbers and statistics are important for him, but he is far from being a mere bean counter. Not everything that counts can be counted. Some issues call for judgment, rather than the pocket calculator. Sir Ivor shows that in some spheres of judicial activity the things that can be measured are the important matters. In other spheres the things that are important are not capable of measurement. Justice Spigelman, Chief Justice of New South Wales, has recently written:

> … In the administration of justice certain matters, such as delay, are capable of quantification. The compilation and publication of statistics relating to the measurement of delay is a perfectly appropriate activity. Nevertheless, the most important functions performed by a court are not capable of measurement. In particular, the fundamental issue of whether or not the system produces fair outcomes arrived at by fair procedures is not capable of quantification at all.

Sir Ivor has always recognised the distinction between quantitative and qualitative assessment.

Many of the papers that have been presented at this Conference have referred to Sir Ivor's catholicity of interests. In his approach to the writing of judgments, he makes it clear that he welcomes non-legal material relevant to the determination of the issues before him. That involves not only receptiveness to relevant non-legal material but also the willingness to accept submissions from persons who have a clear legal interest in the issues before the court, other than the litigants themselves. That remarkable openness stems, no doubt, from his wide-ranging interests. Evidence can be found in most unexpected sources. Thus, in a historical and comparative study of *Soviet Land and Housing law* by Dr Stanislaw J Sawicki the list of acknowledgments refers to: "Dr Ivor L Richardson [who] encouraged me to continue this research interest".[2]

A rare compliment on a rare topic.

It is, of course, quite impossible within the confines of a speech, and of an after-dinner speech at that, to pay proper tribute to Sir Ivor, the Judge, the scholar, the administrator, the man. What is needed is a full-scale biography, but better still, Sir Ivor, a full-scale autobiography. Let us hope that that thought may take seed and come to a full flowering after Sir Ivor's retirement. In the meantime, and here and now, all that we can do is in terms of body language. I invite you to rise and join with me in a toast to Sir Ivor, wishing him in his retirement - with Lady Richardson - good health and enjoyable and fulfilling activities.

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2 Dr Stanislaw J Sawicki *Soviet Land and Housing Law* (Prayer, New York, 1977).