LORD NEUBERGER OF ABBOTSBURY MR

THE MANY FACES OF THE MASTER OF THE ROLLS

MIDLANDS COMMERCIAL AND CHANCERY BAR ASSOCIATION

ANNUAL DINNER

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1. As you all know I am a newly-minted Master of the Rolls - scarcely eight weeks into the job. In contrast, the office is anything but newly-minted. As the recent, albeit ninety-fifth, incumbent in the role, I thought it would be appropriate to start by touching on aspects of the history of the Master of the Rolls and some of the individuals who have, over the last 1000 years, occupied the post. But, before doing so, I should acknowledge the assistance I've received from John Sorabji, a lawyer and an academic, in preparing tonight's talk. As he is not here, I can say that any errors are entirely his; for the good bits, I take credit.

2. The Mastership of the Rolls is the second oldest judicial office in England and Wales. Although John de Kirkby is the first recorded MR in 1265, John Langton, in 1286, is the first that we know anything about. The job may well date back earlier than 1265, but, if it does, any evidence is lost in the mists of time. Only the office of Queen's Remembrancer, which dates back to 1164 , seems to be older, but that is now only a ceremonial office held by the Senior Master of the Queen's Bench Division.[1] While the Master of the Rolls has a number of ceremonial roles, such as taking part in the Lord Mayor of London's swearing-in (as I did last Saturday) and attending the state opening of parliament (as I did last Wednesday), it is a position which, of course, remains a full-time judicial office and more. As Jeremy Lever put it in respect of one of my twentieth century predecessors,

[1] http://www.hmcourts-service.gov.uk/aboutus/history/queens_rememb.htm.

"*The tenure of the office of master of the rolls for any considerable time is notoriously exhausting. [Lord] Greene held it for twelve years and at the time he was visibly worn out.*"[2]

3. Lever may be right. Lord Greene was followed by Lord Denning and Lord Donaldson, who held the office for twenty years and ten years respectively, but since then it has only been held for four to five years. Perhaps it has become more exhausting as the years have gone by; certainly it has as a result of the constitutional Reform Act 2005, since when substantial duties have been imposed on the MR, as the somewhat Orwellian titles of Head of Civil Justice and President of the Civil Division of the Court of Appeal indicate. However, my duties are nothing like as substantial as those imposed on the Lord Chief Justice. Indeed, part of my role is to be number two to the LCJ, which takes a little getting used to. As you probably know, the Chief Justice now operates through the Judicial Executive Board, a Cabinet consisting of himself, the MR, the President and Vice-President of the QBD, the President of the Family Division, the Chancellor, and the Senior Presiding Judge. At the first meeting I attended, Igor Judge had to leave temporarily to take an urgent telephone call. As he left the room, he said, "Would you take over, David"; I looked around to see who David was, before realising it was me.

4. The role of MR has many other functions, including some which I was unaware of when I applied for the job. Such as giving a speech of thanks to the last Lord Mayor at the swearing in of the new Lord Mayor in the RCJ – which, as I mentioned, occurred last Saturday. Such as chairing the National Archives Advisory Committee, which I first did last week. The committee visits a different government department every few months for a full briefing about its work and the way it deals with its records. This enables me to learn much about how the national government works. And then there is the chairmanship of the Magna Carta Trust, which is preparing for the 800th anniversary in 2015. And I am responsible for the enrolment of deeds poll, the custody and preservation of manorial documents, instruments of apportionment and the records of the Chancery of England.

[2] Lever, *Greene, Wilfred Arthur, Baron Greene (1883 – 1952)* in Oxford Dictionary of National Biography, (OUP) (2004) (http://oxforddnb.com accessed on 28 October 2009).

5. One function I will not be performing during my period of office will be making pastries. Despite the efforts of one translator, who Megarry's Miscellany at Law records as misunderstanding the title, I am fairly sure that I am not the '*Maitre des petits pains*'[3]. While I have to admit to a certain fondness for petits pains I'm more than happy to leave their production to others much more qualified than me. My ability in that department is comparable to that of Alfred the Great. The rolls of which I am master are made of parchment and paper, not flour and water: they are the records of the Chancery of England.

6. Like cake-making, I am not altogether unhappy to say, any political role is out. Not for me, the prospect of becoming an MP and Speaker of the House of Commons unlike a number of my predecessors. Once upon a time the Master of the Rolls, uniquely amongst judges, was able to sit in the House of Commons: John Romilly, MR from 1851 to 1873 was the last to do so, losing his seat in Parliament in 1852.[4] Since 1881, the Master of the Rolls, like other judges, has been disqualified from sitting as an MP.[5]

7. However, it must have been quite interesting to sit as an MP and Speaker of the House of Commons. Not least because on occasion the Master of the Rolls would sit as the Lord Chancellor's deputy and take his place on the Woolsack in the House of Lords. The idea of being the presiding officer in both Houses of Parliament, whilst being an MP and a judge, is rather fun, even though it might have surprised Montesquieu, with his rather idealistic notion that we had separation of powers in this country.

8. However, at least I am not at risk of becoming another disgraced speaker of the House of Commons. Earlier this year, the most infamous individual to combine the jobs of Speaker and MR was often in the press, because he set a precedent for the resignation of Speaker Martin. Sir John Trevor, Master of the Rolls from 1685 to 1689, was Speaker of the House of Commons for a short period from May 1685. However, in 1695, he was found guilty by the House of Commons in of the high crime and misdemeanour of having accepted, two years earlier, 1000 guineas from the common council of London in return for his support of the London Orphans Bill. It was also later discovered that he had, amongst others, been guilt of

[3] Megarry, *Miscellany at Law*, (1st Edition) (1986) (Stevens & Son) at 336.
[4] Hamilton (Polden rev.), *Romilly, John, first Baron Romilly (1802 – 1874)* in Oxford Dictionary of National Biography, (OUP) (2004) (http://oxforddnb.com accessed on 28 October 2009).
[5] Supreme Court of Judicature Act 1881 s2.

accepted 'gratuities' from the East India Company. The prorogation of Parliament was the only thing which saved him from impeachment.[6]

9. Strangely enough no objection to him resuming his position as Master of the Rolls seems to have been made: once again, he was MR from 1695 to 1717. It was perhaps Trevor's record that would later lead that great 19th century philosopher and law reformer, Jeremy Bentham, to identify the Master of the Rolls, and other Masters in Chancery, as '*swindlers*.'[7] Things have improved since then – or at least I think they have.

10. Any embarrassment Trevor suffered pales into insignificance when compared with what happened to Thomas Cromwell, around 150 years earlier. As you will recall, he was executed, the only Master of the Rolls to lose not only the rolls, but also his head. He was one of Henry VIII's many victims on Tower Hill, and is currently the hero of Hilary Mantel's Man Booker Prize winning "*Wolf Hall*". I hope I don't follow him to the scaffold. Execution would have ensured he was shorter than I am, but even on tiptoe I could never have matched the tallest of my 94 predecessors, Sir Archibald Smith, who was seven foot one inch. His length of office from 1900 to 1901, scarcely matched his physical length.

11. Some of my predecessors have had names which were far more memorable than mine. Thus, there is the rather unlikely fact that Julius Caesar was MR. That was Sir Julius Caesar, who served in the role between 1614 and 1636, and whose son also became Master of the Rolls. In the same century, there was the splendidly named and even longer serving Sir Harbottle Grimston (1660 to 1685).

12. Two hundred years later there was Sir George Jessel. He is said to have only reserved judgment twice; and then only in deference to the needs of his fellow judges when sitting in the Court of Appeal. His mastery of the facts and the law was such that even in one case, *Commissioner of Sewers v Glasse*, which involved statutes stretching back to the time of King John, evidence from over one hundred witnesses and a hearing lasting 23 days he did not need to reserve judgment.[8] His Herculean approach to cases was matched with what can

[6] Ellis, *Sir John Trevor (1637 – 1717)* in Oxford Dictionary of National Biography, (OUP) (2004) (http://oxforddnb.com accessed on 28 October 2009).
[7] Bentham, *Principles of Judicial Procedure*, in *The Works of Jeremy Bentham*, (Bowring ed., 1843) Vol. 2 at 13.
[8] (1874-75) L.R. 19 Eq. 134.

fairly be said to be a prodigious self-belief. One story about him exemplifies that. As Gareth Jones tells it:

"*[Jessel] was, and was seen to be, no doubting Thomas. Lawyers dined out on the story that he told Sir John Duke Coleridge, then attorney-general [later to become Chief Justice of Common Pleas, then Lord Chief Justice, then Baron Coleridge], that 'I may be wrong, and often am, but I never doubt". Lord James later asked him if the story were true. Jessel replied: 'Very likely, but Coleridge, with his constitutional inaccuracy, has told it wrong. I can never have said "OFTEN WRONG'"*"[9]

13. Coming closer to home, in the 20th century, there was Lord Cozens-Hardy, who, after his death was incarcerated in a rather bleak mausoleum which inspired a haunting poem by John Betjeman. I shall indulge myself by reading you the last verse

"*But when Lord Cozens Hardy, November stars are bright,*
And the King's Head Inn at Leatheringsett is shutting for the night,
The villagers have told me that they do not like to pass
Near your curious mausoleum, Moon shadowed on the grass,
For fear of seeing walking, in the season of All Souls,
That first Lord Cozens Hardy, the Master of the Rolls".[10]

14. And a bit later last century, there was Lord Evershed, who went mad. Apparently, he walked round the lunatic asylum, as one could then call it, telling people that he had been the Master of the Rolls, and they would say, "yes of course", or "there, there". The most famous 20th century incumbent was, of course, Lord Denning, who probably has done more than anyone since Sir George Jessel to make the job prestigious: he took the law of England to the people of England. Denning adopted an approach to the law which treated it as a living thing, able to develop and respond to the world around him.

15. Many solicitors have told me with pride that their admission certificate was signed by Lord Denning. Since 1888 every solicitor in England and Wales has received an admission certificate signed by the then Master of the Rolls, who have been responsible for the

[9] Jones, *Sir George Jessel (1824 – 1883)*, in Oxford Dictionary of National Biography, (OUP) (2004) (http://oxforddnb.com accessed on 28 October 2009).
[10] http://www.literarynorfolk.co.uk/Poems/lord_cozens_hardy.htm.

solicitors' roll. In addition, every solicitor has, again since 1888, been able to appeal regulatory decisions taken by The Law Society and decisions of the Solicitors Disciplinary Tribunal to the Master of the Rolls.

16. This jurisdiction was the work of another of my predecessors, and Jessel's successor: William Brett, Lord Esher MR. You will all no doubt remember Brett as the creator of the *Peruvian Guano* test for discovery, which rendered the obligation '*virtually unlimited*'[11], until Woolf cut it down (or thought he had cut it down) to size. What one Master of the Rolls gave another Master of the Rolls just over one hundred years later would take away. Brett was also responsible for the Solicitors Act 1888, which put regulation of the solicitors' branch of the profession on a proper footing.

17. But now the MR's solicitorial jurisdiction has been almost entirely swept aside. The powers and functions have been redistributed to the Solicitors Regulation Authority and, insofar as the appellate jurisdiction is concerned, to the High Court. However, I hope to maintain a good relationship with the Law Society.

18. The Master of the Rolls is now, as I have mentioned, Head of Civil Justice, which was a product of the Woolf Reforms and requires me to provide leadership in the field of civil justice.[12] I chair the Civil Procedure Rule Committee, following in the tradition of Jessel who was a member of the then newly created Supreme Court Rule Committee and, as such, did so much to shape the development of the Rules of the Supreme Court[13]. In addition to this, and again as a consequence of the Woolf Reforms, the MR is also chairman of the Civil Justice Council and is responsible for guiding its ongoing mission to boldly go into the realms of civil justice reform.

19. In that connection, one of the immediate issues is costs, and the soon-to-be-produced Jackson report. The replacement of civil legal aid by a system which involves uplifts, ATE, BTE, claims handling and the like, has raised concerns in many quarters. I do not want to express a view on this issue. Rupert is reporting to me in a month or so, and I have been anxious to ensure that I keep my distance, and that I actually consider, and that I am seen to

[11] *Compagnie Financiere du Pacifique v Peruvian Guano Company* (1882) 11 QBD; Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO) (1995), Chapter 21, paragraphs 1 and 15 – 17.
[12] See Woolf (1995), chapters 5, 8, 10, 14 & 19 and Woolf (1996) chapter 8.
[13] Supreme Court of Judicature Act 1873 s75.

consider, his report on its merits. Having said that, nobody could read his interim report without being profoundly impressed with its width and depth of analysis, and without being concerned about the present situation in relation to the funding of litigation for poorer and even moderately well off claimants.

20. The biggest cloud on the immediate domestic horizon is, of course, money. The court service, like any other government-funded entity is under the threat of cuts, possibly savage cuts, the extent and nature of which we will not, I expect, really know until after the election due in the first half of next year. It is fashionable to concentrate on education and health, as well as social security, as the core areas of government expenditure. The overriding essentiality of the rule of law can easily be overlooked in a society such as ours, where, at least among the more privileged 75% of the population, it is taken for granted. Yet the rule of law at home and protection from invasion abroad (which we also tend to take for granted) are the two traditional and the two fundamental duties of government. Without them, all hope for all other aspirations of a civilised society – education, health, freedom of speech, safety on the streets, family life at home, diversity, economic well-being - would be pious hot air.

21. Civil litigation tends to be the poor relation of criminal and family litigation, but that is to take a short-sighted view. As the Lord Chief Justice said recently, if we do not have an effective and genuinely accessible court service to resolve civil disputes between citizens, they will take the law into their own hands, and anarchy will ensue. Further, the commercial Chancery and TCC courts contribute very greatly to the reputation of this country in the service industries, especially the financial world, and in keeping the City competitive and the balance of trade reasonably benign. However, we must be careful not to lose our reputation for novelty.

22. On a rather different tack, I am concerned that, on the civil side, too much effort, support and money may be being devoted to the High Court and Court of Appeal in London, and not enough to the County Courts across the country, which is where 95% of the population experience civil and family law. The Circuit and District Judges have fuller lists, less preparation, worse representation, and more diversity of issues, than High Court and Court of Appeal Judges, and this makes their job harder. Yet, because the High Court and Court of Appeal Judges are more senior, fewer in number, less expensive to service and more RCJ-based, it is they who get the preferential treatment. I acknowledge that the RCJ-based

Judges, with their greater contribution to the law and invisible exports, do have a claim for a degree of preferential treatment. But that is not an answer, merely a defensive point; in any event, as the extraordinary and growing success of Birmingham over the past 15 years in the Chancery Commercial and TCC fields has demonstrated, the commercial contribution and importance of the courts is not limited to London. Whether legal executives, solicitors, barristers, or Judges, you all have a great deal to be proud of.

23. Then we have the European challenge, with its heady mixture of opportunities and threats. With Ireland, we are different from most of Europe in our legal philosophy, whether you compare the substance and procedure of our common law, based on judicial decisions and experience, with their civil law, based on codes and principle. Each has much to learn from the other, and each has the same ultimate aim, but it is unrealistic not to acknowledge that there are differences of approach. They think their system is better than ours; we know our system is better than theirs.

24. The tension between the common law and civil law systems can be well expressed in terms of epistemology, the theory of knowledge. In that field, there has been a continuing controversy between the empiricists and the rationalists. The empiricists relate ideas, meaning, indeed truth, to experience, whereas the rationalists relate such concepts to reason. It is no surprise that the major empiricists were British – Hobbes, Locke, Berkeley, Hume – whereas the rationalists were from mainland Europe – Descartes, Spinoza, Leibnitz. Francis Bacon, one of the British empiricists suggested that empiricists were "like ants" in that "they collect and put to use", whereas the rationalists, he said, were "like spiders; they spin threads out if themselves". Through the European Communities Act 1972 and the Human Rights Act 1998, we British ants have let in the Continental spiders.

25. The challenges today include a government which suffers from what I call the Mikado syndrome. In the final Act of that operetta, Koko explains to the Mikado: "It's like this: When your Majesty says, 'Let a thing be done,' it's as good as done practically, it is done--because your Majesty's will is law", to which the Mikado replies "I see. Nothing could possibly be more satisfactory!" Many senior politicians appear believes that, if Parliament passes legislation to deal with a problem, then the problem is thereby dealt with. Contrary to the Mikado's view, nothing could be less satisfactory. Partly because there are so many perceived problems identified in the media, there is a welter of ill-conceived lengthy

legislation – poor in quality and voluminous in quantity. The result is an illusion of action without the reality of achievement, which brings the legislature, even the rule of law, into disrepute. It leads to unnecessary litigation, uncertainty and risks putting the judiciary on a collision course with the executive and legislature

26. On a slightly different note, the exchange between Koko and the Mikado may have brought to the minds of some of the equity lawyers here the rule that just as an order that something be done meant that it was as good as done was rather like the principle that an agreement for a lease was as good as a lease. The Mikado was first performed in March 1885, so it was presumably written in 1884, which was two years after *Walsh v Lonsdale* was decided.[14] Lord Woolf would have been impressed with the timing: the distress under challenge took place on 15the March, the first instance judgment was on 20 March, and the Court of Appeal gave its famous judgment on 29 March. I also note that three of my predecessors were involved – Jessel as MR in the Court of Appeal, Lord Lindley as an LJ, and Cozens-Hardy as leading counsel for the unsuccessful tenant.

27. Like those past predecessors of mine, my primary responsibility as MR is, of course, judicial. Most obviously I continue to be President of the Court of Appeal (Civil Division). As such I remain a judge first and foremost. The Master of the Rolls continues to carry out a judicial role that the office has had since, at least the time of Edward I, when judicial matters were delegated by the King to the office holder and thereafter became the second judge sitting in the High Court of Chancery.[15] Although strangely enough, or perhaps not given the organic nature of our constitutional development, the Master of the Rolls' formal status as a judge was not confirmed until a statute of George II in 1729 confirmed that all orders and decrees of the Master of the Rolls were valid, subject to a right of appeal to the Lord Chancellor.[16]

28. The office of Master of the Rolls is one which carries with it a rich and varied diet of responsibilities. Over the years Masters of the Rolls have been responsible for some of the most far-reaching developments in English law. John de Waltham, MR from 1381 – 1386

[14] (1882) LR 21 ChD 9.
[15] Spence, *The Equitable Jurisdiction of the Court of Chancery*, (Stevens & Co) (1846) Vol. 1 at 358.
[16] 3 George II, c. 30.

introduced the writ of subpoena in to English procedural law and through it into the common law throughout the world.[17]

29. Examples can of course be multiplied: there is Lord Greene MR's magisterial judgment in *Young v Bristol Aeroplane*, which was resoundingly endorsed in the House of Lords[18]; there is his judgment in *Associated Provincial Picture Houses v Wednesbury Corporation* – the *fons et origo* of judicial review[19]; And then, of course, there is Denning, with his love of, and commitment to, justice and his development of the law of estoppel.

30. Of course, the law moves on. No more can judges sit on appeal from themselves, but that was the norm until the 1850s. In that connection, let me recommend the sadly overlooked case of *Martindale v Falkner* (1846) 2 CB 706, heard in the Court of Common Pleas. Maule J sat with Tindal CJ and Erle and Cresswell JJ on an appeal against his own decision at first instance. After his three colleagues had given short judgments upholding his decision, Maule J gave a judgment longer than the other three put together, dissenting and explaining in convincing detail why the appeal against his decision should be allowed.

31. I, of course, am the first Master of the Rolls since Lord Evershed in 1949 to have come from Chancery, the MR's historic home. I wonder what if any that difference will make. Given the merger of law and equity over 130 years ago perhaps we ought to be in a position to say that it should make no difference.

32. I hope that, after I am gone, I do not receive a similar accolade to that which the ghastly Lord Hewart, Lord Chief Justice from 1922 to 1940, received from Lord Devlin in 1985. Hewart, he said, "*has been called the worst Chief Justice since Scroggs and Jeffries in the seventeenth century*." Devlin added "I do not think that is quite fair. When one considers the enormous improvement in judicial standards between the seventeenth and twentieth centuries, I should say that, comparatively speaking, he was the worst Chief Justice ever."

33. Thank you.

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[17] Spence, *The History of the Court of Chancery*, in *Select Essays in Anglo-American Legal History*, Vol. 2 (1908) at 237.
[18] [1944] KB 718; [1946] AC 163.
[19] [1948] 1 K.B. 223.