



JUDICIARY OF
ENGLAND AND WALES

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Keynote Speech:

The Changing Face of Commercial Litigation in Newcastle and Tyneside

Introduction

It is a particular pleasure to be in Newcastle - for a variety of reasons which I'll cover during the course of the talk.

Firstly, I have strong links to the area both in my professional incarnations. As a historian, I have been blessed to benefit from the advice of the great Professor Michael Prestwich, who headed the department of medieval history at Durham University. Newcastle is of course a medieval name itself, the new castle (in whose grounds the Moot Hall is placed) being one put up by William the Conqueror. Wearing my historian's hat it is also nice to reflect that Eleanor of Castile stayed here between 14 and 17 September of 1280.

Of course, it is not only historical links that I have with Newcastle. As a lawyer throughout my career I had links here to a number of firms including Mills & Co and Eversheds Newcastle. I was also lucky enough to work with the great Chris Hilton via NEPIA.

As part of the Commercial Court's 125 year anniversary I spent a lot of time looking at the Court's history. In early editions of the Lloyd's reports we see the origins of many of the great commercial solicitor firms who are still regular users of the court today. Many of these solicitors firms started in Newcastle – for example Botterell Roche and Temperley, which I believe is the cursor of Eversheds Newcastle; or Ingeldew and Fenwick. Newcastle was also home to a variety of other firms busy in the Court: Bramwell Clayton and Clayton, Criddle and Ord and Wilkinson and Marshall to name a few.

In the early years of the 20th century, Newcastle seemed to dominate the Admiralty Court, having links to the merchant navy and the Shipbuilders. Even the non-shipping cases had a maritime flavour. I think of *The Newcastle Breweries v the Crown* (1919) 1 Ll L Rep 654 case arising out of the requisition by the Admiralty of rum - a sine qua non for the Navy - which involved 239 puncheons of which 172 were Demerara.

Newcastle's Commercial Judges

Mr Justice Gainsford Bruce

Mr Justice Gainsford Bruce was Newcastle's first Commercial Court Judge. He was born here in 1834 to a schoolmaster and antiquarian John Collingwood Bruce who published a guide to Hadrian's Wall in 1861. The 14th edition of this book appeared in 2006. Bruce was called to the Bar in 1859 by Middle Temple, joining the Northern Circuit, and practised largely in Durham and Newcastle. The Northern Circuit of course originally embraced the whole of the North of England, however when the North-Eastern Circuit broke away, Bruce joined the new Circuit which covered the area where he did almost all of his work. His appearances in London cases were relatively seldom.

Bruce made his first appearance in the Law Reports prosecuting a man for obtaining a mare by deception at the Newcastle horse fair (*R v Bulmer* 169 ER 1479). It was almost certainly his Newcastle links which attracted him to the areas of law relating to shipping. He developed an Admiralty practice, editing and updating a book on shipping whilst co-writing another about Admiralty procedure.

His career was not exactly stellar. When Bruce took silk – rather late - in 1883, the 'Times' commented that there was "*no spice of speculation or adventure*" about his approach to practice. In the latter part of his career at the Bar, he was more active as an arbitrator than as an advocate. His most significant case as a QC was in a commercial case – the key case of *Leduc v Ward* (1888) 20 QBD 475, in which he failed to persuade the Court of Appeal that the holder of a bill of lading was bound by an oral understanding between the shipper and the carrier.

It was actually politics that got Bruce on the bench. In no fewer than four general elections in the 1880's he tried, and failed, to win election as a Conservative MP in his native North East. Changing tactics, he was rewarded for his persistence by winning Holborn in London at a by-election in 1888 and held it again at the general election in 1892. With an election in the offing the Conservatives wanted to free up what was then a safe Tory seat (how times change - they now weigh the Labour vote in Holborn!) for someone else. Halsbury dispensed with the usual routine for offering places on the Bench, which was to send a formal letter on which the candidate could reflect with a degree of leisure. Instead, he sent his Assistant Secretary in person to haul Bruce out of an arbitration and obtain an immediate answer. After some initial hesitation, Bruce said "yes".

It is fair to say that this unconventional appointment caused some negative comment. The 'Law Times' condemned the circumstances as "scandalous". The 'Law Journal' confined itself to the observation that Bruce's elevation to the Bench "*has been the occasion of considerable adverse comment*". However he rapidly won the market over with his "*earnest desire to do right and unfailing courtesy*" which were widely acknowledged and appreciated.

He was of course a natural to step in to look after the Admiralty berth in the illness of John Gorell Barnes and he was one of the signatories to the May 1894 resolutions of the QB judges calling for the creation of a commercial court. Once the Commercial Court had been created most of the work was done by JC Mathew, the first judge in charge but Bruce sat in some of the gaps.

However one of the commercial cases that he did gain interest of the public was *Bostock v Nicholson* [1904] 1 KB 725. The defendant was contracted to sell to the plaintiff sulphuric acid free from arsenic, however it delivered product which was contaminated with arsenic. The plaintiff had not told the defendant what it wanted the sulphuric acid for; in fact it used it to manufacture brewing sugars, which it sold to various breweries who used it to produce beer. The poisoned beer killed several people and made many others seriously ill. Bruce held that

the plaintiff's claim for liabilities incurred to brewers and victims was too remote. The incident caused a public scandal, and was the subject of a commission of inquiry.

Alongside the commercial work, Bruce returned to the early days of his practice, marking out for himself something of a niche as the Queen's Bench's go-to Judge for equine litigation: he tried several cases about sale of horses and gambling, and in *London & Eastern Counties v Creasey* [1897] 1 QB 422 he reached the sound conclusion that a horse was not a "*fixture, plant, or trade machinery*". He retired in 1904 due to ill-health and his popularity is testified to by the fact that at a farewell drinks reception in Middle Temple, 400 members of the Bench and Bar turned out to say good-bye. His good nature is reflected in the fact that he spoke to each one individually.

He comes across personally as a very rounded and balanced person: he was a keen amateur astronomer, owned an extensive library, and enjoyed yachting. He gave his time to a number of charitable causes: he was a founding force of the Inns of Court Mission which provided poor relief in an area near the Law Courts which was appallingly run-down in the late 19th Century, but is now the site of expensive modern buildings of the University of London. The 'Law Times', which had so condemned the circumstances of his appointment, profoundly regretted the loss of a Judge who "*possessed all those qualities that are so essential in an occupant of the Bench of the High Court.*" Whilst the 'Law Journal' said of him: "*No litigant ever left his Court without feeling that his case had been fairly and fully tried.*" This is the kind of tribute which many of his contemporaries in the Court could not aspire to. Sir Thomas Scrutton - for some the perfection of a commercial judge - was notoriously intolerant and rude - leading to actual complaints from court's users.

Lord Wright

Lord Robert Wright must however be Newcastle and Tyneside's greatest judge. He was born in South Shields in 1869 to a marine superintendent. Although terrifyingly bright Lord Wright was not much of an advocate, with a style described as lugubrious – and temper-wise he was often somewhat difficult. He also took silk late, in 1917. He had a rather patchy practice even in silk as evidenced by his taking somewhat unusual cases - such as acting for Gwyneth Bebb in her litigation against the Law Society.

In 1925 however Lord Wright became a King's Bench Judge and his career really took off. A mere seven years later, he was appointed directly as a Law Lord, bypassing the Court of Appeal – a vanishingly rare distinction. After reluctantly agreeing in 1935 to become the second Commercial Judge appointed as Master of the Rolls, he returned to the Lords in 1937. As an appellate judge he was described by the 'Law Times' as "*short, craggy, indomitable, rather testy, with his heavily lined face and keen eyes, endlessly probing the arguments of counsel with searching questions*". He sat throughout the Second World War, complaining about the need to suspend sittings during flying-bomb attacks. Over his two spans of service he gave hundreds of distinguished judgments – favouring a fact sensitive approach which has stood the test of time.

Lord Wright died in 1964. No other Commercial Judge has exceeded his ninety-four years and eight month lifespan - though Lord Lloyd is bidding fair to take this title.

Returning to my own reasons for being pleased to be here – I stake a claim as a local judge: my mother attended Jarrow grammar school, in the same class as Jack Cunningham and Doug MacAvoy and my grandfather was in the Merchant Navy here.

Newcastle and commercial litigation today

Newcastle remains as important to commercial law today as it was in the early days. It has continued to supply us with a steady stream of interesting shipping related cases, an example of this being the *Gregos* case [1985] 2 Lloyd's Rep 347. This was a case in which the Wear Shipyard, represented by Miss Belinda Bucknall (now a well known maritime arbitrator) instructed by Ingledew Botterell and Roche sued the shipowners instructing Mr Angus Glennie (now Lord Glennie) in a dispute about what repairs had been agreed. Mr Justice Sheen, who was well known to practitioners of my generations as a judge not shy of expressing a view said;

"the seeds of the dispute between the parties were sown by the defendants by their inefficiency in failing to prepare a specification of the work they required to be done and were germinated by a total lack of business efficient and precision on both sides. The dispute grew into a disaster. The fertiliser for that growth included such well-known ingredients as avarice, unreasonableness and stubbornness."

It is a corking "plague on both your houses" judgment.

As I have indicated many of those firms who were the earliest patrons of the Commercial Court remain here doing important work – though one hopes in front of slightly politer judges: more the Gainsford Bruce than the Lord Scrutton is what we aim for these days. Of course there is some change. Now we have the BPC's, and it is wonderful to have HHJ Philip Kramer here. Given the history it is slightly unbelievable however that it has taken so long to have a dedicated Circuit Commercial Court judge. And looking at the judgments produced by HHJ Kramer one sees the modern commercial world: swaps agreements, share sale and purchase agreements and contracts relating to modern recycling and waste management facilities etc. Bigger cases are also finally being fought here as they should be as in the fascinating recent case of *Easteve v Malhotra* [2020] EWHC 2606 (Ch) where over a 13 day hearing in excess of 40 witnesses were called and HHJ Kramer produced a 210 page judgment.

The region continues to generate important cases and I was delighted to have the opportunity to decide the case of *Rockliffe Hall v Travelers Insurance* [2021] EWHC 412 (Comm) last year – known to its aficionados as "the plague case". It is a decision which has proved quite significant not just nationally for the various litigants who were considering running the same argument in the leading Irish case of *Brushfield v Axa* [2021] IEHC 263. I am currently considering that decision in turn in the latest covid BI case: *Corbin & King v AXA*. As I have made clear on previous occasions, we are planning to get more large cases in the Circuit Commercial Courts heard by High Court Judges - when the parties and the local Circuit Commercial Court judge consider that appropriate. I am very pleased to be able to report that we have another large commercial case to be heard, we hope live, by a High Court Judge in November and another lined up for next year. These cases are concerning breach of fiduciary duties and breach of confidence in the technical business segment and the provision of highly specialised technical equipment for medical purposes. They illustrate beautifully my point about Newcastle as a centre for modern commercial litigation.

Newcastle and Tyneside are of course well placed to generate such work. You have here a major tech cluster including the FTSE 100 company Sage PLC, Ubisoft's largest UK Games Studio and a new BBC Tech Hub. You also have the highest proportion of STEM and computing students in the country, and the UK's National Innovation Centre for Data. You have a £1.1 billion+ regional life sciences ecosystem that employs around 7,000 professionals in almost 200 companies. Then there is the Biosphere, the National Centre for Subsea and

Offshore Engineering and the Offshore Renewable Energy Catapult (the UK's flagship technology innovation and research centre for offshore wind, wave and tidal energy). This is enough to ensure that the area should be expecting to generate significant commercial disputes in the future.

This is perhaps the more so when one looks at some of the areas where we can expect exciting legal developments in the near future. There are fascinating thoughts originating from the Law Commission – and those thoughts are bound to end up being stress tested in the Courts. I refer in particular to their work on smart contracts and electronic documents. Of course the BPC's have already heard much about this from the former Chancellor, now the Master of the Rolls! But those themes are now moving into concrete form, with the Court in London starting to see a number of disputes about bitcoin, cryptoassets, blockchain, digital assets and similar subjects, most obviously in *Blockchain Optimization SA v LFE Market Ltd* [2020] EWHC 2027 (Comm), and *Onfido Ltd v Blockchain Access UK Ltd* [2020] EWHC 2585 (Comm).

The Law Commission has noted the importance of ensuring the law is capable of accommodating electronic documents, cryptoassets and other digital assets in a way which allows the possibilities of technology to flourish. It is also aware that this is a dynamic area where cases will not wait for academic debate to reach a comfortable landing point – they have committed to dealing with the issues in the very near future to put England and Wales in pole position to offer a certain framework for resolving the disputes which are bound to happen.

Electronic documents are of course a topic close to the heart of the traditional marine interests of this area. Here the Law Commission has already made provisional proposals for law reform to allow for electronic trade documents to be “possessed” provided they satisfy certain criteria. Their proposals are designed to ensure that electronic trade documents could have the same legal effects as their paper counterparts.

We are expecting the Law Commission to produce its proposals on smart contracts very soon. A smart contract is, of course, a self-executing contract with the terms of the agreement between buyer and seller being directly written into lines of code. Smart contracts are therefore programs stored on a blockchain that run when predetermined conditions are met. They typically are used to automate the execution of an agreement, the idea being that all participants can be immediately certain of the outcome, without any intermediary's involvement or time loss. Here the questions are more fluid. They include such issues as: In what circumstances will a contract written in code be legally binding? How are smart contracts to be interpreted by a court? What are the legal consequences of the code not performing as intended?

These are interesting challenges for us all. With the Circuit Commercial Court under the strong leadership of HHJ Philip Kramer at its heart and with the strong BPC's forum which I have been fortunate to have met here it is clear that Newcastle will continue to produce and attract significant commercial work, across the spectrum of commercial subject matter from the traditional to the groundbreaking, for the BPC's.

Commercial litigation and the live court experience

Finally, I would like to talk about the wonderful surroundings that I have had the pleasure of seeing whilst here, having had the pleasure of a tour of the Moot Hall with HHJ Kramer and a lovely lunch with the BPCs Forum in the Grand Jury Room.

Moot Hall of course has its roots in the distant past as an adjunct to the castle and has been part of the justice system since then. It was designed to give Newcastle a really excellent court – and it succeeded in doing so. It is perhaps useful to use its merits to reflect on what it offers and what your business and property courts need here – now with the extra dimension of understanding offered by Covid. Although it has been miserable in many ways I feel strongly that the experience of Covid has offered us, through the length of our flirtation with virtual courts, a real chance to appreciate and value what the live court experience offers. I spoke of this in Manchester last year and my views have only been strengthened by the experience of still more time doing remote hearings and now a return to real trials – I recently completed a six-week live trial.

In preparing my speech for Manchester, I did some work looking at court layouts - across jurisdictions and history. What I found was surprisingly consistent: a raised dais, space, fields of vision, so the judge can see what is going on, and sound proof to enable concentrated active listening (a point close to our hearts with the experience of remote hearings). It is not insignificant that we have been creating this paradigm for courtrooms for years. That is because the creation of that still safe place, where the rest of the world does not intrude, means there is somewhere where we can focus on the human interaction at the heart of the dispute. It is also significant that court is a place inhabited by a sense of authority, control and respect which promotes the giving of best evidence and creates an ability to accept and respect decisions which are – in the commercial world too - of great importance to people. I have described that atmosphere as numinous – because a court is an awe-inspiring place – a place which inspires respect, and a form of spiritual emotion. Obviously, such qualities and such emotions are of critical importance in criminal trials. But they have their place too with us in commercial litigation.

Looking back at Gainsford Bruce and his skill in giving the parties the feeling that they have had their case fairly tried, a part of that is giving them that space, that atmosphere, that best opportunity to test the case advanced by the other side. Such a beautiful court as the Moot Hall court makes the concept of “numinous” relatively easy to understand. But that sense is needed in a degree in all court rooms; and it is important that whatever the plans for the future may be the idea that this is important needs to be understood and respected.

I am confident that Newcastle will, as I have said, continue to contribute significantly to the development of commercial litigation in the future. I hope very much to come back soon and try a case here – I hope in November indeed - and form a part of that exciting future. May I thank you all for your very warm welcome here today and to the BPCs Forum for giving me a chance to meet and speak to so many Court users.

