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Lord Hewart: The Man, the Decision, and the Legacy

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A. The Man

1. In Buffalo, Western New York, William Howard Taft, the former 27th President of the United States, and now Chief Justice of the Supreme Court, delivered a welcome address to Gordon Hewart, first Viscount Hewart at the Annual Meeting of American Bar Association. Taft's transition from the White House to the Supreme Court was a first,[1] and it is as a judge that Taft is perhaps best remembered.[2] Taft declared of Hewart:

> He has preferred in the outset to devote himself to the dispatch of business in the courts of first instance; thus to lay broad, by actual experience, the basis for a wide and great judicial career, with every prospect that with his ability and adaptability, his learning and culture as a man, and his skill and knowledge of the law, he is to become a worthy successor of Mansfield …
>
> It has been a real exchange of fellowship that we have had tonight in this address of the Lord Chief Justice; and we know, and are glad to know, that England has a Lord Chief Justice who represents the purest spirit of the common law and does not hesitate when opportunity presents itself to point out with naked emphasis and with great courage the dangers that we both are confronted with.[3]

2. There was something similar between Taft and Hewart. Both men had had careers in politics and in governing, but it was the Chief Justiceship in their respective countries that both men regarded as the pinnacle aim of their career. Hewart had turned down

[1]Interestingly, there had been calls for former President Barack Obama to be appointed to the Supreme Court. See for example, 'Biden would nominate Obama to Supreme Court "if he'd take it"' (*CNN*, 31 December 2019) <https://edition.cnn.com/2019/12/31/politics/biden-obama-supreme-court-trnd/index.html> accessed 7 March 2025. This idea was also endorsed by Hillary Clinton in 2016. However, Obama conceded that despite loving 'the law, intellectually … being a justice is a little bit too monastic for me'.

[2]Peri E Arnold, 'William Taft: Impact and Legacy', Miller Center, University of Virginia <https://millercenter.org/president/taft/impact-and-legacy> accessed 7 March 2025. Arnold rejects the assertion that Taft's presidency was am 'unmitigated "disaster"', but did not see his presidency being an especially successful one: '[a]lthough the word "disaster" is perhaps too extreme, there can be no doubt that Taft's hesitancy as a leader and politician produced few accomplishments during his term. See also Donald F Anderson, 'The Legacy of William Howard Taft' (1982) 12(1) Presidential Studies Quarterly 26, 27. Anderson makes the point that Taft was ill-suited to the presidency, as he had 'the publicity habits of a judge', and failed to engage with the press. This meant that despite his 'remarkable knowledge of public affairs, his experience, his talents, and his integrity, in the end, produced a fascinating but disappointing presidency': ibid 33.

[3]'Chief Justices of Two Nations Address Association' (1927) 13 ABA J 499, 499, 503.

the offer of becoming Home Secretary, preferring the position of Attorney-General with its traditional presumption that afterwards he would be appointed as the Lord Chief Justice if it was vacant. This presumption has been described as 'a peculiar, and thoroughly undesirable, convention … [which] obviously made the post of Chief Justice a matter of chance, much like musical chairs'.[4] Similarly, whilst Taft had turned down being nominated to the Supreme Court by Theodore Roosevelt prior to becoming President himself, it was his lifetime's ambition.[5] The irony would be that whilst Taft's presidency would be ineffectual and described as a disaster, it would be Hewart's judicial career that would be a failure due to his temperament and bombastic nature. Perhaps Hewart's saving grace would be his comments about the importance of justice in *R v Sussex Justice ex p McCarthy*,[6] a legacy that continues to live on and be cited by new generations of lawyers who may, or may not, be oblivious to his judicial reputation.

3. The American magazine *Life* in 1938 depicted Lord Hewart and his wife in a series of photographs playing games and declared to its readers that, 'Lord Hewart, a just, humorous, and hot-tempered man, has given British justice more good human sense than any other living man in England'.[7]

4. This was quite a stateside endorsement for the Chief Justice of England. But Gordon Hewart, the first Viscount Hewart, would not receive such flattering descriptions at home. Appointed as Lord Chief Justice of England in 1922 after 'vigorously [advancing] his own claims … and after a certain amount of manouvering', Hewart would serve in this role for 18 years until 1940.[8] Because of the way that vacancies for Lord Chief Justice were filled, Hewart, being a frontline politician, had 'no judicial experience whatsoever'.[9] However, it was accepted that the Lord Chief Justice 'was still thought of as a political office'. Some of Hewart's immediate predecessors were not great lawyers; Robert Stevens describes Lord Alvestone as 'not intellectually distinguished' and Lord Reading who was regarded by his opponents as having 'dubious ethics'.[10] In his biography of Hewart for the Oxford Dictionary of National Biography, Robert Stevens pulled no punches about the man and his tenure as a judge:

> His period as lord chief justice was not distinguished … Unfortunately, his behaviour as a judge lacked many basic judicial qualities. He made up his mind early and was frequently boorish and rude to counsel. Out of court, he extended his discourtesy to fellow members of the bench and to the lord chancellor and the members of his office. Hewart may well have been disappointed to discover how little power the lord chief justice actually had,

[4]Graeme Williams, *A Short Book of Bad Judges* (Wildy, Simmonds and Hill Publishing 2013) 35.
[5]Donald F Anderson, 'The Legacy of William Howard Taft' (1982) 12(1) Presidential Studies Quarterly 26, 27.
[6][1924] 1 KB 256.
[7]*Life* (1 August 1938) 58.
[8]David Keene, 'The Independence of the Judge' in Mads Andenas and Duncan Fairgrieve (eds), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (Oxford University Press 2009) 258.
[9]Williams (n 4) 36.
[10]Robert Stevens, *The English Judges: Their Role in the Changing Constitution* (Hart Publishing 2002) 21.

but his feuds during the 1920s and 1930s became famous, as did his frequent changes in politics.[11]

5. Hewart was chosen for inclusion in a book entitled *A Short Book of Bad Judges*, with the author declaring, '[t]hat he was a very Bad Judge is a very widely held opinion, probably the only dissentient being his hagiographical biographer, R. Jackson in "the Chief" of 1959'.[12] The assessment of Hewart was scathing: 'incapable of changing his mind … a tendency to paranoia … [with a] total want of judicial experience, and of common courtesy'.[13] An even more starker assessment was offered by RFV Heuston (who Sir Sydney Kentridge KC called 'that most learned and critical historian of the judiciary'[14]), who in his book on the *Lives of the Lord Chancellors* considers Hewart to have 'tarnished' the office of Lord Chief Justice and 'was perhaps the worst Lord Chief Justice of England since the seventeenth century'.[15] Rodney Brazier agreed: 'the worst since the seventeenth century'.[16] As Geoffrey Lock remarked, if Hewart was 'the worst Lord Chief Justice since the seventeenth century', then he was worst 'since Scroggs and Jeffreys'.[17] Lock continued, 'Lord Devlin thought this view to be unfair to Jeffreys, and in his opinion Hewart was "comparatively speaking … the worst chief justice ever", with not "a grain of judicial sense"'.[18]

6. The comparison with the likes of Scroggs and Jeffreys is certainly far from flattering. George Jeffreys, first Baron Jeffreys is best remembered as the hanging judge who loyally served King James II as Lord Chief Justice and Lord Chancellor and brutally dealt with those who had supported the Duke of Monmouth's rebellion in 1685. Jeffreys had been asked by James to oversee what became known as the Bloody Assize, and out of 1381 individuals who were tried most 'were convicted and sentenced to die, [and] of these approximately 200 were executed'. Nonetheless, despite the notoriety of the trials, Paul D Halliday is of the opinion that '[i]n the context of other risings – for instance, those of 1536, 1569, 1715, and 1745 – it is difficult to see these results as anything but ones reached according to ideas of justice prevailing throughout the period'.[19] Jeffreys' reputation suffered following the Glorious Revolution: he was to die in the Tower of London, but whilst not 'a profound jurist, Jeffreys was none the less a learned justice who managed his court effectively'.[20] This was who Hewart was being compared to.

[11]Robert Stevens, 'Hewart, Gordon, first Viscount Hewart (1870–1943), judge', Oxford Dictionary of National Biography (3 January 2008).
[12]Williams (n 4) 35.
[13]ibid 37.
[14]Sydney Kentridge, 'The highest court: selecting the judges' (2003) 62(1) Cambridge Law Journal 55, 64.
[15]RFV Heuston, *Lives of the Lord Chancellors* (Clarendon Press 1964) 603.
[16]Rodney Brazier, *Constitutional Practice: The Foundations of British Government* (3rd edn, Oxford University Press 2001) 287–288.
[17]Geoffrey Lock, 'Statue Law and Case Law Applicable to Parliament' in Dawn Oliver and Gavin Drewry (eds), *The Law and Parliament* (Butterworths 1998) 55.
[18]ibid.
[19]Paul D Halliday, 'Jeffreys, George, first Baron Jeffreys', Oxford Dictionary of National Biography (21 May 2009).
[20]ibid.

7. Hewart's departure from office was controversial, mirroring his tenure in office. Stevens summed up Hewart's departure aptly: 'his undistinguished term … came to an end in 1940 when he received a telephone call from 10 Downing Street asking for his resignation. The end says much about the England of the inter-war years'.[21] The request for Hewart to resign was controversial, notwithstanding that Hewart was unwell and had told the Prime Minister Winston Churchill that he expected to resign soon. To Brazier, 'this was an extraordinary prime ministerial removal of a very senior judge'.[22] To be fair to Churchill, it is doubtful that the legal profession would have been especially saddened by Hewart's enforced retirement.

B. The decision

8. The case that would gain Hewart a legacy that was not solely defined by his notoriety was *R v Sussex Justice ex p McCarthy*.[23] Sir Stephen Sedley has remarked that '[w]ere it not for his celebrated, if circumlocutory, dictum [in *McCarthy*] … Hewart's long tenure as chief justice might have passed almost unnoticed'.[24] This is a fair assessment.

9. Hewart heard the case alongside Sir Charles Montague Lush. Sir Charles Montague Lush had been appointed as a King's Counsel in 1902, and then appointed to the High Court in 1910. Lush was to retire a year after the decision due to deafness. As was the case with Hewart, Lush, although being a successful barrister, did not carry forward this success to the bench, his career being somewhat a failure: 'he seemed to possess all the qualifications for a great judicial career. But he did not live up to expectations. Courageous to a fault as a barrister, he lacked confidence as a judge. In his anxiety to do justice, he hesitated to make a decision and detected difficulties in cases which seemed simple to others'.[25]

10. Along with Hewart and Lush, the final member of the Bench was Sir John Sankey. Appointed as King's Counsel in 1909 and appointed to the High Court in 1914, Sankey had been seen as a candidate to serve as Lord Chancellor in Ramsey MacDonald's first Labour government in 1924, but instead Lord Haldane was appointed. It was not until 1929 that he became Lord Chancellor and he served in this position until 1935 when he was replaced by Lord Hailsham. The dismissal was 'a blow from which Sankey never fully recovered' and '[w]hen dropped, he burst into tears and refused to sit as a judge for several years'. In contrast to Hewart and Lush, Sankey was described by his biographer as 'a superb judge and lawyer, a reformer and a radical, and one of the few

[21]Stevens, 'Hewart' (n 11).
[22]Brazier (n 16) 288.
[23]*McCarthy* (n 6).
[24]Stephen Sedley, *Lions Under the Throne: Essays on the History of English Public Law* (Cambridge University Press 2015) 30.
[25]Theobald Mathew, revised by Hugh Mooney, 'Lush, Sir (Charles) Montague (1853–1930)', Oxford Dictionary of National Biography (23 September 2004).

English judges of the twentieth century who understood Commonwealth and constitution'.[26] Indeed, Sankey has left a legacy in terms of an important legal phrase: his 'golden thread' in *Woolmington v DPP*.[27]

11. Counsel in *McCarthy* included a man who would become a government minister and serve as Solicitor General. Walter Turner Monckton (later first Viscount Monckton of Brenchley) was a veteran of the First World War and had been called to the Bar in 1919. Described as his biographer as 'clever', but 'not highbrow or pretentious … he habitually worked through the night, mastering his briefs with ease. In court his gift for lucid exposition and his ability to disarm witnesses by sheer courtesy brought him great success'.[28] Monckton became King's Counsel in 1930 and during the 1930s he served as the constitutional advisor for the Nizam of Hyderabad. An ally of Edward VIII, he was sent by the government 'to persuade the duke of Windsor to accept an appointment as governor of the Bahamas'.[29] Monckton would later serve as Solicitor General in 1945, before finally becoming a Conservative Member of Parliament in 1951. In *McCarthy*, Monckton acted for the superintendent of police.

12. The other two counsel are somewhat less famous. According to the archives at Lincoln's Inn, Herbert David Samuels had been called to the Bar on 3 July 1905 at the Honourable Society of Lincoln's Inn.[30] At the time of his call, he lived with his parents at 52 St Quintin Avenue, North Kensington. A search on Google Street View reveals that 52 St Quintin Avenue is still there, an attractive redbrick Victorian terraced house. There is a mention of Herbert David Samuels in the *Supplement to the London Gazette* of 12 November 2018, which states that Herbert David Samuels and other cadets were to be temporarily appointed to second lieutenants on 26 October 2018. He had been appointed as a King's Counsel by the time he appeared before the Court of Appeal in *Odhams Press Ltd v London & Provincial Sporting News Agency (1929) Ltd*.[31] The following year he appeared before the House of Lords in *Izzard v Universal Insurance Co Ltd*.[32] However, in *McCarthy*, Herbert David Samuels was not called upon.

[26]Robert Stevens, 'Sankey, John, Viscount Sankey (1866–1948), Lord Chancellor', Oxford Dictionary of National Biography (6 January 2011).
[27][1935] AC 462.
[28]Martin Pugh, 'Monckton, Walter Turner, first Viscount Monckton of Brenchley (1891–1965), Lawyer and Politician', Oxford Dictionary of National Biography (6 January 2011).
[29]ibid.
[30]See 'Researching Past Members', The Honourable Society of Lincoln's Inn <https://www.lincolnsinn.org.uk/library-archives/researching-past-members/#:~:text=A%20member%20will%20have%20an,in%20the%20Inn's%20Black%20Books> accessed 7 March 2025.
[31][1936] 1 All ER 217.
[32][1937] AC 773.

13. The other barrister listed is Russell Davies. A search of the online material from Middle Temple,[33] Inner Temple[34] and Lincoln's Inn (sadly Gray's Inns' online materials only extend to members who joined up until 1889)[35] reveals that there is a Francis Maurice Russell Davies who was called to the bar at Middle Temple on 29 April 1910. Francis Maurice Russell Davies had previously been a Clerk in Holy Orders and was living in Cloppenhall in Staffordshire. His father Septimus Russell Davies was a Clerk in Holy Orders. In *McCarthy*, Russell Davies acted for the Justices.

14. The solicitors involved were Taylor, Willcocks and Co who acted for the Police Superintendent. Interestingly, the firm still has a presence having been subsumed within another firm; in 2012 known as Taylor Willcocks the firm joined Howell Jones Solicitors.[36] Pettitt & Ramsay acted for Langham, Son & Douglas, Hastings. Finally, WC Crocker acted for Mr McCarthy.

15. Judgment was given in the Divisional Court on 9 November 1923. On the same day that judgment was given in this case that has come to encapsulate the importance of justice, another event occurred which represented the polar opposite, as the Beer Hall Putsch in Munich was onto its second day, with Adolf Hitler's coup against the Weimar Republic ending in failure.

16. The facts were relatively straightforward. Mr McCarthy was driving either a 'motor car' or more accurately a 'motor cycle', the decision using both terms, on 21 August 1923. There was a collision between Mr McCarthy and 'a motor cycle and side-car driven by [Mr] Whitworth'. Mr Whitworth and Mrs Whitworth (who was the passenger) alleged that they had suffered injuries as a result of the collision.

17. The collision led to Mr Whitworth instructing a local firm of solicitors in Hastings (Langham, Son & Douglas) to seek damages for the injuries suffered by him and his wife from Mr McCarthy. The Langham family were by tradition lawyers in London and Hastings, with their ancestor William Langham living in London where he practised as a solicitor from 1779. His son (or possibly grandson) James George Langham moved to Hastings where he practised law.[37] The firm continues to exist, albeit having been merged with another firm. In 2000 Langhams merged with Gaby Hardwicke Solicitors.[38] This merger was quite apt, given that Gaby Hardwicke

[33]See 'Research Archive', The Honourable Society of the Middle Temple <https://www.middletemple.org.uk/archive/archive-information-access/sources-resources/historical-research-and-past-members#:~:text=If%20you%20are%20uncertain%20which,details%20of%20an%20individual's%20membership> accessed 7 March 2025. See specifically the Register of Admissions.
[34]See 'Inner Temple Collections', The Inner Temple <https://archives.innertemple.org.uk/> accessed 7 March 2025. There is a comprehensive online database of previous members.
[35]See 'Tracing Past Members', Gray's Inn <https://www.graysinn.org.uk/the-inn/the-archive/tracing-past-members/> accessed 7 March 2025.
[36]Howell Jones Solicitors <https://www.howell-jones.com/about-us/> accessed 7 March 2025.
[37]For details see the Friends of Hastings Cemetery website <https://friendsofhastingscemetery.org.uk/langhamjg2.html> accessed 7 March 2025.
[38]See 'Langhams', Gaby Hardwicke Solicitors <https://www.gabyhardwicke.co.uk/langhams/> accessed 7 March 2025.

Solicitors was a long-standing local form in Hastings, having been founded in 1889. The two individuals referenced in the firm's current name are Ralph Gaby who joined the firm in 1892 and Allen Hardwick who joined the firm following the First World War and these men would presumably have known the Langhams well.

18. The police also obtained a summons against Mr McCarthy on the basis that he was driving 'in a manner dangerous to the public'. The present case concerned the criminal prosecution of Mr McCarthy.

19. The Justices hearing the criminal case against Mr McCarthy were sitting in Hastings in the county of Sussex. They were assisted by a legal advisor, then known as a clerk. Mr FG Langham (a partner in Langham, Son & Douglas, the firm which were representing Mr Whitworth in the civil claim) was the Justices' usual clerk. Mr McCarthy's solicitor 'inquired whether Mr FG Langham … was then sitting as clerk, and was informed that he was not '. This was because Mr FG Langham was on holiday.

20. On the day of the hearing the deputy clerk who assisted the Justices and then went with them when they retired to deliberate was a partner in Langham, Son & Douglas (the firm of solicitors that was representing the party seeking damages from McCarthy in a civil claim related to the criminal proceedings against McCarthy). He was also a Mr Langham, Mr EH Langham to be precise, the brother of the clerk.

21. Mr McCarthy's solicitor denied that he had known the connection between the deputy clerk and Mr FG Langham before the Justices had retired to deliberate, and that the identity of the deputy clerk had only became known to him following his client's conviction. The law report states that in the affidavit of the Justices, the Justices believed that Mr McCarthy's solicitor had in fact known the connection and did not formally object at the time. Consequentially, the Justices continued under the presumption that the solicitor had no objection, and stated that otherwise they would have adjourned and requested another clerk from the local area assist them.

22. Lord Hewart was clear that he accepted that the deputy clerk had done nothing wrong in terms of influencing the Justices in favour of the party represented by his firm: '[i]t is said, and, no doubt, truly, that when that gentleman retired in the usual way with the justices, taking with him the notes of the evidence in case the justices might desire to consult him, the justices came to a conclusion without consulting him, and that he scrupulously abstained from referring to the case in any way'.

23. However, it did not look good. This is where Lord Hewart observed that 'a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done'.

24. The key issue was not whether the deputy clerk had done anything to try and influence the Justices, but rather 'whether he was so related to the case in its civil aspect as to be unfit to act as clerk to the justices in the criminal matter'.

25. Hewart held that:

> I accept the statements contained in the justices' affidavit, but they show very clearly that the deputy clerk was connected with the case in a capacity which made it right that he should scrupulously abstain from referring to the matter in any way, although he retired with the justices; in other words, his one position was such that he could not, if he had been required to do so, discharge the duties which his other position involved. His twofold position was a manifest contradiction.

26. Mr Justice Lush took the same view: 'it is irrelevant to inquire whether the clerk did or did not give advice and influence the justices'. This lack of influence or interference did not matter as, '[w]hat is objectionable is his presence at the consultation'. To Lush, the deputy clerk was 'in a position which necessarily makes it impossible for him to give absolutely impartial advice'. Mr Justice Sankey merely said: 'I agree'. The conviction was quashed.

C. The legacy

27. The legacy of Hewart's famous statement lives on. In May 2024, Mr Justice Nicklin, the Chair of the Judiciary's Transparency and Open Justice Board, gave a speech in which he observed:

> [w]ith a simplicity of language, Lord Hewart captured two of the essential aspects of open justice. First, the need for the Courts to do justice, which must be the overriding objective, and then for the administration of justice to be open … The importance of *seeing* justice done is an essential foundation of our democracy. In most Courts, judges give detailed reasons in public. Sir Michael Tugendhat argued that this was: ' … in part to persuade the public that the decisions the judges have made are the right decisions. They have to be unelected to be independent, but they account to the public by administering justice in public. One purpose of open justice (as Shakespeare put into the mouth of the King in the *Winter's Tale*) is to put judges on trial. Criticisms of those decisions by the public and in the media would be even more helpful to the public, if the critics reported (or gave hyperlinks to) the reasons that judges give for their decisions' (original emphasis).[39]

28. In a similar vein, the then President of the Supreme Court, Lord Neuberger, emphasised the importance of judgments:[40]

> Judgments are the means through which the judges address the litigants and the public at large, and explain their reasons for reaching their conclusions … Without judgement there would be no justice. And without Judgments there would be no justice, because decisions

[39]'Transparency and Open Justice – Opportunities and Challenges', Newcastle-upon-Tyne Law Society Annual Lecture 2024 , Newcastle Law School (9 May 2024) [26]–[27] <https://www.bailii.org/uk/other/speeches/2024/Q7YH8.html>.
[40]Lord Neuberger, 'No Judgment – No Justice', First Annual BAILII Lecture (20 November 2012) [2] <https://www.bailii.org/uk/other/speeches/2012/121120.html> accessed 7 March 2025.

> without reasons are certainly not justice: indeed, they are scarcely decisions at all. It is therefore an absolute necessity that Judgments are readily accessible. Such accessibility is part and parcel of what it means for us to ensure that justice is seen to be done, to borrow from Lord Hewart CJ's famous phrase.

29. In another lecture Lord Neuberger noted:

> The popularity of Lord Hewart CJ's oft-quoted observation that it is of 'fundamental importance that justice should not only be done, but should … be seen to be done' – is such that it is in danger of being seen as trite or jejune. But the reason for the unusual popularity of this phrase is that it captures something we see as an essential part of justice … Important as what Edmund Burke referred to as the 'cold neutrality of an impartial judge' no doubt is, the truth of Lord Hewart's aphorism extends beyond it … It is a fundamental principle of the rule of law that justice is done in public.[41]

30. Hewart's name is often referred to in judgments. In *Cape Intermediate Holdings Ltd v Dring (for and on behalf of Asbestos Victims Support Groups Forum UK)*,[42] Lady Hale began her judgment, '[a]s Lord Hewart CJ famously declared [citing his words] … .That was in the context of an appearance of bias, but the principle is of broader application. With only a few exceptions, our courts sit in public, not only that justice be done but that justice may be seen to be done'.[43] Lord Dyson in *Al Rawi and others v The Security Service and others* emphasised the importance of open justice with reference to Lord Hewart:[44] '[t]he importance of the open justice principle has been emphasised many times: see, for example, *R v Sussex Justices, Ex p McCarthy* '.[45] In *Bubbles & Wine Ltd v Lusha*[46] Leggatt LJ observed, that while the appellant as a litigant in person 'reminded us of the famous statements of Lord Hewart CJ … These principles remain as salutary and important as ever, but the way in which they are to be applied has been made more precise by the modern authorities'.[47]

31. In another recent extra-judicial speech entitled 'Justice Must be Seen to be Done', Mr Justice Cobb remarked that:

> [r]ather like the cases which concerned the ineffective Carbolic Smoke Ball as a cure for flu, and the decomposing snail in the bottle of ginger beer, *Sussex Justices* is a case of little factual consequence; it concerned a £10 fine for dangerous driving. But, like those other claims to which I have just made mention, initiated (respectively) by the disgruntled Louisa Carlill and May Donoghue, *Sussex Justices* has acquired considerable standing in the law; its point of significance … related to the due administration of justice, and specifically the

[41] Lord Neuberger, 'Sausages and the Judicial Process: The Limits of Transparency', Annual Conference of the Supreme Court of New South Wales, Sydney (1 August 2014) [4]–[5] <https://jcpc.uk/uploads/speech_140801_883b13434b.pdf> accessed 7 March 2025.
[42] [2019] UKSC 38, [2020] AC 629.
[43] ibid [1].
[44] [2011] UKSC 34, [2012] AC 531.
[45] ibid [10].
[46] [2018] EWCA Civ 468.
[47] ibid [17].

> appearance of improper influence upon a bench of magistrates after they had retired to consider their decision.[48]

Mr Justice Cobb summed up the significance of what Lord Hewart had said back in 1924: 'Lord Hewart's phrase, stripped of its adverbial adornments, has been cited probably more often than any other in legal discourse over the last 100 years'.[49]

32. Hewart has had an impact globally. In the Irish Supreme Court in *Rooney v Minister of Agriculture*[50] Keane CJ observed that, 'It has long been recognised that the appearance of bias is as damaging to the administration of justice as its operation. This principle is summarised in the much quoted observation of Lord Hewart'.[51] Previously, in *Radio Limerick One Ltd v Independent Radio and Television Commission*[52] Keane J had referred to it as the 'well known statement of the law'.

33. It has even been adopted as a legal truth across the Atlantic Ocean. For example, in the Supreme Court of New Jersey's decision in *Mazza v Cavicchia*[53] Vanderbilt CJ cited Hewart in *McCarthy*, commenting: 'as Lord Hewart, C.J., has aptly pointed out, "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly [be seen] to be done"'.[54] Similarly, Hewart was cited by the California Court of Appeals in *Lois R v Superior Court*,[55] and by the Supreme Court of California in *Re Stevens*,[56] was referred to as '[t]he late greatly lamented Lord Chief Justice Hewart of England' by the Federal Circuit Court of Appeals, Third Circuit in *Lusthaus v Commissioner of Internal Revenue*.[57] In the Montana Supreme Court's decision in *Washington v Montana Mining Proper*,[58] Justice RC McDonough stated: '[j]ustice must satisfy the appearance of justice … As eloquently stated by Lord Hewart "The people's confidence in the ability of the courts to administer justice must not be diminished. A state ruled by law cannot afford any perceived notion that justice is not being served by the judiciary"'.[59] In *State of Wisconsin v Michael Love*[60] the Court of Appeals of Wisconsin declared that '[t]he judicial system is built on the trust and respect of the public and relies

[48]Mr Justice Cobb, '"Justice Must be Seen to Be Done": One Hundred Years since *R v Sussex Justices* [1924]', Conkerton Memorial Lecture (10 October 2024) [4] <https://www.judiciary.uk/speech-by-mr-justice-cobb-justice-must-be-seen-to-be-done/> accessed 7 March 2025.
[49]ibid [9].
[50][2000] IESC 69.
[51]ibid [28].
[52][1997] IESC 3.
[53]15 NJ 498 (1954).
[54]ibid 525.
[55]97 Cal Rptr 158, 19 Cal App 3d 895.
[56]LA No 31540. Supreme Court of California. May 20, 1982 (per Kaus J).
[57]149 F2d 232 (3d Cir 1945).
[58]No 88–577 (1990).
[59]ibid 11–12.
[60]97-2336-CR.

on that trust and respect for its effectiveness. Lord Hewart's frequently quoted remark of nearly seventy-five years ago is equally appropriate today'.[61]

34. It is not just in the United States. In the Canadian Supreme Court's decision in *R v Latimer*,[62] Chief Justice Lamer stated:

> I need only address this issue very briefly. The actions of Crown counsel at trial, which were fully acknowledged by Crown counsel on appeal, were nothing short of a flagrant abuse of process and interference with the administration of justice. The question of whether the interference actually influenced the deliberations of the jury is quite beside the point. The interference contravened a fundamental tenet of the criminal justice system, which Lord Hewart C.J. put felicitously as 'justice should not only be done, but should manifestly and undoubtedly be seen to be done' … [63]

35. In a decision relating to public confidence in the police and police investigations following the killing of suspects by police officers, Moldaver J observed:

> This history teaches us that appearances matter. Indeed, it is an oft-repeated but jealously guarded precept of our legal system that 'justice should not only be done, but should manifestly and undoubtedly be seen to be done' (*R. v. Sussex Justices, Ex parte McCarthy* …). And that is especially so in this context, where the community's confidence in the police hangs in the balance.[64]

Hewart's words can be seen as a given, but they are still important. In *R v Burke*,[65] the Canadian Supreme Court stated that 'we should look again, albeit unimaginatively, to Lord Hewart's famous admonition'.[66]

36. It is no surprise that justice must be seen to be done. Lord Hewart neatly summed this up. It is somehow ironic that this is the legacy of such a lampooned figure, whose name is now associated with the epitome of justice, and who his critics deemed to be the worst judge in over 200 years. Given the power of, and the succinct nature of, his words it has stuck and become part of the language of the common law world. It is the cornerstone of the rule of law that courts are independent and there is equality before the law. This is undermined if there is a perception that justice is not being done. The common law has developed strong rules against bias, with even eminent judges falling foul of these rules (see Lord Hoffmann in *R v Bow Street Metropolitan Stipendiary Magistrate and others ex p Pinochet Ugarte (No 2)*[67]).

[61]ibid 8.
[62](1997) 1997 SCR 217.
[63]ibid [43].
[64]ibid [48]. See also *Police Constable Kris Wood, Acting Sergeant Mark Pullbrook and Police Constable Graham Seguin v Ruth Schaeffer, et al* (2013) 2013 SCR 1053.
[65](2002) 2002 SCR 857.
[66]ibid [67].
[67][2000] 1 AC 61. For commentary see Kate Malleson, 'Judicial Bias and Disqualification after Pinochet (No. 2)' (2002) 63(1) Modern Law Review 119.

37. On a basic level we expect our judges to be independent of those in power. Since 1701, the senior judiciary have enjoyed security of tenure subject to their good behaviour. This legislative step to secure independence followed decades of judicial dismissals or judicial subservience to the Crown (see for example Charles I, Charles II and James II).[68] But even if our judges enjoy security of tenure this is not enough, the parties before the court (and the wider public) must have confidence that the court is not biased against or predisposed towards one party.

Disclosure statement

No potential conflict of interest was reported by the author(s).

[68]See e.g. Paul Hunneyball, 'The Early Stuart Judiciary – Independent or Subservient?' (The History of Parliament Blog, 22 November 2018) <https://historyofparliament.com/2018/11/22/the-early-stuart-judiciary/> accessed 7 March 2025; and Sir Henry Brooke, 'The history of judicial independence in England and Wales' (2015) 5 European Human Rights Law Review 446.