

**Australia and New Zealand College of Notaries
Biennial Conference**

"Notaries – from Stones to Electrons"

Chief Justice Robert French

11 September 2009, Melbourne

It is a pleasure to be able to attend the conference dinner of the Australia and New Zealand College of Notaries. The objects and membership of the College indicate a commitment to excellence and ethical practice that lies at the heart of the notarial function of which I wish to speak briefly tonight. Before doing so may I join with your President in expressing my sadness at the passing of your Patron, the Honourable John Phillips, the former Chief Justice of Victoria. I am delighted that his wife, Helen, has been able to join us this evening.

I must confess that the invitation to speak at your conference dinner was made the more tempting by my limited knowledge of the history and functions of notaries. I never heard anything said about notaries when I was a law student. It is conceivable something was said and I wasn't listening, but there was certainly nothing in the curriculum about it. As an articled clerk and young practitioner, notaries seemed to me to be rather mysterious creatures. The most I knew about them was that they were a lot more expensive than Commissioners of Affidavits when it came to having affidavits sworn.

Accepting your invitation has involved some inquiry about where notaries come from and what they do. The result of those inquiries has been illuminating. My first port of call was *The Notary in Opera* a book published in 1995 by A.J. Burgess, a Notary Public of the City of London. He reviewed 17 operas in which

notaries are featured. I selected two at random. In Richard Strauss' *Intermezzo* the notary is depicted as a serious professional not ready to be bulldozed into granting the distraught heroine Christine a divorce on flimsy evidence of her husband's infidelity. Ultimately they returned to matrimonial bliss. Burgess comments¹:

In this opera the notary has played a serious and significant role: by not acting, despite her obvious annoyance, upon the requests Christine makes to him, he gives time for wiser judgments to prevail and makes the final reconciliation possible.

In Offenbach's *La Périchole*, two notaries are prevailed upon with much alcohol to conduct a wedding ceremony which they undertake inebriated and with great enthusiasm. Together they sing the '*Duetto des Notaires* (Duet of the Notaries)²:

*On dit que pour nous amuser,
Deux personnes vont s'épouser,
Et qu'à leur santé l'on boira,
Sans avoir à payer pour ça.*

My limited understanding of what it is that notaries do could be excused in part by a certain indeterminacy about their functions in the common law world even today. What their history demonstrates rather strikingly is a unique legal institution which has its roots in the scribes of Babylon and ancient Rome and has evolved

¹ Burgess A J, *The Notary in Opera* (1995) at 194.

² Offenbach J, *La Périchole*: "It is being said that to amuse us, two young people are going to be married, and that we shall drink to their health, without having to pay for it.", cited in Burgess, *ibid* at 92.

through the Byzantine empire and Medieval Europe into the modern world³. The transposition of what was a well-established feature of the civil law system into the common law of England and Australia and New Zealand was perhaps not seamless. It was complicated by the involvement of Popes and later the Archbishop of Canterbury's Court of Faculties in the appointment of notaries in England and until relatively recently in Victoria. The Court of Faculties still appoints notaries in Queensland and New Zealand. The continued existence of the notary in the modern world and the International convention relating to the use of apostilles and the concept of "cybernotaries" to meet authentication requirements in electronic documentation all lead to the conclusion that if today notaries didn't exist, it would probably be necessary to invent them⁴. In order to indicate the seriousness of my quest for knowledge about your origins and functions may I briefly share a superficial sweep of the history of notaries.

A Roman scribe who used shorthand signs or marks was called a *notarius*. In the later period of Roman law this title applied almost exclusively to public officers attached to courts, secretaries to emperors and other high officials. The private professionals of the Roman Republic who were the forerunners of the modern notary were the *tabelliones* who prepared and authenticated private documents. They kept registers of the date and place their documents were executed. They summoned the witnesses and noted their names and wrote the information into a register from which copies could be made in return for a fee.

³ On the history of the development of the notary see: Zablud P, *Principles of Notarial Practice* (2005) Ch 1 and Ch 2; Ready N P, *Brooke's Notary*, 12th ed (2002) at 1-17.

⁴ On the development of the modern "CyberNotary" see Cox N, 'The Notary Public: The Third Arm of the Legal Profession' (2000) 6 *New Zealand Business Law Quarterly* 321; Kennair W B in Ready above n 3 at 627 citing American Bar Association, Section of Science and Technology, *Resolution* (August 1994).

Notaries survived the fall of Rome and found places in the service of the Byzantine emperors. The *Book of the Prefect* of Constantinople discusses the requisite characteristics of a candidate for membership of the Guild of 24 Notaries⁵:

A notary cannot be appointed without deliberation and a vote by the primikerios (chief) and the other members of the guild of notaries. He must, in fact, have perfect knowledge of the laws, excellent handwriting, be neither a chatterbox nor insolent, nor have dissolute habits; his character must command respect, his judgement must be sound, he must combine training with intelligence, speak with ease and possess a perfectly correct style ...

It is pleasing to know that I'm among such people tonight. However, more was required of candidates by the Guild than the exemplary qualities already mentioned⁶:

The candidate must know by heart the forty titles of the manual (the *Prochiron* or abridged law code of Basil I) and know sixty books of the Basilika (also by Basil I); he must also demonstrate a general education without which he might commit errors while writing his acts and err against good style ...

In addition to the preceding, a stringent initiation test was imposed on the candidate⁷:

⁵ Cavallo G (ed), *The Byzantines* (1997) at 200-201 also cited in Zablud above n 3 at 12.

⁶ Ibid at 13.

... [h]e will draft an act on the spot in front of the members of the guild in order to protect them from any unpleasant surprises on his part. If, in spite of this precaution, he is caught making any mistakes, he will be forced to leave his post.

Notaries were appointed by Popes and Emperors. Initially the Popes made appointments exclusively within their own territories. Towards the end of the eleventh century they extended their authority and began appointing notaries to act outside the Papal States.⁸

In the twelfth century there was a revival of commercial and urban life in Mediterranean Europe and a resurgence of legal financial activity. This required professionals such as notaries who were trained and could be trusted to prepare legal documents which evidenced and supported that commercial activity. In the middle of the twelfth century, Bologna University began to offer a systematic vocational course of training for notaries. By 1300, the Guild of Notaries in Bologna was sufficiently entrenched to require prospective notaries to undertake a six year course of instruction at the university followed by an examination in grammar, Latin and the notarial art. This might be seen as a serious and early example of a professional closed shop with some very expensive barriers to entry⁹.

⁷ Ibid.

⁸ See Ready above n 3 at 4; see also Cheney C R, *Notaries Public in England in the Thirteenth and Fourteenth Centuries* (1972) at 4-5.

⁹ See Zablud above n 3 at 16-17; Ready above n 3 at 5-7.

The development of the profession in England began with the arrival in the thirteenth century of foreign notaries, mostly Italian, who had been appointed by papal authority. In 1279 the Archbishop of Canterbury was first authorised by the Pope to appoint notaries. The next 300 years saw the establishment of an English notary profession¹⁰.

The defining moment in the history of English notariat was the passage of the *Ecclesiastical Licenses Act* 1533. That Act removed the Pope's powers to appoint notaries in England. Instead that power was conferred on the Archbishop of Canterbury through his Court of Faculties, "after good and due examination by theym had of the causes and qualities of the persons procuring for ... faculties"¹¹. All faculties appointing notaries to practice in England have been issued by the Archbishop of Canterbury, through the Court of Faculties. The chief officer of that court is known as the Master of the Faculties. In time, the Master of the Court of Faculties came to require evidence of certain qualifications for appointment as a notary. Candidates were required to be over 21 years of age, of sober life, conformed to the doctrines of the Church of England, and loyal subjects of the King. They were to have received practical training by serving as a clerk to a practising notary for some years¹².

¹⁰ On the "four phases" of development of the notarial profession in England see Ready above n 3 at 7-17.

¹¹ *Ecclesiastical Licenses Act* 1533, s 3; see also Zablud above n 3 at 22-23.

¹² See Brooks C W, Helmholz R H and Stein P G, *Notaries Public in England since the Reformation* (1991) at 23.

Notaries became recognised in literature although not always to advantage. Shakespeare in the *Rape of Lucrece* spoke of the hours of darkness in which evil deeds were done and used the notary as a metaphor¹³:

O comfort-killing night, image of hell,
Dim register and notary of shame,
Black stage for tragedies and murders fell,
Vast sin-concealing chaos, nurse of blame!

The surrealist Latin American poet Pablo Neruda wrote in 1940 of a dream of coffins under sail¹⁴:

setting out with the pale dead,
women in their dead braids,
bakers as white as angels,
thoughtful girls married to notaries

On a more positive note Longfellow in a poem entitled "Evangeline" described one Father Leblanc¹⁵:

Bent like a laboring oar that
toils in the surf of the ocean
Bent but not broken by age

¹³ Shakespeare W, *The Rape of Lucrece*, lines 764-767 cited in Orgel S and Braunmuller A R (eds), *The Complete [Works] Pelican: Shakespeare* (2002) at 35.

¹⁴ Neruda P, *Death Alone* (1940).

¹⁵ Longfellow H W, *Evangeline: A Tale of Acadie* (1850 ed) Part the First III at 20.

was the form of the notary public

And of course the famous bond in the *Merchant of Venice* was sealed by a notary¹⁶.

In the nineteenth century the first statutory regulation of notaries was introduced with the *Public Notaries Act* 1801 that confirmed the jurisdiction of the Master of the Faculties and the Archbishop of Canterbury to admit notaries to the profession. The mid nineteenth century saw the transfer of much of the jurisdiction of the ecclesiastical courts and of the Court of Admiralty to the common law courts so that the involvement of notaries with them was greatly reduced. When the *Judicature Act* 1875 (UK) led to unification of the profession under one High Court of Justice, only notaries continued as a separate profession¹⁷.

In the Australian colonies it seems that the Court of Faculties appointed notaries in New South Wales, Tasmania, Queensland and Victoria from a relatively early stage¹⁸. Eventually the States and Territories passed their own Acts for the appointment of notaries other than Queensland. The Court of Faculties also continues to appoint notaries in New Zealand¹⁹.

The question – what do notaries do? – is still not susceptible of a clear and well-defined answer. There has been very little attempt in the common law world to

¹⁶ ‘Go with me to a notary; seal me there your single bond’ see Shakespeare W, *Merchant of Venice* (1596-1598) Act 1, Sc 3.

¹⁷ See Ready above n 3 at 15-17.

¹⁸ See Leyser J, ‘Notaries in Australia’ (1964) 37 *Australian Law Journal* 308 at 311-314.

¹⁹ On the New Zealand profession see Laxon B, ‘The Notary Public’ (1997) *New Zealand Law Journal* 65; Cox above n 4 at 321.

codify the precise nature of the office, as has been the case in continental Europe²⁰. Halsbury's *Laws of England* describes a notary as a legal officer appointed by the Court of Faculties, whose general role is among other matters, to draw, attest or certify, under an official seal, documents which are intended for use in other jurisdictions. A notary may also prepare wills or other testamentary documents, note or certify transactions relating to negotiable instruments and draw up protests or other formal papers relating to shipping and cargo. The office also confers the right to administer oaths and declarations. English notaries may also be involved in the presentation of bills of exchange, particularly foreign bills, for acceptance and payment²¹.

There is no standard description today of an Australian notary's functions and powers and none of the Australian jurisdictions has made a serious attempt to codify them²². In the few modern cases which have dealt with the appointment of notaries in Australia, the "public office and duty" of a notary in English practice as described in the text *Brooke's Notary* has been quoted, but the courts have not formally approved or adopted that formulation for Australian purposes. The Northern Territory, Tasmania and Western Australia have included statements in their legislation to the effect that notarial powers include the powers and authorities "usually exercised by notaries in the United Kingdom"²³. The legislation of the ACT and South Australia as Zablud has written, "is even less illuminating"²⁴.

²⁰ See Cox above n 4 at 324-325.

²¹ See Halsbury's *Laws of England*, 4th ed (1997) vol 33 [726].

²² See Zablud above n 3 at 26-27.

²³ *Public Notaries Act 1992* (NT) s 7(e); *Notaries Public Act 1990* (Tas) s 9(b) and *Notaries Public Act 1979* (WA), s 15(1).

²⁴ Zablud above n 3 at 27.

Perhaps it is the slight fuzziness that surrounds the core functions of the office of notary that has allowed it to be so flexible and to evolve through many centuries. A progress from marks on stones to the authentication of international electronic transactions is an impressive progress indeed. The history is fascinating and the future full of interest. Your College has already, by its involvement in the Special Commission of Inquiry at the Hague Conference on Private International Law conducted in February of this year, indicated clearly that it has the will and the capacity to contribute to that future development.