

DOBELL'S CASE

(Draft 21 April 2016)

Over the past couple of years, the world has been marking various anniversaries associated with the great conflict of 1914-1918.

Our story starts in the midst of that war. A little over one hundred years ago, on 15 March 1916, when the founder-editor of *The Bulletin*, J F Archibald¹ made his last will.

Archibald's will

Archibald, a Francophile who preferred to be called Jules François Archibald, directed his executor² to hold one tenth of his residuary estate upon trust for a period and:

to pay the income thereof to the trustees of the New South Wales National Gallery³ to provide an annual prize to be styled 'The Archibald Prize' for the best portrait preferentially of some man or woman distinguished in Art Letters Science or Politics painted by any artist resident in Australasia during the twelve months preceding the date fixed by the trustees for sending in the pictures.⁴

Archibald outlived the Great War. He died on 10 September 1919 and on 10 October 1919 the Supreme Court of New South Wales granted probate of his Will - expeditious service from the court and the profession. The estate was sworn for probate at £92,218. In 2016 terms a value of about \$7,000,000.

¹ John Feltham Archibald (1856-1919).

² Perpetual Trustee Co (Ltd).

³ This was plainly intended to refer to the then National Art Gallery of New South Wales. It had been founded in 1871 as the Academy of Art; in 1880 it opened in new premises as the Art Gallery of New South Wales; between 1883 and 1958 was the National Art Gallery of New South Wales; and in 1958 it reverted to the title Art Gallery of New South Wales. In this paper it is convenient to refer to it as the **Gallery**.

⁴ cl 10(a), extracted in *Perpetual Trustee Co Ltd v Groth & Ors* (1985) 2 NSWLR 278, 281 (Powell J).

History of the prize to 1943

The prize was first awarded in 1921. Lawyers were involved from the very beginning. The trustees took the advice of Langer Owen KC⁵ on the meaning of “resident in Australasia”.⁶

The first winner was the Melbourne artist William McInnes⁷ for his portrait of the arts and crafts movement architect Harold Desbrowe Annear.⁸ McInnes would win six more times, in 1922, 23, 24, 26, 1930 and 1936. He was not the only serial winner; another Victorian, Sir John Longstaff⁹ was awarded the prize five times in 1925, 28, 29, 1931 and 35. Ernest Buckmaster¹⁰ and Charles Wheeler,¹¹ also Victorian artists, won in 1932 and 1933.

The first of nine women artists¹² to succeed was Nora Heysen¹³ in 1938. Although Heysen was working in Sydney at the time, born in Hahndorf and educated in Adelaide, she was regarded as South Australian.

The Scottish born Melbourne artist Max Meldrum¹⁴ won in 1939¹⁵ and 1940,¹⁶ followed by the young Melburnian William Dargie¹⁷ in 1941¹⁸ and 1942.¹⁹ Dargie would go on to win the Archibald six more times.²⁰

⁵ Sir Langer Meade Loftus Owen KC (1862-1935), Justice, Supreme Court of NSW 1922-1932.

⁶ The trustees may have followed Owen’s advice – that Australian artists painting outside Australasia were excluded – for some time, but by 1942 they seemed happy to act contrary to it, awarding the prize to war artist William Dargie for a portrait painted in Syria.

⁷ William Beckwith (Billy) McInnes (1889-1939).

⁸ Harold Desbrowe Annear (1865-1933). The Archibald is one of a number of annual prizes awarded by the trustees. The oldest is the Wynne prize for the ‘best landscape painting of Australian scenery in oils or watercolours or for the best example of figure sculpture by Australian artists’, first awarded in 1897 to Walter Withers for *The storm*. The Sir John Sulman prize, for the best subject painting, genre painting or mural project by an Australian artist, was first awarded in 1936 to Henry Hanke for *La Gitana*.

⁹ Sir John Campbell Longstaff (1861-1941).

¹⁰ Ernest William Buckmaster (1897-1968). His winning portrait was of Commonwealth Attorney General and Victorian Premier and Chief Justice Sir William Hill Irvine KCMG (1858-1943).

¹¹ Charles Wheeler OBE (1881-1977), was born in New Zealand, but came to Victoria as a child and trained at the Working Men’s College and the NGV School. His winning portrait was of the writer Ambrose Goddard Hesketh Pratt (1874-1944).

¹² Nine women artists have won a total of 11 Archibald prizes: Nora Heysen 1938; Judy Cassab 1960, 1967; Janet Dawson 1973; Davida Allen 1986; Wendy Sharpe 1996; Cherry Hood 2002; Del Kathryn Barton 2008, 2013; and Fiona Lowry 2014. Women have fared slightly better as the subjects of 15 of the 91 winning portraits.

¹³ Nora Heysen AM (1911-2003). The subject of her painting *Madame T Elink Schuurman* was Adine Michèle Elink Schuurman (1913-1986), the wife of the Consul General for the Netherlands.

¹⁴ Duncan Max Meldrum (1875-1955). Meldrum had criticised the award to Nora Heysen in 1938, in the course of doing so saying that to expect women to paint “equally as well as men is sheer lunacy”: “Art and Marriage – Differing Views” *The Cairns Post* 24 January 1939. Heysen wrote to her parents, “You’ll laugh at the attack of Meldrum’s. The reporters all want to urge me into battle defending women’s rights, but I

With all of this glory going south of the Murray, there were few breaks for Sydney artists in those first 21 years. George Lambert,²¹ born in St Petersburg, but raised in NSW, won in 1927 for a portrait of Mrs Anne Murdoch.²² The 1934 prize was awarded to the first Sydney born winner Henry Hanke,²³ for a self-portrait. Another Sydneysider, Normand Baker²⁴ won in 1937, also for a self-portrait. At 29, he was the youngest ever winner.

The first two decades of the prize were not free from controversy.²⁵ However, none of the early controversies was brought before a court. All changed after the trustees announced the winner of the 1943 Archibald Prize was the Newcastle born painter William Dobell.²⁶

1943 Archibald prize

Dobell and Joshua Smith

Since 1939, Dobell and his sitter, fellow artist Joshua Smith,²⁷ had served together in the Civil Construction Corp as camouflage painters, disguising aircraft hangars

have no wish to be drawn into it especially as it becomes personal.” Speck, Catherine (ed), *Selected Letters of Hans Heysen and Nora Heysen* National Library of Australia, Canberra 2011, pp 100-101.

¹⁵ A portrait of the Hon G J Bell CMG DSO VD, Speaker of the House of Representatives.

¹⁶ A portrait of Dr J Forbes McKenzie.

¹⁷ Sir William Alexander Dargie CBE (1912-2003).

¹⁸ A portrait of Sir James Alexander Mackenzie Elder (1869-1946), businessman, chairman of the National Bank of Australasia.

¹⁹ A portrait of James Hannah (Jim) Gordon VC (1909-1986). Dargie painted Gordon while an official war artist in Syria. The ship carrying the work to Australia sank and the painting spent some time underwater.

²⁰ 1945, 1946, 1947, 1950, 1952 and 1956.

²¹ George Washington Thomas Lambert (1873-1930).

²² Annie Murdoch (1856-1945), mother of Sir Keith Murdoch, grandmother of Rupert Murdoch AC KSG.

²³ Henry Aloysius Hanke (1901-1989).

²⁴ Normand Henry Baker (1908-1955).

²⁵ The 1923 prize awarded to McInnes for his *Portrait of a lady* was criticised because the sitter was not named; and it was said therefore to be impossible to determine if the condition of the prize – that the portrait be ‘preferentially’ of a man or woman ‘distinguished in the Arts, Letters, Science or Politics’ – was fulfilled. In 1926, the Society of Artists had placed on record its “carefully considered opinion” that Lambert’s portrait of George Judah Cohen (1842-1937) was “immeasurably the best portrait” in the field, not Longstaff’s portrait of Maurice Moscovitch (1871-1940), which the trustees had selected: “Archibald Prize” *The Sydney Morning Herald (SMH)* Friday 22 January 1926, p 1. In March 1939, two meetings of Sydney artists were held at which calls were made for a Government inquiry into the Prize: “Archibald Prize – Complaints About Method of Award”, *SMH* Saturday 11 March 1939, p 39. *The Sydney Morning Herald* art critic Paul Haefliger described Dargie’s winning 1941 portrait of Sir James Elder as “a mediocre piece of academic painting”: “Archibald Prize – W Dargie Wins Award”, *SMH* Saturday 17 January 1942, p 12.

²⁶ Sir William Dobell OBE (1899-1970).

²⁷ Joshua Smith (1905-1995).

as chook sheds and painting airstrips with rows of cabbages. They had become friends. More than sixty years later, Smith recalled sharing a tent and “great wartime camaraderie” with Dobell and two others:

we talked a lot, and Dobell and I often sketched each other to keep our hands in.²⁸

In 1943, Dobell was sharing a flat in King’s Cross, not far from where Dame Mary Gilmore²⁹ lived. In her flat, Gilmore was sitting for Smith to paint her portrait for the Archibald competition and, going to and fro, he often dropped in to visit Dobell. At the time Dobell had been experimenting with an elongated style of portraiture in works like *The Student* and *The Strapper*. He asked Smith if he could paint him for the Archibald. Smith agreed. Competition between them was not new. Both artists had entered works in previous Archibald competitions. In 1942, Smith had submitted a portrait of his parents and Dobell a painting of the artist Jimmy Cook: in each case without success.

Smith later recalled Dobell warning him:

You may not like it when it’s finished. You know the character of my work. ... I believe an element of distortion makes the portrait more like the subject than he is himself.³⁰

Of 148 entries, the gallery trustees settled on a final two: Smith’s portrait of Gilmore and Dobell’s portrait of Smith. It seems that before the final vote was taken of the 10 of the 12 gallery trustees, the President B J Waterhouse³¹ reminded his fellow trustees of the terms of the Archibald Will and expressed his own opinion that Dobell’s painting was “distorted to the point of caricature.”

The trustees’ ballot split 7-3 in favour of Dobell. It was rumoured that the contest was even closer: apparently one trustee wrote afterwards to say he was confused in the voting procedure, in voting to “Smith” he meant Smith’s Gilmore

²⁸ Hawley, Janet “A portrait in pain”, SMH 16 September 2014.

²⁹ Dame Mary Jean Gilmore DBE (1865-1962).

³⁰ *ibid.*

³¹ Bertrand James Waterhouse OBE FRIBA LFRAIA (1876-1965), architect. He had been appointed a trustee in 1922 and served as president from 1939 to 1958. Mary Edwards’ (Edwell-Burke) portrait of Waterhouse had been a finalist in the 1938 Archibald exhibition. Her 1940 portrait of him is held by the Royal Australian Institute of Architects, Sydney. In 1958, the AGNSW acquired Dargie’s portrait of Waterhouse.

portrait and not Dobell's Smith portrait; and, according to Dobell, another trustee also admitted confusing his vote, which could have tied the result.³²

The award of the prize to Dobell was announced in January 1944. It was accompanied by much comment and discussion over the merits of the trustees' choice. Paul Haefliger in *The Sydney Morning Herald* called Dobell's three competition entries "overpowering characterisations". Of the winning painting, he wrote:

An air of grotesque contemplation, a certain depth and wistfulness permeate the work. It reveals itself not only in the features and the long clasped hands, but in every line of the sitter's angular body. Any seeming physical grotesqueness effaces itself and becomes a natural part of this mood.³³

On the other hand, Melbourne art critic and former director of the Gallery, James MacDonald wrote in *The Daily Mirror* that the painting was not a portrait at all, but "a fantasy" and:

even as a fantasy, it is pretty poor stuff, resorting to the age-old caricaturing dodge of deforming.³⁴

Both critics would be called to give evidence at the *Dobell* trial.

The trial

The trial was heard in late October 1944. Imagine Australia then, in the midst of the 20th century's other global war.

In the Pacific, General MacArthur's promised reconquest of the Japanese-occupied Philippines was underway. In Europe, following D Day and the liberation of Paris, British and Canadian troops had advanced into Holland; the US Eighth Army was advancing north of Rimini into central Italy; and the Soviet Red army had crossed into Hungary, beginning an occupation that was to last 55 years.

³² op cit Hawley.

³³ "Masterly Portrait", SMH Saturday, 22 January 1944, p 8.

³⁴ MacDonald, James, letter to the editor, 31 January 1944, Papers of James Stuart MacDonald MS430 National Library of Australia.

At home basic food, clothing and petrol were rationed; industrial action by the meat workers union³⁵ had halted supplies through butcher's shops; the strike was before the Arbitration Court.

Among this serious news, the nation's attention was diverted by a hearing in the Equity division of the Supreme Court of New South Wales, in which two Sydney artists, Mary Edwards³⁶ and Joe Wolinski,³⁷ as informants with the fiat of the Attorney-General,³⁸ were bringing suit against the trustees of the Gallery and William Dobell.

The Art Prize Case, as *The Sydney Morning Herald* described it, ranked third, after the war news and the meat strike. By any measure, it was an important public controversy.

The prize money at stake was about £500³⁹ - a considerable sum in 1944, about \$35,000 in today's terms. Without doubt it was the richest art prize in the country and, as then was commonly said, in the Southern Hemisphere, and one of the richest in the world.

Edwards and Wolinski

Mary Edwards was a prolific painter, who had entered most Archibald competitions from the very first in 1921, in most years submitting multiple entries. She was not only prolific. In June 1940, the president of the Gallery trustees, B J Waterhouse, had described her as "probably the greatest woman painter Australia has produced up to the present time."⁴⁰ Edwards travelled widely in the South Pacific and painted many portraits and studies of local sitters in Fiji and Noumea. The Gallery had acquired seven of her works painted

³⁵ Australian Meat Industry Employees Union.

³⁶ Mary Edwards (1894-1988). After the case, Mary Edwards adopted her parents' surnames and was known as Mary Edwell-Burke. It is under this name that most of her works are now catalogued.

³⁷ Joseph Wolinski (1872-1955)

³⁸ Major the Hon Clarence Edward Martin QC LLB MEd (1900-1953). Martin, who went on to be the longest serving Attorney-General in New South Wales, was on active service in Port Moresby in 1943-44. It is likely the decision to grant the fiat was made by the Solicitor-General C E Weigall QC.

³⁹ "1943 Prize Sent to Dobell", SMH Thursday 24 May 1945.

⁴⁰ SMH, Thursday 13 June 1940, p 18.

between 1916 and 1941, including a powerful self-portrait, which had been a finalist in the 1936 Archibald competition.⁴¹

Wolinski was the most prolific of all Archibald prize entrants: 107 of his entries were exhibited as finalists. He was an established and popular portrait painter, renowned among artists mainly for the speed with which he was said to produce portraits on commission. It was also said that he lingered near his Archibald entries, greeting viewers with offers to paint their portraits. In his early seventies, he was more than twenty years older than Edwards.⁴²

Justice Roper

The trial was before the Honourable Justice Ernest David Roper.⁴³

He was born in Orange, New South Wales, eighth of twelve children.⁴⁴ He was educated at Armidale District School and North Sydney Boys' High School. In 1921, he graduated in arts from the University of Sydney with first-class honours in mathematics and philosophy, and was awarded the university medal in each subject. In 1925, he graduated in law and was admitted to the Bar.

He was appointed a judge in 1937 at the ripe old age of 36. Initially on the Land and Valuation Court, he frequently acted as a Supreme Court Judge and in 1940 was granted a commission for that office.

Roper was about six foot tall, slight, clubbable and walked with a measured and purposeful gait.⁴⁵ Hugh Slattery, associate to the then Chief Justice, recalled:

He had the reputation of being dispassionate and judicial but almost to the point of being remote. He was always courteous and patient in court rarely interrupting proceedings. This was not always appreciated by counsel who were thus unable to assess the judge's likely thinking. He also had the reputation of being a brilliant mathematician. Although I

⁴¹ The AGNSW would go on to acquire two more of her works in the 1950s. The NGA holds her *Tiana of Tamavua* (1936).

⁴² Wolinski had painted a large oil work, showing NSW rising from native flora, used to decorate an arch erected for the Federation procession in Sydney on 1 January 1901: Design & Art Australia Online: <https://www.daao.org.au/bio/joseph-wolinski/biography/>

⁴³ Ernest David Roper BA LLB (1901–1958).

⁴⁴ 1 March 1901.

⁴⁵ Else-Mitchell, R, "Roper, Ernest David (1901-1958)", *Australian Dictionary of Biography (ADB)* vol 16, MUP 2002.

never saw it myself, it was often said he engaged himself with mathematical problems during court hearings.⁴⁶

He was a cousin of the prominent lawyer-politician brothers Bert⁴⁷ and Clive Evatt.⁴⁸

The Sydney Bar in 1944

The Sydney bar was a smaller institution in 1944. The whole private bar comprised about 290 counsel, of whom 120 were away on active duty with the defence services and 13 were sitting members of parliament.

There were 33 silks, three on active military duty. The silks included Sir Robert Garran,⁴⁹ Arthur Canaway,⁵⁰ Albert Piddington,⁵¹ Richard Windeyer,⁵² Sir David Maughan⁵³ and Andrew Watt,⁵⁴ who had all been admitted in the 19th century and played various roles in the Federation and early post-Federation controversies.

In contrast, the three silks briefed in Dobell's case were quite recent appointments: Garfield Barwick and Frank Dwyer in 1941 and Frank Kitto in 1942.⁵⁵

Barwick KC and Dr Louat

Garfield Barwick KC⁵⁶ appeared nominally for His Majesty's Attorney-General for the State of New South Wales, but in substance for the informant artists,

⁴⁶ Slattery JA, "Some reflections on Supreme Court judges of the 1940s", *Bar News*, Winter 2007 56, 60.

⁴⁷ Herbert Vere Evatt KC (1894-1965). In 1944, Bert Evatt, a former High Court justice, was Attorney-General and Minister for External Affairs in the Curtin Government.

⁴⁸ Clive Raleigh Evatt KC (1900-1984). In 1944, Clive Evatt was an assistant minister in the second ministry of Sir William John McKell GCMG (1891-1985) who was then Premier of New South Wales.

⁴⁹ Sir Robert Randolph Garran KCMG (1867-1957).

⁵⁰ Arthur Pitcairn Canaway KC (1857-1949) was the subject of a portrait by J S Watkins that was selected as a finalist in the 1931 Archibald competition.

⁵¹ Albert Bathurst Piddington (1862-1945).

⁵² Richard Windeyer KC (1868-1959) was the subject of a portrait by Edmund Arthur Harvey (1907-1994) in 1930 and another by Arthur James Murch (1902-1989) in 1940 each of which was selected as a finalist in the Archibald competition for its year. Murch was to win the Archibald prize for 1949 for his portrait of artist John Bonar Dunlop (1916-1992).

⁵³ Sir David Maughan KC (1873-1955) was a son-in-law of Sir Edmund Barton PC GCMG QC (1849-1920).

⁵⁴ Andrew Watt KC (1872-1950) had been leading counsel in one of Barwick's first appearances in the High Court: *Radical Tory*, p 26. It was Watt who obtained the permission of Sir Philip Street CJ to hold the first Red Mass at St Mary's Cathedral to mark the opening of the law year. His great-grandson is Justice Tony Meagher of the NSW Court of Appeal.

⁵⁵ Roper was their near contemporary. He had been called to the bar in 1925; the leading Counsel appearing before him had been admitted in May, June and August 1927.

⁵⁶ Sir Garfield John Edward Barwick AK GCMG KC (1903-1979). Barwick was the subject of portraits selected as finalists in the Archibald competition: in 1972 by Reginald Earl Campbell (1923-2008); in 1975

Edwards and Wolinski. Barwick was the child of Methodist parent of Cornish descent. Due to family illness⁵⁷ and disability, he had been raised by shopkeepers grandparents in working-class inner-suburban Sydney. He attended Fort Street High School, then the University of Sydney, where he was awarded the University medal in law. He served articles of clerkship and was called to the bar. This was one of Barwick's first cases to attract public attention, a break from the more usual fare of breaches of wartime regulations. Barwick was small, direct, some would say ferocious, but certainly tenacious and conducted his cases with a sense of drama, which verged on the theatrical.

In time, he would become arguably Australia's most successful barrister of the 20th century.⁵⁸ Barwick would later serve as Commonwealth Attorney-General, foreign minister and, for 17 years, as Chief Justice of the High Court of Australia.

Writing of the case fifty years afterwards, Barwick gave the impression he came late to the brief, which his junior Dr Frank Louat⁵⁹ had worked up.

Barwick described Louat as being "much more familiar with painting, than I was, and he helped me greatly in the conduct of the case."⁶⁰

Barwick had seen Dobell's painting early in the year when he visited the Archibald exhibition. He recalled "It impressed me by the brilliance of its colouring. ... the painting leapt off the canvas." Not yet professionally

by Brian Dunlop (1938-2009); in 1978 by John Brack (1920-1999); and in 1981 by Ted Markstein (1942-). Markstein painted the portrait from a photograph cut out of *The Sydney Morning Herald*. The artist donated the work to the High Court in 2010.

⁵⁷ His father, a typesetter, suffered lead poisoning.

⁵⁸ A famous example of his advocacy involved an appeal to the Privy Council by thirteen Malaysians sentenced to death. Barwick found a technical deficiency in the arrest warrants for the twelve appellants for whom he appeared and secured their freedom. The last appellant, whose counsel was not so thorough, was hanged: *International and Comparative Law Quarterly*, Vol. 17, No. 3 (Jul., 1968), pp. 782-783.

⁵⁹ Frank Rutledge Louat QC (1901-1963). Louat was for many years the only Doctor of Laws in practice at the NSW Bar. His thesis was "A Survey of the Executive Power of the Commonwealth": SMH 4 May 1933, p 17. He was a Francophile, like Archibald, and would later be appointed to the Légion d'honneur for his services to Australian-French relations. Louat would take silk in 1952. In 1958 he would be appointed a trustee of the Gallery, and so become a judge of the Archibald prize.

⁶⁰ Barwick, *A Radical Tory – Reflections and recollections*, Federation Press 1995, p 48-49. Barwick, Louat and MacDonald went to see the painting together in preparation for the trial. Barwick recalled that his "immediate reaction" on seeing the painting after about a nine-month interval was to say, "This thing has faded, its brilliance has diminished." MacDonald agreed that it had faded, attributing it to mastic applied as a varnish when the oil pigments were still green. From this MacDonald inferred that the canvas was not painted for entry to the competition, but the decision to enter it had been an afterthought, occasioning the premature use of the varnish. Had enquiries been made of Smith, these would have revealed the inference to be in error.

interested, Barwick did not know Joshua Smith and “could not tell whether the almost emaciated figure really resembled him.”⁶¹

Kitto KC and Kerrigan

Frank Kitto KC⁶² appeared with Alan Kerrigan⁶³ for the gallery trustees.

The child of a senior Commonwealth public servant, translated from Melbourne to Sydney, Kitto had worked in the NSW Crown Solicitor’s Office while studying at the University of Sydney. In 1921, he graduated in arts, majoring in Latin and Greek, and then with first class honours in Law.⁶⁴

A very small figure, by nature a little shy, in court his style was brief and self-confident, like his later High Court judgments. As Sir Owen Dixon⁶⁵ observed privately, Kitto was “immersed in equitable doctrines”.

He always argued a case beautifully and never betrayed ignorance of any legal doctrine with which I was acquainted.⁶⁶

Kitto had already been identified as a rising star of the Sydney Bar. He was not quite four years at the bar when he appeared as junior Counsel in *Trethowan’s case* – over Premier Jack Lang’s attempt to abolish the NSW Upper House.⁶⁷

Kitto’s junior Kerrigan was a member of Barwick’s chambers.⁶⁸ School and sports captain at Trinity Grammar, Kerrigan won an exhibition to the University of Sydney. He graduated in 1921 in arts with first class honours in history. He taught at the King’s School, Parramatta. After his father died in 1926, Kerrigan decided to read law. While associate to Sir Langer Owen, he passed the Barristers Admission Board examinations and was admitted to the Bar in 1930. Kerrigan

⁶¹ *ibid*, p 48.

⁶² Sir Frank Walters Kitto PC AC KBE KC (1903-1994).

⁶³ Alan Bevly Kerrigan CBE QC (1899-1977)

⁶⁴ Meagher, R P, “Obituary”, *Bar News* Autumn/Winter 1994.

⁶⁵ Sir Owen Dixon OM GCMG (1886-1972).

⁶⁶ Dixon to John A Spicer, 20 May 1950, “Kashmir Correspondence 1950”, Owen Dixon Personal Papers, quoted in Ayres, Philip, *Owen Dixon*, Miegunyah Press, Melbourne 2003, p 199.

⁶⁷ *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 395.

⁶⁸ 142 Phillip Street, Sydney.

played a prominent role in the *Red Book* cases,⁶⁹ which were underway at the time of the *Dobell* case.

Dwyer KC and Conybeare

Frank Dwyer KC⁷⁰ and Theo Conybeare⁷¹ appeared for Dobell.

Dwyer was from Goulburn. He had been educated there by the Sisters of Mercy and in Bathurst by the Vincentian fathers.⁷² He had graduated from the University of Sydney in Arts (1924) and then with first class honours in Law (1927), going straight to the bar. In 1948, he would be appointed to the Supreme Court and in 1950 conduct a Royal Commission that saved the political career of Joe Cahill MLA.⁷³

Dwyer and Barwick had both taken silk in 1941. In fact, Barwick described his silk application as a reaction to receiving Dwyer's notice. Barwick did not wish to be overtaken by Dwyer (whom he thought "much junior to me")⁷⁴ and made his own application. He sought to persuade two other leading juniors (Alan Taylor⁷⁵ and John Shand⁷⁶) also to apply. As Barwick later recalled:

At that time the silks were not getting the work. As the leading juniors we were doing it; when one of us was available, the silks were not briefed. We were being paid fees very comparable to anything a silk might charge. Because of this Taylor and Shand refused to take silk with me, saying it was too risky. When I said nonetheless I intended to go ahead, they said that in that event I would most likely lose out. I

⁶⁹ The "Red Book" cases concerned the use in the Bathurst Diocese of certain prayers, the sign of the cross and Sanctus bells in accordance with a "Red Book". In January 1944, Kerrigan and Maughan KC were advising the Bishop of Bathurst, the Right Reverend Arnold Lomas Wylde CBE MA (1880-1958). The proceeding was commenced in April 1944 in the Equity Division and ultimately tried before Justice Roper, with Kitto and Kerrigan appearing for the Bishop. His Honour granted an injunction restraining the Bishop from using any form for administering Holy Communion other than that contained in the 1662 Book of Common Prayer: *Attorney-General v Wylde & Anor* (1948) 48 SR (NSW) 366. When the Bishop appealed to the High Court, Kitto and Kerrigan again appeared: *Wylde v Attorney-General (NSW)* (1948) 78 CLR 224. Kerrigan had built up a large Equity practice. He had been appointed to the Synod of the Anglican Diocese of Sydney in 1938 and in 1943 became chancellor of the Diocese of Grafton. He would later serve as chancellor of the Diocese of Newcastle.

⁷⁰ Francis Aloysius Dwyer KC (1902-1953).

⁷¹ Alfred Theodore Conybeare QC (1902-1979). In the 1972 Archibald exhibition, a portrait of Conybeare by Hanke was a finalist.

⁷² at St Stanislaus' College.

⁷³ Frederick Joseph Cahill MBE (1898-1980).

⁷⁴ In fact, Barwick, admitted 1 June 1927, was less than 3 months' senior to Dwyer, admitted 26 August 1927.

⁷⁵ Sir Alan Russell Taylor PC KBE KC (1901-1969).

⁷⁶ John Wentworth Shand KC (1897-1959).

retorted that I would not if they would come with me, as there were no juniors likely to pick up our work. But they were both obdurate.⁷⁷

This presents the interesting scenario of the future Attorney-General, who would be responsible for the first restrictive trade practices legislation, seeking to make a pact with his nearest competitors (one a future fellow High Court member) to maintain their share or at least avoid the leakage of well-paid work to others.

Conybeare occupied a room in Dwyer's chambers.⁷⁸ After North Sydney Boys High School, he became an exact contemporary of his leader at university in both Arts and Law. He had served with Barwick as an article clerk at the firm HW Waddell in the mid 1920's and was called to the bar in 1928.⁷⁹

The courtroom

The case was heard in a courtroom in the old Hyde Park barracks in Macquarie Street, within sight of the Archibald fountain. The room is now the Barracks Café.

The trial started on Monday 23 October 1944 and ran four days. The Archibald exhibition in January had drawn enormous crowds.⁸⁰ The court case was to be no different. It attracted "more interest than a murder trial."⁸¹ The courtroom could not contain all the artists, critics, art lovers and others who wanted to watch proceedings.

The winning painting was in court on a blackboard easel covered by a sheet. It was unveiled when Justice Roper took his seat. The informant Mary Edwards was sitting close to it. She wore a turban and waved a Japanese fan to keep cool.

The bar table was stacked with art books, rather than authorised law reports, among them works on Picasso, Kandinsky, Dali and Brancusi.

⁷⁷ op cit *Radical Tory*, pp 30-31.

⁷⁸ 167 Phillip Street, Sydney.

⁷⁹ Conybeare would take silk in 1951 and, shortly afterwards, be appointed chair of the Workers Compensation Commission.

⁸⁰ Normal attendances averaged up to 300 per day, whereas during the Archibald exhibition they averaged 3,275 on weekdays and over 7,000 on weekends: "38,670 see Art prize Entries", SMH 8 February 1944, p 4; "Record Crowds at Art Gallery", SMH 21 February 1944, p 4, p6.

⁸¹ *The Daily Telegraph* 24 October 1944. "Some were unable to contain themselves and exclaimed loudly when statements with which they disagreed were made about art": SMH 24 October 1944.

Trials in those days operated on the principle articulated by Coke in the early 17th Century, that no one was obliged to arm an adversary against attack⁸² or as Justice Wells of South Australia once said:

It was the treasured right of each litigant to store up, in secret, as many unpleasant surprises for his opponent as he could muster, and only reveal them at the last minute at the trial.⁸³

The informants' case

Barwick opened the informants' case. Their claim was that, in deciding to pay the prize money to Dobell, the trustees had been guilty of a breach of trust.

The informants' case was that the trustees should be prevented from carrying the award into effect because the painting by Dobell was not a portrait, but was a caricature, bearing a certain degree of resemblance to the sitter, but having the characteristic features of his appearance highly distorted and exaggerated. It would be apparent, Barwick said, from an examination of the picture and a comparison of it with the appearance of Joshua Smith that it did not represent any attempt on the part of Dobell to make a likeness of Smith. On the contrary it was the result of an endeavour to depict him in a distorted and caricatured form.

Barwick read the admissions made by the defendants. He tendered some solicitors' correspondence and a copy of Archibald's will and the published conditions of the 1943 prize.⁸⁴ He called for "the picture in question", which Dwyer notionally produced. It was marked "exhibit D". Finally, he tendered dictionary definitions "portrait" and "caricature".

He said there would be two witnesses, each a former director of the Gallery. Their evidence would be that, having examined the painting by Dobell, they were certain it is not a portrait and was not intended as such.

⁸² *Nemo tenetur armare adversarium suum contra se*: (1628) Co Litt 36a.

⁸³ *Donaldson v Harris* (1973) 4 SASR 229, 302.

⁸⁴ which Kitto produced, objecting to their relevance.

Barwick then called his first witness, James MacDonald.⁸⁵

James MacDonald

Before the war MacDonald had studied in London⁸⁶ and in Paris,⁸⁷ exhibiting his own work at the Royal Academy and the Old Salon. He had married an American art student⁸⁸ and moved to New York, where he taught art. In 1914, he had returned to Melbourne and enlisted in the AIF. MacDonald was a Gallipoli veteran.

After demobilisation, MacDonald had written for *The Argus* and *The Herald* in Melbourne and published a number of books on leading Australian painters.⁸⁹ From about 1921 to 1928 he was official art critic for *The Herald*.

He had been the director of the New South Wales National Art Gallery from 1929 until 1937, when he left to become director of the National Gallery of Victoria for a five-year term until the end of 1941. At the time of the trial he was retired, but acting as art critic for *The Age*.

MacDonald's evidence in chief

According to MacDonald, there was “quite a distinct category of art which one can call portraiture”. It was “very well-defined.”

... it is a special thing, just as a sonnet would be in literature. You have to have certain definite limits within which you work. There has to be a balanced characterisation of the subject, and as to the featural details and proportions it should be objective, though not to the extent that it prevents a certain amount of subjectiveness on the part of the painter from entering into it.⁹⁰

⁸⁵ James Stuart MacDonald (1878-1952).

⁸⁶ at the Westminster Art School.

⁸⁷ At the Académie Julian and the Whistler School. The Académie Julian was established in 1868 by the French painter Rodolphe Julian (1839-1907). It continued as a separate institution until it was integrated with l'école supérieure d'arts graphiques Penninghen in 1968. The Whistler School was founded by the American artist James Abbott McNeill Whistler (1834-1903), the school operated, albeit briefly, under his supervision from 1898-1901.

⁸⁸ Maud Mary Keller.

⁸⁹ *The Art of Frederick McCubbin* (1916), *Landscapes of Penleigh Boyd* (1919), *The art and life of David Davies* (1920) and *The Art and Life of George W Lambert* (1920). MacDonald's McCubbin book was re-issued by Boolarong Publications in 1986.

⁹⁰ The extracts of the oral evidence given at the trial are taken from the transcript of *Dobell's Case*, held by the library of the National Gallery of Australia.

He traced the history of portraiture from ancient Egyptian and Greek sculpture, through Byzantine mosaics to the use of oil paint in the 15th Century by van Eyck.⁹¹ He also noted Chinese, Berber and Mogul works.⁹² MacDonald explained the portrait works by the Italian masters Giotto,⁹³ Lippi,⁹⁴ Botticelli⁹⁵ and Mantegna⁹⁶ and the “great portraitists” like Bellini,⁹⁷ “the teacher of Titian.”⁹⁸

He then sketched the history of English portraiture from Holbein⁹⁹ to Lawrence.¹⁰⁰ Dwyer interrupted to ask:

What is the date of the last good portraitist? --- Lawrence. I think he died in 1832.

MacDonald also identified great caricaturists, including Rowlandson,¹⁰¹ Gilray,¹⁰² and Hogarth.¹⁰³

Barwick asked whether MacDonald knew Smith. He did. Smith was then called into court. He asked whether MacDonald had seen Exhibit D before. He said he had seen it hanging in the Gallery and in other situations and had regarded it very carefully.

In your opinion, is Exhibit D a portrait of Joshua Smith? --- ... No.

Would you be able to tell me what it is in relation to him? --- I think it is a pictorial defamation of character.

If you were given the job of hanging it, if you had to classify it in some way at an exhibition? - I would call it a fantasy, a satirical caricature. ... A portrait allows of your consideration, your scrutiny, you do not feel as if it were your bounden duty to ring for the ambulance, as you do

⁹¹ Jan van Eyck (1390-1441).

⁹² including those commissioned by Shahabuddin Muhammed Shah Jahan (1592-1666), fifth Mughal Emperor of India 1628-1658.

⁹³ Giotto di Bondone (1266-1337).

⁹⁴ Fra Filippo Lippi, O Carm (1406-1469).

⁹⁵ Alessandro di Mariano di Vanni Filipepi (1445-1510), known as Sandro Botticelli.

⁹⁶ Andrea Mantegna (1431-1506).

⁹⁷ Giovanni Bellini (1430-1516).

⁹⁸ Tiziano Vecelli (1477-1576), known as Titian.

⁹⁹ Hans Holbein the Younger (1497-1543).

¹⁰⁰ Sir Thomas Lawrence PRA FRS (1769-1830).

¹⁰¹ Thomas Rowlandson (1756-1827).

¹⁰² James Gilray (1756-1815).

¹⁰³ William Hogarth (1697-1764).

when you see this sort of thing. ... It does not look like that of a normal person to me. It looks like an elf-person, a person sick in body and brain.

With this answer, Barwick had procured the newspaper their headlines for the following morning.

MacDonald cross-examined by Kitto

Kitto commenced his cross-examination of MacDonald with the definition at the heart of his opponents' case.

The category of portraiture is as clearly defined as that of a sonnet? --- I think so.

That being so, doubtless you can give us the precise and generally accepted definition of a portrait? --- ...

... --- A recognisable likeness, that is to say, a likeness recognisable by the majority of those acquainted with the subject; which yields the maximum of the character of that subject.

Is that the whole definition? --- and which can be certified to by contemporaries of that subject as being competent to reassure future generations as to its resemblance.

Is that the whole definition? --- I suppose it is not the whole definition, but it is all I can think of at the present time.

Have you just made up that definition on the spot, or is it a well-recognised definition? --- I have just made it up on the spot.

Do you know of any well-recognised definition of a portrait that is accepted generally in art circles? --- No. Painters are not in the habit of reducing to formulae the meanings of their art. ...

That is exactly what I should have expected. Do you still adhere to your assertion that the category of portraiture is as clearly defined as that of a sonnet? --- Yes.

You regard that as consistent with what you have told me? --- Yes.

Perhaps sensing a path to victory, Kitto, accepting for his present purposes the definition proffered by MacDonald, pressed his next point.

... both ... likeness and character must be a matter of individual opinion of the person concerned? --- The majority. ...

...

... If some of those who know the sitter see a likeness, and some do not, is the picture a portrait or not? --- I should say it would be a portrait.

... whether a picture is a portrait or not must be a matter of the individual opinion of those who consider it? --- It is hard to answer. Yes, I suppose so.

A little later, when MacDonald attempted to give the impression that there was no room for a difference of opinion about Dobell's painting of Smith, Kitto's cattle dog instinct sought to prevent any escape:

No - what I am putting to you is that those who are acquainted with art sufficiently to have a clear idea as to what is meant by words used amongst artists might differ in an opinion as to whether that is a portrait or not? --- Yes.

You know in point of fact that the majority of the trustees of the Art Gallery considered this picture to be a portrait? --- Yes.

You know that a number of other people do, too? --- Yes.

Kitto then took MacDonald through a book entitled *500 Self Portraits*.¹⁰⁴ In a number of instances there were multiple portraits of the same person, sometimes by different artists. MacDonald was able to specify those he considered were and were not portraits. Plainly, the witness had markedly different views to the compilers and publishers of the book.¹⁰⁵

Kitto then turned his attention to the Dobell portrait itself. MacDonald conceded that Dobell's painting had "technical merit."

Looking at the picture you would conclude that it was painted from an actual sitter? --- Yes.

Knowing Mr Joshua Smith, may I suggest that it is not entirely devoid of some resemblance to him? --- That is so.

You agree with me? -- Yes.

¹⁰⁴ Goldschneider, Ludwig (ed), Shaw, Bryan (translator), *Five Hundred Self-Portraits from Antique Times to the Present Day*, Phaidon Press, London, 1937.

¹⁰⁵ Kitto's attack on the opinions expressed by MacDonald in his January letter to the editor of *The Daily Mirror* did not go so well. Having established that MacDonald first saw the Dobell painting of Smith only the week before the trial, Kitto put to the witness that his letter was based of only press photographs and written descriptions of the work. However, MacDonald was able to say that, as director of the National Galleries of New South Wales and of Victoria, he had selected a great number of works to be purchased abroad, sometimes for substantial sums, on the basis of photographs and accompanying written descriptions.

There is some resemblance? -- Yes.

Would you go so far as to suggest there is no element in that picture of any attempt to portray character? --- Yes. There is on one side - that is timidity.

You get that information from the picture? --- Yes.

Would it be going too far to suggest that it indicates some other characteristics possibly? Would you think it suggests a man who had been through a considerable amount of ill health? --- It looks to me as if he had been cornered by the New York police and beaten with a piece of lead pipe for not coming clean.

Leaving aside any attempts to be humorous, I'm asking you do you see any suggestion in that picture that the sitter was a man who had suffered from ill health? --- Yes certainly.

...

Would you think there was any air of wistfulness about him? --- Yes.

Having formed those opinions about it now, do you think I would be going too far if I said, there is a picture which gives a certain resemblance to Mr Joshua Smith, and certain suggestions of characteristics possessed by that gentleman? --- Yes, as much as a caricature would.

But you agree with what I said? --- Yes, qualified by what I say.

You want to say "as much as a caricature would"? --- Yes.

I just want to put one thing to you, suppose I describe this in a short form - would you agree it is a representation or delineation of the person - that is not asking you to go too far, is it? --- No.

Will you answer? Would you agree with that or not? --- Yes.

Would you agree with this, that it is a picture painted from life as a presentiment of the sitter? --- No.

Would you suggest it is painting from life but intended not to be a presentiment of the sitter? --- No.

I should have thought the opposite was involved - a picture painted from life as a presentiment of the sitter. Would you agree with that? I am not asking you to say whether it is successful or not? --- Well, I would say "Yes".

...

In fact you would agree it is done by an accomplished artist? --- Yes.

This picture, painted by accomplished artist, you agree is the picture painted from life, of Mr Joshua Smith? --- Yes.

It has some resemblance to him, and gives some suggestion of the characteristics of him? --- Yes. He is the text.

Having done well, we might think Kitto would sit down, but he asks one question too many.

What I really wanted to know is, do you go so far as to say that that picture is, in your considered opinion, to be excluded altogether from the realm of portraiture, or do you say that it is a bad example of portraiture? --- I think it should be excluded.

Kitto tried to get MacDonald back on track, but the witness seems to have sensed there was room to move.

Are you very definite about it, or is that just the tendency of your opinion? --- Your questions are very hard to answer. I am trying to reply as justly as I can. I cannot help thinking in terms of the Archibald competitions, which I know, where I have interviewed so many of the painters of the pictures, studying them; they have come to me and have talked, and I know what they think concerning what is required of him. None of them had the hardihood to enter a thing like this before, except Mr Dobell, who did twice before, and was non-suited.

An unhappy Kitto let slip his discontent:

In a moment I will have to ask his Honour to strike out answers that are irrelevant. Just keep to my questions.

There followed a series of question trying to unpack what MacDonald's evidence about his discussions with other Archibald entrants, at the end of which Kitto tried again his point about the standard of the painting. It was to no avail.

Kitto then tried to get to the reasons behind MacDonald's opinion.

Is one reason this, that it does not sufficiently resemble Mr Joshua Smith in your opinion? --- No.

That is not a reason? --- That is not the whole reason.

Is that a reason? --- Yes.

Is another reason that it does not in your opinion show character sufficiently? --- Yes.

This seemed to be going well, but then came a question that gave MacDonald an opening:

Are there any others? --- For 700 years a travesty has not been reckoned portraiture.

You regard this as a travesty? --- Yes.

Is there any other reason? --- I would think that none was necessary.

There is no other in fact, is there? --- The proportions are all wrong, if that is to be taken as a consideration, and I think it is. I would not call that a portrait of a human being, let alone a person, an individual.

Sensibly, Kitto moved on, taking the witness to some books, including *Art*¹⁰⁶ by Clive Bell¹⁰⁷ and *Twentieth Century Portraits* by an American author. MacDonald was open to Bell's views, but of the American text observed, "Most of it is not very good." MacDonald said he knew American art "very well".¹⁰⁸ He told Kitto:

I think art in America is in a dreadful state. You cannot tell me of any eminent American painter of the present day.

Despite these difficulties, Kitto managed to get MacDonald to accept that a number of works illustrated in the books, which involved a degree of distortion or exaggeration of the subjects, were portraits. He then rounded on his theme as to matters of different artistic opinions and attempted to step the witness through the logic of the trustees' case.

Would you agree with this, that distortion then is justified by artistic success and by nothing else? --- Yes.

...

¹⁰⁶ Stokes, 1913.

¹⁰⁷ Arthur Clive Heward Bell (1881-1964).

¹⁰⁸ Of course the most eminent and influential American painters, (Paul) Jackson Pollock (1912-1956) and Lee Krasner, born Lena Krassner (1908-1984), were just beginning to have an impact on visual art at this time. Pollock's first major acclaimed work *Mural* had only been painted in July 1943. Krasner's *Little Images* series (1946-1950) were yet to be produced. As abstract expressionists, they were expressing the view that "the painting has a life of its own" and that the painter has to "try to let it come through." "It doesn't make much difference how the paint is put on as long as something has been said. Technique is just a means of arriving at a statement."

Is not success in art a matter upon which opinions must necessarily differ? --- Yes.

... --- It is a matter of trained opinion. It all depends on what you call "success".

Exactly - and that is a matter of opinion, is it not? --- The opinion of the competent, I think.

...

... The degree of exaggeration in a modern portrait is justified by success, and success must be a matter of individual opinion amongst those who are informed in art? --- That is too hard a question to answer - it cannot be answered "Yes" or "No" without a lot of qualifications.

Would you agree that whether a picture is a good portrait must depend upon opinion? --- Yes.

Would you agree that whether a picture falls within the category of portraiture, again must be a matter of opinion? --- Yes.

Again, Kitto asked one question too many:

Then it is very difficult to draw a distinct line between caricature and portraiture? --- I do not think so.

Kitto had no success with his questions about Reynolds,¹⁰⁹ who MacDonald thought "drew in a curious way", or Whistler.

Kitto tried Michelangelo's response to the criticism that his bust of *Cosimo de Medici* did not look like its subject, the master had said, "*It will look like him in a hundred years.*" Again, no traction with MacDonald, who insisted Dobell's painting would not be accepted as a portrait, even by those who had never seen his sitter, because in addition to being "not like him", it was not "in the portrait style."

¹⁰⁹ Sir Joshua Reynolds RA FRS FRSA (1723-1792). The distortion Kitto identified in Reynolds' portraits was, MacDonald thought, "inadvertent" and "to the detriment of his portraits." However, the witness was generous enough to accept that Reynolds' work, notwithstanding the distortions, "would qualify for the Archibald Prize."

MacDonald cross-examined by Dwyer

When Dwyer began his cross-examination, he took a more personal approach than Kitto.

He asked about a self-portrait MacDonald had done, then hanging in the National Art Gallery in Sydney. MacDonald was not shy: it was he said, “a reasonably successful portrait” with “a physical likeness” and showing his character as “a benevolent man, penetrating” and “above all critical”.

Dwyer then took MacDonald back to his article in *The Daily Mirror* and his reference to “a bad portrait by Goya”¹¹⁰ that Dobell had cited as an influence on his work. Dwyer chanced his arm, asking if the bad portrait had been purchased on MacDonald’s recommendation. It had not.

Dwyer then asked MacDonald about the evidence he gave about the authenticity of a number of paintings, said to be by Titian, Rembrandt and Van Gogh.

Would you agree that your comments as to the authenticity of certain paintings were printed in the Melbourne *Herald*? --- Yes.

This was about 1925? --- Yes.

And will you agree that it was found, that it was dishonest criticism – not honest? --- Certainly not.

At this point Justice Roper intervened and asked Dwyer what the relevance was of this line of questioning. Dwyer backed-away:

If your Honour thinks it is not of assistance, I shall not pursue it.

Dwyer then took an interesting turn:

Supposing I gave you a blank sheet of paper and a pencil, would you indicate the way you would treat Mr Smith? --- No.

Well, why not? --- I would have to have Mr Smith in front of me in the chair.

Justice Roper interjected:

¹¹⁰ Francisco José de Goya y Lucientes (1746-1828).

I don't think we can have an art competition here, Mr Dwyer.

He asked MacDonald why his appointment as director of the National Gallery of Victoria had not been renewed. MacDonald said this happened after he had a difference of opinion with some of the trustees. It arose out of a report he made to the trustees recommending very strongly against the purchase of any of a large collection of pictures one of the trustees had brought from England to sell to the Gallery.

Finally, Dwyer asked:

In the information, the legal document that initiated these proceedings, it is stated that the portrait does not represent a person of human aspect and proportion? --- Yes.

...

Can you tell in detail, by measurement ... [what] you say the correct normal human proportion is? --- No, not offhand. You will find it in Leonardo's book, all the canons of proportion for the normal person, but one does not carry that in his head.

MacDonald re-examined by Barwick

Barwick's re-examination was short, clarifying the reason MacDonald's term as director of the National Gallery of Victoria was not renewed;¹¹¹ the photographs of Dobell's painting that MacDonald saw before he wrote to *The Daily Mirror*, the instances in which acknowledged master painters had used exaggeration or distortion to any degree in their portraits (an accentuated sneer by Frans Hals¹¹² in the *Laughing Cavalier* and Gainsborough¹¹³ shortening Mrs Siddons' nose) and finally to revisit the definition of "portrait".

John Young

Barwick's second witness was John Young.¹¹⁴ In 1925, Young had founded the Macquarie Galleries,¹¹⁵ then and to this day, one of the most important private

¹¹¹ The trustee whose "job lot" of paintings had been rejected was Sir Keith Murdoch (1885-1952), a patron of modernist art. By 1941, Murdoch had become chairman of the NGV trustees, ending MacDonald's chances of a renewed term as director.

¹¹² Frans Hals the Elder (1582-1666).

¹¹³ Thomas Gainsborough FRSA (1727-1788).

¹¹⁴ John Henry Young (1880-1946).

galleries in Sydney. He left in 1938, setting up his own businesses as an art restorer, valuer, adviser and dealer. In June 1944 he had been appointed acting director of the New South Wales National Art Gallery.¹¹⁶ When in September 1944 he had decided to give evidence in this case, he resigned his post at the gallery to avoid any conflict of interest with the trustees.

Young was a quiet man, of medium height and slight build. He had a very white skin, thick long dark hair, a broad brow and a slight stoop. He wore glasses.¹¹⁷

Young's evidence in chief

In chief, Young offered the opinion that the business of a portrait painter was to reproduce the figure and character of the sitter. He said he could not think of any great or even good portraits in which distortion or exaggeration was obvious.

Asked about Dobell's wining painting, Young said he was "a little dumbfounded when I saw this picture. I was shocked."

In your opinion is the exhibit a portrait of Joshua Smith? --- Well I must say no. I don't think it is a portrait of Joshua Smith.

And might you tell us why you say it is not a portrait of Joshua Smith? - -- I find that since the coming into being of modern art and the use of so many experiments with figure and the calling of a picture a portrait - it is very arbitrary. Picasso took a lozenge and call that a picture of his mistress. I think it is a 50-50 business between the sitter and the painter and it is upon that ground that I have judged whether the picture is a portrait or not.

Well then, apply it to this picture? --- I think 85 Dobell and 15 Joshua Smith.

What would indicate to you that it is not a portrait of Joshua Smith? --- Well, I don't think it is a portrait of Joshua Smith. Ultimately considered, I don't think it is a portrait of a person at all.

... --- ... a biological absurdity, and I think no being could live like that.

Young cross-examined by Kitto

¹¹⁵ With Basil Burdett (1897-1942).

¹¹⁶ In the absence of Sir John William Ashton OBE ROI (1881-1963), who had succeeded MacDonald as director in 1937.

¹¹⁷ Johnson, Heather ADB (2002).

Perhaps thinking it would appeal to the maths wiz on the bench, Kitto began his cross-examination of Young on the mathematical point.

You said there should be a 50-50 relationship in a portrait between the artist and the sitter? --- Yes.

...

Have you ever heard that definition propounded by anyone else? --- No. I don't think so. I think it is one of my own. I just had to search my mind and my experience very carefully.

And suppose that you approached a particular picture and estimate that the relative contributions are say 60 to 40, would you rule it out from the category of portraiture? --- No, but I would feel that another title might be a better.

Well, supposing it rose from that to 65 to 35?

... --- I would not say that that was really a portrait, no.

Can you suggest where the line and ought to be drawn? --- Very definitely.

...

... in terms of these percentages, where do you draw the line? You say you do not draw it at 60-40? --- Possibly that was a slip, between 60-40 and 65-35 that might have been a slip. I had it really at 50-50.

But 60-40 would not be a portrait? --- Yes. I would rule it out from specific portraiture.

...

... anything that did not satisfy exactly the 50-50 proportion you would rule out from the category of specific portraiture? --- Yes. I would, insofar as it departed from specific portraiture.

...

Supposing you say 50-50 and Mr McDonald says 60-40, is that a portrait or not? --- Well, if I say it is 50-50 I think it is a portrait and I can demonstrate that.

But supposing Mr McDonald says it is 50-50 and you say it is 60-40, is it a portrait then? --- Probably I would be wrong.

...

But would *you* say it was a portrait in those circumstances? --- ...

... --- No.

Well, do we come to this, that a picture is only a portrait if you think it is? --- No, not at all.

Kitto then asked about other paintings entered and exhibited in the competition, including two by Dobell. Young said he did not think the other Dobell paintings were portraits and that “at least half” of the other paintings in the competition “were not portraits” and some were “the strangest things on earth.”

At this point, Justice Roper interposed.

Suppose you were asked by the trustees to sort out the entries as they came in, and to pass in to the judges only those entries which were in fact portraits, whatever their artistic merit was, either good or bad - to pass into the judges those entries which were portraits, and keep away from the judges if for instance you found somebody holding up a sugar loaf and saying “it is a portrait of my mistress”? --- Yes.

... --- ... I would then eliminate this picture [indicating exhibit D].

It would not go in? --- It would not go in.

Justice Roper again intervened:

But supposing, having been put in that position, you had never met Joshua Smith, that you had never seen him – would you still have excluded that picture? --- Yes, I would say to myself that is a biological absurdity, and out it goes.

Well then, it would have been excluded it on the question of biology? --
- Yes, on the question of biology and proportion. I would say it was not a human figure.

Kitto then took the witness to Gainsborough’s painting of Mrs Siddons, in which the artist took the “liberty” of shortening the sitter’s rather long nose.

And would you consider the [Gainsborough] picture not to be a portrait?
--- It was a blemished portrait.

Was it a portrait? --- Blemished.

Was it a portrait at all? --- Finally, no.

If you had a job of sending pictures to the trustees of the Archibald collection, would you send it or not? --- If it has an obvious blemish of that nature, I would not, frankly.

At this point, with respect sensibly, Kitto resumed his seat.

Young cross-examined by Dwyer

Dwyer's cross-examination of Young, like his approach to MacDonald, was direct and personal. He began by putting bluntly to Young that he was not an expert. Young said personally he did not like the term, but that was what other called him.

... When did you become an art expert? Was it a sudden transformation did it take some time? --- I think that term got there when I dis-associated myself from the Macquarie Galleries and took on valuation and other things.

Dwyer's information seems to have failed him. He wrongly thought Young had run a "ham and beef shop" before opening Macquarie Galleries. His questions indicate that he did not know that Young was an art restorer, did not know what was involved in art restoration and did not know that Young also painted.

A line of questioning about a recent exhibition of French paintings at the National Art Gallery also misfired. It transpired Young was only involved in the hanging of the works at the Gallery, not with the organisation of the exhibition, the selection of works or the invitations issued by the *Spirit of France* committee.

Dwyer then sought to impeach Young's appointment as acting director of the Gallery, seemingly on the basis that the witness ought to have told "all the trustees it was your determination to give evidence in this suit". Young said when he was appointed he did not know that the suit was coming on.¹¹⁸

--- There a lot of people hopeful that it would never come.

¹¹⁸ Young explained that several of the trustees knew of his position as a possible witness, including Dobell, who was a trustee at the time of Young's appointment. Young had written to Dobell, congratulating him on his appointment as trustee, and informing him that he had found himself "in the camp of the objectors." When he was specifically asked to give evidence, a month or two before the trial, Young immediately spoke to the president of the trustees, Waterhouse, who told him not to do anything, but to wait. Young then wrote a letter to Waterhouse, confirming he would be a likely witness. When he learned the trial was listed for hearing, Young tendered his resignation.

Were you one of them? --- I was not wholly and completely in favour of this suit, no.

Why not? --- Well, I doubt very much whether a matter of art can be settled in a suit.

And I take it that that is your serious and considered opinion? --- Yes, that is my considered opinion – that is to say for the purposes for which that suit would be brought.

... --- For the final satisfaction of art, I think it is going to be very difficult. Whichever way the verdict goes, I think some people will be of the same opinion.

Sagely, Justice Roper added, “I think that is the case in every lawsuit – at least half the audience is dissatisfied.”

Dwyer then fished for some collaboration between Young and MacDonald over preparation for giving their opinion evidence. This was also in vain. As to MacDonald’s earlier evidence, Young said

I don’t know what he said. I don’t remember what he said. I did not take the slightest notice of what he said. As a matter of fact, I thought it was a good opportunity to go out for a smoke.

Dr Vivien Benjafield

Barwick’s final witness was Major Vivien Benjafield.¹¹⁹

Dr Benjafield had become something of a legend in his own lifetime. He enlisted in 1914 and served throughout World War I as a surgeon and administrator, including at Gallipoli, on hospital ships, in Alexandria and later in England before being invalided back to Australia. After the war, he practised from rooms in Macquarie Street and appears to have been a rather frequent expert witness in trials and veterans’ claims.

Benjafield was, as the bookmakers might say, a late starter. Barwick recalled that, as he entered the courtroom on the first day of the trial, he noticed the doctor near the entrance. Barwick asked him if he “would venture an opinion in the witness

¹¹⁹ Major Vivien Benjafield (1879-1973). Benjafield’s two sons entered the legal profession. One, David Gilbert Benjafield, was awarded first class honours and the university medal in law (1945). He was called to bar and appeared as one of the junior counsel to H V Evatt KC for the Commonwealth in the 1948 *Bank Nationalisation case*. He later became professor of law at the University of Sydney.

box about the relationship of the canvas to the sitter.” Benjafield said he had “a firm opinion about that and was willing to give it.” In this way Barwick decided to call him as his last witness for the informants.

When Barwick gave a brief outline of Benjafield’s evidence, Kitto objected.

Kitto: If he says the picture is like a corpse, I shall have to call other witnesses from Macquarie Street to say it is alive.

Barwick: He could call an undertaker to speak as an expert on corpses, but I want to ask the doctor a number of questions which an undertaker might not be able to answer.

The bailiff sought in vain to quell the laughter this remark generated.

Justice Roper dismissed the objection and Benjafield was called.

Benjafield’s evidence in chief

Benjafield knew how to grab a headline, at least as well as Barwick. It was shortly before lunch when Benjafield came to the witness stand. Barwick asked

Have you seen Mr Smith? --- Someone has pointed him out to me, but I am not sure whether that is he or not.

Barwick then asked Joshua Smith to stand in the courtroom.

Do you see sufficient of him there? --- Yes, I think so.

First of all, I want you to tell me in relation to Mr Smith, his physical appearance and, leaving aside proportion for the moment, what does the representation represent from the physical point of view?

[Both Kitto and Dwyer objected, but the question was allowed.]

What I want to know is this: what state of Mr Smith’s physical existence – his body – does that picture represent, leaving aside proportion? --- I would say that it represents the body of a man who had died in that position and had remained in that position for a period of some months and it had dried up.

...

Would there be anything in it that would be different? --- Yes, in a dead man the lips would have retraced to have shown the teeth. The eyes would have shrunk.

The court adjourned for lunch and the afternoon papers had their story.

Benjafield cross-examined by Kitto

After lunch, Kitto asked Benjafield about the eyes shown in the painting; had the witness confirm his opinion - that it depicted a corpse - was formed excluding colour – “a good deal of the colour is inconsistent with a corpse”; and clarified that his opinion was based on an apparent lack of subcutaneous tissue.

Benjafield cross-examined by Dwyer

Dwyer also chanced the very briefest of cross-examination:

Do you know anything about art? --- No.

Benjafield re-examined by Barwick

Barwick asked Benjafield whether his opinion was also informed by his “experience of seeing dried dead bodies in the last war”. It was, the witness said, by “a very large number of them. Some of them were men who I knew.”

On this sombre note, Barwick closed the case for the informants. Edwards and Wolinski did not give evidence.

The trustees’ case

Kitto opened the case for the trustees. He tendered a list of the trustees, indicating those in office in January 1944 when the prize was awarded, and the addition of Dobell, who had been subsequently appointed.

There would be only two witnesses: the acting director of the Gallery; and an expatriate connoisseur.

Frank Medworth

The first witness was Frank Medworth.¹²⁰

A lecturer in art at the East Sydney Technical College,¹²¹ at the time of the trial Medworth was acting director of the National Art Gallery of New South Wales, apparently having taken up the role following Young's resignation.

Medworth was a bit of a celebrity.¹²² He made radio broadcasts for the ABC, wrote articles for the newspapers and magazines and gave lectures on design in modern living. His portrait of his wife, Muriel Medworth, had been hung in the 1940 Archibald exhibition. Medworth was a "small, animated man, of 'restless enterprise and fecundity of expression' [and] an inspiring teacher".¹²³

Medworth's evidence in chief

Kitto asked Medworth's opinion on the Dobell work, exhibit D, which he said he had studied "very carefully."

... --- In my opinion with my own definition of what a portrait could be, yes, it is a portrait.

Would you explain what the definition is that satisfies you? --- I would define a portrait this way, that it is a representation of a person, showing either his actual or imagined characteristics.

Medworth said it showed a distinct likeness to Smith.

And how does the degree of exaggeration shown in that picture stand in relation to what you have just said? --- I think it is markedly exaggerated, and perhaps it is more exaggerated than is customary in the painting of portraits, but I do not object to it personally. It is ... a matter of the preference of the artist who chose this particular symbol for

¹²⁰ Frank Charles Medworth (1892-1947).

¹²¹ Based at the old Darlinghurst Gaol, adjacent to the Sydney home of the High Court, the "Tech" had opened in 1922 as an annex of the Sydney Technical College at Ultimo. In the 1940's it offered the only art diploma courses in NSW. Based on studio practice (the atelier method), the Tech maintained an impressive reputation. In 1996 it became the National Art School.

¹²² Medworth had studied and practised art since the age of 16. Born in London, he had spent four years in Hull before arriving in Sydney in February 1939.

¹²³ Sparks, Cameron, ADB Vol 15 (MUP) 2000. Medworth was an Australian delegate to the 1947 UNESCO conference in Mexico City. When his appointment was announced, allegations were made in the Commonwealth Parliament that he was a communist – based upon his position as vice-president of the People's Council for Culture, a communist party front organization. Sadly, Medworth committed suicide in the Reforma Hotel in Mexico City on 11 November 1947.

depicting the individual. This is not a commercial portrait. This is a portrait or picture painted by the artist of a person to satisfy himself.

Medworth said that exaggeration and distortion “has always been employed by artists from the commencement of time”. He cited El Greco and Van der Weyden¹²⁴ as examples.¹²⁵

You have heard what Mr MacDonald said here? --- Yes.

What do you say of his view about that picture? --- Well, I think his view was tenable and still is, by a very great number of people. ... Art has to show a certain characteristic, and art has to change. Fashions are always appearing in art. Supposing that one set about a portrait with the idea that it had to be first of all a likeness; how would one determine the making of that likeness? If one were a painter there are no means of measuring. ...

Perhaps detecting that this was not very helpful, Kitto directed Medworth back to the Dobell painting, exhibit D:

--- ... if Mr Dobell had painted this under the conditions of candlelight ... it would therefore decide the actual appearance of this person when Dobell was making his observations. But apparently, as one who knows anything about it, he has experimented.

This wasn't much better. Kitto looked for an escape. He tried asking about colour, but Medworth responded with a speech about prisms and how an orange object would appear black under blue light.

Finally, Kitto asked whether “portrait” had a special meaning in “the vocabulary of art” different from its usual meaning. Medworth's answer was unsatisfactory, meandering over the “colloquial” meaning of portrait to “a lay person”.

--- but that which makes you feel that some person that might be in the room with you has been accepted by the layman really as that which might be more truly the portrait, rather than what has been determined by the artist as a revelation of the sitter's character.

That is the popular sense that mentioned? --- Yes; a lay person does think of that as being the portrait. The artist would not think of that.

Kitto resumed his seat. Dwyer had no questions for the witness.

¹²⁴ Rogier van der Weyden or Roger de la Pasture (1400-1464).

¹²⁵ The witness even produced a profile he had drawn on the basis of a painting by van der Weyden, reproduced in *Art in Australia*,¹²⁵ which was tendered as Exhibit I.

Medworth cross-examined by Barwick

Barwick then embarked on his cross-examination of Medworth, beginning with the “imagined characteristic” element of the definition of “portrait” propounded by the witness.

... in painting a portrait in your view the artist is not limited in any way by the objective presence of the sitter? --- In actual fact, of course, he can paint what he likes. ...

... We are considering an artist who does not care. It is art for art’s sake at the moment. You will agree, will you not, that in his case, he is not limited, in your definition, in any way by the physical presentation or presence of the sitter? --- He need not be.

... so far as definition and generic classification of the work is concerned, the achievement of resemblance is but accessory? --- In my opinion I probably would think it essential, although in my definition, I made it wider.

But in painting a portrait according to your definition, the artist is untrammelled entirely by the physical presence of the sitter. You have told me that, haven’t you? --- If he chooses to take that line.

... So that your definition would justify the portrait that has been mentioned in evidence by Picasso, of the two packing cases on the wharf, as the portrait of his father? --- ...

... --- Yes, but only in the sense that if I choose a certain characteristic of person and use that to represent him, in that sense it is a portrait. If I say, “You are cubic”, and if I draw a cube and say it is you, it might represent something else. If a person chose to call it a portrait, right enough it is a portrait.

And in your definition he [Dobell] chose to call it a portrait, it is a portrait? --- It is a portrait.

Barwick then asked Medworth about the changes in fashion in art in the early 20th Century associated with Cézanne, Picasso and Matisse.¹²⁶

He put to Medworth:

¹²⁶ In 1975, all three artists would feature in *Modern masters: Monet to Matisse*, the first of the modern blockbuster exhibitions to be held at the AGNSW, attracting 180,000 visitors over 29 days. In 2008, the AGNSW would acquire *Bords de la Marne* by Cezanne (c. 1888) for \$16.2 million – the highest amount paid by the Gallery for a work of art.

... to apply your definition of the portrait to be accepted view of portraits at the time that this school developed - 1908 to 1910 - that would have been revolutionary or cataclysmic, wouldn't it? --- It was regarded as revolutionary.

Despite objection, Barwick pushed on.

And it would be regarded? --- As a change was regarded by established artists of the day, as being cataclysmic.

You were not in Australia in the years 1916 and 1919, and so on? You don't know how backwards this country was in matters of art? --- No, I can only guess.

There was no re-examination.

Richard James

Kitto's second witness was "Jimmy" James.¹²⁷

In 1939, James had come to Sydney from London, via six months in Tahiti, to be senior creative director of J Walter Thompson, then Australia's largest advertising agency. Although only 33 years of age, James had already been art director for the McCann advertising agency in London. He had studied at the Westminster Art School and the Grosvenor Art School. He been elected a fellow of the Royal Society of Arts and was a friend of Walter Gropius of the Bauhaus.

The son of an Indian Army Colonel, James was said to have looked and sounded like Rex Harrison playing Bernard Shaw's Henry Higgins.¹²⁸

After only five years in Sydney, James had become a founder of the Design Centre and a member of the council of the Contemporary Artists' Society. He was writing regularly for Sydney Ure Smith's *Australian National Journal*, and giving a weekly radio broadcast "World Observations" and frequent lunchtime lectures.

¹²⁷ Richard Haughton James FRSA (1906-1985).

¹²⁸ Robinson, Max, *AGDA Hall of Fame: Richard Haughton "Jimmy" James, 1906-1985*. <http://www.agda.com.au/inspiration/hall-of-fame/richard-haughton-jimmy-james,-1907-1985/>

In 1944, he was serving as a lieutenant in the camouflage unit. Although he was not asked about it, James may have been the commanding officer for Dobell and Smith, who had worked together in the camouflage unit.

Not long after the *Dobell case*, James transferred to the Military Education Council and designed the Commonwealth Government war recruitment posters. After the war, James moved to Melbourne. There, with John Briggs, he founded a highly successful advertising agency¹²⁹ and had a similar impact in the local art and design circles.¹³⁰ His firm was acquired by a major international agency in 1964. He took up painting and retired to Positano. One has the sense that, if *Mad Men* were to be set in Australia, James might have played Bertram Cooper of Sterling Cooper.

James' evidence in chief

Kitto adduced from James his opinion on the portrait of Joshua Smith:

--- I have studied the picture, which is Exhibit D in this case, and in my opinion it is a portrait and a good one. I think the word "portrait" covers a very wide field and it always has. ... you can have a carrot and you can say that that is a portrait ... But I think firstly it should be artistic, and secondly you should learn some truth from it. It should present some truth about the subject.

James said Dobell's painting bore "a very strong likeness" to Smith and gave indications of his character. If he had never seen Joshua Smith, he would know a great deal about him from the portrait.

--- that he was not an old man; that he is not a fat man; that he is not a robust man, etc and that he is a very sensitive man. ... If I may say so, from my small knowledge of him, I think possibly that Mr Smith has kind of angularity of character. He sits in his chair in a manner that is slightly uneasy.

James said that exaggeration in the picture served to produce the effects he had described on his mind and "it is an essential part of the artist's means of creating those impressions, to make such distortions as are necessary."

¹²⁹ Initially Briggs & James; later Briggs Canny James & Paramor Pty Ltd.

¹³⁰ He edited *The Australian Artist*, a quarterly of the Victorian Artists' Society (1947-48), published *Art Appreciation*, FW Cheshire, Melbourne 1948. James was also involved in the Arts Festival for the 1956 Melbourne Olympic Games. See: Powerhouse Museum Collection, Richard Haughton James design archive, 1930, History notes.

James cross-examined by Barwick

At the beginning of his cross-examination, Barwick asked what each exaggerated element of the painting told the witness about the sitter. He asked about the colour, the exaggerated ears, the narrowness of the head, and why a standard portrait of Smith would not reveal the same things about the sitter's character. James protested:

--- I am afraid I cannot be tied down to these terms in quite specific terms, because one has impressions of the mind which you can note down in two or three hours, but under cross-examination it is more difficult to say.

Barwick was having none of it.

You have been thinking of giving evidence in this matter more than one day? --- Yes.

You have sat in the court two days? --- Yes.

You have come here to say something? --- Yes.

Do you want to tell us you are incapable of saying it? --- No.

Barwick asked James about "portrait" in the sense in which the witness used the word.

It is desirable first of all that it should be a work of art; then it should bear some resemblance? --- If it born no resemblance, it would not be a portrait.

The degree of resemblance is determined by what? --- Likeness.

...

As long as it conveys any single fleeting resemblance to the person, it would satisfy you? --- No, it would not. ...

When does it become a portrait – if it is not when it is a fleeting resemblance? --- When it is a worthwhile contribution to your knowledge of the subject.

I do not understand that. When in the growth of the resemblance does it become a portrait – if it is not in a fleeting resemblance, when does it? -- These questions are unanswerable. They are nonsense.

You cannot answer it? --- Of course I cannot.

So I may take it you have no standard knowledge of portraiture which would admit of an exact statement by you? --- You may not take that.

[Can] you state to me your precise definition of a portrait, if it is susceptible to statement in your hands? --- I did not say it was susceptible of statement. I am not qualified enough.

One has a sense of Barwick's theatricality, from what happened next. He took up a box from the bar table and produced a plasticine bust of the then NSW Leader of the Opposition, Reginald Weaver, a small body and a large head with an extremely prominent nose.¹³¹ John Frith,¹³² a talented cartoonist at *The Bulletin* had made the model to be photographed and feature in the magazine.

Would you call that thing a portrait? --- No, I think it is a caricature done for fun.

Don't you learn anything at all about the sitter from the thing I showed you? --- Yes, certainly, but it may not be true at all. I do not know if it is true, if that is what you want to know.

...

This would conform to all your definition of portrait provided it was [not] done in a spirit of fun? --- Not at all, it is not a work of art.

What is it? --- A joke.

As it happened, Frith was in the public gallery. He rose from his seat and interjected loudly, "I object to that. I made that image in all seriousness." Laughter ensued. Barwick went with the flow, asking:

Assuming that it was done in all seriousness? --- Then it is a matter whether I recognise it as a work of art or not. I do not.

Assume for the moment it is done as a work of art by a person very competent to do so, seriously as a work of art? --- Yes.

...

Then it would be a portrait? --- A portrait is a very wide thing. It can be a bit of the portrait if it is quite like him. If it is a caricature, it is not.

Would it be a portrait in those circumstances? --- No. It is not serious.

¹³¹ Reginald Walter Darcy Weaver MLA (1876-1945)

¹³² John Eric Frith (1908-2000).

Assuming it is serious? --- You may assume that, but I cannot. I have seen it.

Barwick moved back to the Dobell painting:

You told us that these arms and angularity has conveyed to you Mr Smith had an angular character? --- Yes.

Tell me what is an angular character?

... --- an angular character is a person who is perhaps not immediately happy in all circumstances but who finds that he has some difficulty in fitting in new circumstances and new people and so on.

That merely describes most of us on earth? --- Not so – some are less angular than others.

Barwick toyed with the seriousness of the witness.

Tell me what is “angular character” – would the opposite be circular character? --- You are getting quite near it – a man with no nerves and a heavy figure – circular might be thought of as being the opposite of angular.

Barwick ended his cross-examination. There was no re-examination.

Kitto closed his case. He called none of the Gallery trustees. Given their (apparently) divided opinions, this was the undoubtedly the correct forensic decision.

Dobell’s case

Dwyer opened the case for Dobell. He would call four witnesses: a sculptor, a critic, a senior fine art teacher and, finally, the artist himself.

Lyndon Dadswell

His first witness for Dobell was Lyndon Dadswell.¹³³

Dadswell was a sculptor.¹³⁴ After undertaking a number of Great War memorial commissions, he won the Wynne Prize in 1933 at the age of 25. He had enlisted

¹³³ Lyndon Raymond Dadswell CMG (1908-1986)

in April 1940, fought in Greece, Libya and Syria, where he was seriously wounded in June 1941 fighting the Vichy French forces, the injury permanently impairing his vision. In September 1941 he was commissioned as a lieutenant and appointed an official war artist, working in a studio at Heliopolis, Cairo. He was the first sculptor so appointed in the Second World War. He returned to Australia and resigned his commission at the end of 1942, taking up a teaching position at the East Sydney Technical School.¹³⁵

Dadswell's evidence in chief

Dwyer began with an attempt to extract a definition of portrait from Dadswell. The answers were rather rambling. Instead, he turned to Dobell's painting:

Directing your attention to that portrait in court, is it a portrait or a caricature? --- A portrait.

Tell us what in your opinion there is in that canvas that compels you to say that it is a portrait? --- It is like Joshua Smith.

...

--- ... some people have said that there are rules in art – I say there are not. I feel, here, that it is quite impossible for me to say that is not a great picture, and it is equally impossible for me to say that is not Joshua Smith. If I am going to allow that I have a personal point of view, then I must allow Mr Dobell that same license. ...

--- I like the whole thing as a picture. I should like to hang it in my room. Particularly, I think it would suit it. There may be few to agree with me. ...

Dwyer asked Dadswell to produce a picture of a sculpture by Epstein,¹³⁶ *Duke of Marlborough*.¹³⁷

What do you say about that? --- ... that portrait of the Duke of Marlborough was done by Epstein and I understand took 18 months... They haggled and argued over the thing for all that period, and finally Epstein said, "Look, I see you like this. I am trying to give impression of you as a noble person, and this is my impression of you." I understand

¹³⁴ He had trained at the Sydney Art School (also known as the Julian Ashton Art School) and the East Sydney Technical College. The Julian Ashton Art School was founded in 1890 by Juilan Rossi Ashton (1851-1942) as the "Academy Julian". It continues to operate as an independent art school.

¹³⁵ Dadswell would become head of the fine arts division of the school in 1966.

¹³⁶ Sir Jacob Epstein KBE (1880-1959).

¹³⁷ A bust of the Ninth Duke (c. 1925).

[the Duke] would not have it, but it is in the possession of the family, purchased by his daughter or sister who thought it was a very good interpretation of the Duke of Marlborough.

So Dadswell's evidence in chief ended with an analogy between Joshua Smith and the noble Duke.

Dadswell cross-examined by Barwick

In a brief and targeted cross-examination, Barwick sought to explore Dadswell's reasoning and set up his own closing argument.

... you say that when he [Dobell] paints a portrait, there are no rules by which he shall be bound? --- I am presuming that if I were painting it there would be no rules, but I cannot speak for Mr Dobell.

But you accord to him the position that there would be no rules? --- Yes, I see what you mean.

And that which Mr Dobell makes of the sitter must be a portrait? --- It can be a portrait, yes.

...

You say you accord it to him the right to express his own reaction himself? --- Yes.

...

... when he has finished, so long as he is prepared to write underneath it "Portrait of X", then it is a portrait, because he must have seen it that way or he would not have done it? --- Yes, may I now say and something?

Yes? --- He did paint this as a portrait, and I accept it as a portrait. He may now wish to send it to London and call it "Man sitting on a chair".

...

What he produced, he calls a portrait - if he sent it to London and called it something else, it would be something else - and it is by that standard that you say that this is a portrait, is that right? --- Quite.

You will agree that there is a distinct form, both in sculpture and in painting, called caricature? --- So I understand, yes.

Do you concede that there is one or do you think there is not? --- Yes there is.

And that is differentiated from portraiture...? --- I cannot define the difference. ...

... so that even if this were done with a view of caricature, it's being called a portrait, would you say that it is a portrait? --- It is a portrait.

This ended the cross-examination and the day. There was no re-examination.

Paul Haefliger

On the morning of the third and final day of evidence, Dwyer called the art critic for *The Sydney Morning Herald*, Paul Haefliger.¹³⁸

Haefliger gave his opinion that a portrait should be a painter's reaction to the portrayed:

--- I think it is essential that a portraitist should "picture-ise" the man whom he is painting. Nevertheless, I do not think it of supreme importance that an absolute likeness be achieved. I think it essential, though, that while the painter is painting he should bear in mind the man he is painting. I think, too, that through his reactions he may ultimately give a clearer picture of himself, rather than the portrait. That is, I think, a trait which is common in all portraiture. I think when you look through the old masters you will find that every artist has his so-called type— There is a Leonardo time, there is in modern times the Picasso type. Any great painter has a type. Within his type he creates a portrait. I think ultimately you will find that these portraits as such are to a certain extent fallacious. They are reflections of the artist rather than a portrayal, because the artist can only know himself thoroughly. ... It is a vague term, but I think in art most terms are very vague, including portraiture. ...

Perhaps sensing that this was moving away from his main point, Dwyer attempted a course correction:

Will you deal with it in relation to the Dobell portrait? --- Mr Dobell is really what might be termed an expressionist. He stresses the forms to express an emotion; and to express his intense excitement about certain forms of art - his conception - he would have to exaggerate. ... If he was a severe classicist, he could not exaggerate the way he does here [in the painting of Joshua Smith].

¹³⁸ Paul Haefliger (1914-1982). Between 1931 and 1935 he studied at the Julian Ashton Art School and Adelaide Perry's School, in Sydney. He also studied Japanese woodcuts for eight months, in Japan in 1932. In 1936, he went to London and studied painting at the Royal Academy Schools and the Westminster School of Art, under Bernard Meninsky (1891-1950) and Mark Gertler (1891-1939) where he produced some cubist painting. He returned to Sydney in 1939. He had been the *Herald* critic since 1942.

According to Haefliger, expressionism was a very broad school; he thought El Greco, Rembrandt, Goya, Cézanne and Picasso all to be expressionists, as well as the conventionally accepted artists like Soutine.¹³⁹

Haefliger thought the likeness to Joshua Smith, who was in court, “very considerable.” On the other hand, he “personally” did not think that Mona Lisa looked exactly like the image in the picture painted by Leonardo.

the wife of a merchant, is given such a spiritual look, such a mysterious look, the look of a supreme being, that I do not think Mona Lisa, the wife of Giocondi, possessed.

Haefliger’s evidence seemed to roll on and on in this manner. He spoke at length about Rembrandt, Goya, Manet,¹⁴⁰ Cézanne once again, and finally Picasso. Dwyer seemed only able to occasionally interrupt to ask, “Is there anything else that you care to say in relation to this particular portrait?”

At last, Dwyer asked:

Is there any other matter? --- I think for the moment, no.

Haefliger cross-examined by Barwick

It is fair to say that Haefliger was a difficult witness – for any counsel. In response to questions he would ask questions, rather than answer. He would debate the meaning of each formula of words put to him and then of the individual words in the formula.

Barwick’s approach was to never give in and to exploit Haefliger’s argumentativeness to highlight the more extreme version of his views.

At the end of the first part of the struggle, Barwick consolidated Haefliger’s view:

You understand when I say you concede the artist in painting a portrait is at liberty to paint something which has no resemblance to what the viewer sees, when he looks at the physical presence of the sitter? ---
Yes.

¹³⁹ Chaim Soutine (1893-1943) and Georges Henri Rouault (1871-1958).

¹⁴⁰ Édouard Manet (1832-1883).

He then sets out to paint a spiritual portrait of the sitter? --- Yes, the spiritual atmosphere.

I suppose you agree with Mr Medworth that it need not be the actual one? --- It can be an imagined one.

He then proceeds to paint this spiritual idea which his communion with the sitter had evoked in the artist? --- This is right.

Barwick asked Haefliger about a statement by a previous witness that Picasso had painted a pile of packing cases and called it “portrait of my father”. Haefliger said he had not seen such a portrait, but an artist could paint in any form to express his sincere spiritual reaction. Then, Barwick asked,

... if I had a certain spiritual reaction to my mother-in-law could I paint her portrait as a coil of barbed wire?

After the loud laughter, subsided, Haefliger replied:

--- No. ... because if you are a sincere artist it would be impossible to paint barbed wire and call it the sitter. ... I do not think it can possibly happen that an artist’s sincere reaction to somebody would be a coil of wire.

Barwick then asked a series of questions about changes in physical appearance that an artist might make when painting a portrait, changing eye colour, hair colour and so on. Haefliger had great difficulty answering them, in particular, he resisted engaging with the various scenarios Barwick put to him; culminating in this exchange:

I am asking you to assume it? --- What is the good of assuming everything? My opinions are based on fact, and I have brought some reproductions to base my claims on, but you are assuming everything.

In the course of preparing this paper, I examined the manuscripts of J S MacDonald deposited with the National Library of Australia.¹⁴¹ Amongst MacDonald’s papers were a series of letters written by Dame Mary Gilmore. These included two letters to Joshua Smith dated 25 October 1944, written in the course of the trial, which Gilmore suggests Smith show to MacDonald.¹⁴²

¹⁴¹ NLA Special Collections, MS430.

¹⁴² Obviously, Smith did show them to MacDonald, as they have ended up with MacDonald’s papers deposited with the NLA.

These letters reveal that, prompted by Medworth's evidence that a painter is "untrammelled" by rules, Gilmore had formulated some possible cross-examination questions and sent them to Barwick. The first letter was written in the morning and the second in the afternoon. Gilmore's notes must have made their way to Barwick with some expedition, because the questions that so vexed Haefliger were those proposed by Gilmore. So the writer, poet and social campaigner, whose views - too radical for the AWU and the Labor Party - were published in the communist *Tribune*, supplied key cross-examination questions to the tory (albeit radical tory) Barwick in the battle pitched as "modernism versus tradition" in Australian art.

Having unsettled Haefliger with the Gilmore questions, Barwick sought to test the witness in another way. He took up one of the witness's books and directed his attention to a work, *Soft self-portrait with grilled bacon* by Salvador Dali (1941).¹⁴³ In it, Dali had painted the peeled skin of his face and neck, supported at various points by crutches, draped over a low pedestal that also bears a crinkled rash of bacon.

... that is quite a satisfactory portrait on your definition? --- No, that is not a portrait.

That is a book of portraits? --- Yes, practically all the reproductions are portraits in this book, but I do not think that is a portrait.

Barwick probed for a while Haefliger's understanding of surrealism, which the witness called "the art of the subconscious". He then returned to extract a useful concession from this otherwise unbidable witness.

This thing that is put in that book as a modern portrait and commended is really not a portrait but an attempt by somebody to describe his dreams? --- Yes, it is an illustration of the theory.

Justice Roper asked:

What does Dali mean by "soft self-portrait"? --- It is probably an indication of mood. It is not a technical term.

The judge then asked:

¹⁴³ Salvador Domingo Felipe Jacinto Dalí i Domènech, Marqués de Dalí de Púbol (1904-1989).

What is your opinion of the bronze of a young lady on page 68;¹⁴⁴ is that a portrait? --- I would have to see the original to be able in my own mind to know whether that is a portrait, but I can conceivably think it might be a work of art. ... I would have, on the whole, an open mind about it, because I would first of all ask the sculptor what he tried to do. I have a vague idea of what tried to do, but not an exact idea.

Barwick picked up on this theme.

You can judge whether it was a portrait with out seeing the artist and interrogating him? --- Sometimes. There are occasions when I might not be able to, because these are works of recent times. I am acquainted also with works of recent times, and I myself, living in our present world, have not the proper perspective to that work to be able to have a judgement. You must have a certain number of spiritual years between you and a work of art. This [work] is 1920. That would be 24 years, but this is still a modern work in this idiom. I would have to have a certain perspective to the work to be able to judge it. If I had not got that perspective, I would simply keep an open mind about it.

What is the perspective to the work that you want over a number of spiritual years to tell whether it is a portrait? --- I am too near to that idiom to be able to judge it.

What time would you take? --- I would take to the end of the year 1900, because a man does not feel competent to judge his own century, because you cannot see it in relation to all that came before. I cannot see that in relation to all that went before.

I was asking you to judge it as a work of art. His Honour asked was it a portrait? --- If I cannot answer: "Is it a work of art?" I cannot answer, "Is it a portrait?"

Barwick turned again for home, asking why Haefliger was able to be definite that the Dali painting was not a work of art, given it was only painted in 1932.

There are not many spiritual years between you and that. Why is it not a work of art? --- Because I do not feel that it is a good art. To me it is not a work of art.

But if I look at exhibit D [the Dobell painting of Joshua Smith] and it does not excite much feeling in me, it is not a work of art for me? --- It may not be for you, but then you have no informed opinion on the matter.

[Then] It is not a work of art? --- Not to you.

¹⁴⁴ It seems this was *Princess X* (1920) by Constantin Brâncuși (1876-1957).

There was a brief excursion to discuss Picasso's *Portrait of Dora Maar*,¹⁴⁵ about which Haefliger was cautious:

Are you able to say whether that is a work of art? --- I think, if I were able to know exactly what Picasso was driving at in this case, I might be able to pronounce it a work of art. I think it is conceivable it might be a portrait, but I will keep an open mind at present, but I can imagine it is a portrait.

Barwick ended his cross-examination asking:

What school does this [indicating exhibit D] belong to? --- I would say roughly that that is the Impressionist School. I don't know whether Mr Dobell cares what school it belongs to, but you would say that it belongs to the Impressionist School.

Of course this contradicted Haefliger's own evidence in chief that Dobell was an Expressionist painter. No one in the courtroom seemed to notice.

Douglas Robert Dundas

Dwyer's third witness was Douglas Dundas,¹⁴⁶ head teacher of life drawing and painting at the East Sydney Technical College.

Dundas' evidence in chief

Dwyer began with the definition of portrait painting.

Would you be good enough to tell his Honour what you comprehend and understand by portrait painting? --- If I am asked to make a precise definition of portrait painting, I would find it rather difficult.

Dwyer tried again:

Yes. Speaking as one who, by years of study and association with art and working as an artist, has knowledge of that branch of art – what is

¹⁴⁵ Picasso painted a number of paintings of Dora Marr (Theodora Markovic) (1907-1997), a photographer who was his muse from 1936 to 1945. These have been referred to as the "weeping woman" series. As Haefliger said the work was painted in the cubist idiom, it seems likely it was *Portrait of Dora Maar* (1937) or *Dora Maar du Chat* (1941).

¹⁴⁶ Douglas Robert Dundas MBE (1900-1981). Dundas later served as a trustee of the AGNSW (1948-1970). Dundas had studied in evening classes at the Julian Ashton Art School for five years. In 1927, he received the Society of Artists' travelling scholarship, allowing him to attend the Polytechnic School of Art, Regent Street in London and study in galleries in Paris, Italy and Belgium. He returned to Sydney in 1929, where his work was exhibited at the Macquarie Galleries. In 1931 he was appointed to the staff of the East Sydney Technical College.

portrait painting? --- Well I think that portraiture is a particular artist's serious interpretive impression of that particular person. ...

Dundas continued, at some considerable length, to speak "broadly" about "two different methods of approach to portrait painting"; one, the "light and shade method" derived from Velasquez and, indirectly in Australia from Raeburn;¹⁴⁷ and the other, the "drawing and construction" method, which he thought Dobell had taken.

After some time, Dwyer directed the witness to Dobell's painting. Initially, he asked Dundas to "tell us the type of portrait you see and what you consider to be its merits or demerits as a work of art". Barwick objected to the question. At the same time, Dundas asked that Exhibit D be turned more towards him, so that he could see it. This was done, but the witness then complained that there was too much light reflecting from the surface of the painting, so it was turned a little away from him. Barwick joked about whether the witness had seen the painting before, to which Dwyer objected, though it is difficult to identify the basis or reason.

When this little pantomime was over, Dwyer returned to his questioning.

What do you see in this painting? --- In this painting I see a likeness to Joshua Smith. I would say an unmistakable likeness. I see how the artist has produced an effective design within the limits of his canvas. ... The degree to which he has exaggerated is consistent throughout his portrait. The style is therefore complete.

Kitto had no questions for Dundas.

Dundas cross-examined by Barwick

Barwick questioned Dundas about the two methods of portraiture. He then focussed on his central proposition or case theory.

You could have a caricature that is an art form. So the art form does not distinguish caricature and portraiture. ... Now what does distinguish it in your mind? --- I would distinguish it in this way: that the caricature is

¹⁴⁷ Sir Henry Raeburn FRSE RSA (1756-1823). Between 1911 and 1935, the NGV had acquired four Raeburn portraits and, in 1917, a fifth work had been gifted to the gallery by John Henry Connell (1860-1953). Dundas said and "artists of the Melbourne School have been very much influenced in their portrait work by these paintings".

a superficial effect, which is based on a likeness. It exaggerates to the extreme certain superficial characteristics which the caricaturist has chosen to represent.

After the lunch adjournment, Barwick pressed onward.

Are you, by the way, a portraitist? --- Yes.¹⁴⁸

What are the limits of this exaggeration which are permissible in order to convey an idea of character? --- Those are different for each portraitist.

...

Would it be caricature for the competent man who sees in it a vulgar attempt to portray or to be hysteric at the expense of the sitter? --- I think that would depend on whether the person was informed.

... if ... an artistic well-informed person found in this picture, shall I say, an element of caricature... his views would be so different from mine that I could not decide.

....

You said that if exaggeration descended into the vulgar it would turn a portrait into a caricature? --- Yes.

If, in a portrait, an artist descended into the vulgar, according to you, but it was his own honest attempt to portray the sitter, would it be a portrait according to you? --- No.

Content with that answer, Barwick resumed his seat, anticipating the dénouement of the trial, the evidence and cross-examination of William Dobell.

William Dobell

In a crowded courtroom, Dobell spoke “in a soft voice which at times was almost inaudible.”¹⁴⁹ His evidence in chief was quite brief.

Dobell's evidence in chief

¹⁴⁸ In an interview with James Gleeson, recorded for the National Gallery of Australia on 10 August 1978, Dundas spoke about *Portrait of the artist's wife*, which he painted in 1942-44. Dundas had first painted his wife from life on canvas, but then created the second work

“entirely without her on the spot, working into a kind of colour scheme in which the flesh was rather more golden or yellowish than in the other one; less factual in terms of flesh tones, at any rate. Here I think I must have been influenced by what Bill Dobell was doing at the time, you know, where he used to see something that interested him and paint a picture from it without the model in front of him. So this was an experiment in that direction.”

¹⁴⁹ “Portrait ‘In Rembrandt Tradition’ – William Dobell Explains His Work”, Courier Mail, 26 October 1944.

He began with evidence of his background. He had trained as an architect. At age 24, he began four years of study of painting at the Julian Ashton Art School. In 1929 he won a travelling scholarship and enrolled at the Slade School¹⁵⁰ at London University.¹⁵¹ Dobell exhibited his work at the Royal Academy in 1933.

He remained in England for ten years and returned to Australia in 1939.

Dwyer asked:

Your entry for the Archibald prize –was that a serious work of painting as far as you were concerned? --- Well, I would not have exhibited it otherwise.

Dwyer then had Dobell explain how he had developed the painting. He liked to know his sitter for at least three months before attempting to make studies for paintings of them. He had known Smith well for more than 12 months. In that time he had noted Smith had “a determination which amounted to stubbornness.”

Dobell said:

Joshua has a habit, when he is very determined to gain his point, of sitting very erect and saying, “I will go to Curtin if necessary”, to get his point. He is a very determined person, and I admire him for it, and I tried to show that.

Dwyer asked:

To what extent did you endeavour to obtain in your portrait a resemblance to the physical appearance of Mr Smith? --- I think that was my whole job – 90% of my job, as well as producing a work of art. I think I did get a likeness of Joshua.

Finally, Dwyer asked about Dobell’s view of his own work.

What particular influences do you tell his Honour are manifested in your painting of Joshua Smith? --- My particular love in the art, as you may put it, is Rembrandt. I studied his methods in Holland and in London. I have had a close acquaintance with them ... I mean not copying his brush strokes or his technique, or anything like that – but his aims.

¹⁵⁰ The Slade was founded in 1871 with a bequest to University College London from Felix Joseph Slade FRA (1788-1868) to fund a chair and six student scholarships for a fine art school within a liberal arts university.

¹⁵¹ There he studied drafting under Henry Tonks FRCS (1862-1937) and painting under Philip Wilson Steer OM (1860-1942). At the Slade, Dobell was awarded the second prize for draftsmanship and the first prize for figure painting. He also had private drawing classes with Sir William Newenham Montague Orpen KBE RA RHA (1878-1931).

We have heard various expressions of opinion put forward as to how you would judge your own work. Is it modern work or academic in your opinion? --- I would say classic tradition. I do not like the word “academic” as applied to a great artist like Rembrandt.

But in one of the London art journals you are described as an academic worker - in the *Art News*, and in an American publication in 1941? --- Yes. I was not called a modernist until I came to Australia. In London I was regarded amongst artists and art students as academic.

And I take it that you do not regard yourself as a modernist - in the sense that it has been used here in these discussions? --- No, definitely. No. I would prefer to say an artist.

Dwyer tried to ask Dobell about Joshua Smith’s comments when the painting was finished, but Barwick objected and Dwyer sat down.

Dobell cross-examined by Barwick

At this point, Barwick took up his cross-examination, starting with the topic of design:

You say that the elongation or the exaggeration of arms, to whatever extent, is also part of that design? --- Yes, and to stress elongated and on the arms you will notice that I have tightened the sleeves, so that probably you could get a tailor along here to criticise that too. But I tightened the sleeves to give a further impression of the elongation of those arms. You will notice that the arms are not unduly long; it is the tightening of the sleeves that gives that effect.

The exchange then moved to the character shown by these features of the painting. Dobell said it was “angularity”.

You mean angularity of his physical person? --- Yes. By the way, might I make a statement?

No; answer my questions, if you will. You felt that you could not paint Smith as he appears objectively, faithfully and portray angularity of his physical character? --- I painted Mr Smith as he appears.

...

First of all, is it correct that he was like that when you painted him? --- He had that physical appearance – the way that he appeared to me, and with the license that I as an artist can claim–

If you painted him objectively, faithfully would you have conveyed that he was thin and angular without reducing the girth of the arms and tightening sleeves? --- I painted the man faithfully – in my faith for my work and my model.

Listen to my question. Could you have painted him objectively and have conveyed to the viewer that he was thin and angular in physical appearance? ...

Could you have done it without exaggeration and all these other things? --- I would not use the word exaggeration to that extent. I would say without designing my picture.

Could you have done it without what you choose to call “designing your picture”? --- Yes.

...

You do not call that representative of the physical presence of Joshua Smith, do you? --- ...

... --- Yes and no.

Which do you prefer, yes or no? ... do you call that a physical representation of the physical appearance of Joshua Smith? --- I would say 90%.

That is 90% physically, an objective representation, as it were, of Joshua Smith? --- Yes.

Perhaps after pausing for effect, Barwick proceeded to ask Dobell about each element of the physical composition of Smith in the painting: the mouth, ears, the shape of the head, the nose and the length of the neck.

Dobell thought most of these to be objectively faithful, but admitted the neck was elongated. He reacted to Barwick’s intense scrutiny at this point:

... you are taking it bit by bit and I am taking it as a picture. I might just as well criticise the conduct of your case by the angle of your big wig as for you to take individual things like that.

Barwick moved to another line of attack.

You were not attempting to paint a portrait along any of accepted lines of portraiture when you were painting this? ... --- I was not *trying* to paint in the tradition, but I definitely was.

Do you tell us that this is in the tradition of Rembrandt? --- I like to think so, yes.

...

I want you to just listen to this question: Will you tell us that exhibit D represents an attempt by you to paint Joshua Smith's physical presence?
--- As I knew it, yes.

As you saw it? --- As I knew it.

But he was sitting in front of you?

Dwyer objected that the question had been asked and answered. Justice Roper remarked: "You must attribute to your client the degree of intelligence which he appears to be exhibiting." This drew applause from back in the courtroom. The objection was not allowed.

Barwick continued:

It is very simple, as he sat before you did he physically appear to your eyes as he appears now on that canvas, that is the question? --- On what occasion?

On any occasion? --- He sat many times.

I don't care if he sat fifty times, did he, on any time sitting before you, appear to your eyes physically as he appears on that canvas now? --- It is not necessary--

I did not asking that, I asked you did he? --- Yes, within those limits that I have already mentioned. You cannot answer a question like that yes or no, not an artistic point of art.

Leave the art out for the moment? --- You cannot leave art out.

At this point, Dwyer rose again, asking that the witness be treated with "elementary fairness." Justice Roper said that the witness had answered the question.

Barwick returned to the question of whether Joshua Smith ever looked in person as he was depicted in the painting. Dobell sought to avoid it, by answering that Smith looked like that "summarily" and that "If I had wanted to I could have taken a camera." Barwick persisted:

I am asking a simple question: as he sat before you, did he physically appear to your eyes in the proportions and appearances that he now has on that canvas? --- Just to my eyes?

Yes? --- Would I say, possibly no?

Why only possibly no? --- I say possibly no.

Can't you answer it definitely no? --- Well, I will say no to [my] eyes.

This began another struggle between Barwick and Dobell over language: "appearance", "physically", "representation", "traditional portraiture" and other expressions.

You do not agree with the many witnesses here who put the explanation of this picture on grounds other than traditional portraiture? --- I certainly do not agree with them.

...

Do you say that that face is an attempt by you to represent his precise proportions? ...

...

... --- That is a very wide thing. You can take 95% of the Archibald pictures and I will guarantee that not 10% are faithful representations of proportions.

That may be because of deficiencies in the artists and some of them might not be able to draw? --- Wouldn't you allow me a deficiency?

Is that what you want to say: that you attempted to draw precise proportions in that face and failed? --- No, I did not *attempt*.

Barwick had a copy of an *ABC Weekly* report of a broadcast talk by Dobell.¹⁵²

He asked:

You hold, do you not, that your function in painting a portrait is to create something regardless of the subject? --- I said that in a broadcast statement.

...

Did you believe it when you said it? --- No.

¹⁵² "Artist replies to portrait critics", *ABC Weekly*, 19 February 1944, p 7.

So you have broadcast something which you did not believe? --- At the time, no. Would you allow me to say something?

Is that what you said in relation to this very exhibit "to me a sincere artist is not one who makes the faithful attempt to put on canvas what is in front of him"? --- Yes, I remember saying that.

Did you believe it when you said it? --- No.

Do you believe it now? --- No, I don't.

Barwick pressed Dobell again about whether his broadcast comments applied to portraiture. Dobell avoided directly answering these questions, saying that his views applied to art generally. Finally Barwick cornered the witness in this way:

In February 1944, did you believe what I had read to you? I will read it again if you'd like? --- No, I know what it is.

Did you believe that, in respect of a portrait? --- No, I honestly did not.

...

I suppose you realise that, if you once concede that you were trying in this painting to create something which was an living thing in itself regardless of its subject, you may be in some difficulty in this case? --- I realise that.

Have you had your attention call by anyone to what you said in February, since you said it? --- I have noticed it myself.

...

So the position is that what you said in February as being your view, you now say was untrue? --- I already have admitted that.

...

Well, excluding Mr Dundas, [your] other witnesses and the two witnesses for the defendant trustees sought to justify the exhibit on the footing that the artist was untrammelled. You heard them, did you? --- Yes, but I didn't say it.

But you say that the exhibit is not to be justified on that basis? --- I say, as before, that you should have at least 90% of the physical traits of the sitter.

Say that, to be a portrait, 90% should be of a straight or of a physical likeness of the sitter? --- Physical characterisation of the sitter.

...

The judge asked:

When you answered the question as to physical likeness by “physical characterisation”, did you mean physical likeness? --- Well, I meant the rule of the tape measure.

Barwick continued:

No, but you understand what one means by physical likeness? --- Yes.

And when you say 90%, you mean 90% of physical likeness? --- Yes.

Barwick resumed his seat.¹⁵³

The artist James Gleeson,¹⁵⁴ who sat through the trial, thought Barwick’s cross-examination of Dobell was “ferocious”.

It was tough without concern for Dobell’s fragility, but it was perhaps an habitual toughness. It was not so deliberately cruel – the quality that is most apparent in it is a cold literalness.

The end of the evidence

That closed Dobell’s case.

Barwick called no evidence in reply. The trial was adjourned until the next day.

Although he had been asked to stand in the well of the court and then to sit in a chair next to Dobell’s work, while various witnesses were asked questions about him and the painting, none of the parties called Joshua Smith as a witness.

Addresses

Counsel’s addresses occupied the whole of the fourth day of the trial. As is usual, the transcript of the trial does not include any of the addresses. The comments below are based on the reports in the daily newspapers by journalists who were

¹⁵³ Dwyer then called for the *ABC Weekly* article on which Barwick had cross-examined and it was tendered as Exhibit 7.

¹⁵⁴ James Timothy Gleeson (1915-2008)

avidly following events in the courtroom and on the points of argument identified by Justice Roper in his judgment.

Barwick's address

Barwick accepted that a passage from *Godefroi on Trusts and Trustees* correctly stated the law:

A personal trust or discretion involving a matter of opinion or judgment will not be interfered with, unless a fraudulent or mischievous exercise of it takes place or is contemplated.¹⁵⁵

No fraud was alleged. So Barwick's argument began (and ended) with the definition of the word "portrait". To succeed he had to persuade the Court that Dobell's painting was not a portrait.

He submitted the word "portrait" connoted essentially a likeness to the physical presence of an actual person, and it involved the idea of a record.

The late J F Archibald did not want posterity to have Mr Dobell's view of somebody, but a record to which they could turn to know what the great of these days looked like ...

It is idle to say that portraiture and caricature are synonymous. Caricature does not merely reside in the intention of the author of the work. It might reside in the results because of distortion, overloading or the didactic quality of the work.

...

Justice Roper asked:

You aren't suggesting that if Mr Dundas's landscape for the Wynne Prize had been accidentally labelled "for the Archibald exhibit" it would have had to be hung?

Barwick answered:

Yes. There are no limits to the principle once you have opened the door.

In addition to the definitions, Barwick relied on the expert evidence of MacDonald and Young that the painting was not a portrait. Dr Benjafield had

¹⁵⁵ Williams, Sydney Edward, *Godefroi on Trusts and Trustees* 5th edition, p 244.

pointed out what the Judge could himself observe, that the painting was anatomically unsound and beyond what could be described as a likeness of Joshua Smith. As a matter of classification, it was a caricature and not a portrait.

Kitto's address

For Kitto, appearing for the trustees, there were several problems. He could not cavil with Barwick's submission that the painting contained much exaggeration and distortion. He needed to undermine the opinion evidence of Barwick's experts and he needed to ensure the Court was happy to stretch the meaning of portrait far enough to encompass the trustees' choice.

Kitto turned first to a safe point, taking the judge to the Archibald will.

The late Mr Archibald had provided for an annual prize to be awarded by the trustees for the best portrait painted during the 12 months preceding the award. That it must be for the best portrait in the opinion of the trustees is plain.

It is obvious that the award of the prize for any painting would cause dispute among various people, but it is obvious also that there has to be some body of persons forming a tribunal with authority to say "Yea" or "Nay". In appointing the trustees of the gallery to be the judges in the competition, Mr Archibald knew that they were members of a changing body and knew also that appointments as trustees might be made to admirers of modernist painting.

The only basis on which the court could interfere with the trustees was that their decision was not *bona fide*. The plaintiffs did not suggest that the trustees were lacking in good faith. So it might well be that the Court, without consideration evidence at all, would dismiss the suit.

If, on the other hand, it had to be shown that the painting of Joshua Smith was something which could not be regarded as a portrait, the evidence had shown that it was impossible to give such a close definition of the word as would permit one to say whether the painting was a portrait or not.

Kitto knew the qualifications and experience of MacDonald and Young were really unimpeachable. Unlike Dwyer, he had not sought to do so in his cross-examination. Kitto's attack was different, if a little parochial. He noted that only two witnesses had been called to support the claim and "one had been brought all the way from Melbourne."

Echoing a sentiment I am sure is shared by members of the Queensland bench, his Honour retorted:

We can't have all the experts available.

Turning to the specific witnesses, Kitto submitted that Mr MacDonald had

already committed himself in public controversy to a most trenchant view without seeing the picture other than in press photographs. His mental processes were not free when it came to considering the portrait itself.

Justice Roper commented that, on seeing it, MacDonald might have found the painting was worse than he expected from the photographs.

Kitto then concentrated on how the experts had formed their opinions. He “boiled down” the experts’ thought processes to two propositions: first that Dobell had gone beyond the proprieties of the relationship of artist and sitter, thereby caused offence to the right-minded expert. This was a way of making sense of Young’s evidence about the 50-50 contributions of artist and sitter. Secondly, Kitto urged the judge to find that the true source of the experts’ opinions that the painting was not a “portrait” was their views that it was not “good” portrait.

Dwyer's address

Dwyer began an attack on the originators of the suit:

The initiation of these proceedings is at once a disgrace to Australian sportsmanship ...

Justice Roper immediately interrupted:

That does not help your legal argument very much.

Dwyer persisted:

I resent this action of Miss Edwards and Mr Wolinski and I say so publicly. When one tries to come to grips with the plaintiffs’ case it is most difficult to find on what grounds they can rely.

His Honour did also:

Does it affect the results that the case was brought out of spite or out of high-souled ideals of maintaining the standards of Australian art?

Dwyer retreated:

I appreciate that the case will be decided on matters of law and if I have transgressed your Honour will understand nature of the case.

He continued:

The court has been asked to find that the picture is not a portrait at all, but why should such a finding be substituted for the verdict of the trustees? Matters pertaining to art are essentially matters of artistic opinion. Throughout the history of art there have been instances of contemporary criticism of the most stringent and trenchant kind.

Barwick's reply

In reply to Dwyer's rather personal remarks about his clients, Barwick noted:

Your Honour will remember that there was a runner-up for the Archibald prize. If the award made by trustees were set aside, the prize would naturally go to the runner-up's painting.

It was not necessary for Barwick to say that the runner-up was not a work by Edwards or Wolinski, but Joshua Smith's portrait of Mary Gilmore.

Justice Roper reserved his decision.

Judgment of Roper J

On 8 November 1944, he delivered his judgement dismissing the suit and published his reasons for doing so.¹⁵⁶

First, his Honour found:

the question of whether any competing picture is a portrait is as much a matter upon which the judgment of the trustees is invoked as is that of whether it is the best portrait.

Next, his Honour noted that:

¹⁵⁶ *Attorney-General v Trustees of National Art Gallery of NSW & Anor* (1945) 62 WN (NSW) 212.

The same principles of law apply to the decision of the trustees on each of these questions, and in my view the decision of the trustees, that a particular picture is qualified to enter into the competition as being a portrait, is only open to attack upon the grounds that it is not a *bona fide* decision ...

As there was no allegation of fraudulent conduct, as in the trustees deliberately departing from the terms of the trust or that the trustees themselves did not believe the painting to be a portrait, his Honour proceeded on the basis that:

before this Court should interfere in the administration of the trust it must be satisfied that as a matter of objective fact and not of mere opinion the picture is not a portrait, so that the opinion formed by the trustees to the contrary is founded on a wrong basis of fact and is not truly an opinion upon the question to which the minds of the trustees should have been directed.

His Honour was not so satisfied because:

The evidence is overwhelming, in my opinion, that at least there is a proper basis for forming an intelligent opinion that the picture in question is a portrait.

This was enough to dispose of the informants' claim. However:

Having heard the evidence of eight persons, all highly qualified to express an opinion on the meaning of the word as it is understood by artists, I am satisfied that it has not among artists a technical meaning different from its meaning as an ordinary English word in current use among laymen.¹⁵⁷

It followed that the evidence of each of the experts as to the meaning of portrait was irrelevant opinion. Assisted by the dictionaries and other works to which Counsel had made reference, his Honour found that:

The word "portrait" as used in the will ... means a pictorial representation of a person, painted by an artist. This definition denotes some degree of likeness is essential and for the purpose of achieving it the inclusion of the face of the subject is desirable and perhaps also essential.

¹⁵⁷ His Honour also found that even if it had a technical meaning, it had not been shown that Archibald was a member of the class of persons that used the word in the technical sense.

Turning to the Dobell painting, his Honour noted it is “characterised by some startling exaggeration and distortion”, which was “clearly intended by the artist, his technique being too brilliant to admit of any other conclusion.”

It bears, nevertheless, a strong degree of likeness to the subject and is I think, undoubtedly, a pictorial representation of him. I find as a fact that it is a portrait, within the meaning of the word in the Will, and consequently the trustees did not err in admitting it to the competition.

His Honour accepted Kitto’s submission that the informants’ witnesses MacDonald and Young “whose competency to express opinions in the realm of art is very great” were led into expressing opinions that it was not a portrait because of their strong views against the work as “bad”, as exceeding “the limits of good taste imposed by the relationship of artist and sitter”; so that

they have come to regard as essential to a portrait characteristics which, on a proper analysis of their opinions, are really only essential to what they consider to be good portraiture.

Finally, Justice Roper found it unnecessary to consider whether the painting was a “caricature” or a “fantasy”.

If it could be so classed it would only establish to my mind that the fields are not mutually exclusive, because in my opinion it is in any event properly classed as a portrait.

The suit was dismissed and the relators, Edwards and Wolinski, ordered to pay the defendants’ costs.

The appeal

Following the decree, Edwards and Wolinski lodged an appeal to the High Court; a step then available.

In March 1945 the Solicitor General directed the discontinuance of the appeal, which stood formally in the Attorney’s name. Harding and Breden, the solicitors

for Edwards and Wolinski, wrote to the Crown Solicitor stating that Barwick had advised “they had reasonably good prospects of success on the appeal.”¹⁵⁸

In his 1995 memoir, Barwick listed the Dobell case as one of his three major public failures as an advocate; the others being the defence of the *Communist Party Suppression Act* and the case for CSR in the Privy Council over unimproved land valuation in Fiji. Barwick regretted the loss of the opportunity to obtain some vindication on appeal.¹⁵⁹

Dobell after the case

Before the trial began, Dobell had been appointed a trustee of the Gallery. This had the effect of disqualifying him from entering the Archibald competition for the next two years. However, it made him one of the judges who awarded the 1944 Archibald Prize to Joshua Smith for his portrait of John Solomon Rosevaar, the then Speaker of the House of Representatives.

The court case had a dramatic effect on Dobell’s health. He developed a severe dermatitis; the skin would peel off his whole body every few days. His left eye was also affected. In common parlance, he suffered a nervous breakdown. He retreated to Wangi Wangi, on eastern shore of Lake Macquarie to be cared for by his sister. This malaise lasted until about mid-1948. Ironically, at about this time the popular press caught up with the story. *Smith’s Weekly* led with a front-page story: “THE DOBELL MYSTERY For Australian Art, A Tragedy”.

Dobell saw the banner headline on a visit to the village shop for groceries. He told his sister, “Look, this is worth £1000 publicity for me, I’m going back to Sydney tomorrow.”¹⁶⁰

Dobell did return to Sydney in July 1948. He attended a party at Lynne and Russell Drysdale’s home. There he met the young artist Margaret Olley,¹⁶¹ wearing her “duchess dress” made of white parachute silk and mosquito netting.

¹⁵⁸ “Dobell Prize to Stay - Appeal Cancelled By Crown”, SMH Saturday 3 March 1945, p 4.

¹⁵⁹ op cit Barwick, *A Radical Tory*, p 48.

¹⁶⁰ Bevan, Scott, Bill: *The Life of William Dobell*, Simon & Schuster Australia, 2014.

¹⁶¹ Margaret Hannah Olley AC (1923-2011).

Dobell and Olley left the party together and he took the opportunity to ask if she would sit for a portrait. Olley agreed. Although she sat for him in a day dress and hat, Dobell remembered the party dress. The result was Dobell's remarkable portrait of the 25-year-old Queensland artist, for which he was awarded the 1948 Archibald Prize.¹⁶²

In 1949, Dobell sold the portrait of Joshua Smith to Adelaide businessman and art collector Sir Edward Hayward.¹⁶³ It was hung in his home in Adelaide, until a fire in 1958 largely destroyed the residence and with it the painting. Hayward sent the charred canvas to Dobell, asking if he would restore it. Dobell declined, saying it was beyond hope.

Dobell would win the prize a third time for his 1959 portrait of Dr Edward MacMahon.¹⁶⁴ In 1957 Dobell had been diagnosed with bowel cancer. MacMahon, a leading Sydney surgeon, performed two difficult operations on Dobell in early 1958, successfully removing the cancer. The portrait was painted as a token of gratitude.¹⁶⁵

Dobell's reputation was further enhanced by Bernard Smith's classic study *Australian painting: 1788-1960*, from which he undoubtedly emerges as the "hero". However, Dobell's traditional, figurative approach, not only in portraits but also in landscapes, left him out of the gathering fashion for abstract works. The young Robert Hughes wrote of Dobell

¹⁶² Another entrant in the competition Sidney Nolan (1917-1992) thought, "In spite of the weaknesses in his painting it stood out from the others a long way." Letter to Albert Tucker 25 February 1949, published in *Nolan on Nolan* (ed) Underhill, Nancy, Penguin 2007. Nora Heysen wrote to her parents on 18 March 1949, after seeing the exhibition, "of course Dobell's portrait eclipsed everything else. It is painted in a high key with a lot of cadmium making the canvasses around it look like mud pies." Speck, Catherine (ed), *Selected Letters of Hans Heysen and Nora Heysen* National Library of Australia, Canberra 2011, pp 189.

¹⁶³ Sir Edward Waterfield (Bill) Hayward (1903-1983), best known as the owner/manager of the James Martin department stores. See: "Prize Painting By Dobell Sold To Art Collector", SMH Wednesday 26 October 1949, p 3.

¹⁶⁴ Dr Edward Gerard MacMahon CBE FRCS (1904-1987).

¹⁶⁵ 'Dr MacMahon is an enormous person. I owe everything to him': see Engledow, Sarah "Bill and Ted's excellent portrait", *National Portrait Gallery Magazine*, 9 March 2016. Dobell also painted a landscape of Wangi Wangi for Dr Noel Curtis Newton (1917-1974), who assisted MacMahon in the operations: <http://www.dobellhouse.org.au/history.htm>

no living Australian painter has been so grotesquely over-praised ... an occasionally interesting, but always a minor eclectic, with his small output of uneven quality.¹⁶⁶

After Dobell's death in 1972, Hayward sent the burnt canvas of *Portrait of Joshua Smith* to Kenneth Malcolm, an art restorer at the National Gallery in London. There it was "re-painted" with the assistance of photographs.¹⁶⁷ Although widely disparaged, the painting sold for \$222,500 at auction in Melbourne in 1998.

More Archibald controversies

1975 John Bloomfield's portrait of Tim Burstall

The 1975 Archibald prize, awarded in January 1976 to John Bloomfield¹⁶⁸ for his portrait of the film director Tim Burstall,¹⁶⁹ was re-judged in February 1976 and awarded to Kevin Connor¹⁷⁰ for his portrait of Sir Frank Kitto. The trustees resolved to act in this way because they considered Bloomfield's work to be ineligible, as it was not painted from life. He had painted the (initially) winning work from a colour photograph that had appeared in a magazine. Bloomfield had not taken the photograph and had never met his subject Burstall.

In 1981, Bloomfield threatened legal action, claiming that the winner that year, Eric Smith,¹⁷¹ had not painted his subject, Rudy Komon,¹⁷² from life. The trustees did not budge.

In 1982, Bloomfield did sue, not to overturn Eric Smith's award, but for the return of the 1975 prize. In September 1983, Justice Helsham,¹⁷³ chief justice in equity,

¹⁶⁶ *The Art of Australia*, Harmondsworth, 1966, pp 182-183.

¹⁶⁷ Hayward gave the restored work to his cousin Sir Jock Pagan (1914-1986), then NSW Agent-General in London. With him it returned to Sydney and for many years was hung in the dining room of Lady Pagan (1923-2015).

¹⁶⁸ John Bloomfield (1950-).

¹⁶⁹ Timothy Burstall AM (1927-2004).

¹⁷⁰ Kevin O'Connor (1932-). He is the son-in-law of Kitto. O'Connor would win the Archibald again in 1977 for a portrait of the sculptor Robert Kippel AO (1920-2001). In contrast to Dobell, O'Connor was an Expressionist painter, in the tradition of Edvard Munch and Max Beckmann, at least in the 1970's when he won the Archibald prizes: *James Gleeson Interviews: Kevin O'Connor 12 June 1979*, NGA.

¹⁷¹ Eric John Smith (1919-) has won the Archibald prize three times (1970, 1981 and 1982), the Sir John Sulman prize three times (1953, 1973 and 2003), the Wynne prize twice (1972 and 1974) and the Blake prize six times (1953, 1956, 1958, 1959, 1962, 1969 and 1970).

¹⁷² Rudolph John (Rudy) Komon (1908-1982), art dealer, gallery owner. In 2003, a new upper level exhibition space at the AGNSW was named the "Rudy Komon Gallery".

found that the word “portrait” as used in Archibald’s will had the same meaning as in contemporary times, namely “a picture of a person painted from life.”¹⁷⁴

If the testator did not use the word "portrait" in what I call its conventional sense, ie involving the notion "from the life", then the painting could be of any Australian, alive or dead, preferentially someone distinguished in Art, letters, science or politics, provided it was painted in the preceding twelve months. If portrait involves the notion "from a photograph", then the range of subjects cannot be limited to those living at the time the portrait was painted.

Now the impression that I get from the annual recurrent nature of the bequest is that the testator intended the subjects of the paintings to be contemporary subjects, persons distinguished in the field of Arts, letters, science or politics whose names would be likely to be known and features perhaps recognised by all those likely to be interested in the competition and the prize, perhaps displayed among other entries. The whole idea of the testator seems to have been to give the competition a contemporary ring, an annual event calculated to be of interest or importance because the subjects are likely to be well known in association with artistic works of merit. And if this be so, then I think the competition requires portraits from the life. If you allow the photograph, then you cannot exclude the dead dignitary — if the picture was painted during the preceding twelve months it could not be excluded, no matter how dead the subject. Contemporaneity could not be ensured. But I think it was intended to be.

This is only another way of saying that the impression I get is that the word "portrait" when used in the context here under scrutiny includes the notion from the life.

If an artist makes use of a photograph or photographs in painting a picture of a person from life, then whether that painting is a portrait may be a question of degree. That is not the case here. A mere imitation or reproduction of what somebody else using a camera has recorded is not a painting "from the life", no matter how alive the subject may be.¹⁷⁵

1997 Evert Ploeg’s portrait of Bananas in Pyjamas

This was not the end of controversy. In 1997 the painting of the Bananas in Pyjamas television characters by Evert Ploeg was deemed ineligible by the trustees because it was not a painting of a person.

¹⁷³ Hon Michael Manifold Helsham AO DFC RFD QC BA LLB (Hons) (1921-2002).

¹⁷⁴ *Bloomfield v Art Gallery of New South Wales Trust* (unreported) NSWSC Eq Div No 1463 of 1982 (23 September 1983); BC8311418.

¹⁷⁵ *ibid*, p4.

2004 Craig Ruddy's portrait of David Gulpilil

In 2004, the winning work *Two Worlds – Portrait of David Gulpilil*¹⁷⁶ by Craig Ruddy¹⁷⁷ was challenged by fellow artist Tony Johansen,¹⁷⁸ on the basis that it was a charcoal drawing rather than a painting. At the trial in the Supreme Court of New South Wales, as in *Dobell's* case, the parties called expert evidence¹⁷⁹ about the meaning of “painting” and whether Ruddy’s work was a painting. Justice Hamilton dismissed the claim in June 2006.¹⁸⁰ His Honour considered and affirmed the reasoning of Justice Roper and, by analogy, concluded that:

minds may well differ as to whether, if the picture must be placed in a single category, that category should be “painting” or “drawing”. But, in view of those matters, I find it impossible on any objective basis to exclude the portrait from the category of a work which has been “painted”, which is the real issue here.

...

Because of my conclusion that the portrait cannot be excluded from the category of a work which has been “painted”, it cannot be said that the trustee’s exercise of judgment or opinion was wrong or that it is established that it was a breach of trust for the trustee to proceed in accordance with that judgment or opinion. This means that, as in the *Dobell* case, the Court is not required to interfere with the trustee’s determination. As in that case, that is sufficient to doom the plaintiff’s case to failure.

Roper J in that case continued to make his own finding of fact, namely, that the picture was a portrait. In this case, I do not intend to proceed to a judicial finding of fact as to whether or not the work is “painted”. I have already commented that there is a certain appearance of strangeness in courts making determinations concerning the qualities of works of art. That matter is better left to those involved in the art world, including the persons involved in the control and administration of the first defendant, or, for that matter to any “intelligent” viewer, using the word “intelligent” in the manner in which it was employed by Roper J.

¹⁷⁶ David Gulpilil Ridjimiraril Dalaithngi AM (1953-), actor.

¹⁷⁷ Craig Ruddy (1968-)

¹⁷⁸ Tony Don Johansen (1967-)

¹⁷⁹ Michael Sourgnes, a curator, art consultant and valuer, gave evidence for Johansen; and Betty Churcher (Elizabeth Ann Dewar Churcher AO 1931-2015), former curator of the NGA, did so for the trustees.

¹⁸⁰ *Johansen v Art Gallery of NSW Trust* [2006] NSWSC 577.

Since a judicial finding on this subject matter is not necessary for the determination of the proceedings, I think it better not made.¹⁸¹

Looking back on Dobell's case

Although much of his evidence appeared muddled, Haefliger may have been correct about one thing. It is easier to make judgments about artistic work with the perspective afforded by the passage of time. Looking back today, it is clear that Haefliger was wrong to describe Dobell's portrait of Joshua Smith as an expressionist work. Viewed in the context of the expressionist works of Charles Blackman, Joy Hester, John Percival and Albert Tucker, Dobell is a realist painter. Dobell was not, nor did he ever claim to be a modernist. His work was innovative, but in the classical tradition.¹⁸²

The trial took place near the very dawn of abstract expressionism, which came to dominate international aesthetic attention through the 1950's. As a mainstream fashion, it was followed, in succession, by post-painterly abstraction and pop art, minimalism and photo-realism, then conceptualism, mixed-media, photo-texts, theoretical art, etc. By the early 1970's it was common in progressive circles to speak of "the death of painting".¹⁸³ In the language of Peter Fuller, art theorists and critics were indifferent to whether a work of art stood in *any* kind of relationship to truth.¹⁸⁴ The human image in painting, like tonality in music, metre in poetry - and other ways in which art had opened its arms to normal humanity - were rejected.¹⁸⁵

In that period, the annual Archibald winners, including Dobell's paintings, often looked decidedly old-fashioned. Even the most exotic seemed not to accord with whatever was the then predominant wave of artistic fashion. Now, with what Haefliger called perspective, the annual Archibald selections stand up as a fair array of the leading Australian painters of those years.

¹⁸¹ *ibid*, [29], [31], [32].

¹⁸² Harold Missingham AO (1906-1994), AGNSW Director 1945-1971, quoted in Hawley, Janet "A portrait in pain", SMH 16 September 2014.

¹⁸³ Fuller, Peter, "Aesthetics after Modernism", John Power Lecture in Contemporary Art, 5 April 1982, published in Fuller, Peter *The Australian Scapegoat*, UWA Press, Perth 1986.

¹⁸⁴ Peter Michael Fuller (1947-1990), *Theoria: Art and the Absence of Grace*, Chatto & Windus, London 1988, p 234.

¹⁸⁵ Scruton, Roger, "Avant-garde and Kitsch" in *An Intelligent Person's Guide to Modern Culture*, St Augustine's Press, South Bend Indiana, 2000, p 85.

Since the mid-1970's, in the broader art sphere there has been a return to traditional artistic values, so to speak, individual creativity, accountability and quality. In that time, the Archibald stream has continued to flow. Each year it attracts substantial public interest and draws the attention of leading artists ambitious “to deserve, to acquire and to enjoy the [public’s] respect and admiration”.¹⁸⁶

Many years after the trial, the relation between artist, artwork and viewer and the tension between accurate imitation and creative expression were addressed by John Berger¹⁸⁷ in his influential essay, *The White Bird*:

The notion that art is the mirror of nature is one that only appeals in periods of scepticism. Art does not imitate nature; it imitates a creation, sometimes to propose an alternative world, sometimes simply to amplify, to confirm, to make social the brief hope offered by nature. Art is an organised response to what nature allows us to glimpse occasionally. Art sets out to transform the potential recognition into an unceasing one.¹⁸⁸

The relationship between artist and sitter can now be seen, perhaps more objectively, in each of the winning works. Perhaps, in some years the trustees have allowed the fish more line to run, but over-all and indeed in each year, they have managed to catch a remarkable artistic record of a person “distinguished in the Arts Letters Science or Politics”, just as Archibald intended.

¹⁸⁶ Smith, Adam, *The Theory of Moral Sentiments* (6th ed) London 1790, I, iii, 2 p 54.

¹⁸⁷ John Peter Berger (1926-).

¹⁸⁸ *The White Bird*, London, 1985, pp 8-9; republished in *Why Look at Animals*, Penguin 2009, pp 217-218.