PLATE XXVI

ARNOLD DUNCAN McNAIR

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1885–1975

ARNOLD DUNCAN, Lord McNair of Gleniffer, LL.D., C.B.E., Q.C., F.B.A. who died at the age of 90 in May 1975, was the son of John McNair (a member of Lloyds) and Jeanie Ballantine. He was educated at Sutton Preparatory School, and at Aldenham School under the Revd. A. H. Cooke. He entered Gonville & Caius College in October 1906 and was President of the Union in 1909. The College was the centre of his life work even though much of it was spent away from Cambridge. He married in 1912 Marjorie, daughter of Mr. Justice Bailhache; they had four children, a son John who succeeded to the title and three daughters. Lady McNair died in 1971. He was elected to his Fellowship in 1913 and became a Life Fellow in 1937 after holding the Senior Tutorship and the Whewell Chair of Public International Law in the University.

The Times heading of his obituary notice styled him a distinguished and versatile legal figure and described his personality as attractive and impressive as his intellect.

His versatility ranged from practice as a solicitor (until 1913), law teaching, authorship of law books, membership (and often chairman) of a large number of public bodies, particularly in relation to the coal industry and the teaching profession, Vice-Chancellor of Liverpool University, and above all, in the field of public international law as a member of the Bar, a Bencher of Gray's Inn and its Treasurer 1947, as a University teacher, and as Judge (1946–55) and President (1952–5) of the Court of International Justice at The Hague and of the European Court of Human Rights at Strasbourg; of the latter he was the first President (1959–65).

There have been published several memoirs of Lord McNair since his death; ten years earlier there came the volume of essays written in his honour on the occasion of his 80th birthday.

Notable contributions came from the present holder of the Whewell Chair (R. Y. Jennings) in the *Cambridge Law Journal*, November 1975, on McNair as a Cambridge don and from Sir Gerald Fitzmaurice (in the *Caius College Record* for 1975). Both also wrote in the volume of essays; the latter dealing, as then himself a judge of the International Court of Justice, with

judicial innovations in international law as applied by that Court during McNair's judgeship (1946–55).

It is difficult as one who was his colleague as a Fellow at Caius for forty-four years not to repeat much that has been written in the honoured memory of one who was his tutor, his teacher, and his life-long friend. One can simply say that contact with him has always influenced the writer; time served only to increase the realization of a distinguished man's achievements and the value of his advice so often sought and always given generously and lucidly. Some of his old pupils have felt that the many obituary notices failed to stress how human he was and ready to help all who sought his advice as pupils and often long after in later life. He was able to look at questions from points of view other than his own, although as a person his was, to quote one of the closest relatives, 'a factual, practical and analytical rather than an imaginative mind'. His humility extended to his work as Judge at The Hague Court; of him the President of that Court (Manfred Lachs) has said: 'In putting on his black robe as a Judge he not only retained his humility but raised it to an unrivalled level; his intellectual humility, impartiality and conscientiousness have become proverbial.'

Those of us who were privileged to see something of his family life which he shared with his wife, Marjorie, for nearly 60 years can never forget their hospitality and friendship and that of their family, three of whom lived close to Cambridge for many years after their own marriages. Thus as grandparents Arnold and Marjorie enjoyed the affection of grandchildren and indeed of great-grandchildren in full measure.

The tenure of McNair's Vice-Chancellorship of Liverpool University covered the years 1937–45, a trying period for all institutions of higher education on account of the Second World War. He took office in succession to J. L. Stocks, a professor from near-by Manchester who died suddenly before the end of his first session. Coming to a provincial campus from Cambridge and necessarily without help from his predecessor, there was much new ground to be covered; McNair quickly absorbed his new surroundings. The University remains in his debt for reorganization of the Senate Committees and in particular for the procedure for appointments to chairs; he also introduced the first tutorial system for women students not living in Halls of Residence. He devoted much time to ensure that relations between the hospitals and University should be effective and to the projected Medical Teaching Centre for Liverpool. To him is owed in his

special field of law the transfer of law studies to the University precincts, a full-time degree course in law, and reconstitution of the Faculty of Law. A similar scheme for training accountants within the framework of a university degree and examination in depth of the appropriateness in a civic university of a number of smaller departments were among his other concerns. He had a reputation for consulting within the University anyone whose knowledge, opinion, or influence could contribute to the identification and solution of problems of policy or action.[1]

McNair, who had been knighted in 1943, was created a peer in 1955 when he vacated the Presidency of the International Court. At first he sat on the cross-benches, but later as a Liberal. One of his most notable contributions as a cross-bencher was his speech on the Suez crisis in 1956 when in the initial debate in the House of Lords he spoke with all the authority of the recent President of the International Court of the illegality of the use of force against President Nasser of Egypt by the British and French in view of treaty obligations and Article 2 of the United Nations Charter.

That speech may be numbered among the most important delivered since 1945, regrettably though, its effect was ruined by events; it has been so described by Lord Longford in his Autobiography, *Private Lives*.

Before attempting to discuss McNair's contribution to the work of the Permanent Court of International Justice something must be said of the law which it applies and the procedure of giving its judgments and advisory opinions. There is no legislative process; no international body defines by statute what is the law. Membership of the United Nations involves the acceptance of its conventions and articles of obligation. But the judgments of the court are not enforceable by legal process such as levying execution on a litigant State's property.

The development of public international law depends largely on judicial innovation which is only acceptable if the decisions of the court are reconcilable with basic legal principles. Interpretation of treaty provisions are, of course, within the jurisdiction of the court, but customary rules remain an important source; for example in the past the law of the sea, which still falls short of formal agreement among States in some respects.

It will be clear from the formidable list of his published works

[1] Much of this part of the memoir is taken in part verbatim from the University of Liverpool *Recorder* for October 1945, a memoir by a colleague whose tenure of his chair largely overlapped McNair's years of office.

that Lord McNair's contribution to contemporary development of the subject in the crucial periods which followed the two world wars was pre-eminent; it has received universal recognition. It is not, however, possible to discuss factually in detail his work as Judge, or even as President of the Permanent Court at The Hague. This body is a corporate tribunal of fifteen judges from fifteen different States; it delivers its judgments and advisory opinions in a single written document which is drawn up by a drafting committee of some of the judges before submission to the Court as a whole. Dissenting opinions are not infrequent, but it does not follow that an individual dissenting judge records his reasons. There were, as Sir Gerald Fitzmaurice has recorded and discussed in his essay to which reference has been made above, twenty-six Judgments and Advisory Opinions during the years of McNair's membership of the Court; in only two cases did he publish the reasons for his dissent; in the majority of the others he assented, but gave no individual opinion. Those who knew his background in the common law, which in practice and in teaching occupied his earlier years before he took up public international law, have detected in judgments and opinions of the Court McNair's influence as a member of the drafting committee. His emphasis on contractual obligations and the binding force of precedent in the common law inevitably influenced his approach to the unwritten rules of public international law.

These are two examples of his reasons for dissent, in the well-known Norwegian Fisheries case and the extent of the former League of Nations Mandate on the present obligations of the South African Government to the United Nations. The Norwegian Case dealt with the claim of Norway to delimit its territorial seas for exclusive fishing rights by a method different from the long-accepted practice of measuring the distance by the tide-mark (even here there was still controversy, but only as to whether the mark was high or low tide). Norway claimed successfully that it could use, by reason of the broken nature of its coastline, a base line system whereby a series of straight water-crossing lines across inlets, indentations, and curvatures roughly following the line of the coast determined the width and extent of the coastal waters. This judgment is of importance to other States than Norway. Lord McNair gave his opinion which showed that the full weight of previous authority and usage was in favour of the tide-mark rule; to approve the manipulation by Norway of the limits of its territorial waters might 'encourage other States to adopt a subjective appreciation of their rights

instead of conforming to common international standards'. Here surely is evidence of the common law background influencing the opinion.

To conclude with two extracts from the address, given in the College Chapel of Caius, by the President of the Court (Manfred Lachs) at the Memorial Service.

As Judge and then President of the Court he made a most valuable contribution to its jurisprudence. At that period of his career Arnold McNair had a real influence on finding and declaring the law, a task that was so close to his heart. He continued to write and to lecture, pleading for a wider teaching of international law. While recalling Maitland's words that 'taught law is tough law', he added, 'law that is examined upon is even tougher'.

Arnold McNair had a rich life, as he well deserved to have. He was so rightly honoured by his country and the international community. One of the greatest of my predecessors, he will remain one of the most important figures in the gallery of international jurists of the last half century; for years and decades to come he will remain the symbol of a great jurist and judge who carried the torch of law and justice among nations. Paying tribute to his memory, on behalf of the International Court of Justice, I think I do so also on behalf of the great family of international jurists, who owe him so much.

Professor Jennings has contributed the following brief appreciation of some of the more important of McNair's writings on public international law.

McNair's writings, books, articles, and monographs span something like half a century. His legal interests were as broad as could be. His first book, *The Legal Effects of War* (1920)—a gem that was to run to four editions—was essentially the work of a common lawyer with an interest in international law. Then, after an edition of Volume III of Stephens's *Commentaries* (1922), came the important and influential 4th edition of Oppenheim's treatise on *International Law*. In the same period he launched (with H. Lauterpacht) the *Annual Digest of Public International Law Cases*, which demonstrated, as the authors designed it would, that there was far more international law material already in being than had commonly been appreciated. Next, the pioneer study (1932) of the then still new subject, the *Law of the Air* (1932), which required knowledge of the common law, international law, and conflict of laws. This was followed by a work of pure comparative law, *Roman Law and Common Law* (1936), with W. W. Buckland.

Already in the middle thirties McNair had begun to delve into the rich international law sources in the Public Record Office, and this was the basis of *The Law Treaties, British Practice and Opinions* (1938). This very fruiful line of research led after the war to the splendid three volumes of *International Law Opinions* (1956).

In 1961 there appeared the magisterial and definitive treatise on *The Law of Treaties.*

Apart from the books there was throughout a steady stream of articles and monographs, very many of them major contributions to legal knowledge and understanding. To show the versatility of the author's interests mention may be made in particular of his *Dr. Johnson and the Law* (1949) and *Shakespeare and the Law* (1969 and 1972).

McNair illuminated a subject not only by his thinking but also by the exactitude, felicity, and dry humour with which he expressed it. He recommended to others what was his own usual practice: to begin a piece of writing with a clear statement of what was proposed and to end with a brief statement of the conclusions to be drawn.

The long period in which McNair was working on international law saw its transformation from a rather shallow subject, doubtfully law, or at least woefully short of what he liked to call 'hard Law', into a great body of elaborated and technical law, constantly the concern of the practising lawyer. McNair's writings, teaching, and flair were a major influence in the fashioning of that transformation.

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