Bar News

The journal of the NSW Bar Association

Autumn 1988

In this issue

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Legal Profession Disciplinary Tribunal

Law Society v S

On 12 April the Chief Justice, sitting with the Registrar of the Legal Profession Disciplinary Tribunal, presided over the first listing for mention of matters brought before the Tribunal. His interlocutory remarks are of general interest and importance to all concerned with the working of the Tribunal. It is anticipated that the Tribunal's formal rules of procedure to be made pursuant to Section 170 of the Legal Profession Act will lay down a simple uncomplicated procedure appropriate to carry into effect the terms of the Chief Justice's statement. The full text of the statement is as follows:

Preliminary Observations

The President: There are listed this afternoon the first three matters to come before this newly constituted Tribunal. The purpose of the hearing in each instance is to give directions for the interlocutory preparation of the matters with with a view to enabling them to be properly prepared for hearing by the Tribunal.

The Registrar, who sits with me this afternoon, will ordinarily be the officer who will discharge the responsibilities of the Tribunal in supervising the preparation of matters for hearing. I have thought it desirable to participate myself on this first occasion with the view to outlining the approach and the procedures which will be followed in subsequent matters at their interlocutory stages.

Litigation before the Tribunal is to be conducted with three basic considerations well in mind: they are the pursuit of efficiency; the pursuit of economy; and the pursuit of expedition. The pursuit of these will not, of course, have precedence over, or in the slightest degree inhibit, the overriding interests of justice and fairness in the discharge by the Tribunal of its statutory responsibilities — justice and fairness to the practitioners involved as well as justice and fairness to the public and to the profession. Indeed, the proper and responsible pursuit of these requirements will tend to enhance the overall quality of justice administered by the Tribunal.

The pursuit of efficiency requires that the final hearing before the Tribunal should be confined to the real matters in dispute between the parties. They may be matters of fact. They may be matters of law. In many cases, no doubt, there will be matters of both categories arising for decision. What must be achieved is a refinement at the interlocutory stage of all of the relevant facts and all of the relevant matters of law with a view to isolating those matters that are genuinely open to dispute and in fact in dispute. The pre-hearing conference will result in exchanges between the parties that may ultimately remove altogether some matters from the realm of relevance. Particular transactions included within a complaint may be adequately explained so as to result in their abandonment. Other particular transactions may be able to be established both in point of fact and in point of relevance so as to result in their being included in an agreed narrative without the necessity of adducing the associated primary evidence before the Tribunal at the final hearing.

The Tribunal expects to be provided prior to a hearing with a comprehensive statement of an agreed narrative. The Tribunal will not gladly suffer hearing time being taken up with disputation upon matters that cannot reasonably be regarded as open to dispute and which could have been resolved at a pre-hearing conference. Nor will it not gladly suffer hearing time being taken up with production and examination of documents which could have been attended to at a pre-conference hearing before the Registrar.

I recognise that these requirements will cast a significant burden upon the parties and their advisers in the pre-hearing conference stage of proceedings. In practical terms, however, it will really involve no more than a relocation of that burden from the final hearing to the interlocutory stage and I envisage an overall nett saving of both time and expense.

Closely allied to the pursuit of efficiency is the pursuit of economy. The legal practitioner against whom a complaint is made is at risk as to costs — his own, irrespective of the outcome, and the moving party's also in the event of the complaint being upheld (Section 163(6)). It is thus very much in the interests of the legal practitioner that unnecessary expenditure of costs be avoided.

Expedition, also, is plainly in the interests of all concerned. If a complaint is well-founded then the interests of the public and of the profession demand that this be exposed at the earliest possible time and that appropriate remedial action be taken. If the complaint is not well-founded then, conversely, it is in the interests of the legal practitioner, including his or her clients, that this be made clear at the earliest possible time.

I repeat, I see not the slightest reason to apprehend that principles of fairness and justice will be in any way compromised by the determined pursuit of efficiency, economy and expedition.

One of the purposes of my sitting this afternoon with the Registrar is to confirm that he will exercise a very substantial degree of authority when presiding at pre-hearing conferences and overseeing the preparation of matters for hearing. It is not the present intention that such conferences take place in formal surroundings. They will be conducted around a table and the Registrar will take a positive, active role in guiding the parties along the path to a distillation of the facts, a crystallization of the issues of law and the formulation of an agreed narrative. His role will be far more than that of presiding at a preliminary conference for the purpose of enabling documents to be produced or exchanged between the parties, fixing a hearing date and attending to mechanical matters. His role will involve active participation in the negotiation between the parties of the matters to which I have referred. He will exercise on behalf of the Tribunal an appropriate measure of authority.

In conclusion I should emphasise that I do not underrate the importance of a full oral hearing on matters that can only be fairly developed in the course of an oral hearing. What I am anxious to achieve is a confinement of the oral hearing in pursuit of the considerations I have mentioned earlier. □

From the President

18 March 1988

The Bar has a problem with its public image. This is not new, and we can never hope to be popular with all our clients. However today the consumer revolution, legal aid, and the dominance of the media make the problem far worse.

Our poor public image makes us an easy target for politicians and the media. This is not good for the Bar but the danger is that we will lose our capacity to be heard on civil rights issues.

This lesson was brought home to me during the discussions that the Bar Council and the Law Society had with the State Government over Workcare and Transcover prior to June 1987.

I believe that a majority of the politicians concerned were not even trying to find a way to preserve reasonable rights for accident victims. Accident victims were seen as powerless and their natural spokesmen from the legal profession were seen as easy targets for attack on the basis of self-interest.

If the Bar cannot be heard, and will not be listened to when the issue concerns the rights of accident victims what chance is there that we will be listened to on other civil-rights issues which may only effect really small groups in the community?

This Bar Council and its predecessor have decided that it was essential for the Council to attempt to communicate more effectively with and through the media. The Bar must work not only to maintain civil rights in the Courts. It must also be active to maintain those rights by appropriate action outside the Courts.

Our effectiveness as a guardian of civil rights outside the Courts depends in the long run on the way the public views us. Every time one of us has dealings with a client or a witness the Bar is on trial. Each of us should set for ourselves the highest standards and seek to live up to them. If we did so not only would there be less complaints from the public but the Bar would become more effective in its efforts outside the Courts to maintain civil rights against legislative and other encroachment. □

Are "YOU" in the Bar Sickness and Accident Fund?

If not WHY NOT? You must be either careless or crazy! You must be either uninsured (crazy) or insured with a commercial insurer (crazy and careless).

The Bar Sickness and Accident Fund insures barristers against loss of income from those risks for up to 12 months. The premiums charged are only 60% of those charged by commercial insurers. The reason is obvious. Barristers do not take "sickies" unless they are really sick. The Bar fund's claims experience is therefore well below the industry average.

Furthermore the Bar fund pays no commission to salesmen, no profit to shareholders, no fees to directors, and has very low overheads. Moreover if you do have a claim it will be assessed by colleagues, and not by some unknown claims manager behind closed doors. This insurance with our own fund is a really good deal.

Why then do only 314 out of 1139 memebers belong to the fund? It beats me.

Premiums for this insurance are *fully* tax deductible under Section 51 of the Income Tax Assessment Act *without* loss of the $1,500 concessional deduction for superannuation or life insurance payments.

The Bar's fund has now been operating successfully and profitably for over 25 years. It has built up substantial reserves and is protected by appropriate reinsurance. It is a worthwhile co-operative activity that deserves the support of *every* member of the Bar. If more members joined the fund would become even more successful and be able to further reduce premiums.

Do yourself and the rest of the Bar a favour. Insure with the Bar's Sickness and Accident Fund. If you don't you must really be either crazy, careless or both. The contract runs from 4 p.m. on 30th April for the following year so act now. Cover is available on an indemnity basis up to $2,500 per week. □

K.R. Handley.

LAWASIA ENERGY LAW SECTION

1988 - Hong Kong Conference

Theme: "Investment Opportunities in Energy in the Asia-Pacific Region in the 1990's"
Dates: 15-17 September 1988
Contact: Mr Gage McAfee
Coudert Brothers
Alexandra House, 31st Floor
20 Chater Road
HONK KONG

Tel: 852 5265 951 Telex: HX 74073 AMLAW
Telefax: 123 4129

Transcover Sitrep

During the latter part of 1987, the Executive and the Accident Compensation Committee, with the assistance of the Bar's public relations consultants, designed a strategy to keep the Transcover issue alive and to expose its deficiencies to the public and the media.

Transcover was selected rather than both Workcare and Transcover because:
(a) Transcover affects everyone;
(b) Those injured in work accidents are represented by their union officials (although those officials have failed dismally in looking after their rank and file over Workcare);
(c) Road accident victims were otherwise leaderless, unorganised and unrepresented;
(d) It is hard enough to expose the deficiencies of one system let alone two;
(e) The public relations experts advised it;
(f) The coalition's promise to restore the Common Law applies to both.

The strategy developed as follows:

(1) We demonstrated that the media could be prevailed upon to run anti Transcover stories to counter the Government's pro Transcover and anti Lawyer campaign if the stories were well done.

Such stories followed up by letters and argument were run in The Manly Daily (organised by Coombs), the St. George Leader (organised by David Mitchell and Kingsford Dodd) and the Central Coast News (organised by Ellis). These cuttings can be inspected by arrangement with Yvonne Grant at the Association's office.

(2) We helped arrange for Terry Willessee to run a programme on Transcover. The programme was radically cut at the last minute and was a disappointment but at least we did manage to get a programme on Transcover onto T.V. screens.

(3) A joint meeting with the Law Society's Accident Compensation Committee was held in early January and thereafter a full meeting of their Regional Presidents was arranged. These meetings were addressed by Handley and Coombs and the methods used in Manly, Gosford and St. George were outlined. The Regional Presidents were given the task of organising similar coverage in local newspapers throughout the state. This bore fruit in Newcastle, Wollongong and the border regions, particularly.

(4) Accident victims contacted the Bar. They later formed a Citizens for Accident Justice Committee which promoted the issue to the public.

(5) Handley and Coombs were invited to discuss Transcover on radio, particularly on Margaret Throsby's show.

(6) A High Court challenge to Transcover was mounted and a press conference arranged to publicise it. Extensive T.V., radio and press publicity was obtained. The Bar funded that challenge and Sir Maurice Byers lead it.

(7) The Bar has also supported the preliminary legal argument in *Wright's* case. Wright seeks to recover damages under the Trade Practices Act for an employment injury caused by misleading and deceptive conduct contrary to Section 52 of the Act. The deception relied on is that a safe system of work existed. Sir Maurice Byers again led for the plaintiff. The case was heard by Lee J. Judgment was reserved, and was handed down on 20 April 1988. Lee J found for the Defendant employer on the ground that the corporation's conduct was not in trade and commerce. Our advice is that such a finding is highly debateable and leave to appeal to the Court of Appeal has been sought, and the application listed for 2 May.

(8) Some of the lies being told about Eric Gruber and Transcover were exposed by Handley in a further press conference on Monday 15th February.

On March 19 the government of NSW changed hands. Nick Greiner became Premier and John Dowd, Attorney-General. The Bar Council immediately attended upon the new Attorney both to welcome him to the office but also to ensure that the new Government's pre-election promises to dismantle Transcover and Workcare would be implemented.

The new Government intends to commence inquiries concerning the restoration of common law rights to both victims of motor vehicle and employment-accidents. In the case of restoration of common law rights for motor vehicle victims, it is probable that there will be modifications to full common law rights, both to eliminate small claims and to limit general damages.

In neither case will reforms be implemented overnight. The Compensation Board may be dismantled and private insurers brought back into the field both for motor vehicle and employment related accidents.

Mr Greiner has said that the restoration of common law rights will be retrospective to 1 July 1987.

The High Court litigation which challenged the constitutional validity of Transcover remained in the list for hearing on 13 April until late the day before when, by consent of the plaintiffs and the State, the case was stood out of the list. This became possible because the Attorney-General John Dowd issued a Press Release that afternnon, later supplemented by a letter to Ken Handley. These reaffirmed the Government's pre-election committment to dismantle Transcover with effect from 1 July 1987, and to appoint representatives of the Bar Association and Law Society to the Committee which will work on the scheme of the new legislation. The constitutional challenge remains on foot in the meantime. It was gratifying to find out that the Commonwealth and, we believe, all other States were intervening in support of the plaintiffs. □

J.S. Coombs

Bar Notes

New South Wales Judicial Salaries Fall Behind

The Thatcher Government in the United Kingdom recently announced substantial increases in salaries for Britain's top Civil Servants including Judges. The Judges were awarded a 7.4% increase. The increases were made following a report by the Review Body on Top Salaries. It was the first review since 1985. One of the reasons the Review Body gave for the increases which exceeded the rate of inflation was the difficulty in recruiting Circuit and High Court Judges.

Full implementation of the award in the Autumn of 1988 will mean increases of $10,543.00 for Lord Lane, the Lord Chief Justice, while the eleven Lords of Appeal and Lord Donaldson of Lymington, the Master of the Rolls will receive $9,923.00.

Bar News sets out below a list of judicial salaries in the United Kingdom, converted into Australian dollars based on the exchange rate as at 6 May 1988:

1.	Lord Chief Justice	$206,765.00	(£85,250)
2.	Lords of Appeal Master of the Rolls	$191,000.00	(£78,750)
3.	Lords Justices of Appeal	$183,602.00	(£75,700)
4.	High Court Judges	$166,139.00	(£68,500)
5.	Senior Circuit Judges	$123,452.00	(£50,000)
6.	Circuit Judges	$111,083.00	(£45,800)
7.	Master of the Supreme Court	$90,952.00	(£37,500)

Salaries of New South Wales Judges increase annually, but have recently only been increased to keep up with inflation.

The salaries of the New South Wales Judges, including expenses, are as follows:

1.	Chief Justice	$115,356.00
2.	President of the Court of Appeal	$107,902.00
3.	Judge of Appeal Supreme Court Puisne Judge Chief Judge of the District Court	$105,077.00
4.	District Court Judge	$91,104.00
5.	Master	$87,999.00

It is expected that there will shortly be announced an increase in the New South Wales judicial salaries. *Bar News* hopes the Remuneration Tribunal will heed the wisdom of the English Review Body. □

Assistance to Court Reporters

The Bar Council is liaising with the Chief Justice, Chief Judge of the District Court, the Court Reporting Branch and with senior officers of the Attorney-General's Department with regard to seeking improvements to the New South Wales Court reporting service. A number of proposals are in the course of implementation. However, the major problem is lack of trained court reporters. There are currently 25 vacancies in the Branch for Court reporters but, so far, it has not been possible to attract appropriate people to fill them.

Accordingly, great strains have been placed on the existing staff court reporters as there are simply too few to go around too many courts. It thus behoves the Bar to assist the court reporters in any manner which they suggest could improve their working conditions. In this regard, the Council has received a request from the Chief Court Reporter to promulgate to the Bar the circular which appears hereunder. The Bar Council requests every barrister to make every attempt to comply with his request.

Because of the current shortage of Court Reporters, the Court Reporting Branch is experiencing considerable difficulty in covering courts and promptly producing transcripts. As this situation is likely to remain so for quite some time, the assistance and co-operation of all members of the Bar is sought in making the Court Reporters' load a lighter one. Naturally, anything that assists the Reporters ultimately benefits the Bar, ie. better quality transcripts, hopefully sooner. The Bar should understand that the Branchs is required to cover the same number of courts but with less staff; hence, Reporters are required to spend longer periods in court without relief and, as a consequence, there will be delays in providing transcripts. Accordingly, members of the Bar are earnestly requested to read and heed the following DO'S and DON'TS:

DO	be aware of the presence of the Court Reporter.
DO	ensure that your witnesses are aware of the presence of the Court Reporter and are instructed to speak clearly, audibly and not too quickly.
DO	speak and ask questions at a reasonable pace so as to be heard and recorded clearly and accurately.
DO	assist Court Reporters by spelling unusual names and providing copies of documents from which you propose to read.
DO NOT	speak over the witness or other speakers: the Court Reporter can only record one person at a time; further, speaking over the witness is distractive to the Reporter and thus makes for inaccurate recording.
DO NOT	rustle papers or have audible private conversations at the Bar table: these distract both witness and Reporter.
DO NOT	expect the impossible from the Court Reporter. Remember, every hour of taking evidence in court requires 2 hours of transcription work with typists at the Court Reporting Branch.
DO NOT	order transcripts unnecessarily; this will relieve the Reporter from transcribing to a typist evidence which is not required and thus will permit him more time in court recording "live" evidence the transcript of which is really required.

On behalf of the Court Reporters, I thank all members of the Bar for reading the above. PLEASE try and comply with the foregoing — it WILL improve the service the Branch is trying to provide.

M.K. McLoon
Chief Court Reporter

Bar Notes

Appointments pursuant to the Legal Profession Act

The Legal Profession Act 1987 commenced on 20 February 1988. Following submissions by the Bar Association and the Law Society the Attorney General, the Attorney-General of NSW, R.J. Mulock, made the following appointments.

The Professional Conduct Review Panel:-

Pursuant to section 126(2)(a):
Mr. F.J. Gormly, Q.C. for a term expiring on 1 March, 1991, and pursuant to section 126(2)(b)
Mr. D. Lane for a term expiring on 1 March, 1990, and pursuant to section 126(2)(c)
Mr. John O'Neill for a term expiring on 1 March, 1991, the latter to be Chairperson pursuant to section 126(3)
Mr. P. Wolfe, for a term expiring on 1 March, 1990
Ms. C. Petre for a term expiring on 1 March, 1991, and
Ms. L. Cohen for a term expiring non 1 March, 1990

The Professional Standards Board:-

Pursuant to section 127(2)(a):
Mr. I. Barker, Q.C. for a term expiring on 1 March, 1991
Mr. R.A. Conti, Q.C. for a term expiring on 1 March, 1991
Mr. R.L. Hunter, Q.C. for a term expiring on 1 March, 1991
Mr. K. Murray, Q.C. for a term expiring on 1 March, 1991
Mr. C.S.C. Sheller, Q.C. for a term expiring on 1 March 1990
Mr. T. Simos, Q.C. for a term expiring on 1 March, 1991
Mr. H.D. Sperling, Q.C. for a term expiring on 1 March, 1990.

Pursuant to section 127(2)(b)
Mr. P. Boesenberg for a term expiring on 1 March, 1991
Mr. P. Campbell for a term expiring on 1 March, 1990
Ms. H. Conway for a term expiring on 1 March, 1990
Mr. N. Corkill for a term expiring on 1 March, 1989
Mr. J.D. Edelman for a term expiring on 1 March, 1991
Mr. B. Folbigg for a term expiring on 1 March, 1990
Mr. J.H. Herron for a term expiring on 1 March, 1991
Mr. C. Houen for a term expiring on 1 March, 1990
Mr. P. Kerr for a term expiring on 1 March, 1989
Mr. E. Stevenson for a term expiring on 1 March 1990
Mr. C. Vass for a term expiring on 1 March, 1990
Mr. N. Forrest for a term expiring on 1 March, 1991 the latter to be Chairperson pursuant to section 127(3).

Pursuant to section 127(2)(c):
Dr. M.E. Costigan for a term expiring on 1 March, 1991
Mr. G. Warwick Smith for a term expiring on 1 March, 1990
Mr. F.J. Amor for a term expiring on 1 March 1989, and
Mr. K. Eccleston for a term expiring on 1 March, 1990.

The Disciplinary Tribunal:-

Pursuant to section 128(2)(b):
Mr. R.J. Ellicott, Q.C., for a term expiring on 1 March, 1990
Mr. A.M. Gleeson, Q.C. for a term expiring on 1 March, 1991
The Hon. T.E.F. Hughes, Q.C. for a term expiring on 1 March, 1991
Mr. F. McAlary, Q.C. for a term expiring on 1 March, 1991
Mr. R.P. Meagher, Q.C. for a term expiring on 1 March, 1989
Mr. D.A. Staff, Q.C. for a term expiring on 1 March, 1990.

Pursuant to section 128(2)(c):
Mr. D. Castle for a term expiring on 1 March, 1990
Mr. I. Dunlop for a term expiring on 1 March, 1989
Mr. D. Hunt for a term expiring on 1 March, 1990
Mr. A. Mitchell for a term expiring on 1 March, 1991
Mr. D. Patten for a term expiring on 1 March, 1989
Ms. A. Plotke for a term expiring on 1 March, 1991
Mr. D. Barr for a term expiring on 1 March, 1990.

Pursuant to section 128(2)(d):
Rear Admiral G. Griffiths for a term expiring on 1 March, 1990
Miss N. Keesing, A.M. for a term expiring on 1 March, 1989
Dr. U. Gault for a term expiring on 1 March, 1990
Mrs. B. Ingold, M.B.E. for a term expiring on 1 March, 1989, and
Mr. D. Mahon for a term expiring on 1 March, 1991. □

Double Check on Legal Aid

The Fees Committee has recently been dealing with a matter in which Counsel was briefed by a solicitor on the Bar Council's "Blacklist".

Counsel was aware that the solicitor was so listed. The solicitor told Counsel, however, that the matter was one in which a grant had been made of legal aid for the purpose of enabling Counsel to be briefed. Counsel accepted the brief accordingly.

Counsel has not been paid, and the Fees Committee has been endeavouring to obtain payment of Counsel's fees. In the course of doing so, the Committee has discovered that the solicitor misrepresented to Counsel the true position respecting the grant of legal aid. In the particular case, legal aid had been granted to the solicitor in relation to his own proper costs, but had not been granted for the purpose of the briefing of Counsel.

The solicitor in question has had his name removed from the Roll of solicitors, for reasons unrelated to the matter upon which this note is commenting.

In the result, Counsel is entirely without remedy.

The above circumstances are brought to the attention of the members of the Bar, for the purpose of forewarning them that, in any case in which a solicitor asserts that legal aid has been granted for the purpose of enabling Counsel to be briefed, it would be prudent always to confirm by direct contact with the Legal Services Commission that such a grant has indeed been made for that purpose, or to insist upon seeing a copy of the letter from the Commission granting legal aid. □

Our Greatest Trial Lawyer?

Mr Justice McHugh, who appeared as J.W. Smyth Q.C.'s junior on many occasions analyses the Master's trial techniques.

The late J.W. (Jack) Smyth QC whose lecture on cross-examination appears in this issue of the Bar News was probably the greatest trial lawyer that the New South Wales Bar has produced. Other practitioners have excelled him in individual aspects of advocacy. Sir Garfield Barwick QC, for one, was undoubtedly a better legal advocate; the late Clive Evatt QC probably excelled him in the ability to obtain a verdict from a jury when the weight of the adduced evidence was strongly against his client. But in all round ability I doubt whether any member of the New South Wales Bar has brought to the conduct of a trial the range of skills which Jack Smyth could bring. Indeed he was a master of all branches of the law and all branches of advocacy. He was equally at home in the High Court arguing important constitutional cases such as *Clayton v Heffron* (1960) 105 CLR 214 and *Air Lines of NSW Pty Ltd v New South Wales* (1964) 113 CLR 1 or in appearing for the defence before a magistrate or jury in a sordid criminal case or in demurring *ore tenus* in the old Equity Court to a Statement of Claim on the ground that it disclosed no equity. On any reckoning, he must rank as one of the greatest legal practitioners that the New South Wales Bar has produced.

But it was as a trial lawyer that he was at his best. The arena of the trial gave scope for his remarkable power as a cross-examiner, a power which has probably never been surpassed if indeed it has ever been equalled. Not even his mentor and great friend, J.W. Shand QC, excelled him as a cross-examiner. I have read many books on cross-examination, many of the volumes of the Notable Trial Series, and most of the available biographies and articles on the lives of the great advocates who have practised in the United Kingdom and the United States. But nothing in any of those works can compare with the many cross-examinations by Jack Smyth which I had the privilege of watching during the ten year period when I frequently appeared as junior to him or his opponent. The cross-examinations of English and American advocates such as Edward Carson, Rufus Isaacs, Patrick Hastings, F. Lee Bailey and Edward Bennett Williams seem very ordinary compared to the cross-examinations conducted by Jack Smyth.

It was inevitable that, in 1961 when the Bar Council decided to hold a series of lectures for Readers, Jack Smyth would be asked to give the lecture on cross-examination. As a Reader, I was present at that lecture. But the audience was not confined to Readers. The old Common Room, which then consisted only of the 180 Phillip Street end, was packed — with seniors and juniors as well as Readers.

What was it that made Jack Smyth such a formidable cross-examiner? Undoubtedly, the use of the techniques set out in the accompanying lecture were an essential part of his success. But his greatest asset was a quickness of mind which enabled him to dominate the witness. Quickness of thought is an indispensable characteristic of the great advocate whatever his special field of advocacy may be. It undoubtedly played an important part in the success of Sir Garfield Barwick enabling him to turn almost any question from the Bench into a platform for restating the essentials of his argument or to demonstrate the persuasiveness or absurdity of a proposition, as it suited him, by an apt illustration. In the case of Jack Smyth, quickness of thought was accompanied by a natural coolness and confidence which coupled with a complete mastery of the facts of the case and the use of the subjective method of cross-examination invariably enabled him to obtain the answer which he wanted.

Jack Smyth was an extremely disciplined advocate. Like all successful advocates, he placed great emphasis on preparation. At the age of seventy he prepared cases with a thoroughness which amazed juniors half his age. He gave the lie to the statement of the great US trial lawyer, Edward Bennett Williams, that old trial lawyers retire for the reason old fighters do — it is not that they dislike fighting but they cannot stand the training. For a case which was likely to take seven or eight days, three days of conferences with his junior, solicitor and witnesses were commonplace.

Before he went into court, Jack Smyth was determined to be a master of every fact and circumstance relating to the issues and every explanation or motivation for each actor's conduct. As the accompanying lecture makes clear, his prime concern was to establish the ultimate facts which as a matter of law were necessary to the success of his case together with any facts which made those ultimate facts more probable than not. So obsessed did he seem with the preparation of his own positive case that a stranger, observing his preparation, might have thought that he had no confidence in his own capacity to obtain admissions from the other side's witnesses or, where necessary, to destroy their evidence. Yet more often than not his great skill as a cross-examiner enabled him to address the tribunal of fact on the admissions made by his opponent's witnesses.

His step-by-step, subjective technique of cross-examination frequently enabled him to change the whole complexion of the case with a few questions. Here is a short illustration from a culpable driving trial where the Crown alleged that the accused, while eating a chocolate, had driven in a dangerous manner and injured a detective. The incident occurred at night just off the Pacific Highway in a bush area north of Newcastle. The detective was using a torch to examine the nearside back wheel of his car which was parked some yards off the highway. The accused's car, travelling at high speed, suddenly veered off the highway, went on the inside of the detective's car, and knocked him down as he attempted to run off into the bush.

Q. You said you heard the vehicle roaring down the highway.
A. Yes.
Q. And stood up to see what it was.
A. Yes.

Q. Facing the oncoming car.
A. Yes.
Q. Turning your body as you did.
A. Yes.
Q. With the torch in your right hand.
A. Yes.
Q. The torch turning with you.
A. Yes.
Q. Like this (indicating).
A. Yes.
Q. You have been to many traffic accidents.
A. Yes.
Q. And seen police officers using a torch to direct traffic around vehicles.
A. Yes.
Q. You appreciate that to a driver coming down the highway your torch could have been a signal to go around your car.
A. Could have.
Q. You began to run after the car came off the highway.
A. Yes.
Q. Running across and away from your car.
A. Yes.
Q. The accused's car would have been quite close to you when you entered the beam of its headlights.
A. Yes.
Q. Which did not give the driver much chance of avoiding you.
A. No.
Q. You appreciate that if you had stayed where you were the car would not have hit you.
A. I didn't think about it.
Q. But looking back you appreciate now that if you had not run you would not have been hit.
A. Yes, I suppose so.

Smyth's subjective technique of cross-examination could be used with devastating effect even in respect of witnesses whose evidence came as a suprise. Procedures in the Commonwealth Industrial Court were not noted for clarifying the issues. An affidavit in support of an order nisi was the usual procedure. Trial by ambush was the order of the day. In one case the former President of the New South Wales Branch of the AWU applied to set aside a resolution which had removed him from office. The resolution was made by the Federal Executive for whom Smyth appeared. Central to the case of the President was an allegation that he did not receive the telegram notifying him of the meeting which removed him from office.

A telegram boy was called on behalf of the former President. He said that he had made a mistake and delivered the telegram to the office of the "Australian Worker" in the same building. The witness's evidence clearly took the respondents by surprise. But Smyth soon got the boy to say that, when he left the building, he had had no doubt that he had delivered the telegram to the correct place. The cross-examination then explored the process by which he had come to change his mind. It turned out that a complaint that the telegram had not been received had been lodged. A Postal Investigator had gone with the boy to the building. It had been suggested to him that, if the New South Wales Branch had not received the telegram, he must have delivered it to some other office. One suggestion was that it was to the office of the "Australian Worker" which was the newspaper of the Australian Workers' Union and in the same building. Influenced by these suggestions, the boy had accepted that he delivered the telegram to the "Australian Worker". Smyth's cross-examination then played on his natural reluctance to admit that he could be responsible for an error which would have had the consequence that a man summoned to a meeting did not attend. The boy became adamant once again that his original belief that he had delivered the telegram to the NSW Branch was correct.

Paradoxically, Smyth's great strength as a cross-examiner was occasionally a weakness. Sometimes he was guilty of the overkill. So one-sided would the contest between cross-examiner and witness become that it seemed unfair. An intelligent, well educated witness, who had given his evidence in chief with assurance — even cockiness, would be reduced to incoherence, his will broken, unable to resist giving any answer Smyth wanted, openly admitting he was prepared to lie when it suited himself. A jury's contempt for a litigant could sometimes change to sympathy as he flailed helplessly before the destructive force of Smyth's cross-examination. If the conduct of Smyth's own client left something to be desired, this sympathy could sometimes result in a perverse verdict. A good illustration is the malicious prosecution action of *Atkinson v Custom Credit Corporation Pty Ltd.* Atkinson, a car dealer, had been prosecuted for fraud at the instigation of Custom Credit. He was acquitted. In an action for malicious prosecution he was, I thought, totally destroyed by Smyth's relentless cross-examination. Yet the jury awarded him a very substantial sum of money. The verdict was so outrageous that a Full Court set it aside and entered a verdict for Custom Credit. Atkinson unsuccessfully appealed to the High Court and the Privy Council.

The determination of the Labor Party to get rid of Dr. Evatt as Federal Leader of the Opposition probably prevented the New South Wales Government in 1960 from offering the post of Chief Justice of New South Wales to Jack Smyth. Although he would have filled the office of Chief Justice with great distinction, I doubt that he would have been as great a judge as he was a barrister. Whether he would have accepted the post is open to doubt. The Bar was his natural home. Throughout his life, Sir Owen Dixon believed that the barrister played a more important part in the adminstration of justice than the judge. Jack Smyth shared that belief. He had often rejected the offer of an appointment as a puisne judge of the Supreme Court.

He retired in 1974 after being told that he had hardening of a neck artery. He was 71. His decision to retire upon receiving that advice was typical of the decisive nature of his character. He was not a man who wished to stay around while his great forensic powers declined. His last case was *McRae v Mirror Newspapers Ltd.* He persuaded Maxwell J to direct a verdict for the defendant. It was a fitting end to a great career, but a sad day for the New South Wales Bar. He had practised as a barrister for over forty years. He died in 1984 aged 81. □

The Art Of Cross Examination

In 1961 J.W. Smyth Q.C. gave a lecture in the Bar Association Common Room on cross-examination. The transcript of his address has resided in the top drawer of many barristers, to be thumbed through regularly, a constant reminder of how this master of cross-examination explained his art.

Might I say at the outset that cross examination is something in respect of which it is very difficult indeed to formulate principles. It is something that you do more or less intuitively — that you learn to do by experience, and so forth. There is perhaps one aspect of it, however, which may comfort some of you. You do not have to be a mental giant to be proficient at it. Brains are not necessarily a handicap, but it may comfort you to know that some of the brainiest in the legal profession have not, in fact, been good cross examiners. Perhaps it means that one needs some lower standard of intelligence to excel in that particular department. However that may be, the difficulty is to know how and where to begin because, as I indicated, it is to me, at all events, difficult to formulate principles. It is something you cannot learn from a book.

Perhaps I should begin first by telling you what, in my view, is the equipment that you need if you desire to become a good cross examiner. First of all, you must possess certain attributes, which if you do not have them initially, you should endeavour to acquire them.

1. The most important of these attributes is a capacity for hard, solid, conscientious work, for which there is no substitute, I can assure you, in this profession.
2. You should be reasonably well endowed with plain commonsense.
3. You should have, or it is a great advantage to have, a vivid imagination, and a good memory.
4. You should be a psychologist and be not without some worldly experience, because without it you can never hope to understand human nature particularly its frailties and imperfections, an appreciation of which plays an important part in your approach to the problem of cross examining a witness.
5. You must have or develop a keen appreciation of the probabilities. In respect of any situation or transaction, concerning which evidence is being led, because whoever can succeed in making his side's version appear more probable is more likely to win.
6. You must be observant and keep your wits about you in court, otherwise you cannot hope to follow the ever-changing pattern of a case, or turn an unexpected development to your advantage.

In most situations I would suggest that a pleasant manner is more effective than an unpleasant one. Courtesy will more often than not pay off better than rudeness. An even tempered cross examiner will be more likely to achieve results than one who allows his feelings to take control. No doubt there are other desirable attributes, but if you possess or acquire the foregoing, or the majority of them then I think you may be assured that you are off to a flying start. Finally on this aspect you must acquire, and when you have become more experienced you will have acquired, that sixth sense which will tell you when danger lurks in pursuing a particular line of cross examination, or in the asking of a particular question, and I think those of you who have had experience will agree that many an otherwise efficient piece of cross examination has been wrecked by going too far, or asking too risky a question.

Now assuming those attributes, or at least some of them, there are at least five more essentials, and they are these:

(1) A clear appreciation of the issues in the case;
(2) A complete knowledge of your own facts and an appreciation of where the weaknesses of your case are likely to lie;
(3) An anticipation of your opponent's case and what its weaknesses are likely to be;
(4) A knowledge of the relevant law and, as I shall illustrate later, this can be of the utmost importance; and
(5) A sound knowledge of the laws of evidence, because, after all, they are your tools of trade.

Thus armed, the next step, so it seems to me, is to know and appreciate what it is that you are setting out to do. In other words, what are the objects of cross examination. It is easy to state but I have so often observed that cross examiners seem to overlook or fail to appreciate what it is that they are trying to do.

Now, the objects of cross examination, I would suggest, may be broadly stated as follows:

(1) The securing of evidence from your opponent's witnesses which will support, or make more probable than not, your own case, or some aspect of it.
(2) The destruction, or cutting down, of your adversary's case.

If you keep those two objects firmly in your mind you will not go far wrong in setting about the task of cross examination.

In my view the first of those two objects is the more important and for these reasons. First of all, because an admission in your favour from a witness on the other side is, in general, far more potent than any evidence you are able to elicit from your own witnesses by examination in chief, and secondly, because you will find out that in the very process of seeking to secure favourable admissions from an unwilling witness, his efforts to avoid you will result in his giving the appearance of hedging and being evasive, thereby reflecting on his credit.

The second purpose of cross examination, namely the destruction or cutting down of your adversary's case, again, so it seems to me, falls into two categories:-

(1) The securing of admissions from the other side's witnesses which will destroy, or weaken his case; and
(2) When it becomes necessary — and as I shall illustrate later it is not always necessary — the destruction or imparing of the credit of your adversary's witnesses.

I would like to emphasise at this stage the importance of what I regard as the primary object of cross examination and the first part of the second object, because I sometimes think that many cross examiners appear to regard the destruction of the credit of the witnesses on the other side as their major purpose. Well, normally, I would suggest nothing could be further from the truth. I can assure you that if I am able to secure favourable answers from a witness who happens to possess a criminal record, then I would never breathe a word about his unsavoury past, because if you are getting help from him, if you are getting admissions that assist your case, or cut down the case to support which he has been called, then why destroy him. There is no need to. He may be your most valuable witness. I would suggest that as a general rule — but, of course, there are always exceptions — try the witness out first, to see whether he can help you, whether willingly or unwillingly, by either making admissions that favour your case, or which damage the other side's case before you step into him. It is for those reasons that I defer what few observations I have to make on cross examination as to credit simpliciter to a later stage, and propose to concentrate at the outset on cross examination's primary purpose and that part of its secondary purpose which is confined to destroying or damaging the other side's case.

How does one set about it, or perhaps, more specifically how does one prepare oneself for the task? That is the thing that will, no doubt, trouble some of the younger of you, and this is largely a matter of what best suits the individual. We are all different, and there is one observation I want to make at this stage. Never try to copy anyone else's style. You will only succeed in imitating his weaknesses and his imperfections. If your own style is no good and you cannot make it good, then it is not much good trying, but I would suggest that whatever may be your personal style, develop it, improve it where you can, eliminate its imperfections where you can, and you will do far better than trying to imitate some other Counsel you have witnessed in action.

Now the main thing, I think, is to keep your mind flexible, because as you are all aware a case changes so rapidly. If you set out with a prepared cross examination of any particular witness, or you allow your ideas to become too fixed, then nine times out of ten, you are foredoomed to failure. For instance, it will sometimes happen that in your brief, if it happens to consist of more than a backsheet, you will find a document that you think will enable you to smash the other side's case. If you rely on that and say to yourself "This is all I need" you will very often find that that document loses all its significance by reason of the nature of the evidence led on the other side. The same thing is likely to happen to you if you attempt to plan your cross examination, say, of the main witness, by writing out, or trying to write out the questions that you propose to ask him.

I suppose, at this stage, I could give you an illustration of what used to be done by a very eminent leader of the Bar, now deceased, S. E. Lamb, K.C. who was a first class cross examiner, but he had, at times, by reason of the method he adopted, some disappointments. He had a huge table and it was his practice in planning a cross examination to cover it completely with sheets of brief paper by means of drawing pins. He would then, commencing at the top, write out his initial question. Under that would then appear alternate questions according to whether the witness answered "yes" or "no" to the immediately preceding question until the final result resembled a genealogical tree. I have actually seen this — and he would say quite proudly to you "I'll start here" — pointing to the top of the tree — and "I've got him there" pointing to the last question at the bottom. That worked very well, provided the witness in the middle of it did not say in answer to a question "I don't konw". Then, of course, the whole scheme collapsed. So, gentlemen, I would suggest to you, do not try that method. It just doesn't work unless you are very lucky; quite apart from the enormous amount of work it involves, it also makes your cross examination inflexible, a feature which should be avoided at all costs. What I do myself so far as I am able to analyse it, and that is not easy, is first of all to work out all the matters which it will be necessary for me to prove in order to succeed, together with every circumstance which I think will tend to make those matters more probable than not. Now that is the foundation. I make a brief note of these, usually quite indecipherable, even to myself at times, and as each witness goes into the box, having listened to his evidence, I set out to try and get from him, if I can, some support for one or more of those matters. So long as you have firmly in your mind the final answer that you hope to get in respect of any topic, then you will find that the questions, the answers to which lead step by step to the result, will readily suggest themselves to you. It is a strange thing that you can sit in your Chambers and you can try and work it out, but you just cannot. On the other hand when you are on your feet and you have the stimulus of being in the midst of a cross examination, and you know what it is you are seeking to get it is amazing how the questions will flow. Furthermore if you approach the problem in the way in which I suggest you will learn to appreciate when it is dangerous to proceed further. You get the red light, so to speak. You are asking your series of questions, in the hope that you will get this final result, and then you detect something in the witness, or there is something in what he says, or the way in which he answers a question which tells you it is too dangerous to go any further and you drop it. You might come back later, perhaps, from a different angle, but it is most necessary that you should develop that sixth sense of knowing when to say to yourself, "Thus far, and no further on that topic". If you see that perhaps something dangerous may come out, then you quickly switch to some other topic, so as to distract the attention of not only the witness but also of your opponent from the particular thing that you fear.

Whilst on this aspect, and I shall give some illustrations later, a lot will depend on how you frame your questions. This is of vital importance, and it is something that with experience will come to you after a while. In general, your questions should be short, should admit of an answer

"Yes" or "No" and should be so framed as to encourage the answer you want. Always remember that the average witness will answer your question in the way which will tend to show him in the most favourable light. Witnesses are peculiar beings that way. Therefore, I suggest always endeavour to frame your questions so as to make a witness feel that to answer contrary to what you want may tend to make him appear foolish, or lacking in some recognised standard of behaviour or outlook.

Now perhaps I should proceed to deal with what you should be doing, and thinking, before you rise to cross examine. You already have firmly in your mind what you hope to achieve from the various witnesses that enter the box. You know your own case backwards, or you should, and it is your own fault if you do not, both as to the issues and facts, together with any material you have as to credit. You have in a tentative sort of a way, not in the way in which I indicated in the illustration, but in the back of your mind, mapped out, as I emphasise in a tentative way only, the way in which you propose to deal with the main witness, for instance, the plaintiff or the defendant, or witnesses that you anticipate may be called. You should have done this in your Chambers. That is something which you carry with you into Court.

Now, as I indicated earlier — and this, in my view, is most important — you should be observant. I have so often seen my adversary with his head down, industriously writing, apparently fearful that he may miss one word of the witness' evidence in chief. The result of that is that he meets the witness for the very first time when he rises to cross examine. It is far more important that you should watch the witness closely. You can still make notes of what occurs to you as important and rely on your memory for the rest. Watch his reactions, note where he hesitates or appears uneasy, as these constitute likely points of attack. Try and form some assessment, as best you can, of his makeup, for instance "Is he a conceited man"? "Is he likely to be of the hedging type"? "Is he likely to lose his temper if I hit him on a raw spot?" "Is he garrulous"? "Is he the irresponsible type"? "Is he shrewd"? "Is he stupid"? and so on. You are not always right you know. I have made some awful mistakes in my assessment of witnesses. You must however try to form some idea. You will learn a lot if you watch him closely, his eyes particularly, his facial expression, his mannerisms, his gestures. I can assure you that cases can be lost if you relax or do not pay close attention at this vital stage.

Perhaps I could best illustrate that by two instances within my knowledge. One concerns the late Jack Shand, Q.C., than whom I suppose there has never been a better or more efficient cross examiner. He was appearing in an admiralty case in which the critical issue was whether one or two vessels involved in a collision had given two blasts on her whistle, indicating an intention to turn to port. It was asserted by one side and strenuously denied by the other. A witness who was apparently quite independent was called and it was vital that he should be discredited. He claimed that he was standing on a wharf over at Mosman, I think, it happened in the Harbour — and he

Mr Ray Maher entering Central Court today with his counsel, Mr J. W. Smyth, QC, (left) and his assistant Mr Neville Wran. *(Daily Mirror, January 28, 1965.)*

swore most convincingly that he distinctly heard those two blasts. Shand was watching him very closely as he gave his evidence. When he rose to cross examine he began to fiddle with his papers, as was not unusual with him, pretending to be looking for a document. Keeping his head well down he asked "Where were you standing when you heard these two blasts of the whistle?" The witness stood looking intently at him. There was no reply. Then in a much louder voice he asked the same question, there still being no reply. On the third occasion he literally shouted the question, by which the time the witness noticed that everybody was looking at him and becoming somewhat uneasy said "What did you say Mr. Shand?" The next question was, "You are stone deaf, aren't you"? The witness said "Yes Mr. Shand". The way in which he had achieved that result was that as he was watching the witness he noticed that the witness' lips were moving as though they were forming the words that were being addressed to him by the examiner in chief. He thereupon came to the conclusion, which could of course have been quite wrong, but in this instance was not, that this man was a lip reader and was, therefore, deaf. So the other side's case collapsed.

Another illustration was when the late Bill Monahan, K.C., who was a very shrewd and capable cross examiner, was appearing for a plaintiff in a case where a horse drawn vehicle had been tied to some posts out in Leichhardt somewhere. There was a flash of lightning and a very loud and prolonged clap of thunder, with the result that these horses bolted and injured the plaintiff. The defence was that every care had been taken in tying up the horses, it had been done in the proper fashion, that what had happened was more or less an act of God. The defence was getting along quite nicely on that basis. Then the defendant called a witness on some formal matter to prove employment or something of that sort — nothing to do with the main facts in issue — Monahan noticed that the witness was wearing a returned soldiers badge. The matter being purely formal, Counsel on the other side was surprised when Monahan rose to cross examine. The cross examination went something like this:

"Q. I see you are a returned soldier.

A. Yes Mr. Monahan.

Q. What unit were you in?

A. I was in the artillery.

Q. What were you in the artillery?

A. I was a driver.

Q. You would ride the horses, would you? (Artillery being horse drawn in those days, as you know).

A. Yes.

Q. I suppose you would have to take your horses up into the front line.

A. Oh, yes.

Q. And you would have to put them fairly close to your battery, because you would never know when you would have to advance or retire?

A. That's right.

Q. I suppose an artillery bombardment would make a lot of noise?

A. Oh yes a tremendous amount of noise.

Q. I suppose sometimes you lost horses in action?

A. Yes.

Q. Then you would have to replace them with fresh horses?

A. Yes.

Q. And with the wastage of horses you would be bringing in horses that were not accustomed to front line conditions?

A. Oh yes that was going on all the time.

Q. I suppose when a bombardment started your horses would sometimes bolt and get away?

A. Oh no Mr. Monahan, if you tied them up properly the never got away."

The defence was shattered!

Those are two illustrations of the importance of keeping your eye on the witness and trying to find out something that will give you a lead in.

Now, as I indicated earlier, it is also necessary that you should be a psychologist, and form some assessment of the essential characteristics of the witness if you can, including, as I will indicate in a moment, even such things as racial characteristics or points of view, if he be a foreigner. There was one excellent illustration of that and this was a cross examination by the late S. B. Lamb, although it was not one of the rehearsed kind that I quoted earlier. He was appearing in a case, I think for the Commonwealth prosecuting a Chinese woman for some breach of the Customs Act. The whole case for the prosecution, or the major part of it depended on an alleged oral confession. The defence claimed that that was nonsense, that this woman could not speak English, and indeed they called witnesses before she went into the box to establish that she didn't know any English at all. She was called by the defence and give evidence in denial through an interpreter. Finally Lamb rose to cross examine. He cross examined her through the interpreter up hill and down dale — he asked who her husband was, what was the name of her grandfather, how many children she had, and so this went on for some two hours. He was getting nowhere fast, and then he sat down. The defendant with an obvious look of relief on the face started to walk from the box, and just as she was almost down, he said "Just one more question". She returned to the box. He said in a perfectly nonchalent manner addressing the question directly to her "Your two children are girls, are they not?" She said in English "No, boys". There he used psychology as applied for instance to the Chinese, who are always proud when their children are sons, and so I understand rather diffident about admitting they are daughters. However, that is how he got her, and so the defence collapsed.

Now whilst on this subject of securing admissions, you must take care that your witness does not elude you at the last moment. You must, therefore, eliminate every conceivable explanation that he can give, no matter how ridiculous it may appear on its face, as any explanation however poor it may be, or sound, can sometimes go down particularly before a jury. It has been said that you would liken a witness to a man standing in a paddock completely surrounded by a fence, in which there are a number of gates, each of which is a possible escape route to him. So before you start you ask yourself "What possible explantion that he can give, which will give him a way out, when I confront him with my final question". Each possible explanation that he can give represents a gate, and you must go around and methodically close each one,

not giving him any hint as to what you are up to. If you have been careless and left one gate open, you will find that nine times out of ten that is the gate he will slip out, and thus elude your grasp. The late George Flannery K.C. was an adept at this type of cross examination. I can remember on one occasion his spending two solid days cross examining a witness and asking, in many instances, what appeared to be the most ridiculous questions to the great annoyance of the presiding Judge. Any uninformed listener would have thought he had gone off his head. But when he put the final question, the answer to which was vital to his case, the witness had no alternative but to say "Yes". There was no possible explanation or way out. He had to agree.

Now, I do not wish to trespass on the territory of my friend Reynolds, Q.C. who will be lecturing to you next week on the art of cross examination on a document. This is a most important aspect of cross examination but I do not think he will mind if I just use one aspect of cross examining on a document, to illustrate my last point to you. Is is obvious that if you confront a witness too soon with a document, which if true destroys him, he may escape by saying, for instance, one of the following. He may say "It is not my writing". He might say "It is not my signature" or he may say "I didn't read it before I signed it", or he may simply say bluntly that it is untrue and give some specious explanation as to his reason for signing something which he knew to be untrue, or there may be other possible explanations, depending on the nature of the document and the circumstances of the case which may occur to you. What I would suggest is that you then start to close the gates, or at least try to. If you feel there is any likelihood of his denying that he wrote the document, pick out from the document a few innocuous words which give him no clue to the document or any hint that you have it, or refresh his mind on it, preferably words that have some peculiarity in formation, or, in an appropriate case, spelling, and ask him to write the word, or the number of words, three times quickly one after the other, so that he gets little or no opportunity of disguising his handwriting. Then get his signature, say, three times. This will give you the opportunity of comparing it with the original that you hold, not letting him see or suspect what you are doing. Then go to something else altogether, as though that avenue is finished. Then later on you might ask some such question as this "You claim to be an honourable man, do you not" — they usually so claim — to start off with anyway — and then you ask "As an honourable man, you wouldn't tell a deliberate lie on an important matter would you?" The answer is always "No". Then you ask "Much less would you sign your name to a deliberate lie?" The answer is almost invariably "Certainly not" with just the slightest tinge of indignation in it. Then maybe you can wander off on to some other topic altogether, as though you have finished with that aspect. And then you come back and you might ask something like this "I suppose you claim to be a reasonably careful man" and the answer is usually "Yes". And then you say "As a reasonably careful man you wouldn't put your name to a document without knowing what was in it, would you?" And he usually will say "No, I wouldn't". Then you take up the document, fold it in such a way that he cannot see the contents but merely the signature. You approach him and say "That's your signature, isn't it?" and he says "Yes". If you cannot do the rest, then there is something wrong with you.

I will give you another illustration of closing the gates which I recall after a long period of years, because it happened to me within my first two years at the Bar. I have never forgotten it. One of my floor mates who now is rather high in our profession, was engaged in a somewhat lengthy divorce suit. It had been going for three days, when he was offered a more lucrative brief, a matter of considerable importance in those days, although perhaps not so important to the young fellow of today. However, he prevailed upon me to carry on for him, and foolishly I agreed, the main reason being that I did not have anything else to do anyway. So over I went with the case in progress for three days. The case for the petitioner husband, for whom I was appearing, was in its concluding stages and indeed, concluded that afternoon. The evidence briefly had been that the petitioner and his two witnesses had caught the respondent wife with the co-respondent in flagrante delicto on the rear seat of a car in a secluded spot near Wollongong on a Saturday night, the date being given, of course, at a time around about 10 p.m. During the afternoon the respondent wife entered the box and proceeded to give evidence that on this very night she had attended a certain picture theatre at Wollongong naming it, accompanied by no less than eight independent witnesses, that they witnessed a certain programme and she gave some detail of the pictures that she saw. After

The Federal Attorney-General Mr Hughes, (as he then was), (left), with Mr Smyth and Mr Deane (as he then was), (right), appearing on opposite sides in the Concrete Pipes *case.*

the pictures they all repaired to the coffee lounge nearby and had a cup of coffee. Then her eight companions strolled with her along the street which led to her front gate and left her at about half past eleven. Well, of course, it is obvious that if that were true then not only was I sunk but it looked as though my client and his two witnesses had an excellent change of standing trial for perjury. So with my heart in my boots I returned to my chambers accompanied by my very despondent instructing solicitor. I said "Well this doesn't look too good. I think you had better ring this picture show and check what programme was on that night". He said "They wouldn't be that damn silly, would they". "Maybe not", I said, "But we'll check". The next morning a delighted solicitor turned up to tell me that this particular programme had been shown at the particular theatre on the previous Saturday, not on the Saturday in question but the same programme had, in fact been screened at a different theatre in the same district, about two or three miles away on the relevant night. I then got hold of a friend of mine in the picture game and got a detailed description of both pictures so that I would know what it was all about. We obtained from the agency for country newspapers copies of all newspapers roundabout the relevant date. You can see that the Respondent's possible ways out were to say that she was mistaken as to the programme or as to the theatre she attended. It was also essential that she should not be able to account for her movements on the previous Saturday or the subsequent Saturday or at least have no one to provide her with an alibi. I will not bore you with the details, but those were the things that I had to rule out. I got the respondent hopelessly committed to this particular programme at this particular theatre. There was no argument about it and she could not remember where she was the previous Saturday or the subsequent Saturday. I asked her no more. Then each of the eight witnesses was dealt with in the same way. They fixed that it could not have been the Saturday before or after — one of them was on night shift for instance. Somebody else was at Aunt Mary's birthday party and so on. Then finally I put the Respondent back in the box and said "Have a look at this" showing her the programme as advertised in the newspaer for the relevant night. She looked at me like a startled rat and it was not long before she gave in. She was obliged to admit that she had been speaking of the previous Saturday. This is an illustration of what I mean by closing the gates. If I had gone up to her and said "Look here, you said you were at the theatre and saw this programme on this night. Have a look at that". She would say "Yes, that is right. Yes, I remember now that was the theatre that we went to (mentioning the other theatre)". Or she might have said, "No, I was mistaken as to the programme" or something of that sort. She would have got out of it somehow, and then all the other witnesses, no doubt — I am not suggesting anything wrong, of course — would have given an entirely different version of what happened on that particular night. There is another important thing that flows from the illustration I have just given — don't take anything for granted. It does not matter how probable anything may look that comes out on the other side that you did not expect — check it. Think to yourself when you go back to your Chambers "Now, how can I get rid of that — how can I controvert it". And if you give those sort of things a bit of thought, it is amazing what ideas will come to you.

Now speaking generally, I am firmly of the view that the subjective method of cross examination is more often than not the most effective. I have often heard Counsel saying to witnesses, one after the other "I put it to you that you did this" or "I put it to you that you said that", and getting nowhere fast. On the other hand, if you probe the mind of a witness it will be much more effective. Cross examine him on his thoughts, his reactions, his reasons for doing something, his standards and so forth, always framing your question in such a way as to evoke a favourable answer. I sometimes liken it to arguing with a person who cannot argue back. You have only to give that a moment's thought to realise how advantageous it is. How much more successful, for instance, would you be at home if you could manoeuvre your wife into that situation. When you come to think about it what you are doing is putting propositions to a witness, which he is almost compelled to agree with, because they sound so reasonable. He would feel a bit of a fool if he disagreed with them, or might think that it would look as though he was not too honest or not too honourable or not too truthful. If you frame your questions in that way, then I think you will find that you will do much better than getting up and trying to blast the witness out of the witness box. If I may also add on that aspect there is room for that type of cross examination in virtually every case and if you can learn to do it well you will find that you get vastly different results. You will also find that when you are able to do it well, you will be in a situation where you can address the tribunal almost exclusively on what the other has said. This puts you in the very strong position of arguing or basing your argument upon what you can fairly claim to be common ground. There is no dispute about it you would point out, the other side admits it. If you find that you can give the whole of your address, or base the whole of your address on the facts on what you have secured in cross examination you may say to yourself "Well, I haven't done such a bad job."

I have brought along an illustration of it which occurred in an ordinary negligence case, cases in which category now constitute some 80% to 85% of the work of the Supreme Court. If you can apply it to that sort of case, a collision case, how much more effectively can you apply it in a fraud case, a libel case and so on.

The illustration that I would like to give you is a quite recent case, namely *Williams v Smith 76 W.N. 158.* Do not be misled. My name appears in the report, but I was not responsible for the cross examination — my friend Lusher conducted the trial, and if I may say so it is an excellent piece of subjective cross examination. Indeed, although the jury found against him — as they often do in this sort of case — it was so good that we got a two to one majority in our favour in the Full Court. I must say we went down like tacks in the High Court, but that in no way detracts from the excellence of the cross examination. I think it would pay you to study it as it will give you in graphic form the ideas I am seeking to convey. There is quite a good bit of it — but perhaps I could read a short excerpt so that you will see what I mean. The circumstances of this case were these. The plaintiff was coming down Bulli Pass at 20 to 25 m.p.h. on a motor cycle in a thick fog, his range of vision being no more then 12 feet. He admitted, in cross-examination that if

he had only been travelling at 10-15 m.p.h. he could have stopped in time to avoid our car, which happened to be on its wrong side of the road at the time. Having agreed that he could only see 12 feet, he was then asked as follows:-

"Q. If there was a piece of wood, or log on the road, you would have no chance of doing much about that, would you — of avoiding it, if you could see only 12 feet ahead?

A. No.

Q. You would have no chance would you?

A. No.

Q. So if there was a rock on the road, or some obstruction of that sort, with a view of only 10 or 12 feet in front of you, at that speed that you were travelling, you would have no chance of avoiding it, would you?

A. No.

Q. The real fact of the matter is that you had no chance of avoiding this other motor vehicle either, did you?

A. No."

And later,

"Q. You have already said that you would not have been able to take any evasive action if there had been an obstruction on the road — you have already said that, haven't you?

A. Yes

Q. Supposing you had been coming down that hill at 10-15 m.p.h. don't you think you would have been in a much better position to avoid this accident that you were in fact?

A. Yes.

Q. You certainly would have, wouldn't you?

A. Yes.

Q. Because if you had been travelling at 10-15 m.p.h. you would have had much more time than you had, would you not?

A. Yes.

Q. Without any difficulty at all?

A. Yes."

He agreed that in those circumstances "it would not have been difficult to get out of his road".

"Q. So that if the motor vehicle had been stopped on the road in front of you, right across the centre of the road (which was the evidence for the defendant) you could have avoided that at 10 or 15 m.p.h. could you not?

A. Yes without any difficulty had it been stopped.

Q. Without any difficulty had it been stopped.

A. Yes."

There you have a very good illustration of what I mean by, in a sense, putting propositions to the witness — getting him to agree to them, and gradually leading him to the situation in which he ultimately found himself.

There is another illustration, perhaps, which I could give you — and that is a case which I was in myself some years ago: *Christianson v Gildav, 48 S.R. 352.* I was sitting in my Chambers one afternoon when a Solicitor came up with a panic-stricken look on his face and said "Look, are you doing anything tomorrow"? I said "No. What do you want?" He said "Look, I am in a bit of difficulty, I have a case here, I am appearing for the insurance company. We don't think the company is really liable. the defendant, the insured, has cleared out. We don't think he gave us proper notice, but we are not going to just let it go by default, because the damages might be enormous. I'm sorry we have let the matter go a bit. All I can tell you is the fellow was injured in a winch on a boat. He lost his hand apparently. We don't know when it happened, where it happened, or how it happend. So would you just do your best to keep the damages down." I replied "Thanks very much." After he had left and I had read the entire contents of the brief, namely the issues, I began to think about it. I thought "Well it is something to do with a boat apparently so I had better have a look at the Navigation Act." At this point I would remind you of something I said earlier, namely know the relevant law because very often it can be of the utmost assistance to you in cross examination, as it turned out to be in this case. As I say I had a look at the Navigation Act. I saw that "master" means "every person, except a pilot, having command or charge of any ship". On browsing through the Act I came across Section 96 which said "Every master of a British ship who knowingly takes such ship to sea from any port in New South Wales, in so unseaworthy a state that the life of any person is likely to be thereby endangered shall be guilty of a misdemeanour" unless he proves certain exceptions which had no relevance in this case. I had a look at the cases as to what unseaworthiness meant and found that if you have a defective winch that makes your ship unseaworthy. I was faced at the trial, of course, with the usual alleged admission by the defendant when the plaintiff swore that some time before the accident he said to the defendant "Look here, boss, that winch is dangerous. Somebody will lose their hand or be killed". The boss said "Yes, yes, that's right Bill, but look we are busy at the moment, the weather's good. Wait until we get a bad day and we are in port, and we'll fix it up" but of course said Counsel for the plaintiff "unfortunately it was never done". Then we heard the story of how this man had spent 30 years of his life on this trawler. He knew nothing else. There was nothing else he could do without his hand, and so the damages mounted. The first thing I had to establish obviously was that he was the master. So I said "I suppose you would have been the most experienced man in this crew". He replied "definitely". I then said "Naturally you would be in charge of the vessel" to which he replied "Yes". That made him the master beyond a doubt. At a later stage I asked and — you will see it in the report if you care to look — "Did you consider the way in which it was left" (that is the winch), "that it might be dangerous?" He answered "Yes definitely" (with my opponent thinking "another thousand on the damages, I suppose"). Then I asked "And even dangerous to life" to which he replied "Yes". Then I said "There is no doubt about that". He said "Yes" and finally I asked "And you knew that all along" and his answer was "Yes". I may say that I tried to get him outside the three mile limit, thinking I might be able to put up some argument on common employment but unfortunately an adjournment intervened and never have I seen a ship come inshore so quickly when we resumed. It ended up he was only a mile and one-half off shore, so that closed up that avenue. However, at the end of the evidence I successfully moved for a verdict on the ground *ex turpi causa actio non oritur* — the defendant being a man who was injured in the course of and by reason of the committing by him of a crime. How can he sue? This submission appealed to the learned trial Judge, and we succeeded. However, the

argument in the Full Court was in much more capable hands, and was put on the sounder ground that on the plaintiff's case the effective cause of the injury was the plaintiff's own negligence. So we held the verdict. That indicates to you that no case is ever hopeless. Don't just throw your hands up and say "I can only do the best I can". Give it a lot of thought and it is amazing what will occur to you.

I am afraid there is not much order in this, because it is a difficult subject to put in any real sequence. I think I should now direct your attention to the advantages to be derived in some circumstances from cross examining on the surrounding circumstances. In many cases it is quite futile to cross examine directly a witness on what he has said happened or was said in the hope that he may be induced to depart from his earlier version. A case in court is really a little play and it is divorced, and often very skilfully divorced, from the reality of the situation and the surrounding circumstances. If you cross examine the first witness on those surrounding circumstances, framing your questions in one way to encourage particular answers and then cross examine the next witness framing your questions to encourage answers tending in another direction, you will amaze yourself very often at the conflict you have thus created. Then you are able to go to the jury and say "How can you believe these fellows?" You say "One says this and the other fellow says the opposite". To develop the matter a little further you might with a later witness put something that you have got from an earlier witness in such a way as to encourage him to answer in the negative. For instance having led up to it with an appropriate series of questions to encourage the answer you want you might put to him what the earlier witness has sworn without of course indicating that the latter has done so. You would say "Look, I am suggesting to you this" (giving the earlier witness' evidence on the point) "is what happened". He answers "certainly not". You then ask "that is utterly false, is it?" He replies "Absolutely" little realising that he is damning a witness on his own side. You will find this quite a useful method in cross examining police witnesses of which I have had some little experience. You can cross examine them up hill and down on what their statement says, and if you get them to budge one inch it only means that they have been careless. It is not due to any skill on your part. You can cross examine them, perhaps, on these lines. Didn't you put your heads together in preparing this statement. The very words of their evidence are identical. You will find however that they have never seen one another since the arrest — they have never talked to one another, and it is quite a surprise to them that they have used the same words but that was purely accidental. Of course, that might help a bit before a jury, but a Magistrate merely looks at you in pained silence. He knows perfectly well what goes on. But where you will get them very often, is cross examine them on what happened just before or just after. What they said to one another as they were walking up to arrest the innocent man and what they said to one another when they got back to the station and so on. You will find that very often you will get an amazing conflict, and in that way, particularly before a jury, you can completely and utterly destroy their story.

It has been said, and again I am afraid there is not much continuity in this, that you never ask a question unless you are sure of the answer. Well that must not be taken too literally. I can remember one occasion of which Jack Shand told me where a very eminent King's Counsel, since deceased whom I shall not name although I don't suppose he would mind now, who was brilliant in arguing constitutional matters, construction of documents and so forth, excelled in appellate work in the High Court and elsewhere, but had never had a great deal of common law experience. By some strange chance one day a brief arrived on his table to appear for the defendant in a libel action, it being part of his instructions that "this case is going to depend entirely on cross examination of the Plaintiff". So he thereupon set about directing his mind to this question of cross examination. He wrote out a series of questions, and then after giving them as much deep thought as he would have given to the construction of a Statute or a Will, decided that the first one was too risky. He crossed it out. He kept going and finally was left with two questions which he thought were the only ones which could be asked of the plaintiff with safety. By the time the Solicitor heard this he panicked, seized the brief and took it around to Jack Shand telling him what had happened. The sequel was that Shand cross examined the plaintiff for three days, belted the daylights out of him and secured a verdict for the defendant which only shows that whilst caution is desirable ultra caution can lead to disaster. So you will see that the maxim never to ask a question unless you are sure of the answer is stated somewhat too broadly. You cannot be absolutely sure of what the answer is going to be. The only thing I suggest to you is do not be negligent, if a question is risky or the risk is not worth it, do not ask it. Let it go. If you frame your questions in the way in which I have suggested, you can almost bank on that answer being the right one because you do not rush in, you proceed warily step by step, step by step — very short steps at times — and you will be unlucky if your cross examination ends up on the rocks.

I think it has also been said, and this is important, that the art of cross examination is to know when not to ask a question, and that applies in two ways. First of all, not to ask any questions at all, and secondly not to ask particular questions. When a witness has said nothing to hurt you and there is nothing you can hope to elicit from him, you are a fool if you ask him anything, because every question asked in cross examination has some element of risk.

Another thing you will find, and I am only putting these briefly, witnesses will dodge your question and this is where your memory comes in. They will sidestep the question. You must not let them get away with that. Ask the same question in exactly the same words again, then if he does it again, ask him precisely the same question again and again and again until he says "yes" or "no". Then if you like, go back and pick his answers up one by one and kick him to death on those. You will get a lot of useful material if you are not put off by a witness evading your question. Another thing is try and avoid putting yourself in the situation of having to ask for the question to be read. It is far better to make him see that you are relentless, that you are going to get an answer if you stay there all day and you will find that you will finally get it.

As to the question of credit, I have already indicated to you that your cross examination having as its object the main purposes that I indicated earlier, will in most cases give you all you need, if you want to destroy a witness. He does not have to have a string of convictions. You can, in your cross examination of him, destroy his credit by showing him to be evasive, by bowling him out every now and again in a lie, by reminding him of what he has said half an hour ago and by getting him to agree that what he is saying now is diametrically opposed to what he has said earlier by getting him to tell you which of the two versions is true and then asking why he told a falsehood in the other and so on. What I have just said again emphasises the importance of good memory.

Another thing which, perhaps, I could put shortly to you is how to use a conviction. I have seen this sort of thing happen. Some chap is bringing an action for goods sold and delivered, if you like, or work done and materials provided, and cross examining Counsel gets up before a jury and says "Look here, isn't it a fact that you were convicted of break, enter and steal, three years ago". The fellow says "I have been trying to live that down ever since. I was hoping that wouldn't be brought out". The jury more probably than not will become antagonistic thinking no doubt "What on earth has that got to do with whether or not this man ought to be paid for the work he has done? I don't care whether he is a criminal or not. If he does work for anybody, why shouldn't he be paid". And so you have done more harm than good. The way I suggest you might go about it, and this is only one way, you might proceed somewhat on these lines:

"Q. Of course, you appreciate that the suggestion here is that you are outrageously overcharging for this work?
A. Yes, that is what you say.
Q. And that you are charging for work that you didn't do?
A. Yes.
Q. That would not be very honest if it were so, would it?
A. No.
Q. And that you are charging for work that was done badly?
A. Yes, that is what you say.
Q. As a mater of fact you are not very particular how you make your money, are you?
A. What do you mean?
Q. Don't you know?
A. No.
Q. What would you think of a man who was convicted of breaking, entering and stealing. That would indicate that he is a dishonest man, wouldn't it?
A. Yes.
Q. That is precisely what happened to you, wasn't it?
A. Yes."

You see the difference. The important thing is to make the asking of question concerning a man's criminal record or unsavoury past appear to have some relevance to the case being tried. Otherwise you give the appearance of slinging mud for mud slinging's sake and juries do not like that.

Perhaps I can give you another illustration from my own experience of how to use material which on its face might appear to be utterly worthless. I was appearing in a case in which everything depended on the credit of the principal witness on the other side being destroyed. The only material I had was that the witness on being arrested in a baccarat school on two occasions had on each given a false name to the police. If I had asked "Is it not a fact that you were arrested on two occasions for being on premises used for the playing of baccarat" and then upon receiving an affirmative answer had followed it up by asking "And on each occasion you gave a false name to the police did you not?" he probably would have replied with a smile "Well everybody does that". The jury would no doubt have laughed their heads off at my expense and would have thought perhaps that the witness was not such a bad chap. The cross examination in fact proceeded on these lines:-

"Q. You are a bit of a liar when it suits you are you not?
A. What do you mean?
Q. Do you mean to say that you don't know?
A. No idea.
Q. What would you call a man who when apprehended in the course of committing a crime gave a false name to the police. You would call him a liar would you not?
A. Well yes I suppose so.
Q. And that is precisely what you did on no less than two occcasions?
A. Yes.
Q. So you are a liar when it suits you are you not?
A. Yes."

The cross examination then proceeded to point out to him that it suited him to say this or that in this very case and in the end he went to pieces. I refrain from telling you what my opponent said to me when he discovered the nature of the "crime" committed by his witness.

Finally, I would like to make a few remarks on what should be your demeanour as a cross examiner. I am firmly of the opinion again subject to exceptions in particular circumstances, that a persuasive approach is more often than not far more effective than the hectoring bullying shouting method. In the first place if you violently attack a witness or you are rude to him, he is immediately on the defensive and on his guard. If you approach him in a persuasive manner — I do not mean that you grovel — he is much more likely to agree with the propositions that you are putting to him. Many a devastating cross examination has been conducted without the cross examiner raising his voice. Demeanour is of more importance than is sometimes realised. I am reminded in this regard of a somewhat amusing incident which occurred some years ago. The late Andy Watt K.C. was opposed to the late David Maughan K.C. both very able Counsel and both first class cross examiners. They were, however, rather different types. Watt was tall, smooth and courteous. I do not wish it to be thought that I am suggesting that Maughan was discourteous — far from it — but he was not by any means tall and was inclined to get a little peppery at times, particularly if his witness happened to stray off line during examination in chief. Maughan called a witness whom he had not met in conference and who did not know Maughan. After he had given evidence he was excused from further attendance and when he met his mates outside who were still waiting to give evidence, one of their number said "How did you

go Jack?" He replied "Very good. When I went into the box the little chap on the other side got up and snapped a few questions at me but I can tell you he did not get a thing out of me. He got very cranky with me and sat down very angry. Then our fellow got up — a very nice chap he was too. I was shrewd enought to see what he wanted and I must have answered all his questions the right way because I could see he was very pleased with me". Obviously the witness had got his sides mixed up but you see what I mean when I say that demeanour is of the utmost importance.

Finally on this aspect do not show your feelings. If you have a reverse do not give the slight indication on your face of how sick you really feel although you do not have to tell me how your stomach will be reacting.

There is just one thing I should like to add. Do not come back to your Chambers boasting of the splendid cross examination you carried out in Court that day. You will employ your time far more usefully if you reflect upon the mistakes you undoubtedly will have made to ensure that you do not repeat them in the future. The only difference between yourself and your more experienced colleague is that he will make less mistakes than you. You will make mistakes almost every time you carry out a cross examination as you will almost inevitably ask some risky question or in your enthusiasm will have gone just a little too far. Only be reflecting on your mistakes will you avoid falling into error or at all events the same error on subsequent occasions. □

The Interstate Lawyers' Lament

Bennett QC is said to be primarily responsible for the "lyrics" of this ditty with the assistance of sundry other non-Banana-benders. Sang to the tune of "Waltzing Matilda", it premiered on 12 March at a dinner for the Chief Justice of Queensland at the Southport Yacht Club. With the out-of-Staters' capacity for verse and spelling thus displayed, it's little wonder they don't want us up there!

Once a Sydney counsel
Squatted up in Jupiters
Hoping to earn a brief fee
and he sang as he basked
With joy beside the swimming pool
"Queensland must give
Reciprocity."

Up jumped the barrister
Mounted on his hi-igh horse
Flanked by solicitors
One, two, three
And he sang as he told
The court of his appearance
"Queensland must give
Reciprocity."

I am a lawyer
From the Northern Territory
I am a neighbour of yours, you see
You can deal with dingoes,
Crocodiles and Mick Dundees,
So why not for me
Reciprocity?

Up there in Darwin
We have a firm of M.F.&.C.
With Queensland connections
Don't you see?
Well, the locals complain
That they'll lose their work and hence their fee.
If it's O.K. for thee,
Why not also for me?

I come from Canb'ra
Home of the Hi-igh Court
I understand
The bureaucracy.
I know how to get
P'licemen to co-operate.
Please grant to me
Reciprocity.

Down in Victoria
We shout with euphoria
At the very thought of
Reciprocitee.
So please, please, you Queenslanders,
Get rid of your gerrymanders
So we can steal your clients
With impunitee.

I come from Tassie
Home of trout, apples and cheese.
We never overcharge
Or load counsel's fees.
We love your state,
Your weather, your city.
Please, please, please
Reciprocity.

Down went the counsel
To the court in Canberra
To plead that Australia
Is one big countree.
And the High Court then spoke
With ra-are unanimity
"Queensland must give
Reciprocity."

CHORUS
Welcome to Queensland
Welcome to Queensland
Tourists up here
Spend their money with glee
But try for yourself
To earn an honest dollar
And we'll send you packing
Without any fee.

FINAL CHORUS
Welcome to Queensland
Welcome to Queensland
We're waiting for counsel
From far off Sydney.
'Cos we'll find a way
No matter what your judges say
You'll never have
Reciprocity.

(Cartoon and verse published with the kind permission of the Queensland Law Society Journal).

Judicial Commission of New South Wales

The Judicial Commission has issued a press release outlining its perception of how it will achieve its role in educating the judiciary.

Introduction

In November, 1987 the N.S.W. Judicial Commission released details of its plans for servicing the continuing legal education requirements of the judiciary and for providing criminological assistance on sentencing to the State's criminal courts.

The Commission was established by legislation in December 1986. In addition to servicing these requirements of the judiciary, it has responsibility for investigating complaints against Judges and Magistrates and taking appropriate steps in relation to such complaints.

The Commission comprises the Chief Justice as President and the heads of the other five State Courts together with two appointed members. Judge Thorley retired from the District Court in December 1987 to take up full time duty as the Chief Executive.

Continuing Judicial Education

In its role of providing assistance in continuing judicial education (CJE) the Commission will be following similar organisations established in England and Canada as well as in the United States.

The assistance to be provided will cover a wide spectrum commencing on the initial appointment of the judicial officer and extending throughout the tenure of office. It will cover both practical and academic aspects of judicial work.

On the academic side, there is a constant flow of new legislation, new cases and other general literature with which judicial officers must keep up to date. Until now they have been largely unaided in this regard. The Commission intends to provide significant assistance to judicial officers in meeting this requirement. This in turn will enhance the quality of the administration of justice in this State.

The plans involve seminars on recent legal and social trends and developments. The Commission will publish a regular judicial bulletin and will prepare handbooks on court practice and procedure covering a wide variety of matters dealt with in the courts of this State.

As a first step, CJE committees will be established for each jurisdiction. From these a central cross-jurisdiction committee will be established. These committees will identify areas of need and provide guidance in determining priorities.

In developing the plans consultation will take place at all levels of the judiciary and with other organisations and individuals who are involved with CJE both here and overseas. Links will also be established with the College of Law and academic faculties.

There will be constant evaluation and review so that it will be possible to assess whether the objectives are being achieved as well as the extent of the benefits to participants.

Criminological Assistance on Sentencing

The Commission has also drawn up plans to assist judicial officers to co-ordinate sentencing practices and to eliminate disparities in approach to sentencing in the criminal courts.

A computerized sentencing information resource will be established which will contain dissected details of each sentencing decision of every Judge and Magistrate in New South Wales.

Information in the database will include the important features of each offence and the sentence imposed. This data will be synthesised and sent by computer to courts throughout the State.

An individual Judge or Magistrate, when considering the sentence to impose in a case, will be able to use the information system to determine the nature of penalties imposed in past similar cases. At the press of a button access will be available to the combined experience of all Judges and Magistrates who have dealt with similar cases in the past.

The information will be directed towards assisting a Judge or Magistrate to arrive at the decision appropriate to the case in hand. It will not control or constrict the individual decision to be made.

The sentencing information system will be the first of its kind in Australia and is believed to be one of the most comprehensive of its type in the world.

Work on the information systen has already begun and it will commence operation at Local Court level. The Local Courts account for over 90% of all penalties imposed in the State.

The information system will be expanded in the latter part of 1988 to include the District Court and in due course the Supreme Court. When fully in place Judges and Magistrates will be able to call on the details of over 88,000 cases each year.

In addition to establishing the information source, the Commission's CJE programme will include seminars, sentencing exercises and the provision of assistance generally to Judges and Magistrates on sentencing philosophy and practice. The regular judicial bulletin and hand books will also have an important part in this field.

Conclusion

The Commission is confident that the implementation of its programme for continuing judicial education and criminological assistance on sentencing will be of significant assistance to Judges and Magistrates. This in turn will be reflected by improvements in efficiency and more effective use of the judicial resources of the State. Although it is likely that the workload of the courts will continue to increase the Commission, as a judicial service organisation, will play an important part in countering the delays that exist at the present time in New South Wales courts. □

Trivial Pursuits

Abandon all hope . . .

Ever-mindful, no doubt, of the development of the law concerning misleading and deceptive conduct concerning individuals (see now Fair Trading Act, 1987) Lord Redesdale, in 1827, penned a disarmingly frank introduction to the Third Edition of his ***Treatise on the Pleadings in suits in the Court of Chancery by English Bill.***

PREFACE
TO
THE THIRD EDITION.

"The materials from which the first edition of this Treatise was compiled were not very ample or satisfactory; consisting, principally, either of mere books of practice, or of reports of cases, generally short, and in some instance manifestly incorrect and inconsistent; and the author had had little experience to enable him to supply the deficiencies of those materials. The communication of information, and the assistance of experience, were earnestly solicited by the preface to that edition, but with little effect. Four-and-thirty years have since elapsed; and when, at the distance of seven years from the first publication, the second edition was prepared for the press, such observations as had occurred to the author in practice, and such notes as he had collected, were the principal means of improvement which he possessed; and he was then too much engaged in business to give that attention to the subject which it required. Nearly eight-and-twenty years have since passed; and many volumes of reports have been published, and some treatises have appeared (particularly those by Mr. Fonblanque and Mr. Cooper), from which much assistance might have been derived. During the greater part of this period the author was not only unwilling to engage in the labour of preparing a new edition, but disabled, by various avocations, from attempting to make any important additions. Long absence from the bar, the consequent want of the habits of practice, age, the enjoyment of repose, and the indolence which that enjoyment too often produces, have increased his unwillingness to undertake a work of labour; and that which is now offered is little more than a republication of the second edition, with references to some cases since reported; a few additional notes of cases not reported; some corrections of apparent errors; and some extension of parts which appeared to have been most imperfectly treated in the former editions. It is therefore far from satisfactory to himself; and would not have been now given, if he had not been assured that even a republication of the last edition, with all its imperfections, was desired by the Profession."

Squelch

"I confess that my mind fluctuated one way and then the other during the course of the argument upon this separate trial and to having changed my view once more after I had reserved my decision. However, counsel should not too readily accept that confession as demonstrating their powers of advocacy, as the different views which I formed were in each case against the argument of counsel who was then addressing me."
(Hunt J, *Glenwood Trading Corp. Pty Ltd v Magnani & Wife Pty Ltd & ors,* 6 October 1987) □

Building and Engineering

The renovations to the foyers of Wentworth and Selborne Chambers have evoked a strong response from the Bar (see under).

It is hoped that one day the functioning of the lift system will reflect the magnificence of its surrounds. At the moment the light indicators work on only one lift in Wentworth, while the doors on at least one other won't operate until they have executed a number of shuddering spasms which cause more nervous occupants to exit hastily. The best trick, however, is for the lift to refuse to close its doors or move at all, defying all attempts to prompt it into action by the usual methods (pressing destination buttons, waving arms across the light beams regulating the doors, jumping up and down etc). The moment the despairing would-be travellers exit to seek another lift, the doors slam shut and it (apparently) departs! Not what is needed when you're trying to get to Court on time. Which leads us to the Supreme Court lifts . . . another story reserved for another day, although it is noted, in passing, that on occasions they defy Newton's Law of Gravity - they all go up, but never come down, especially trying when you're trying to juggle a few Friday applications and motions.

The Foyer Revisited - Wentworth and Selborne

Although the Necropolic School, evident in these renovations, is a recent movement in architecture it owes its inspiration to sources as diverse as the pyramids of the Pharaohs, and Dr. Geoffrey Edelsten.

Features of this school of design include the curiously shaped and apparently irrelevant light fittings and lift indicators, the latter irrelevant because, of course, the lifts so rarely go places. It is not clear whether the architect welcomed the decision to include those quaint plastic plant boxes in his new scheme - the contrast with the marble walls is an interesting one.

For those who ask, on entering these portals, "whose tomb is this?", the answer must echo "the unknown barrister", of course, who else?

Some have apparently questioned whether the spending of such a large sum of money was justified, but marble is an expensive material. Was it then Alan Bond who coined the phrase "who says you can't buy good taste?" □

Lawyer Foyer

The rumours abound,
They've spread around
The humble and the well-born;
If you want a treat
Come to Phillip Street -
Stop at Wentworth or at Selborne.

For there you'll see
(the vista's free!)
A spectacle most stunning;
As you just look right at
The awesome sight that
Is the product of some architect's cunning.

Well, I guess that the Lord
Spake with some on the Board,
And said "Tart up the front of your building";
And the Board Said "That's funny -
Let's expend some money -
to give the old lily a gilding".

"It's the ideal foyer
For any lawyer" -
One can hear the Board's resolution;
"Now, shareholder, you'll
Have your own vestibule,
'Cos it's financed by your contribution".

You might well criticise -
"He's got failing eyes", or
"He's nothing but a cynic";
And "How would he know
A Brereton Casino,
From an Edelsten Medical Clinic?"

There are many, I guess,
Whom it will impress,
And I suppose that's better by far;
For it's epitomised
What's oft criticised -
The bold front - of those at the Bar!

"L.D"

Cross Purposes

The following forensic clashes come out of the one case (Toolin v. Electrial Installations Pty. Limited) which was heard before Grove J. and a jury of four on 11th December, 1987 and following. Cummins Q.C. appeared for the plaintiff, McAlary Q.C. appeared for the defendant and Shand Q.C. appeared for the cross-defendant.

The plaintiff claimed damages for personal injury which resulted in significant brain damage. A jury of four was requisitioned and heard the case.

Dr. F.W. Wright-Short, psychiatrist, was qualified to give evidence for the plaintiff and he did. One of the heads of damage claimed was loss of memory. Shand took up the cudgels on that aspect of the claim and the transcript records the following (with the barest of editorial licence):

"Q: It is correct, is it not, that so far as your first report is concerned it contains no complaint by him as to defective memory?

A: Does it not?

Q: One of the things you would expect him to recognise would be a defective memory, would you not, as part of his insight?

A: He told me about that on the second occasion and it was probably because of his defective memory he forgot to tell me about it the first time."

It should be noted, in fairness to Shand Q.C., that he was more than equal to the occasion and responded with one or two forensic body blows to the good doctor and more than recovered the initiative.

Then McAlary gave us an insight into his appreciation of the sophistication of modern juries, and the depth of their education. He cross-examined Anna Tesoriero, psychologist, and at one point took issue with her reasoning; he was attempting to have the witness admit that the basis for her conclusion that the plaintiff suffered an alcohol and drug problem as a result of brain damage was simply no alcohol or drugs before accident, but alcohol and drugs after the accident. Again, with the barest editorial licence the cross-examination proceeded:-

"Q: And who had had no relationship to drug or alcohol consumption before the accident but had had it afterwards.

That was your history wasn't it?

A: Yes.

Q: And prima facie therefore the assumption is *post hoc ergo proptor hoc . . .*

Mr. Cummins: I do not know if the jury understand.

Mr. McAlary: Q: I am sure they do.

A: Yes, well - "

No doubt with his usual perspicacity, McAlary had somehow divined that they were all old St. Ignatiuns! □

John Maconachie

That Sinking Feeling

At a recent inquest at Wilcannia, counsel cross examining a witness with less than perfect recall was suggesting that she would remember significant events. When she seemed confused he continued:

"BUCHANAN: Well . . . if you had never been a sky diver and you fell out of a plane once, isn't it likely that you'd recall that for the rest of your life?

(Aside, MATER)
But not for long."

Vignette

Des Kennedy (cross-examing Plaintiff with left homonomous hemianopoa [loss of vision on the left side])

"Looking straight at me witness, are you able to discern that I have at least the appearance of a barrister?"

McInerney J: "That's a dangerous question. Do you really want him to answer it?"□

The Office of Solicitor General for New South Wales

Keith Mason QC, Solicitor General for New South Wales traces the development and depoliticisation of the office of Solicitor General in New South Wales.

When, late last year, I agreed with the editor to write something about my office for *Bar News* I assumed that most of my fellow members of the Bar who might read it would be as ignorant as I was a year ago about the role of the junior Law Officer in this State. This contribution will hopefully make each of us, if no wiser, then better informed.

The first Solicitor General for New South Wales was appointed in 1824. The office has been occupied for most of the period since that time, although it was abolished for 21 years in the late nineteenth century. A list of the holders of the office appears as a Schedule.

As with most things in the early colony, the appointment was initially seen as a replication of its English counterpart, the ancient office of Solicitor General which had existed in England under that name since the fifteenth century (see generally Edwards, *Law Officers of the Crown*and *Solicitor General v Wylde* (1945) 46 SR (NSW) 83 at 90-92). Inevitably the changing legal conditions of the colony and later the State meant that the incidents of the office were modified and it developed in its own way. Until the passing of the Solicitor General Act in 1969 the office rested upon administrative appointment made by Letters Patent by the Governor with the advice of the Executive Council. It has always been held at pleasure.

J.H. Plunkett
Solicitor-General (1831-1836)

In the very early days the idea of combinging the offices of Solicitor General and Crown Solicitor was toyed with. However the volume of work and the different function of solicitor and law officer meant that a clear differentiation between the two positions was accepted from the 1830s onwards.

The first incumbent, John Stephen, held office for only a year. This seems to have been a blessing given the quality of his later career as the first puisne judge of the Supreme Court. His appointment to the latter position was probably *ultra vires* and his performance in it was feckless and intemperate. "Mr Stephen . . . poor man", Governor Darling informed the Colonial Secretary in 1828, "is a tool in the hands of the Chief Justice, who works with him as best answers his immediate object". Stephen was frequently admonished by the Colonial Office for being indiscreet. His own nephew James prepared a despatch for Governor Darling in 1831 in which the latter recorded that "if I have anything to reproach myself with, it is the forbearance I have shown in not reporting his unfitness for his office".

The second appointee, James Holland who was a former Attorney General of Bermuda, never took up his position because the Chief Justice refused to swear him in as Solicitor General. Apparently Holland accidentally left behind in England the despatch of Lord Bathurst appointing him to the office. In a letter from the Colonial Secretary's Under Secretary to Holland the "inconvenience" was regretted, but it was pointed out that Holland had brought himself "into the unpleasant predicament" in which he was placed. Holland was consoled with the fact that his salary was unaffected by the slip because, like a number of early Solicitors General, he was also a Commissioner of the Courts of Request which were small debts courts. (Several other early incumbents also sat as magistrates or chairmen of courts of Quarter Sessions concurrently with their position as second law officer.)

Until 1922 the Solicitor General was, with occasional exceptions, a member of one of the Houses of Parliament in the State. The incumbent was a member of Cabinet and office was lost if a ministry fell or was reshuffled. In this sense and others the office was political until well into this century, although the Attorney General and Solicitor General were expected to perform their legal functions with a degree of non-partisan detachment, and they usually did so. Under the 1855 Constitution Act the office of Solicitor General was specifically mentioned as one of the "offices of profit under the Crown", which could be held consistently with membership of the Legislative Assembly. However from 1884 onwards the office ceased to be listed in the Schedule of those which could be held by members of the Legislative Assembly.

The primary function of the Solicitor General in the nineteenth century was to assist the Attorney General and to deputise for him in the event of illness or absence. Out of court, this included advice to government, the laying of informations, and the preparation of civil and criminal litigation. In court, the work involved the conduct of criminal prosecutions and, increasingly, the conduct of important civil litigation for the State. In the legislature, the work included drafting bills and representing the government interest in legal matters in debate.

As with the English practice, the Solicitor General often succeeded to the Attorney Generalship when that office fell vacant. The junior role of the first law officer was also reflected in a salary which represented two-thirds of that of the Attorney General. The Solicitor General had a right of private practice which was occasionally exercised in the nineteenth century, but from 1895 onwards the Attorney General and Solicitor General ceased to engage in private practice. (This issue is distinct from any question of the right of the Solicitor General to be paid a brief fee for a civil Crown brief.)

As between the Attorney General and Solicitor General there was considerable overlap of function in the early nineteenth century. The Colonial Secretary pointed out to Governor Darling in 1829 that the two law officers:

"should be jointly employed in all the legal business of the Crown, and should be left to make such arrangements between themselves for the distribution of their common duties, as the Public interest and their own personal convenience may suggest. In the event of any disagreement between them on this subject, the Attorney General should have the right of dictating to his Colleague. If the Solicitor General should complain that an undue proportion of labour had been thrown upon him, you should depute to examine and adjust the dispute. I apprehend, however, that the necessity of making such an appeal would have a strong tendency to check any disputes of this nature in their commencement.

My motive for preferring this arrangement is that it will make both the Crown Lawyers responsible for the due discharge of the whole legal business of the Colony. This joint responsibility will operate as an important security against rivalry and dissension and as a constant check upon precipitate measures." (*Historical Records of Australia* ("HRA") vol XV p10)

This diplomatic language appears to reflect some tension between the incumbents of the respective offices at the time. In a letter from Attorney General Baxter to Governor Darling of 29 April 1829 the former pointed out that there was an "understanding" between himself and the Solicitor General as to the general nature of their duties. Somewhat wryly, he added that although the understanding "does not by any means produce an equal division of labour, yet it imposes a joint responsibility, requiring an equal proportion of vigilance". (*HRA* vol XV p99). Needless to say the Attorney General was at pains to stress "that the more onerous duties devolved upon himself". At this early stage it is clear that the Solicitor General's functions were tending towards the civil side of Crown legal work in court whereas the Attorney General primarily was involved in the criminal side. The reason given by Baxter for the excessive volume of criminal work was that "the general character of the population necessarily produces a frightful catalogue of crimes of the greatest magnitude" (*ibid*). (In the late twentieth century we blame slow judges, greedy barristers, inefficient administrators or inept ministers for these same ills.)

In 1836 the Attorney General was Dr J Kinchela and the Solicitor General was J H Plunkett. In a despatch from Governor Bourke to Lord Glenelg, the Colonial Secretary, the Governor notified Glenelg that he had appointed Plunkett to replace Kinchela as Attorney General because Kinchela's deafness rendered him incapable of properly performing his functions in the Legislative Council. Obviously this disability was not seen by Bourke to be an impediment to other forms of public office because, in the same despatch, the Governor recommended Kinchela's appointment as a judge of the Supreme Court (*HRA* vol XVIII p377). Without waiting for Glenelg's answer, Bourke appointed Kinchela an acting judge of the Supreme Court. It is said that Kinchela's increasing deafness "caused some delays when he was sitting alone" (*Australian Dictionary of Biography* ("ADB") vol 2 p52). Lord Glenelg replied guardedly to Bourke's despatch stating that Kinchela was entitled "to any public employment for which he may not be disqualified by his peculiar infirmity" (*HRA* vol XVIII p733). Shortly after, Governor Bourke appointed Kinchela to be Master in Equity, a position which in the past was apparently not seen to call for the full range of judicial attributes.

In 1836 Governor Bourke abolished the position of Solicitor General and Plunkett performed the duties of both offices in his capacity as Attorney General. There was some speculation that Plunkett had been given a double load in the unfulfilled hope that he would resign. Plunkett was in fact assisted during this period by Roger Therry who not unnaturally bridled at the fact that he was performing the functions of Solicitor General without receiving the full emoluments or status of the office. In 1840 Governor Gipps pressed the Colonial Secretary to approve the appointment of Therry as Solicitor General. His despatch on the matter stated that there was:

". . . one circumstance, of which, when recommending Mr Therry for the appointment of Solicitor General I feel I ought not to withhold the knowledge from your Lordship; it is that Mr Therry is a Roman Catholic, as also (your Lordship is aware) is Mr Plunkett. I beg to assure your Lordship that, considering Mr Therry to be well qualified for the Office, and his position at the Bar to be such as to give him superior claims to those which any other person can advance, I do not myself think his religion ought to stand in the way of his promotion; but at the same time I cannot conceal from myself, and I ought not to conceal from your Lordship, that the accidental circumstance of both the Attorney and Solicitor General being Roman Catholics may be made by some parties in the Colony a matter of imputation on the Government." (*HRA* vol XX p525)

The Colonial Secretary declined to adopt the recommendation, but not apparently because of Therry's religion. The reason given was that the Colonial Secretary did "not feel justified in recommending to the Lords Commissioners of the Treasury any increased expense on this account, until the several Establishments of your Government shall have been reduced". (*HRA* vol XX p176). As an illustration that there is nothing new under the sun, the colonial authorities responded in a typical public service manner by making acting appointments and in 1841 Therry was appointed acting Attorney General and W a'Beckett was appointed acting Solicitor General.

Therry obviously harboured the view that his appointment as one of the law officers was deliberately delayed until the situation of two Catholics holding the offices could be avoided. "In truth", he protested to Governor Bourke, "the law officers have nothing to do with Church affairs" (see J M Bennett, introduction to R Therry, *Reminiscences of Thirty Years' Residence in New South Wales and Victoria,* facsimile ed 1974 p20).

Literally, Therry's statement was untrue because several of the nineteenth century Solicitors General played prominent roles in the affairs of the Anglican and Catholic Churches in New South Wales. This involvement was generally welcomed, so long as the law officer used his skills and position to support, but not criticise, the clerical hierarchy.

The office was formally revived in 1849 when the then acting Solicitor General W M Manning was appointed Solicitor General. Manning's successor was Sir John Bayley Darvall, a barrister who in 1846 had illustrated the sturdy truculence of the Bar when he struck his opposing counsel, Richard Windeyer who had charged him with unfair conduct and had called him a liar. For this "contempt and outrage" Darvall had been committed to gaol for 14 days, while Windeyer received 20 days (*ADB* vol 4 p23). Darvall was elected to the first Legislative Assembly and took office as Solicitor General in the first ministry.

Alfred Lutwyche held the office for a very short time in 1856. He will be well known to modern barristers for his frequently cited *An Inquiry into the Principles of Pleading the General Issue* published in London in 1838. Lutwyche initially declined an offer to serve as Solicitor General and government leader in the Legislative Council until the Attorney General (James Martin, later Chief Justice) was admitted to the Bar. This principled stance was costly because the government fell only 21 days after Lutwyche's delayed appointment. Lutwyche served another short term in the office the following year before being appointed Attorney General. On his rumoured accession to that office the editor of the Sydney Morning Herald remarked that "no doubt Mr. Lutwyche is a very learned lawyer, although circumstances have not afforded him an opportunity to display that learning" (*SMH* 13.11.1858 p6). He was later appointed to the Supreme Court at Moreton Bay. When the separation of Queensland was imminent he claimed seat on the Sydney bench, to be told by the government that he could either become judge of the Supreme Court of Queensland or resign. He went on to serve on the Queensland bench for over 20 stormy years marked by constant bickering with the Queensland government in campaigns of letterwriting to newspapers and petitioning of the Colonial office about the invalidity of the Acts of the local legislature.

W.M. Manning
Solicitor-General (1849-1856)

John Hargrave who held the office during various short terms in the 1860s as governments rose and fell was first appointed Solicitor General in 1859, resigning his then office as foundation judge of the District Court of New South Wales. According to Sir Alfred Stephen, Hargrave's judgeship had been "disastrous for women suitors" because he habitually decided against them, although otherwise he had mastered his "disability". This misogynistic disability was apparently due to his inability to forgive his wife (who had returned to England) for having committed him to a lunatic asylum in the mid 1850s. Hargrave later went onto the Supreme Court, sitting as its first divorce judge. His swearing-in was boycotted by the Bar and his behaviour on the Full Court so aggravated Stephen CJ as to provoke the latter's early resignation.

According to his biographer in Australian Dictionary of Biography, Solicitor General Robert Isaacs, who served in 1866-1868 was a "verbose and plodding orator (who) probably fulfilled his potential and his ambitions in the honourable but unspectacular position as second law officer of the Crown".

Joshua Josephson distinguished himself when, as a judge of the District Court he was subject to a complaint that he, when Solicitor General, had wrongfully induced Judge Cary to retire from the bench of that court (to make way for himself, it seems) by promises and a monetary payment. The question, which was also agitated in recent years involving the late Murphy J, of whether a judge could be removed for misconduct before appointment remained unresolved, because Josephson was cleared of any intentional moral wrong but was reprimanded for his great imprudence and indiscretion.

The office was abolished in 1873 at a time when a Department of Justice and Public Instruction was established and it was decided that the Attorney General should cease to be a member of the Executive Council. This move was largely instigated by Sir Henry Parkes. Unsuccessful attempts were subsequently made to revive the office in order to relieve the Attorney General from some of the crippling burden of his criminal work as law officer. The weight of such burden was seen to undermine the Attorney's capacity to promote law reform measures. It was argued that the position of Solicitor General need not be political and that if an independent appointment of a Solicitor General were made then the criminal duties of the Attorney General would be more appropriately assigned by law to the Solicitor General (of the discussion culminating in the appointment of a Director of Public Prosecutions in 1987). In 1891 a Public Service Inquiry Commission reported that the Attorney General's department had been affected seriously by the abolition of the Solicitor-Generalship.

The office was revived in the 1890s when Sir George Reid added it for five short terms to the several other ministries, including Premiership, held by him. (It may be this was done so that he could depute for his absent Attorney General during those periods.) From 1894 until 1922 the Solicitor Generalship was, with few exceptions, a political office held by a minister of the government, usually a member of the Upper House. During this period the position was frequently held concurrently with the office of Minister of Justice, a portfolio separate from that of Attorney General. A joint opinion given to the

Crown Solicitor in 1920 by C E Flannery QC and H V Evatt stated that the office of Solicitor General was prima facie an executive office held by a Minister of the Crown. The opinion noted that this need not be the case and instanced the non-political appointment of Hugh Pollock in 1901. However the lastmentioned appointment was obviously perceived as exceptional, although one can perhaps see some evidence of a move towards a non-partisan role in the fact that, since 1884, the office ceased to be listed in the Schedule of offices of profit under the Crown which could be held by members of the Legislative Assembly.

The trend towards a non-political focus of the office was not without its critics. The debates in the House of Representatives on the passing of the Solicitor-General Act 1916 (Cth) reveal a strong body of opinion that it was only through personal accountability to Parliament that proper control could be exercised over the incumbent.

Two MLAs, Sir George Reid and W A Holman, did hold the office for brief periods in the 1890s and 1915 respectively. A motion to declare Reid's seat vacant because he had thereby accepted an office of profit under the Crown was defeated (*NSW Parliamentary Debates* vol 75 (1895) pp3911-3914) on the ground, it appears, that no remuneration attached to the additional ministry. Reid was Premier at the time.

In 1922 the Government was apparently blocked in its desire to appoint T J Ley Solicitor General because it was advised by the Crown Solicitor that Ley would thereby vacate his office in the Assembly. (To record simply that Ley is described, correctly, in the *Australian Dictionary of Biography* as "politician and murderer" might convey the suggestion that the office had a peculiar attraction for those destined to get themselves into trouble. The writer is happy to record that most of his predecessors performed their duties with distinction and rectitude, and the several went on to serve in higher positions in public life.)

H. Snelling, QC Solicitor-General (1953-1974)

The de-politicisation of the office effectively commenced in 1920 when a public servant, Robert Sproule, was appointed. (He was given life membership of the Legislative Council and membership of the Executive Council, apparently *virtute officii.*) But he was the last Solicitor General to be appointed a Minister, whether in name or substance.

Sproule's successor in 1922 was Cecil Weigall who, when appointed, was the Parliamentary Draftsman. Weigall held office until 1953 during which time he performed the more traditional functions of the office, deputising for the Attorney General in his legal functions and representing the Crown in criminal matters in court. From time to time he performed administrative functions within the Crown Law Department in addition to those inherent in the position of second law officer.

In a relator capacity the office was thrust into a deep controversy within the Church of England in the "Red Book Case" in which various members of that Church (mainly from Sydney) effectively challenged the right of the Bishop of Bathurst to authorise a liturgical change in the Bathurst Diocese. Of more general relevance is the report of the argument before and decision of the Full Court discussing the history of the office and the precise circumstances in which, at common law, the Solicitor General might exercise powers vested in the Attorney General: see *Solicitor General v Wylde* (1945) 46 SR (NSW) 83.

The appointment of the late Harold Snelling QC as Solicitor General in 1953 marked the swing of the pendulum firmly back in favour of the office being seen essentially as both non-political and non-departmental. Snelling was a practising silk at the time of his appointment. The Solicitor General Act 1969 now requires the appointee to be a QC (s2(1)) and stipulates that the office shall not be held by a Minister of the Crown (s2(6)).

The primary function of the Solicitor General, according to the Act, is to act "as Counsel" for the Crown (s3(1)(a)); and when the office of Attorney General is vacant, or the Attorney General is absent from the State or is by reason of illness unable to exercise and discharge his powers, to exercise and discharge any powers conferred or imposed on the Attorney General "by or under any Act or incident by law to the office of the Attorney General" (s3(1)(b)).

The Attorney General may delegate any other of his powers by instrument in writing (s4(1)) and the breadth of this statutory authority was the subject of some critical comment during the second reading speeches on the passing of the Act. The Opposition members expressed concern that the power of delegation might be used in circumstances that could blur what was perceived to be a clear line between legal and political functions. I am however happy to say that I have never been asked to open a bridge in Burrinjuck, make a political speech in St Marys or campaign in Lane Cove.

The functions presently delegated include matters involving:-

(a) charities and charitable trusts;

(b) venues of trials;

(c) the Listening Devices Act 1984.

None of these, and others not mentioned, appear unduly controversial in the sense that their exercise could be the subject of partisan debate, although experience tells one that anything can become controversial in connexion with the governmental discharge of legal functions in this State.

The commencement of the Director of Public

Prosecutions Act 1986 has had a significant impact. Before 13 July 1987 much of the work of the office involved the criminal process with the Solicitor General providing advice on decisions whether to "no bill", appeal against sentence etc and making these decisions in lieu of the Attorney General when he was absent from the State. The volume of that work meant that latterly the Solicitor General tended to be involved personally in this area only when a Crown Prosecutor and the Crown Advocate disagreed in the advice tendered to the Attorney, or when the Attorney was absent. Since 13 July 1987 the Director of Public Prosecutions has exercised these functions and the Attorney General's (and thus the Solicitor General's) roles, though preserved (s30), is confined in practice to areas where a possible personal conflict of interest precludes the Director of Public Prosecutions from acting.

Nonetheless there remain certain important criminal law matters not directly involving the decision to prosecute such as extradition, the granting of indemnities, change of venue and directing that an inquiry as to fitness to plead which remain vested in the Attorney General. Some of these may be exercised by the Solicitor General as the Attorney's delegate; for others (eg the granting of indemnities) the Solicitor General or Crown Advocate may be involved in tendering advice to the Attorney General. The Solicitor General may also (with the Crown Advocate) be involved in tendering advice to the Attorney General on other matters relating to the latter's roles as first law officer. These include the institution of contempt proceedings, applications involving vexatious litigants, consent to perjury prosecutions, responding to allegations of professional misconduct by practitioners etc.

The bulk of the work of the office is now that of counsel for the Crown in significant civil matters. Naturally much of this work involves constitutional law. Decisions as to intervention following receipt of s78B notices (running at about eight per month) have to be taken or advised to the Attorney. Beyond that there is the usual barrister's lot of advices and court appearances on instruction from the Crown Solicitor. It is little different from the position of a barrister at the "private" bar except perhaps that the brief is returned unaccompanied by a memorandum of fees. As can happen to barristers generally, one sometimes has an unprompted inkling from the nature of the matter as to what advice the client would *like* to receive. As with the barrister who has several clients, it would be unethical and foolish to let that inkling influence one's judgment. Again, just as can happen to counsel who appears regularly for the one client, judges or fellow practitioners may take the opportunity of your presence in a specific case as the occasion for some direct or indirect remonstrance against your client generally. I hope, nevertheless, that it is generally perceived that the Solicitor General appears in court as counsel making submissions for the Crown, and not as an agent making speeches or admissions on behalf of the government of the day. Furthermore, the adversary system and the friendly critical jibes of one's fellow barristers are hopefully the best antidote against the risks of developing an excessively genign attitude towards ministers and bureaucrats.

The position does provide opportunities for the tendering of advice on policy matters. The Solicitor General may be consulted on proposals for law reform and there may be opportunities flowing from constant involvement in litigation on the Crown side to suggest changes in practice or the law.

The Solicitors General of the various States, the Northern Territory and the Commonwealth meet regularly as the Special Committee of Solicitors General to discuss constitutional cases in the pipeline. (The Commonwealth Solicitor General is always invited half an hour late.) In addition the Committee may be asked to act as an adviser to SCAG (the Standing Committee of Attorneys General) to prepare a proper legal solution to give effect to a policy decision already taken in principle by SCAG. By this means, for example, the drafting of the cross-vesting scheme devolved upon the Solicitors General. This hopefully should be some help if the constitutional validity of the scheme is challenged. □

HOLDERS OF THE OFFICE OF SOLICITOR GENERAL FOR NEW SOUTH WALES

Name	Term of Office
John Stephen	1824-1825
James Holland	Appointed on 2.4.1826 but never sworn in.
William Foster	1827
John Sampson	Appointed in 1828
Edward MacDowell	Appointed in 1830 but lost the position when he failed to take up his duties promptly
John Hubert Plunkett QC MLC	1831-1836
William a'Beckett	20.3.1841-30.8.1844 (acting)
William Montagu Manning (Sir) QC MLC	31.8.1844-11.1.1848 (acting) 20.11.1849-5.6.1856
William John Foster MLC	12.1.1848-19.11.1849
John Bayley Darvall (Sir) QC MLA	6.6.1856-25.7.1856 3.10.1856-25.5.1857

Alfred James Peter Lutwyche MLC	12.9.1856-2.10.1856 7.9.1857-14.11.1858
Edward Wise MLC	23.5.1857-7.9.1857
William Bede Dalley MLA	15.111858-11.2.1859
John Fletcher Hargrave QC MLC	21.2.1859-26.10.1859 3.11.1859-31.3.1860 1.8.1863-15.10.1863 3.2.1865-21.6.1865
Peter Faucett MLA	16.10.1863-2.2.1865
Robert Macintosh Isaacs MLA	22.1.1866-26.10.1868
Joshua Frey Josephson MLA	27.10.1868-9.9.1869
Julian Emanuel Salomons (Sir) QC MLC	18.12.1869-15.12.1870
William Charles Windeyer (Sir) MLA	16.12.1870-13.5.1872
Joseph George Long Innes (Sir) MLA	14.5.1872-19.11.1873
Position not filled	1873-1894
George Houston Reid (Sir) QC MLA	21.12.1894-5.3.1895 19.12.1895-20.4.1896 22.12.1896-9.2.1897 27.4.1898-7.10.1898 3.1.1899-1.5.1899
Hugh Pollock	31.7.1901-6.10.1904
John Garland KC MLC	21.12.1909-20.10.1910 * 15.11.1916-23.7.1919 *
Walter Bevan	15.7.1911-1912
David Robert Hall MLC	4.4.1912-1915 *
William Arthur Holman MLA	19.1.1915-6.2.1915
John Daniel Fitzgerald MLC	23.7.1919-12.4.1920 *
Robert Sproule MLC	15.4.1920-13.4.1922
Cecil Edward Weigall QC	18.12.1922-30.4.1953
Harold Alfred Rush Snelling QC	25.8.1953-12.9.1974
Reginald Joseph Marr QC	13.9.1974-10.3.1978
Gregory Thomas Aloysius Sullivan QC	5.2.1979-18.2.1981
Mary Genevieve Gaudron QC	19.2.1981-5.2.1987
Keith Mason QC	6.2.1987-

* Concurrently with office of Minister of Justice.

NOTE: In some cases the appointment as senior counsel or to membership of one of the Houses of Parliament occurred during or after the term of office of the person named.

Prisons-Comment

In the United Kingdom under Mrs. Thatcher the move is to reduce the numbers of people in custody. Here the trend is the opposite. In the United Kingdom the Government has issued a consultation paper, suggesting changes to the statutory provisions regarding remands in custody, with proposed amendments to the Criminal Justice Bill. In the Sydney Morning Herald of 21 November, 1987 the severe increase in prison numbers was stated by Michael Cordell and Bernard Lagan as increasing from 3000 to 4190 over the last two years.

The quite extraordinary "bubble" increase during the law vacation in January by about 40 in the Central Industrial Prison not only causes grave suffering and indignity to those already in prison during one of the most uncomfortable periods of our climate, but must also cause us to query how it is that so many people are apparently locked up unnecessarily. If mere absence of judicial personnel is the cause of the increase, then it seems that these additional people are locked up without sufficient cause. The conditions described in the article, and in the Australian Broadcasting Corporation feature "Out of Sight Out of Mind", are no doubt aggravated by the hot summer. Prisoners then are more at risk from violence and general health conditions.

It may be, of course, that the increase in prison population in January is due to other factors as the article indicates. If the law vacation even in part contributes to the increase, however, it is time we took this matter to our consciences, collective and individual, and seek to have sufficient judges, at the District Court and Supreme Court level, to ensure that the liberty of the residents of New South Wales is properly protected, and to ensure the conditions of those whose liberty is taken are improved, not by the administration of prisons but by the administration of justice. The adminstration of prisons may not be under our control - the adminstration of justice is. It might even reduce the costs of the prison system.

While we are about it we might like to ask why do we have a prison population rate of 74 per 100,000 and Victoria has 48. Is New South Wales a state which contains more evil people? We should also ask why does the national population of prisoners have 14.8% on remand - unconvicted - while we have 21.4%. Is it only because our community is more insecure or more fearful than the rest of Australia? □

Privatisation of Prisons

With privatisation being considered by the Federal Government it is worthwhile noting that in some countries there is a network of private prisons. This is so in the United States and some consideration has been given to such a situation in Britain. The origins of private prisons comes from the United States as a result of the inability of the Prison system to meet the demand. It is beyond the scope of this article to discuss whether present sentencing policies are appropriate but certainly the length of sentences being given is a factor in the problematical conditions of our prisons.

One of the best known of the American private companies is Correctional Corporations of America Inc. The purpose of it was to meet the public need and also to make a profit for shareholders. The American companies seem to run the whole of the prison structure. In Britain the matters under consideration are private provision of services such as laundry and catering. Private contractors might be allowed to use prison labour in various ways, although such a proposal in Australia may result in union opposition. It would assist the problem of boredom in prison so clearly shown in the Four Corners programme in 1987. There would be difficulties in the payment of wages to prisoners. At the present time only nominal amounts, in comparison to wages paid outside the prison, are given to prisoners for any work they do. Full wages may have the benefit of assisting prisoners to support their families and reduce this burden on the State.

Certainly in other areas of public enterprise the practice of sub-contracting privately certain services such as cleaning and catering is well established.

The provision of accommodation by a private company could create severe problems. The private company would then have control over prisoners' rights and whatever access prisoners had to communications with their families and other outsiders. There could be some difficulties in prisoners seeking redress where these rights were infringed. There could also be restricted access to such private prisons by visiting magistrates and rehabilitation services such as those provided by the Probation and Parole Service.

A further difficulty is that the government which is responsible to parliament would not have the same control over the private prison once the contract between the government and the private company was entered into.

Many would find the concept of the deprivation of liberty being effected by a private organisation rather than by a government which is responsible to the people repugnant. Apart from the practical difficulties mentioned above a real question arises as to whether deprivation of liberty should ever be in the hands of anyone but the people of the State through its elected representatives. Because of the experiments in this area overseas it may be that at some stage the matter will be raised here and it is wise for us all to consider the principles and the problems with great care. □

B.H.K. Donovan

Book Reviews

Equity Practice and Procedure in New South Wales

(John Leslie, Registrar, Equity Division, Supreme Court of New South Wales, Legal Books Pty. Limited, $195.00 inclusive of first release)

Passing across the desk of John Leslie, Registrar of the Equity Division of the Supreme Court, are numerous unreported judgments, both interlocutory and final, of the Equity Judges and Masters, as well as unreported judgments of the Court of Appeal on general court practice and procedure and on equity appeals.

In the introduction to his work Registrar Leslie explains that the *Practice* is the result of his desire "to make available to the legal profession up to date material on equity practice and procedure on areas of equity law covered in recent judgments". Also, that the work "covers the practice and procedure in the Master's Court and the Registrar's Court as well covering areas of current equity law".

All who practise at the equity and commercial bar are well aware of the importance of reading the most recent in point judgments of the Judge or Judges before whom a case is to be conducted. The proliferation of unreported judgments has meant that not infrequently one learns for the first time at the bar table that the Judge before whom one is appearing, or his brother along the corridor, has recently considered the issue in an unreported judgment. Use of aids such as CLIRS, ESTOPL and the New South Wales Judgments Bulletin reduces this risk to a certain extent.

My view is that the principal use to the experienced barrister of Registrar Leslie's work is to further reduce the possibility of one's falling into the above predicament in areas particularly of procedure and to a considerably lesser extent of substantive law.

The problem with any attempt to cover the entirety of the field of equity practice and procedure are obvious. The field is so wide that no work can hope to cover it. Registrar Leslie, recognizing this problem, has sought to deal with it by producing a practice which is to be supplemented with periodic releases of additional material. The unfortunate consequence is that the *Practice* in its original form (June 1987) bore a first blush appearance of a scatter-gun attempt to set out extracts from judgments on a large number of seemingly unconnected areas.

Release No. 1 has since been issued (1 December, 1987) Release No. 2 was issued in March. The following comments are based upon all of this material —

1.
— especially the barrister of up to, say, four or five years' standing.

2. Accepting the limitation requiring the *Practice* to be consulted on areas of procedure in addition, say to Ritchie's *New South Wales Supreme Court Practice* and possibly to William's *Victorian Supreme Court Practice*, in my view the *Practice* is a valuable procedural aid to those who practise in New South Wales in the equity and commercial area.

3. By its title the *Practice* purports to deal only with equity practice and procedure. In fact, when one looks at the contents the work purports at times to deal with substantive law. The reader should bear firmly in mind that where the work touches upon such law its treatment can, save in a few specific areas, in no way be considered to be full or to be a substitute for references to standard works. In this respect, it is suggested, the work falls between two stools and one may perhaps be permitted to wonder why the author has gone beyond the scope suggested by the title. One trusts and no doubt the author intends that those isolated areas of substantive law sought to be dealt with will be substantially supplemented in further services. In any event, any references to recent and particularly unreported judgments on areas of substantive law are welcomed.

4. The principal contribution of the work is twofold —

   (i) as a "form guide" to the views of the particular judges whose judgments are extracted;

   (ii) to enable a practitioner unfamiliar with certain areas treated in the work to quickly find his or her way into the main recent relevant reported and unreported decisions.

5. Those consulting the work ought not assume that the extracts are necessarily always a correct or complete exposition of principle on the areas extracted. To a very substantial extent the work extracts the views, and often the recent views, of first instance judges. These views do sometimes conflict and one simply cannot assume that any particular extract will be reflective of the views of each of the judges. Naturally, however, there is some precedent value in being able to cite before any first instance judge a statement of the practice recently followed by another and one would imagine that where possible the judges will endeavour to follow the same line. Registrar Leslie's work does extract some judgments of the Court of Appeal and of course those judgments, particularly when unreported and recent, are of special value to the practitioner before either the Court of Appeal or a first instance judge.

A careful barrister will consult his colleagues before dealing with an area of practice or procedure with which he is unfamiliar. Having read Registrar Leslie's *Practice*

The *Practice* is particularly useful to the new practitioner I cannot say that one could compare it to Parker's *Practice in Equity,* but I can say that when one is able to master the manner in which the extracts are classified it appears to be of real assistance in furnishing one with references to unreported judgments which, outside of this *Practice,* are very difficult to learn of.

It is to be hoped that the equity judges will, from time to time, seek to draw Registrar Leslie's attention to particular portions of their judgments dealing with

procedural matters so that these extracts may be added to the work. Should this occur, the criticism which can presently be made of the *Practice*, namely that it concentrates on the judgments of some, giving lesser attention to the judgments of others, would not be warranted. □

C.R. Einstein

Law of Evidence in Australia

Dr P Gillies, Legal Books, $85 (HB), $60 (PB)

No longer scraping the bottom of the barrel . . .

In *Reg.* v *Morgan* Lord Hailsham of St Marylebone described the prosecution as having had to travel all the way "to New South Wales for direct authority in their favour": [1976] A.C. 182 at 210 — as though thereby counsel were so desperate that they were scraping the bottom of the barrel of judicial authority. One can even perhaps speculate on His Lordship's vocal intonation of those clipped English tones to emphasise the distant peregrinations of counsel viz. to the other side of the globe. Counsel had cited *R* v *Flaherty* (1968) 89 W.N. Pt.1 (N.S.W.) 141 and *R* v *Sperotto & Salvietti* (1970) 71 S.R. (N.S.W.) 334.

It may be that their Lordships were not accustomed to hearing the citations of N.S.W. cases in the hallowed surroundings of the House of Lords.

It is perhaps very appropriate that in this Bicentennial year Dr Gillies has given us the last word on the Law of Evidence with emphasis on "In Australia". Indeed at page 8, when discussing the sources of evidence he writes that:

"The Australian Legislatures have tended not to follow British Parliamentary initiatives in the area with as much alacrity as was evidenced in earlier generations. . . . Today it is appropriate to speak of an authentically Australian law of evidence, one differing in a number of more or less significant ways from the English which, for so long, fulfilled the role of the template."

In his 78 pages of Table of Cases, Dr Gillies cites a total of 2,407 cases, of which 1,540 are Australian. The total number includes a small number of United States and Canadian citations, but 64% of the total number are Australian, emerging from each of the States and Territories.

The Author's method of citation in the table is most welcome in that, at a glance, one sees a collection of all the reports in which a case has been included, e.g. "Rogers v Home Secretary [1973] A.C. 388; [1972] 3 W.L.R. 279; 116 S.J. 696; [1972] 2 All E.R. 1057; affirming R. v. Lewes Justices; Ex p. Secretary of State for Home Department [1972] 1 Q.B. 232; [1971] 2 W.L.R. 1466; 115 S.J. 306; [1971] 2 All E.R. 1126 . . . 431, 432, 434, 435".

The work, released in December of 1987 is a statement of the law as it stood at March 1987.

The student and practitioner are referred to the relevant statutes of all the Australian States and Territories — even those of the United Kingdom (if I may say that with tongue in cheek).

As we have come to expect from Dr Gillies, this work is the obvious result of meticulous research. He gives us a refreshingly different approach in the exposition of the fundamental principles, doctrines and rules in the law of evidence. His method of exposition is to take us on an historical overview of the general common law principles and trace their development to the present day. The journey is both comfortable and illuminating because of the logical sequential flow of its delivery. He takes us from point to point in such a way as to evoke from the reader "Well, yes, that makes sense when you put it that way".

Dr Gillies exhaustively deals with the various doctrines by dividing them into segments each under a short heading. At times he appears to adopt a Thomistic or Socratic system by posing a short question e.g., in discussing the scope of Res Gestae, after demonstrating that strict contemporaneity is not required, he asks, "Must the transaction in issue be inherently dramatic or surprising?", "Does the doctrine apply to purely verbal acts?" and "Whose statement can be part of the Res Gestae?"

The work comprises thirty-nine chapters. Under the heading "Applying the Law of Evidence" he devotes two short chapters (14 and 15) on "No Case to Answer" and "Taking Evidence on the Voir dire". In treating on the exclusionary rules, there is a chapter on Opinion Evidence another on Propensity Evidence as well as four chapters (24, 25, 26 & 27) on Privilege in General, Occupational Privilege, Privilege Against Self-Incrimination, and Public Interest Immunity, which is followed by a short chapter (28) on the Ireland Discretion. Under the heading Admissions and Confessions, chapter 33 represents a plenary study on the exclusion of confessional statements.

The author's style is laudably readable, often times obviating that all-too-familiar exercise of re-reading a passage in order to understand the particular doctrine.

The Law of Evidence in Australia is, indeed, a major and important work. I would go so far to say that it should be a compulsory acquisition for students and practitioners. Bearing in mind the author's other works viz., The Law of Criminal Complicity (1980), The Law of Criminal Conspiracy (1981), The Law of Criminal Investigation (1982), Criminal Law (1985) and numerous articles on Criminal Law and Evidence, it is no wonder that (at least in the District Court) we are hearing more and more citational references to Dr Gillies' works. □

L.J. Attard

Brysonalia

"In pursuing this opportunity to obtain rental revenue the S.R.A. took little notice of signals displayed by persons not on its staff and proceeded on iron rails to a timetable and destination known only to itself." (*National Australia Bank Limited v. Italo Australian Club Ltd,* Bryson J, 23 September 1986)

Reports from Bar Council Committees

Computers and Law Reporting Committee

The main task of this Committee over the last few months has been the designing of a computer data base for the Bar Association to deal with its membership register and the records that it will need to have under the Legal Profession Act.

The system is based on Ashton-Tate's dBase III+. It will enable an instantaneous search to be done to ascertain formal details of any member (name, telephone number, chambers, date of admission etc.). A separate file will contain references to disciplinary matters concerning members so that prior lapses may be taken into account in considering the renewal of practising certificates. This procedure is necessitated by the obligations imposed by the legislation upon the Bar Association.

Needless to say a security system will exist to prevent the information going to unauthorized destinations.

Precise details of disciplinary matters will not appear in the computer file. The theory of the system is that a person searching it will merely be directed to particular numbered physical files which will contain relevant papers. The system, in other words, is merely an indexing system rather than a system itself containing information of the more sensitive kind.

Before the Committee embarked upon the design of the system, indicative quotes were received from computer programmers for tens of thousands of dollars. The result (assuming that it works) will prove that barristers are true jacks of all trades. □

District Court Rules Committee Report

The District Court Rules Committee met on 2 February 1988 and considered the question of increasing Scale fees.

In September 1987 the Supreme Court Scale of fees was increased by approximately 25% across the board. This brought the Scales back into line with increases in, inter alia, the costs of practice over the preceding twenty-seven months.

The District Court Rules Committee resolved also to increase the District Court Scale by 25% across the board, rounded to the nearest $5. The increase applies to briefs delivered on or after 15 February 1988.

It is hoped in future that the Scales will be updated at the commencement of each year on a regular basis in line with CPI increases and other relevant factors.

Members who have any suggested amendments to the District Court Rules or the procedures in the District Court are invited to forward them to Greenwood - DX 397, Sydney. □

Conduct of Arbitrations

The Chief Judge Staunton of the District Court, has received adverse comment concerning the manner in which some arbitrations have been conducted. The attention of Arbitrators is drawn to his views on some of the matters which have been raised with him.

1. Arbitration hearings should be conducted so far as is possible in surroundings which convey a judicial atmosphere.

   In Sydney, Arbitrators, by courtesy of the Law Society, may book a court for hearings in 65 Elizabeth Street through Mrs. E. Merchant on 220 0333 or 223 4677. A fortnight's notice is required. Attempts are being made to provide additional accommodation in Windeyer Chambers later this year and inquiries concerning this should be made to the Registrar.

2. Where arbitrations are conducted in counsels' chambers or solicitors' offices, Arbitrators should be astute to convey to the parties the necessary degree of formality and attention to the arbitration. This will include care with respect to dress and to the manner of addressing counsel or solicitors appearing. Further, interruptions such as telephone calls should be avoided whenever possible.

3. Arbitrators' decisions should be delivered as soon as possible after the hearing. □

Professional Conduct

1. A barrister of over 10 years seniority has been found guilty of professional misconduct by a disciplinary tribunal. The barrister misled the court by making false statements when his retainer was challenged. The tribunal took the view that misleading the court was one of the most serious offences which a barrister could commit in the course of his professional duties. Proceedings are to be commenced for the disbarment of the barrister. □

2. A professional conduct committee recently dealt with a complaint against a barrister of less than 5 years seniority that he had made comments to his client which, on one view, contained racial slurs and amounted to an attack on the judiciary and judicial system such as, if proved, could result in disciplinary action other then counselling. The barrister denied the allegations. The complaint has been referred to a disciplinary tribunal. □

3. Many compaints which are made to the Bar Association about barristers really relate to a lack of communication between the barrister and the client and/or solicitor.

   A complaint was recently received from a senior solicitor who was a plaintiff in a case before an arbitrator. After some evidence had been taken, the plaintiff's barrister closed the plaintiff's case without reexamining the plaintiff or calling the plaintiff's wife to give evidence. The matter was then adjourned and the barrister quickly departed to go to another court.

   The client felt aggrieved, inter alia, that he had not been given the opportunity to put other matters before the arbitrator and that his wife had not given evidence.

   The complaint was received and referred to the barrister. He gave an appropriate explanation for his behaviour but a few minutes with the client at the time to explain why further evidence was unnecessary would probably have avoided all the unpleasantness which resulted. □

4. A barrister was briefed in three matters on a country circuit. The matters were not reached at the circuit. Other counsel was thereafter briefed to take over those three matters.

   The original counsel then made an enquiry of the senior solicitor as to why the briefs had been withdrawn and transferred. As a result of those enquiries the briefs were returned to the original barrister.

   The matters was referred to a Disciplinary Tribunal to determine whether the barrister communicated with the solicitor in an attempt to have the briefs returned (in breach of Rule 21) and/or whether he had directly or indirectly solicited employment (contrary to Rule 72).

   The solicitor gave evidence that the barrister had expressed concern about the briefs being withdrawn. As the evidence did not go further, the Tribunal was not satisfied that the barrister had the necessary intent and so the complaint was dismissed. □

5. A young barrister was briefed in a criminal case which ran over to a day when he was also briefed in a civil case (where he was being led).

   After addressing the the criminal case the barrister left the court and attended the civil hearing.

   The trial judge in the criminal matter referred the Barrister's conduct to the Bar Association for consideration. The Disciplinary Tribunal found the barrister had breached Rule 9 in leaving his client in the criminal case. The barrister was reprimanded and required to undertake a further three months' pupillage. □

OBITUARY

Garth Marden

Garth Marden died suddenly in Vila on 16 February. Mr Justice Finlay delivered the occasional Address at his funeral service held at St James Church.

Garth Marden was born 22 March 1944, the only child of Merle and Ronald Marden. He died on 16 February 1988, leaving his wife Katya and two children, Alex and Sophie.

He filled the next 43 years and 11 months with a life lived to the full. Who of us can't shut his or her eyes and hear his infectious laughter and his very pleasant and mellifluous voice so often associated with a twinkle in his eyes. Each of us responded to his energetic enthusiasms, his open friendliness and to his generosity with his time. He was a most courteous listener who readily gave his time and compassion whenever it was needed.

These qualities inevitably resulted in his having so many affectionate close old friends, many being quite unrelated to the law and many of whom I know are here today.

We grieve with his family. With his mother whom he loved so dearly and who already had the sadness of losing her husband when he was comparatively young. We grieve with his cousin, Gaynor Barden, with whom he, being an only child, shared so much of his growing up. It was most fitting that she read one of the lessons today.

We especially grieve with his lovely wife, Katya, whom he loved so dearly and his children, Alex and Sophie, to whom he was devoted and of whom he was so very proud. It was Sophie who read the first lesson so beautifully.

As we all knew Garth to be a very special person, it is perhaps not surprising that some aspects of his life were a little out of the ordinary. His wife Kitty (by which name so many of you know her - but Garth always called her by her lovely Russian name of Katya) was first taken out by him when he was in the first year law school at Sydney University. He would have taken her out before then but her parents, perhaps wisely, thought her too young. He was admitted to the Bar in February 1967. They married in June of the same year. By his marriage he also acquired an extended family, enjoying very close relationships with Kitty's parents and her brother, Alexander, and his family. When they bought their superb, but impossibly steep waterfront block at Castlecrag, Garth and Kitty cleared it together. Kitty's brother was the architect who designed the house. Her father, an engineer, and Kitty built it whilst Garth helped, particularly in the paying for it. They spent some seven wonderful family years there.

On going to the Bar he first went to Mena House where he started in a readers room. This, I think, he shared with Toomey - the two of them having been admitted on the same day. As you can imagine with those two, they were never at a loss for conversation! For the last twenty years he's been on the third floor of Wentworth Chambers.

There he was always most generous with his time and his chambers were like a clearing house for so many counsel, young and old. He was a good original and, where necessary, lateral thinker. He could often see a different and more helpful way of approaching a matter.

There were occasions when he over-committed himself. Sometimes he adopted the well-known solution of bringing in a leader in one of the matters. But where he was somewhat unorthodox is that he brought in the leader in the easier matter when costs were no problem and retained the more difficult matter to look after himself! He was, as I have said, very generous with his time. When it was required he would be wonderfully patient, sensitive and unfailingly courteous. He became a very polished advocate with a wonderful sense of timing and a felicitous use of his natural sense of humour. His practice was extensive. They sought his services from Bega and Cooma in the south to Kempsey and Coffs Harbour in the north and from Canberra on one side to Vila in the Pacific on the other.

It was on returing from the High Court in Canberra, towards the end of 1986, that the first shadow of his illness fell across his life. He elected vacation times to undergo surgery. He spoke very little of it and kept working with an indomitable spirit. For example, his appearances last year included a 14 week conspiracy trial for one accused. John Kiely was for another. He enjoyed it hugely and there were triumphant acquittals at the end. Only last October he appeared in three criminal trials in a busy Bega circuit. He was on the eve of a large Supreme Court case in Vila when he collapsed and died there on the following day, last Tuesday 16 February.

One thing was very apparent to those of us who came across Garth through the law and no doubt it was even more apparent to those friends who knew him from other fields. This was that whilst embracing the good things of life with great energy - be it sailing, fast cars or skiing - and whilst at one stage somehow fitting in three years as an Alderman on the Lane Cove Council, there was never the slightest doubt that his first priority was his wife and children. He truly dedicated himself to his family and he had great joy from the reciprocated affection and love he shared with his wife and with Alex and Sophie. He was very proud of Kitty's achievement in completing a degree in Landscape Architecture at Sydney University last year; just as he took great pride in the achievements of his children.

Garth Marden - you live on in the hearts of so many of us. So be it. □

Barrister Honoured

On Australia Day, Robert Goot was awarded Membership of the Order of Australia (A.M.). His citation was for "service to the welfare of the Jewish Community".

Since 1972, Goot has held executive positions on the N.S.W. Jewish Board of Deputies, the roof body of Jewish organisations in this State. In 1978, he became its youngest ever President. He has been Senior Vice-President, and is currently Honorary Secreatry, of the Executive Council of Australian Jewry.

In a long period of community service for one of his meagre years, perhaps Goot's most notable achievement was as Chairman of the Australian Committee of Soviet Jewry.

The Soviet Government had imposed its Education Tax (the notorious "Ransom Tax"). This required payment by Jewish (but not other) professionals seeking to leave Russia of an impost (upwards of $A20,000), ostensibly as reimbursement of education expenses.

Goot organised the collection of substantial cash amounts, delivered in bags to the Russian Embassy in Canberra, as payment made on behalf of one well-known prospective emigre.

The payment was refused. This form of protest spread world-wide, and the authorities were forced to abandon the requirement.

Goot motor-cycles to and from the front of Wentworth each day. If not the youngest recipient yet of the A.M., he is surely the first bikie to have been so honoured! □

Travel packages for IBA conference, Buenos Aires, September 1988

The Law Council of Australia has arranged with Ansett International Travel to provide packages for Australian delegates to the International Bar Association's 22nd Biennial Conference in Buenos Aires in September.

The arrangements mean that Australians travelling to Argentina for the conference (25-30 September) can use Ansett International Travel as a 'one-stop' agent for their conference and travel bookings. This includes conference registration, hotel bookings, pre- and post-conference tours and air travel to and from Buenos Aires.

Delegates will be able to make a single payment in Australian dollars for all these services. The arrangements mean there will be no need for delegates to contact London or Buenos Aires direct or to buy overseas currency other than for their personal needs.

Ansett International Travel offices in each State have a comprehensive brochure describing the package arrangements, as well as the IBA conference program and registration brochure.

The Law Council and several of its constituent bodies are members of the IBA, and Australians are amongst the most active participants in IBA work. □

Law Council of Australia Federal Practice and Litigation Section

The Law Council's Federal Practice and Litigation Section was officially launched at the Legal Convention in Perth in September 1987. The Section Executive Chairman is David Malcolm, QC. Alex Chernov, QC, Malcolm Lee, QC, Anthony Whitlam, QC, Ronald Ashton, John C. Richards, Pat Dalton, QC and Justice Trevor Morling, are also members.

At its inaugural meeting in Sydney, the Executive resolved to accept into the Section several established committees of the Law Council namely, Courts (Federal) Committee, Administrative Law Committee, Industrial Law Committee, Defamation Law Committee and Costs (Federal) Committee.

The Executive feels confident that the Section will develop in such a manner as to provide an appropriate forum where all branches of the legal profession will deal with matters relating to federal practice and litigation. It is expected that the Section will contribute to the programs at Australian Legal Conventions and Section conferences and seminars.

The Executive will look at matters of concern that relate to rules of practice of the High Court and Federal Court; constitutional matters; appointments to the Courts and their functions; video conferencing; industrial legislation; the Administrative Decisions (Judicial Review) Act; costs; defamation and contempt laws.

The Section Executive wishes to encourage solicitors and Barristers involved in federal practice and litigation to become members of the Section and to give it their support and expertise.

For further information regarding the Section, please contact the Section Administrator at the Law Council Secretariat, PO Box 1989, Canberra or by phone on (062) 47 3788. □

Law Foundation Travelling Fellowships

The Law Foundation of New South Wales conducts a Travelling Fellowship program to enable persons directly involved in, or concerned with, the administration of the law and the legal system, and the promotion of reforms in the administration of justice, in New South Wales, to undertake short study tours to other countries.

The Fellowships are awarded annually and are tenable during the following calendar year. The Foundation anticipates awarding up to five Fellowships in 1988 which

will be undertaken during 1989. Successful applicants will receive sufficient funds to meet the cost of air travel, ground transport, accommodation and meals.

The target group for the award of Fellowships includes administrators, policy/legal personnel in departments and instrumentalities operating in the areas of the courts, police, prisons, child welfare and other like agencies within New South Wales, legal practitioners and academics.

Advertisements calling for applications will appear in the daily press from 27 April 1988, and applications will close on 31 July 1988. For more information, contact Dawn Wong (Grants Administrator) or Terence Purcell on 29 5621 or DX 984 Sydney. □

Australian Young Lawyers Section Bicentennial Young Lawyer of the Year Award.

Following the excellent response to the 1987 Awards, the Australian Young Lawyers Section of the Law Council of Australia is conducting the Bicentennial Young Lawyer of the Year Awards.

The objectives of the Awards are to encourage and foster young lawyers sections/associations/committees, and individual young lawyers throughout Australia to establish and institute programmes for the benefit and assistance of the profession and/or the community, and to provide recognition of the programmes initiated.

This year the Award has been extended to include recognition of an individual's contribution over a number of years to the profession and/or the community.

Application forms and the rules governing the Awards are available from the Section Administrator, AYLS, Law Council of Australia, GPO Box 1989 Canberra ACT 2601 or DX 5719 Canberra.

Nominations will close on 30 July 1988 and the winners will be announced on 30 August 1988 at the Bicentennial Australian Legal Convention in Canberra. □

Changing Rolls

The following persons have transferred from the Roll of Barristers to the Roll of Solicitors:

Friday 6th November 1987:
Peter Raymond Callaghan
Thomas Alexander Cunningham
John D'Arcy Freeman
Anthony Joseph McCarthy
Evangelos George Manollaras
Michael Kevin Minehan
Paul Anthony Power
Tyan Razeen Sappideen
Michael John Sergent

Friday 18 December 1987:
Stephen John Gates
James Alexander Cameron
Diana Mary Sharpe
Christine Mary Moorhouse
Trevor Kelvin Neill
Simon Christopher Fisher
Francesco Fotea
Alex Gelbart
Peter John David Hamill
Malcolm Reeves Gracie
Gabrielle Mary Hollis
Christine Patricia Kelly
Peter Alan Robinson

Friday 12 February 1988:
David Charles Tonge
John Ramsay Paul Partridge
Nazzareno Bruni
Geoffrey Kolterman Kolts
Margaret Joyce Laurence
Frank John Oppedisano
Allan Anforth
Catherine Mary McKimm
Stephen Mark Edwards
Mary Eftimou
Jeffrey Denis Walsh
Brian Thomas Muir

Friday 8 April 1988:
William Robert McComas
Joseph Robert Cleworth
Kerrie Elizabeth Palmer
Andrew McKellar Paull
Jon Richard Watts
Charles George Roth
Chandrakant Jamnadas
Bruce Stephen Horton

Private Life — Public Virtue

Twice recently matters have come to the attention of the Bar Council which suggest it is necessary to remind barristers that their private lives may be relevant to their professional conduct as barristers.

In particular, emotional involvements with clients, spouses of clients or witnesses should be avoided as a matter of common sense and also because they could conceivably lead to the barrister being found to be in breach of Bar Rules 4 (a barrister shall refuse to accept a brief where to do otherwise would render it difficult for him to maintain his professional independence or would otherwise make acceptance thereof incompatible with the best interests of the administration of justice) and 21 (a barrister shall not engage in unprofessional conduct or do anything contrary to the standards becoming a barrister) or to have been guilty of "professional misconduct" under Part X of the Legal Profession Act, 1987. The latter Act defines "professional misconduct" as including "conduct (whether consisting of an act or omission) occurring otherwise than in connection with the practice of law which, if established, would justify a

finding that a legal practitioner is not of good fame and character or is not a fit and proper person to remain on the roll of barristers . . .". Since the definition is an inclusive one the common law meaning of professional misconduct will continue to apply in addition to the express statutory meanings.

Any barrister who is uncertain what he/she should do in circumstances of this nature can contact a member of the Bar Council or Ethics Committee for advice. The Bar Council publishes a list of the members' names but, in any event, they can be ascertained by contacting the Bar Association. □

Streamlining Case Preparation

The Chief Judge of the Commercial Division, Mr Justice Rogers has issued a practice note designed to facilitate the smooth flow of the work in that Division. Although most immediately relevant to solicitors, its existence and terms should be known to all barristers who practise there.

The attention of practitioners is drawn to a number of measures that are being taken in the Commercial Division to streamline the preparation of cases for hearing. The purpose is to reduce the need for attendance by practitioners at directions hearing with consequent savings of costs. Practitioners are reminded that judges of the Division welcome all suggestions for improvement and that operation of the Practice Note outlining procedures to be followed is regarded very much as a cooperative enterprise. The involvement of practitioners is essential to the speedy and cost effective resolution of commercial disputes.

1. Practitioners need to give more adequate instructions to persons filing summons as to the desirable return date. Experience has shown that inappropriate return dates are allocated because of lack of information as to any anticipated delay in service.

2. Difficulty is sometimes experienced in the service of the summons in adequate time prior to the return date to enable the defendant to formulate its case and sometimes there is a complete inability to serve the summons prior to the return date. In either event, it is open to practitioners to approach the registry and obtain a new and later return date. For this purpose, it is essential to have all sealed copies of the summons available to ensure that there are not sealed summons with different return dates in circulation. An application may be made at any time up to 4.00p.m. on the Wednesday preceding the return date. The matter will then be taken out of the list without the need for an appearance.

3. On occasions matters are adjourned to a later date by consent and in circumstances where the Court would have no objection. For example, it may be that meaningful negotiations between the parties for settlement have commenced. In such circumstances matters may be taken out of the list upon the parties completing a document in the form shown below. It will be noted that the legal representatives of the parties are required to obtain their client's prior consent to both the proposed adjournment and the fresh date and are required to advise the client of the reason for the adjournment and the fact that the adjournment is at the instance of the parties and not of the Court. The parties are required to specify the reason for the adjournment so that the Court does not lose control of the timetable and adjournments are not arranged inappropriately. The procedure is not appropriate where other orders are required.

The consent adjournment form may be handed to the Associate to Rogers J. (and in his absence Brownie J.) no later than 4.00p.m. on the the Thursday preceding the date when the proceedings would otherwise appear in the list. □

CONSENT ADJOURNMENT FORM
(Name and number of matter)

I request/consent to the adjournment of the abovementioned matter from ..... to .....
I certify that I complied with the requirements of cl (b) of the Usual Default Order.
The reason for the adjournment is .....
.....

.....
Solicitor for the Plaintiff

I request/consent to the adjournment of the abovenamed matter from ..... to .....
I certify that I have complied with cl (b) of the Usual Default Order.
The reason for the adjournment is .....
.....

.....
Solicitor for the Defendant

Our Favourite Mention

"In this matter your Honour I appear for the plaintiff and my learned friend Mr. Smith appears for the defendant. Mr. Smith apologizes that he is unable to be here today and has asked me to mention the matter on his behalf. Would your Honour on his application and over my strong objection adjourn the matter to next Friday for further mention." □

The Journal of

Pymble Golf Day

The Bar Association Golfing Society held its second Annual Bench and Senior Bar versus Junior Bar competition at Pymble Golf Course on Easter Tuesday.

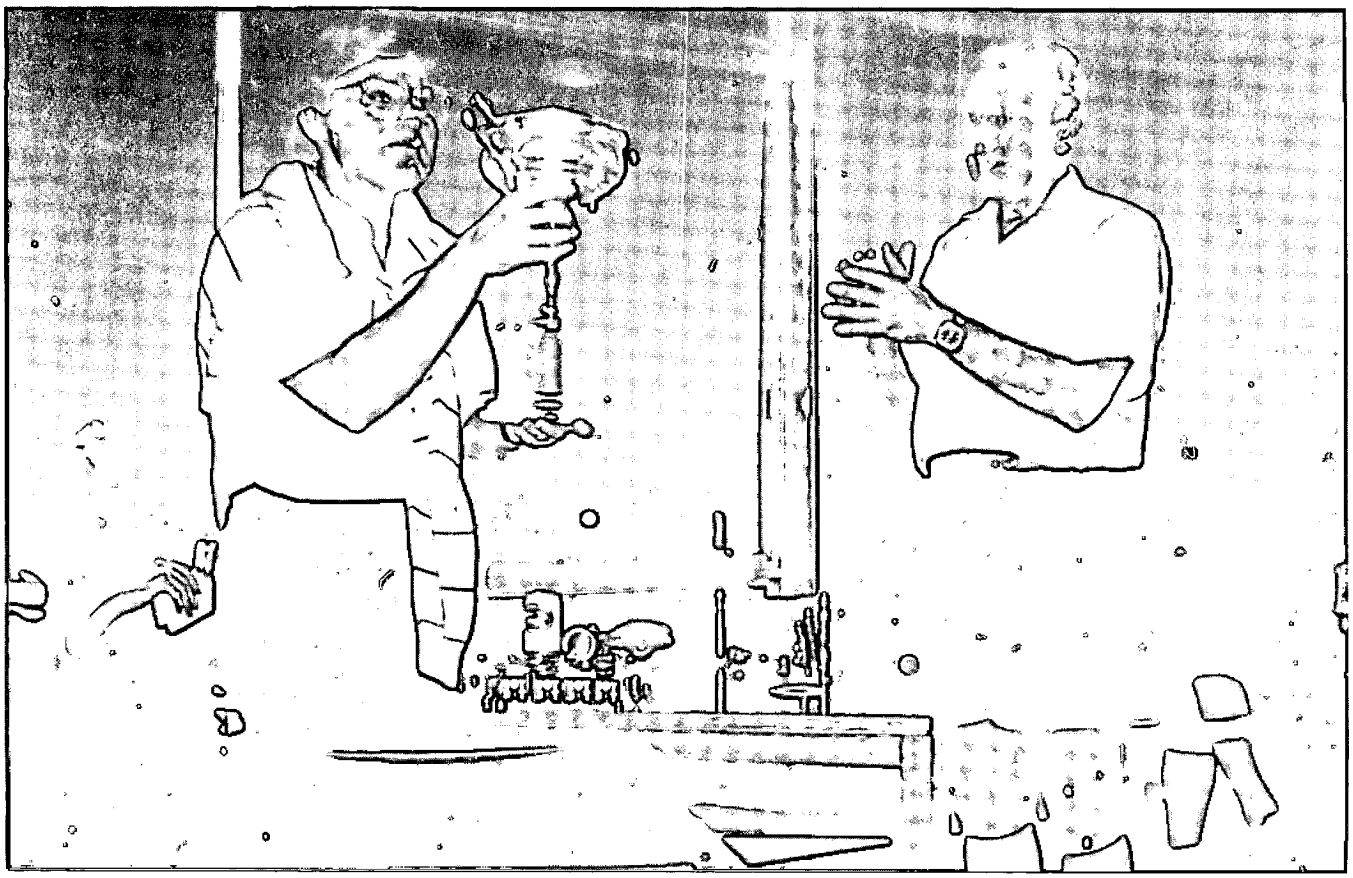
Despite inclement weather over the first four days of the Easter break, 45 Society Members enjoyed a rain-free afternoon on a slightly damp track. The Junior Bar again won although the margin of 6½ to 4½ matches was much closer than last year.

Judge Denton and Vinnie Hrouda returned the best card of the day with 44 stableford points. Runners up (on a count back with 26 points on the back 9) were Steven Finch and Paddy Anne Bergin on 43 points. Otherwise, the best front 9 went to Gallen J and Sinclair J for the Bench and Senior Bar and John McDonald and Chris Maxwell for the Junior Bar. On the back 9 Staunton J and Peter Barber for the Bench and Senior Bar and Richard Seton and Ken Earl of the Junior Bar had the best results. Peter Barber and Vinnie Hrouda won the nearest to pin prizes and the long drive was taken out by John Hislop.

In recognition of her creditable performance, Paddy Anne Bergin accepted the Bill Cook Cup on behalf of the Junior Bar from District Court Chief Judge Staunton whose jurisdiction was well represented by eleven Judges. This contributed significantly toward fulfilling the purpose for which the event was originated, namely, to provide an opportunity for young Barristers to mix with Members of the Bench and Senior Bar in the levelling environment of a golf course.

The date, Easter Tuesday, and location, Pymble Golf Course, have been confirmed for next year so those interested in playing will be able to plan well in advance to ensure their availability. Closer to hand, the traditional match against the Services is to be held this year on Friday 15 July, 1988 at Eleanora Country Club. Entry forms should be available in early June. □

Neil Francey



Paddy Bergin accepting the Bill Cook Cup.

This Sporting Life

Fourth Great Bar Race
Bar Fleet Conquers the Elements

The *Fourth Great Bar Race* boasted a record 45 pre-race entrants. The southerly gale and squally conditions did not deter 24 courageous skippers (and their apprehensive crews) from facing the starter's gun. There was to be no heaving to, storm jibs, applications for adjournment or such other nonsense from this intrepid lot!

Egan (of Counsel), who it seems really ought to have been declared the winner, reported to the Official Starter, Officer of the Day and Commander of the Fleet (who shall remain nameless), that many of his learned colleagues had not rounded Naval Buoy No. 2 where the Australian Naval Fleet (or what is left of it) is usually moored. Unconfirmed reports indicated that it was undertaking fleet exercises on Lake Burley Griffin. The fact that it wasn't there no doubt confused most of the skippers. The temerity of Egan's plea in mitigation was rewarded by the summary dismissal of his craft "Misty" and he was struck out of the race and marked "did not finish".

In between the rain, wind, squalls, rolling seas and, no doubt, more than a few sherbets of Tooheys the Commander of the Fleet, in a blanket finish, had inadvertently missed the passage of Egan's sail number over the finish line which would have given him a win on corrected time.

This historic event, however, had been recorded on a secret Nixon-brand video recorder which is to be donated to the Race Committee for use in all future races. Alas, it was discovered too late to have his action restored to the list and his cause was lost.

Final judgment was entered in favour of Robinson in "Bella Blue" who took the Law Book Company Sailing Trophy. He was closely followed by Nock in "Freedom Bound" (2nd) and Tomasetti in "Aston" (3rd). Egan graciously declined to file a Notice of Appeal which saved him the dozen Dewars filing fee.

Foster J. in "Bonfire", (one of which was sorely needed on Store Beach — see accompanying photograph) a regular competitor, was rewarded with the "Chalfont Cup" for competition amongst Judges and Silks.

The Bar Association again kindly donated pewters for the competition. All skippers who did not round Naval Buoy No. 2 are to attend this year's first reading lecture as their punishment at which the necessity for careful reading of one's brief (sailing instructions) will be the theme.

Special thanks to Mr. John Phillips and Granger who kindly made available "MV Viking" as the starter's boat. The Race Committee also wishes to thank all those on board who kindly assisted in ensuring a good weather eye was kept on the start and finish of the race as well as maintaining an adequate supply of liquid refreshments. □

Des Kennedy

Some of the hardy souls who braved the elements.