Bar News

The journal of the NSW Bar Association

Chief Justice Gleeson - the new "cosy" Court of Appeal!

Incorporating the 52nd Annual Report of the N.S.W. Bar Association 1988 and the Annual Report of the Barristers Benevolent Association of N.S.W.

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COVER: Chief Justice Gleeson - photographed by D.A. Wheelahan

Bar Notes

Solicitor Prosecutors

Following upon a complaint from a member, the Bar Council referred to the Law Society the question whether a solicitor who acted in a prosecution as an advocate should be bound by a rule similar to Rule 57A of the Bar Association Rules. The Law Society has now informed the Bar Council that it has resolved to adopt the following ruling based upon the Bar Association's Rules.

"A solicitor appearing for the prosecution should not act as an advocate in order to attempt to persuade a court to impose a harsh sentence, but nevertheless should be prepared to correct any error or mis-statement made by Counsel for the defence, refer the court to any relevant authority which has bearing on the appropriate penalty and generally to assist the court to avoid appealable error."

The ruling is to be brought to the attention of the members of the Law Society by means of publication in the Law Society Journal.

Funding of Courts Must Keep Up with the Pace of Litigation

In his opening address to the Australian Institute of Judicial Administration Seminar on 3 September, 1988 His Honour Sir Anthony Mason A.C., K.B.E., Chief Justice of the High Court of Australia made many important points including:

* That expenditure on law and order must keep up with the volume and complexity of litigation rather than just with such indicators as the population increase and GNP.

* Denying law enforcement agencies adequate resources for the investigation of and preparation of cases coming before the criminal courts means delay with consequential inefficient use of the court system and leads to a waste of facilities and resources as well as the potential of permanent stay of proceedings on the basis of such dely.

* That a suitable model for the administration of court systems had to be evolved.

* That greater participation by judges was inevitable in order to achieve more efficient court administration.

* That neither the judiciary nor the legal profession could legitimately expect the executive to provide whatever level of funding and administration was necessary to provide courts and facilities without the executive concerning itself about the efficiency of the court system.

* That the judiciary and the legal profession could not justifiably criticise executive funding and administration of the court system unless they were prepared to participate in formulating and implementing strategies and procedures to ensure efficiency without impairing the administration of justice. ❑

Time and Motion in Court

On October 5 the Premier, Mr. Greiner and the Attorney-General, Mr. Dowd announced an inquiry to identify the cause of delays and inefficiencies in the New South Wales court system. They said that the Government had appointd the management consultants Coopers and Lybrand W.D. Scott to conduct the review. Mr. Greiner said the public confidence in the court system would flounder unless action was taken to speed up the hearing of court cases and to make the system more efficient. Money alone would not solve the problems he said, but fundamental changes in management practices had to be introduced. He said that the consultants would consult widely within the legal profesion in the course of their review and would have due regard to the fundamental principles of justice and due process. They are to report to the Government by the end of Feburary 1989. He said that the Government had already taken several steps to improve the court system including the announcement in the State Budget of a 24% increase in spending on courts. New courthouses aare to be built at Parramatta and Burwood, at Wyong and Byron Bay. In addition two new Supreme Court Judges, four District Court Judges and seven more Magistrates are to be appointed. ❑

N.S.W. Bar Assocation v. Kalaf

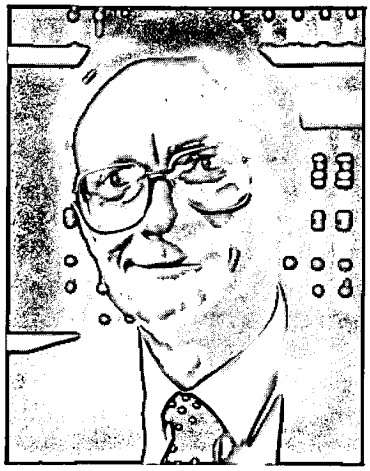
On 11 October 1988, the Court of Appeal delivered judgment in the above matter.

The Court (Kirby P., Samuels J.A. and Mahoney J.A.) unanimously held that Kalaf's irregularities of dealings with his client as well as his lack of frankness in dealing with the Solicitors Admission Board amounted to professional misconduct for which a reprimand would be insufficient.

The majority (Kirby P. and Mahoney J.A.) held that the appropriate penalty was suspension for one year - Samuels J.A. held that Kalaf's name should be removed from the Roll of Barristers.

Kalaf was ordered to pay the Association's costs. A precis of the decision will be published in Bar News in Autumn 1989 ❑

From the President



This is the last issue of Bar News for 1988 and it is therefore appropriate to review the work of the outgoing Council. The year has been a very demanding one for the Council. The issues we have had to face include Transcover, Workcover, Delays in the hearing of Criminal Trials, Delays in the Common Law Division, Legal Aid, Legal Aid Fees in Criminal Cases, Criminal Listing in the District Court, ICAC, the Ombudsman and the Police, Mental Health, and the Family Court.

We have also had to adjust to the commencement of the Legal Profession Act on 1st January and the introduction of compulsory practising certificates on 1st July. We have moved to a computer-based accounting system which handles membership records and the issue of practising certificates. We have recently made a submission to the Government for amendments to the Act to remove some anomalies which have become apparent.

At the time of writing the Transcover Committee, presided over by the Attorney-General, the Hon. John Dowd M.P. is continuing to work with no immediate resolution in sight. Here I must acknowledge the dedicated work of Coombs Q.C. with the research assistance provided in particular by Graham Ellis.

More recently the Hon. John Fahey, the Minister for Industrial Relations, established a committee to review the Workers Compensation Act 1987. This committee has 3 sub-committees and the Bar is represented by Poulos, McCarthy Q.C. and Ferrari. Studdert Q.C. was also a member prior to his appointment to the Supreme Court.

Unfortunately despite some progress no finality has yet been achieved on any of the issues referred to above with which the Council has been confronted. Indeed issues such as Court delays are likely to be before the Council for some time to come.

The Hon. Lionel Bowen M.P., the Commonwealth Attorney-General, has been anxious for some time to relocate the Sydney Family Court in permanent premises of its own. Unfortunately a decision has been made to locate the Family Court in Goulburn Street. The Council considers that this site is inappropriate and totally unacceptable. A move to this site will intensify the isolation of the Court, and would permanently downgrade it in the eyes of the profession and the public in Sydney. The Council has therefore supported moves to locate a more acceptable site and is hopeful that one can be found on Hospital Road. While the Council does not support proposals for the amalgamation of the Federal and Family Courts, it firmly believes that the Family Court should receive the full support of the Federal Government and the profession, and should be backed with appropriate resources.

One of the problems which will have to be faced by future Councils is the problem of judicial salaries and allowances. In recent years judicial salaries have not kept pace with inflation, and in real terms they are falling further and further behind the levels at the Bar, in the large law firms and in Commerce. Neglect by Governments in this area constitutes a creeping attack on the independence and efficiency of the Courts. I believe that on this issue the Bar will have to be prepared to stand up and be counted.

The Council is very concerned at the cost and shortage of accommodation for the Bar. Counsels Chambers has a special role and special responsibility in this area and the Council has encouraged the Board to actively investigate opportunities to secure additional permanent accommodation for the Bar. The Superannuation Fund and Sickness & Accident Fund constitute other specialised co-operative organisations which exist to serve the needs of our members. Both Funds provide services at favourable rates and on favourable terms compared with those available in the general market. Both deserve support from all members of the private Bar.

The Council, working in conjunction with the Australian Bar Association, has undertaken a review of the professional indemnity policies available to the Bar. Already the insurance covers on offer have been expanded and clarified. The question of premium rates is still under negotiation and any benefits are not likely to be achieved until the renewals in 1989.

Upon taking office last year the Council decided that something had to be done to improve relations with the Bar as a whole. With this in mind it introduced a system of meetings with the Heads of Chambers not represented on the Council. At these meetings the Office Bearers outlined some of the Council's current plans and the Heads of Chambers were invited to comment on and criticise the work of the Council. A number of the suggestions that were made at these meetings have been accepted by the Council and acted on.

In conclusion, can I remind members of the existence of the Barristers' Benevolent Association which in appropriate cases is available to assist members of the Bar in the event of illness and accident, and their families in the event of a member's death. Cases of need should be brought to the attention of a member of the Council. In some cases this is the only way we will get to know of the need. ❑ **K.R. Handley**

Report of the Marre Committee on the Future of the Legal Profession in the United Kingdom

In 1986 the Bar Council and Law Society of England and Wales established a committee chaired by Lady Marre CBE to review the way the legal profession met the needs and demands of the public for legal services.

In July 1988 the Committee made the following recommendations in relation to the structure and practices of the legal profession:

1. Rights of audience in all courts other than Crown Court should remain unchanged.
2. Solicitors who have been recommended by the Rights of Audience Advisory Board and licensed by the Law Society should have extended rights of audience for all cases in the Crown Court (by majority).
3. A Rights of Audience Advisory Board should be established for each circuit to make recommendations as to which solicitors meet an appropriate standard for rights of audience in a Crown Court. (by majority).
4. The Advisory Board should notify the Law Society which solicitors should be licensed to appear in the Crown Court and should also have the right to notify the Law Society which licences should be withdrawn.
5. Professions other than solicitors should be permitted direct access to counsel.
6. Where counsel is instructed by a professional client (other than a solicitor) he should be entitled to negotiate fees for work done direct with a professional client and, if necessary, take such steps as might be available to enforce payment.
7. Access by professional clients should not be restricted to those professions which make it a disciplinary offence not to pay counsel's fees.
8. The General Counsel of the Bar and Law Society should explore the practicalities of promoting an amendment of the law to enable barristers to enter into contractual relationships with solicitors and/or lay clients and sue for non-payment of fees; and should also explore whether non-payment of counsel's fees should any longer be treated as professional misconduct.
9. There should be no change in the present rule which gives an advocate (barrister or solicitor) immunity from an action for negligence in respect of the conduct and management of a case in court.
10. Employed barristers who have completed their pupillages should have the same rights of audience in the Magistrates Courts and the County Court as are enjoyed by employed solicitors.
11. Employed barristers should have direct access on behalf of their employers, to practising barristers.
12. A barrister employed at a law centre should, where the centre is organised on appropriate lines, be able to work at such a centre whether a solicitor is employed there or not; such a barrister should have direct access to counsel and be able to appear in court for clients of the law centre.
13. Employed barristers and solicitors (other than those employed by the Crown Prosecution Service) who have been licensed by the Rights of Audience Advisory Board should have rights of audience if their employers face prosecution in the Crown Court.
14. Rights of audience in the Crown Court should not, at present, be extended to lawyers employed by the Crown Prosecution Service.
15. Solicitors should be eligible for appointment as High Court Judges.
16. Any action relating to multi-disciplinary practices and multi-capacity practices should await the completion of the Law Society's examination of the issues.
17. No change should be made in the present rule which prohibits a barrister from practising in partnership.
18. The Bar should continue to encourage chambers to adapt and develop their support services and management so as fully to meet the needs of a modern profession. Every encouragement should be given to the steps being taken to improve the educational and professional qualifications of barristers' clerks. The practice of many sets of chambers in negotiating new contracts with their clerks on the basis of a salary with an incentive to reward effort and efficiency should be adopted by all sets of chambers.

The Committee rejected the proposition that there should be fusion of the Bar and the solicitors' branch of the profession. All the Bar members on the Committee and one of the independent lay members, Lady Elizabeth Cavendish, also opposed the majority recommendations on rights of audience, principally because they saw that any significant extension of solicitors' rights of audience in the higher courts, (including the Crown Court) carried a very high risk of bringing about fusion. They saw the process being brought about by:

* Reorganisation of solicitors' firms to establish or expand advocacy departments;
* recruitment of barristers to become advocates within solicitors' firms;
* continued pressure for further extension of solicitors' rights of audience with consequent damage to recruitment to the Bar; and
* the eventual concentration of advocacy resources within the larger solicitors' firms.

Following the publication of the report, the Bar Council of the Bar of England and Wales re-affirmed its view that any significant extension of rights of audience to solicitors was against the public interest and should be resisted. ❑

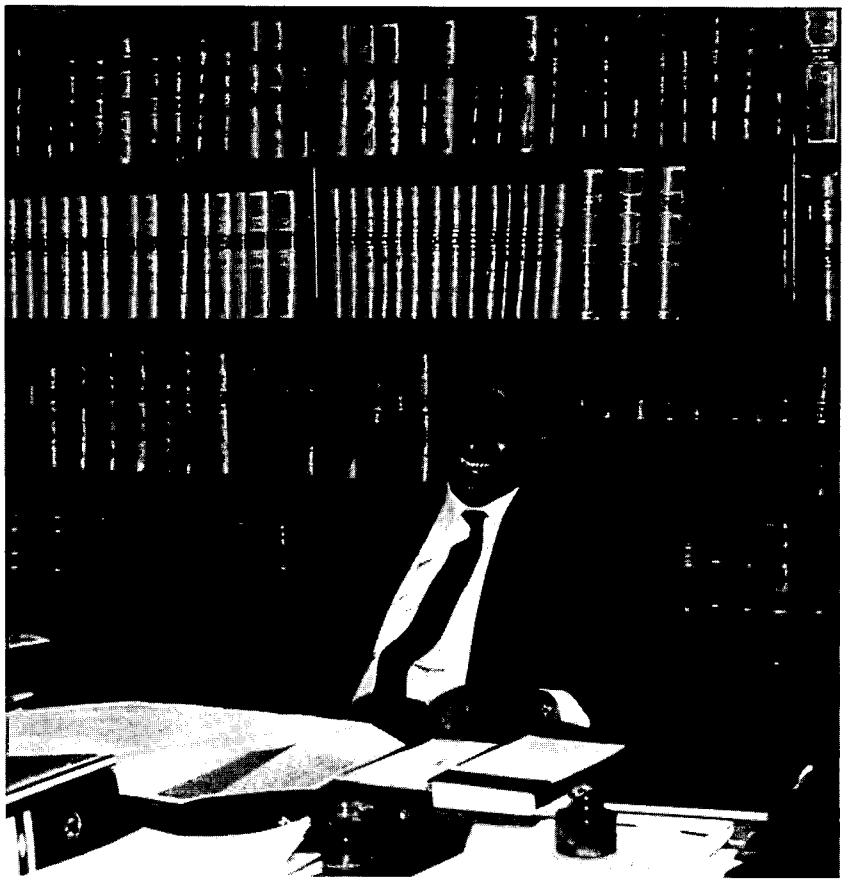
Chief Justice Gleeson: "relaxed and friendly."

Bar News interviews the new Chief Justice

In 1979, speaking at the 20th Australian Legal Convention, you said: "Some of the qualities that are displayed by, and perhaps even account for the success of some of our leading advocates are antithetical to the qualities required of a judge." What qualities were you thinking of when you said that, in relation to: (a) barristers; and (b) judges?

(a) Competitiveness, aggression and the capacity to view a case with a keen eye to the interests of one of the parties to the litigation.

(b) Patience, courtesy and the concern for the interests of justice rather than the individual parties. I would be opposed to the use of anabolic steroids by judges, but I could understand how they could be useful to barristers.



You have been Australia's leading advocate for some years now. Presumably, you possess some of those qualities as a barrister of which you were speaking. Which do you possess?

The breeding of this question is by J.W. Smyth out of Jane Singleton. The flattery does not succeed in masking the sting. The answer to the question is: all of them, but in moderation.

Which of the qualities which you think desirable for a judge to have do you believe you possess and which do you think you may have to "grow into"?

I am constantly amazed at my own patience. I hope to be able to "grow into" the other qualities.

Do you anticipate having any difficulties translating from the Bar, not only to a position on the Bench, but to the job of Chief Justice of New South Wales?

Yes. I feel that I really have very little idea what it is like to be either a judge or the Chief Justice of New South Wales. However, most judges that I have seen going about their business have taken a somewhat less adversarial approach to the problems before them than I have. I remember attending a speech in the Bar Common Room made by the late Phillip Jeffrey upon his appointment to the Supreme Court Bench in which he said that he had made a resolution that he would not, as a judge, regard it as any part of his function to endeavour to persuade counsel to agree with him. That sounded to me like a very good resolution, and also one that I will have considerable difficulty in keeping.

You also said in the same speech that there were some matters upon which judges did not speak up frequently enough, in particular, matters of public concern in the law and the administration of justice. Do you want judges to have a higher public profile on such matters?

Higher than whom? My observations were made in 1979. Since then some judges have assumed distinctly a high public profile. If I may, I would observe that the quotation from my speech is somewhat selective. What I in fact said (see 53 ALJR 346) was: "There are some matters upon which judges do not speak up frequently enough, and when they do, insufficient notice is taken of what they say. There are, however, other matters upon which some judges (fortunately, a relatively small minority) already have far too much to say."

I proceeded to give examples of what I had in mind as falling into the former category.

Do you think that, whether because of events of recent years concerning the judiciary, or generally because the community is more critical of professions than it used to be, the public image of the administration of justice has become tarnished?

Yes. Both of the factors referred to in the question have been at work in recent years. It is to be hoped that the first will disappear,

but the second is bound to increase. This is the age of consumerism, and litigants are encouraged to regard themselves as consumers of judicial services. However inappropriate such a notion may seem to a laywer, it is by now well entrenched in the community.

If so, what steps will you be taking to restore it?

There are some aspects of the administration of justice of which public criticisms are well-founded. For example, the present level of court delays in New South Wales is simply unacceptable. This is a problem which is being expertly and diligently addressed by persons within and outside the Supreme Court, and if their efforts are successful then they will have achieved a major improvement in the public image of the court. I hope that I will be able to encourage and assist their efforts.

Do you perceive a role in the Supreme Court for a public relations/media liaison person?

No.

How do you expect to divide your time on the court between the Court of Appeal, the Court of Criminal Appeal and the administration of the Supreme Court?

Because of my complete lack of experience and because I only have a vague idea of what is involved in the work of administration, my estimate is likely to be completely unreliable. However, I would hope that I would be able to devote approximately 1/3 of my time equally amongst the three matters referred to in the question.

The Supreme Court appears to be going through a crisis in terms of having sufficient judges to hear the matters before it. How do you see that crisis being resolved or at least eased?

There needs to be a combination of two elements. There is, I think, undoubtedly a need for more judges and resources available for the administration of justice. However, it is unrealistic to expect that governments can be persuaded to seek to solve the problems confronting the operation of the courts by throwing money at those problems. They will only be induced to spend more money if they can be shown that the courts themselves are taking their own steps to promote efficiency. This is being done within the Supreme Court at the moment. A great deal of effort is being expended upon devising a program for reduction of delays. This is the sort of thing which might well encourage the Government to give further financial assistance.

"There is undoubtedly a need for more judges and resources available for the administration of justice."

The High Court has decided that its members will no longer wear wigs and a full set of robes because of its purely appellate function. Do you think the Court of Appeal should follow suit?

This is not a matter on which I would wish to express a view without having heard what the judges think. However, I can't imagine that it would be appropriate to have one form of dress for the Court of Appeal and a different form of dress for other judges of the Supreme Court.

What sort of a court can we expect to see you run?

Relaxed. Friendly. A cosy place in which a just solution to peoples' problems can be sorted out as the result of a quiet chat between Bench and Bar.*

What do you hope to see from members of the Bar appearing before you?

It would be impertinent of me to lecture barristers on their professional standards. I have no doubt that the Bar will continue to maintain its present high standards in that regard.

Do you see the increase in the mega-firms and in-house advocates as representing a challenge to the existence of the Bar as an independent institution?

Oddly enough, I see these circumstances both as representing a challenge to the existence of the Bar as an independent institution and, at the same time, as helping to ensure its survival. Nothing is calculated to underscore the need for an independent Bar quite so much as the viewing of a few episodes of L.A. Law.

If so, do you think that the Bar should change any of its practices in order to resist that challenge?

It is for the Bar Council, rather than judges, to make decisions on matters such as this. However, I think it is important to maintain flexibility. For example, the question of accepting instructions in relation to non-contentious matters from persons other than solicitors is one that will have to be kept under review.

Will you miss the Bar?

Yes. ❑

* Believe that, and you'll believe anything! - Ed.

The Artful Bar

Clive Evatt, who combines his practice at the Bar with ownership of the Hogarth Gallery, reviews the Bar's eclectic art collection.

The profession has long patronised the arts. Any evening at the Opera House sees a gathering of Bench and Bar. Judges of the Court of Appeal have a penchant for opera whereas the Equity Bench, in keeping with the jurisdiction, prefers more esoteric chamber music.

There is an even closer connection between Bar and stage. The funniest ever review compere was Roden. Waddy is also a riot in this field. However it is in dramatic art that the Bar shines. Those fortunate enough to have seen Rofe in "The Eagle has Two Heads" as he clutched the heroine to his bosom witnessed one of the great moments in theatrical history.

Every barrister has some interest in the visual arts. Many own at least one decent picture and some floors have a high standard of art in the common areas. There are fabulous private collections. The name most mentioned is Lockhart J but his collection would have to be good to rival the magnificent collections of Meagher or the late Tom Reynolds. Meagher's collection which is scattered all over Sydney would be big enough and good enough to refurbish the Art Gallery.

Although all three have given paintings to the Association it was Meagher and Reynolds who dramatically influenced the Bar collection by bringing members into contact with modern art.

Mr. Pidgeon's Barwick

Before Wentworth Chambers opened in 1957 there was no common room and nowhere to hold social functions. Donations were few. Sir George Rich holds the honour of presenting the Association with its first gift - a portrait of himself (since disappeared). Sir George was also responsible for the Association's second gift a year later when Barwick donated the President's chair now in the dining room under his portrait. Sir George had been reading in the Association library in the old Law School when his chair collapsed.

> "..being somewhat shaken he accepted from the librarian a glass of spirits, which effected a sound restoration. His Honour jocularly submitted to Barwick, then President of the Association, a claim for damages which led to a good deal of humorous correspondence between them and an ultimate 'settlement' in the presentation of the maple chair. Barwick sought a latinism for the chair and Mr. John Sparrow, warden of All Soul's College, Oxford was enlisted to supply the inscription: "Hic parumper requievit Georgius Rich donec lyaeis laticibus suscitatus est", his translation being "Here George Rich reclined in rest until he was raised up by strong waters." (J M Bennett "A History of the New South Wales Bar" at 215).

In 1959 Snelling gave a portfolio of portraits of early English Judges (also missing). At that time the Association commissioned the artist Bill Pidgeon to paint the portraits of Barwick and Manning which hang over the refectory table at the top of the dining room. Mr. Pidgeon was better known as a cartoonist and has unduly emphasised, indeed exaggerated, their stern countenances. Those who trembled before Manning J when seeking an adjournment of one of his special fixtures must still shudder when they see this grim profile. Both of them deserve better. The artist has missed their true personalities which were far more amenable. They both worked tirelessly for the Bar and were the driving force behind Selborne-Wentworth Chambers.

The gifts trickled in over the next dozen years. All had a legal theme. They were mainly pictures or photographs of Judges.

Bowen who also had a major private collection commissioned Mr. Pidgeon in 1961 to paint sevel legal paintings which he donated. These are hung together at the far end of the dining room. However the artist who excelled in black and white drawings was never really happy with paint. What should have been light-hearted is too sombre.

The collection ambled along with more legal portraits, photographs and the occasional etching. Thus in 1966 Cohen (Alroy) presented some framed portraits of English and NSW Judges, in 1970 Gee gave a photograph of the District Court Judges of 1929 and in 1972 a picture of Ralston was presented. This probably would have been the pattern of donations for the next 100 years when in 1973 out of the blue a large painting of an ostrich arrived. This is described in the catalogue thus:-

> "...a hapless and enigmatic ostrich. It will evoke apt and cunning thoughts."

What induced Meagher, Hughes, Jeffrey, Lockhart and O'Keefe to give this picture by Terrence O'Donnell is not

known. It could be they were concerned at the way the collection was going and wanted to demonstrate that art could be contemporary and cheerful and need not have any particular meaning. On the other hand they may have won it in a raffle.

Over the next 10 years the ostrich was followed by eight further contemporary but non-legal pictures. Meagher and Reynolds were behind all these either alone or in association with other members - mainly 8 Selborne. This set the yardstick for 7 Selborne to give the Bill Salmon "Twist Trunk" in memory of Jeffrey J and an Eric Smith in memory of Henderson. The other floor to give a painting was 10 Wentworth who in 1984 appropriately donated "The Unexpected".

Although at the same time gifts of legal theme pictures, prints, photographs and engravings kept on arriving these were mostly shunted off to passageways, the archives trunk, boardroom or the Registrar's office.

The last picture presented was in May this year when 8 Selborne gave the Ian Pearson "Hunters and Collectors" in memory of Reynolds. The yellow spiral appears three dimensional because of the black shadows painted underneath. This trick of illusion was introduced into Australia by Tim Storrier. The painted tree branch motif was first used by Colin Lanceley. However despite its eclecticism it is a worthy and impressive painting. The deep waters of the pond lie still with a hint of mystery.

"Hunters and Collectors"

The common rooms today have an excellent and harmonious collection of traditional and modern art. The pictures blend well and make a lively collection. Art connoisseurs would recognise the quality of the paintings and even those members and visitors not so familiar with art would know the collection is out of the ordinary and unique for such a legal setting.

The jewel in the crown is "From David Jones' Window" (1936) - a drawing by Grace Cossington Smith (Yet another gift from Meagher and Reynolds and others of 8 Selborne). It shows Queens Square and Hyde Park Barracks then the District Court. Queen Victoria gazes serenely across Macquarie Street (she has since turned). People scurry by like spiders and altogether the picture captures the art deco charm of pre-war Sydney. Meagher and Reynolds purchased it in 1974 for only $750 (price marked on back). An absolute bargain. It would be worth at least $15,000 on today's market (an increase of 2,000% which would rival Voss's superannuation fund profits).

Another first class painting is Euan McLeod's "Sir Ninian and Lady Stephen". This was not commissioned but came from an exhibition at Watters Gallery. At first glance it looks like a parody with garrish colours of green, yellow and black, but on closer examination the sitters emerge as real people with character. It is a superior portrait to Mr. Pidgeon's Barwick.

There is only one realist painting "Time Means Tucker" by Tim Storrier who is a skilled craftsman. You have to look closely to observe it is not a real flag but only painted.

In 1974 a painting by Geoffrey Proud caused such controversy it made the press. Untitled, it shows a lady unaware of Section 576 of the Crimes Act. It is described in the Inventory as :-

"A fine Renoirresque, soft, spray-gun painted work...a seductive example, in the neo-realist mode....comprehensible by the most benign barrister"!

According to the catalogue responsibility for this gift is shared by Meagher, Hope JA, Lockhart, McHugh, O'Keefe, Cripps, Morris, Poulos, Hely and Chapman.

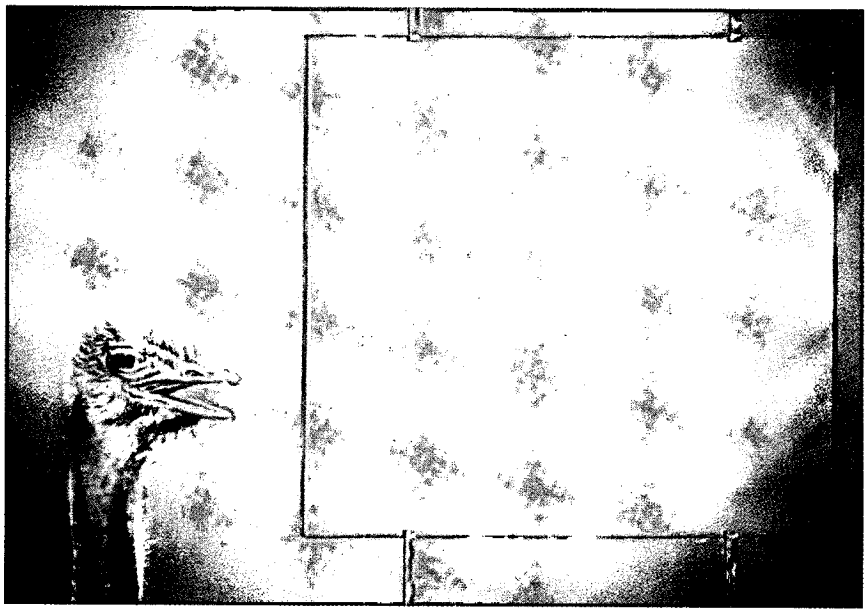
The painting is not neo-realist at all but photo-realist. It resembles a photograph because it appears sharp from a distance and out of focus close up. It is not a good example because the central figure should remain sharp from all distances. Using Renoir's name in the description is questionable. It had many critics including Coombs (Janet) who retaliated by donating a painting depicting an undressed male. The Association rejected this on aesthetic grounds because the work was by an amateur artist and not competent enough. What would have happened had there been a gift of one of Juan Davila's highly professional homosexual paintings?

As the surrealist Magritte would have said, the picture is not a woman but only a painting. If females wish to protest at anything in the collection, the obvious one would be the photograph of Sir Frederick Darley donated in 1965 by Maxwell. Sir Frederick was Chief Justice of New South Wales in 1921 when our first woman Barrister, Miss Ada Evans, qualified for the Bar. He did not approve of women Barristers and refused to allow her to practice. Eventually the Holman Government had

to pass a special Act to enable her to appear in Court.

The painting by Mr. Proud ought to be taken in the context of the contemporary paintings which surround it. Artistically speaking, it does not warrant the attention it has received.

One way or the other, the Association has a significant and important art collection. It now needs direction and a curatorial policy. There is no space in the common areas for even one more painting. The few bare patches of wall which survive must remain to avoid the collection becoming too cluttered. As it is the passageways, back rooms and administration sections are overcrowded with pictures and photographs relegated from the common areas or not regarded as good enough or too small to be on public view. The Art Gallery of New South Wales gets rid of excess pictures by selling them. However the Association could place many of the overflow on loan to the floors or members. The old photographs and prints are fascinating as are most of the legal paintings and portraits. Some could be lent to the Supreme Court to liven up the drab walls. The Federal Court obtains its excellent collection from Art Bank which only lends to Federal institutions. There is no similar State scheme. Perhaps the Geoffrey Proud could be placed on the 12th level where it could be more frequently seen especially by at least two of its donors.



".....out of the blue a large painting of an ostrich arrived."

As to the future acquisition of paintings the possibility of obtaining the name artists is out because of ridiculously high price levels. Today everyone is scrambling to buy paintings forcing prices up and up. It is reminiscent of the rush for shares on the New York Stock Exchange in the years leading up to October 1929. The only sensible policy is to obtain works by younger emerging artists and hope they will come good in years to come. This is exactly what Meagher and Reynolds had been doing. Predictions are always difficult but the Storrier and the Salvatore Zoffrea could become extremely valuable in time.

It is also recommended that pictures be rearranged every few years. New positioning and replacement makes any room look different. This is a policy adopted by public galleries to avoid any feeling of déja vu.

Apart from pictures the Association has an excellent collection of furniture, silver, glass and other bric-à-brac.

The four Inns presented replicas of their Coats of Arms and historic stone relics. There is a purbeck marble base of a column from the Round Church in the Temple which was placed there by the Knight Templars before 1185. A capital of one of the original columns of the choir dedicated in 1240 was also donated with a piece of the art of one of the Lancet windows of the organ bay of the Church and a carved pediment which formerly stood over the doorway of the students entrance to the library engraved Gray's Inn. These old stones are full of history and are aesthetically pleasing.

All types of sundry items have been donated such as a brass ashtray from HMAS Australia given by Bell, a ships bell from Wheelahan and Hartigan, a Sepic River Mask from the judges of the Supreme Court of Papua New Guinea and a plaque from the US Navy given by Captain Phillips. There is a bust of W.C. Wentworth from the Nielsen Park Trust given by Snelling and a white bordered burgundy table runner and 24 napkins being a gift of the silks of 1985.

There are numerous sporting trophies. Four trophies for golf, a soccer trophy, a cricket trophy, a hockey trophy and a tennis trophy. None of these could be appraised because unfortunately they seem to be held by the competition.

The glassware was donated by Counsels Chambers and comprises Waterford tumblers, sherry glasses, wine glasses, champagne glasses (two dozen of each), an ice bucket and a water jug. Altogether fourteen dozen glasses. Perhaps there should be a trophy related to their use which judging from the size of the collection would never be lost. In the catalogue the following remarks appear about a hole in one of the champagne glasses:-

> "The defect...was discovered at a dinner in the boardroom when Norman Travers was pouring wine for Sir Garfield Barwick. The champagne spurted out in a most realistic fashion (cries of "Jamis boit de l'eau). Sir Garfield was intrigued and delighted and begged Norman to continue. However, we who deplored the waste of good wine, won the day. Waterfords replaced it."

There is an impressive collection of silver. The first gift in 1963 was a silver ice bucket, tongs and water jug from that machiavellian group, the Barristers Clerks.

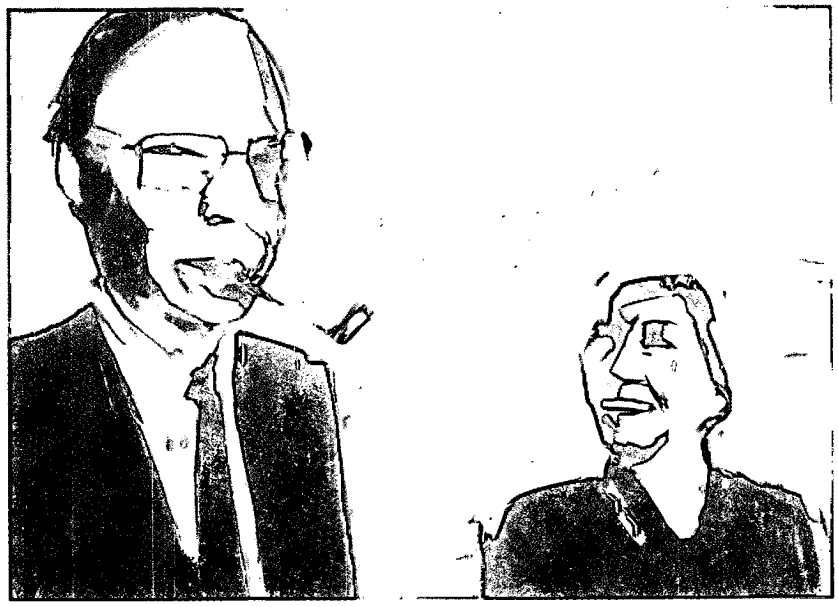
There is a silver ducal butlers tray "Nec Male Notus Eques" (a knight of good repute) (c1789) donated by Mrs. Holmes in memory of Holmes J. Yeldham gave a silver cigar box with a

Bar crest and Samuels a Georgian silver cream jug and ladle. Meagher gave a silver dutch sweetmeat bowl and Gleeson four beautiful art deco silver menu holders. Altogether there are over forty donors and over 100 pieces. The collection is worth thousands. Unfortunately the silver and other smaller items such as glassware, cutlery and the like are locked away in drawers. They ought to be put on view in proper display cabinets. Some gifts of antique cabinets for this purpose would not go astray.

Donations of furniture include the boardroom table together with 18 chairs donated by Mr. H.D. Daley and the George IV longcase clock (c1820) donated by the silks of 1981 and 1982.

To date all gifts, including even Meagher's are on orthodox lines - paintings, silver, furniture and other objects d'art. The current collecting crazes for nostalgia such as old movie posters, costumes and particularly antique toys are not represented.

Who will be the first to donate a Schiparelli gown, a Steiff teddy bear or a Hornby 0-4-0 number 1 tank locomotive?



Sir Ninian and Lady Stephen - real people with character.

The blot on the escutcheon is the library collection. It was established in 1936 and started off in a room in Denman Chambers then moved to the top of University Chambers. Although the library had over two thousand books donated by Judges and Barristers it was never a success. Revenue came from a charge of threepence per book and from fines. Even though morning and afternoon tea was served and readers had the use of a telephone the library was seldom patronised. At one stage Tom the University Lift Driver was its custodian keeping the key in his pocket. Eve Coyle who was part-time librarian in the fifties used to complain that often days could go by without a visitor. It was Eve who found and supplied Sir George with the brandy when the chair collapsed.

In 1952 the library moved to Wentworth Chambers and remained thereafter in the complex. Although there have been many generous gifts, incuding the whole of the estate of Emerton, the Bar could have done much more.

The collection of legal memorabilia is disappointing to say the least. One would have expected for example, appeal books and transcript of leading cases. These would be invaluable to members as they could read how some of the great leaders of the Bar presented and conducted cases, cross-examined and addressed. The comparatively small collection of items of historical interest is kept in only one tin box.

The box contains a wealth of absorbing items but there should be more. For example, there is a scrap album of press clippings tracing the career of Sydney's second woman Barrister, Sybil Morrison. A page from "The Sun" of 24 January 1926 has three photographs entitled "Mrs. Sybil Morrison, Sydney's Woman Barrister, in a corner of the kitchen, preparing the potatoes for dinner", "Ready for the court, picture taken before a tapestry in her home" and "The cup that cheers..Mrs. Morrison dispenses afternoon tea". These photographs are followed by a lengthy article:-

"Mrs. Morrison has been most successful during her 12 months at the Bar, and when she sheds her wig and gown she dons an apron to peel potatoes, or beat up cakes, and changes into taffetas for dinner, at which she makes a bright and charming hostess etc. etc."

There follows a clipping from "The Daily Guardian" of 25 February 1926 with the headlines "Two Portias ask for judgment" "Woman solicitor briefs woman Barrister". The article goes on:-

"Two Portias will make a magistrate blink at the Water Police Court this morning. Miss Jollie Smith a woman solicitor has briefed Mrs. Sybil Morrison a woman barrister."

It is hoped that Mrs. Morrison received a better brief than those Miss Jollie Smith delivered to Counsel after the war.

The press clippings trace Mrs. Morrison's career for two years then cease abruptly in 1926. The remaining 30 pages in the album are blank. What happened? The yearly almanacs disclose moves to less fashionable Chambers and by 1936 her name disappeared altogether.

Other items in the box range from photographs of members making merry at the 50th anniversary ball of the Association in 1986 to a 1941 report on qualifications for appointment of King's Counsel.

There are sketches and humorous descriptions of silks in the early years of the century by Scarvel and a long poem by Letters

"Elegy of the Bar". This was written when the then Attorney General Lysaght (Labor of course) had incurred the wrath of the Bar by supporting a move for an amalgamation of the professions and abolition of wigs and gowns. Letters in rhyming couplets roast the Attorney and many of the leading barristers of the day who included Kitto, Holman, Windeyer, Toose, Watts and Lamb.

Herewith a few stanzas:-

"His Majesty's Attorney General
(The New South Welsh one, not the Federal)
Who let the murd'rer walk, and hangs the Bar,
Demands th' attention of our earliest par,
A giant in height, out of a meagre girth,
He stalks and booms as tho' he owned the earth.
A feeble chin his thrusting beard off-sets
And scares the Crown to sending briefs to pets
.....
And Dignam master of a bogus college,
Whose dupes pay more than earns his legal knowledge
.....
Mack's rocky practice hath declined of late,
The reason I would rather not relate
.....
When Hammond squeaks, E'en Jordan's whine enthrals
But Newell's bleat like Mack's dull drone appals"

Luckily there appear to be no Barrister poets around at the present time to write an up-to-date version of the above.

Members are urged to remember the various collections of the Association whenever the opportunity arises. ❑

Above: Mrs. Sybil Morrison, Sydney's woman barrister, in a corner of her kitchen, preparing the potatoes for dinner.

Right: Ready for the court, a picture taken before a tapestry in her home.

NSW Bar Association v. Maddocks

On 23rd August 1988 the Court of Appeal constituted by Kirby P, Samuels J.A. and McHugh J.A. handed down a unanimous judgment in the matter of NSW Bar Association v. Maddocks.

The Court made orders in accordance with the summons declaring that Maddocks was not a fit and proper person to be a member of the NSW Bar Association and directing that his name be removed from the Roll of Barristers.

Findings of the Court of Appeal

The Court found that Maddocks had:-

1. While a defendant in personal litigation threatened that unless the proceedings were withdrawn he would disclose to the police that the plaintiff had defrauded an insurance company.
2. In 1977 made a representation to the Equity Court that he was an appropriate person to be a company director without disclosing that he was an undischarged bankrupt in circumstances where he knew it to be an offence for an undischarged bankrupt to hold such office.
3. Accepted instructions as a barrister on behalf of a client without the intervention of an instructing solictior; conducted conferences with him in inappropriate places and without the attendance of a solicitor or lerk and received from him payment of fees in cash.
4. Not been honest and candid with the Court in the explanations that he offered with respect to the above matters.

Points of Interest

The case is of particular interest because:-

1. It contains a useful summary of the principles to be applied in disbarment proceedings.
2. It stresses the absolute necessity for barristers to be both honest and candid in answering complaints relied upon as the foundation for disbarment proceedings if they are to have any real prospect of remaining on the Roll.
3. It emphasises the seriousness with which the Court views misconduct directly involving Court proceedings or the barrister's relationship with the Court.
4. It acknowledges the diversity of the Bar and the inappropriateness of rigid insistence upon an unvarying mode of professional practice.
5. It suggests that seeing clients without solicitors present and/ or taking cash directly from clients may not in the circumstances of a particular case be professional misconduct of such seriousness to warrant disbarment.
6. It suggests that it would be far more efficient and expeditious if the factual aspects of disciplinary cases were contested before a single judge whose findings would then be referred to the Court of Appeal for ultimate decision as to whether those findings justify any disciplinary action. ❑

Court Delays

The Supreme Court has launched a full-scale assault on the problem of court delays in the Common Law Division. Robert Stitt Q.C. outlines the new measures which were odiscussed at a seminar for members of the Bench and the profession on 17 September, 1988

The backlog and delay existing in the Common Law division of the Supreme Court of New South Wales has now reached a critical level.

At a recent seminar for judges and members of the legal profession organised by the Chief Justice Sir Laurence Street the nature of the problem and methods for its solution were examined and discussed.

The Chief Executive Officer and Principal Registrar of the Supreme Court, Mr. Warwick Soden, delivered a report which evaluated the extent of the delay in the Common Law Division.

Some of the points which emerged from that report were:

* In the Sydney Registry alone, filings of statements of claim have remained high at approximately 9,500 per year since 1985, with an extraordinary rise in filings in 1986 of 13,332. This was directly attributable to the imminent Transcover and Work Cover Legislation.

* The opening of Supreme Court Registries in Wollongong, Newcastle and Wagga Wagga allowed parties to comence actions in those country centres. There has been no decline in the number of actions commenced in those areas.

* Since mid-1983 pre-trial conferences in claims for damages for personal injuries have been conducted. The percentage of common law mattes settled prior to hearing has steadily fallen from 47.3 in 1983 to 15.4 in 1988.

* A decline in settlements at the door of the Court has occurred since 1983. This decline is believed to be attributable to the fact that cases have been unable to be allocated a definite hearing date. As the delay in hearing dates increase, the settlement rate decreases.

"..... 2.4 judges "

* Any percentage decline in the success of pre-trial settlements reduces the Court's overall capacity to dispose of cases. The percentage of cases not reached has increased from 10.3 in 1985 to 22.6 in 1987; already in 1988 it is 14.4.

* The decline in the availability of judges to hear common law matters is quite startling. The average number of judges listed as available per day to take general matters in the common law division has declined from 6 in 1986 to 2.4 in 1988. This decline is partly due to the increased workload within the Criminal Division of the court with the resultant loss of judicial resources to the Civil list.

* On presently available statistics the estimated disposal rate of matters in this list lies between 4 years and 12 years.

The need for urgency in defeating delay is starkly apparent.

Mr. Justice Wood as chairman of the Delay Reduction Project Committee outlined in a report some of the proposals which are to be implemented by the Court in an endeavour to overcome this critical problem. Apart from the difficulties identified by Mr. Soden the committee is concerned that if common law rights in motor vehicle and industrial accidents are restored retrospectively from 1st July, 1987 and these claims are to be heard in the Supreme Court a significant volume of additional work will come into the division.

The proposals as to current matters will take effect from the commencement of the 1989 Law Term. All practitioners should carefully note the following points:

1. A revised roster which allocates judicial resources between civil and criminal matters will be introduced.

2. The Court of Criminal Appeal sittings are to be concentrated over ten days in two weeks of the month.

3. Regional Circuits, the majority of which will be concentrated in the middle of the year will be introduced. The circuits will be presided over by the same judge sitting successively in each centre as the work requires.

The Regional Circuits are as follows:

* Northern Rivers - Grafton, Lismore, Coffs Harbour.
* Northern Tablelands - Tamworth, Armidale, Narrabri.
* Central West - Dubbo, Orange, Bathurst.
* Riverina - Albury, Griffith, Wagga.
* Broken Hill.
* Goulburn.

There will be a concentration of criminal hearings separate from civil sittings in country districts at a principal centre for each region. They are Lismore, Tamworth, Bathurst, Wagga, Broken Hill and Goulburn for each Regional Circuit respectively.

4. There will be continuous sittings (alternating civil and criminal) in Newcastle and Wollongong (in the latter case using that centre as the extra court for criminal trials) with provision for standby periods for extra sittings.

5. Once the pre-trial procedures have been completed in the Administrative Law and Defamation Lists (which should remain specialist lists under the control of a particular judge) matters in those lists should be included in the General List, with appropriate priority for the purposes of allocating a hearing date.

6. No changes were recommended in relation to the Admiralty List.

7. All pending matters in the long cases list or matters sought to be added to it, will be subjected to court supervision to confirm that they are properly in the list, to narrow the issues, to promote settlement and to ensure realistic time estimates are given for the hearing when a date is allocated. The criterion for a long case will be 7 days plus.

8. The court will be in a position to guarantee firm hearing dates. The period between the Issues and Listings Conference and hearing is intended to be reduced to six weeks. Matters will only be given a hearing date when the court is satisfied that they are ready for hearing. This will require the parties to be fully prepared at the time the hearing date is allocated and so should encourage settlement.

9. A central part of the new proposals is the Issues and Listing Conference. This will be held before a Master. At the Conference the court will not allocate a hearing date unless satisfied that the matter is ready to be heard. At such conference the Master will satisfy himself:

(a) that all medical reports and experts' reports to be relied upon have been served;
(b) that final Part 33 particulars have been filed and served;
(c) that all documents evidencing financial loss have been served;
(d) that all necessary medical examinations have been conducted;
(e) that the issues are settled;
(f) that settlement prospects are explored;
(g) whether there is to be any application to dispense with the jury or other contested interlocutory application;
(h) whether there are any aspects in which informal proof or delivery of witnesses statements or delivery of bundles of documents relied upon would assist in disposition of the proceedings;
(i) that the estimated length of hearing is realistic.

The conference should be attended by counsel or a solicitor fully prepared to negotiate and make relevant decisions. The plaintiff and the defendant (or the relevant claims manager where the defendant is insured) should also attend. Offers between plaintiff and defendant and also contribution offers between cross-claimants will be recorded and if made by a defendant with payment-in arrangements, treated as equivalent to a payment in; otherwise the offer should be accompanied by a payment into court within fourteen days after the conference. The plaintiff's presence at the conference will be necessary and the Master will ensure that he/she is involved in the settlement negotiations.

Once a matter is fixed for hearing no additional particulars or reports will be permitted (save for good cause) and the matter will proceed on the date allocated unless settled.

10. Costs sanctions will be applied in the case of matters which should not reasonably have been left in issue at the conference. Cost orders will be made in favour of the defendant if the verdict does not exceed the offer made by the defendant at the Issues and Listing Conference.

11. In jury matters, at the Issues and Listing Conference theparties will be required to specify:

(i) which doctors whose reports have been served, are required for cross-examination; reports of those doctors who are not required for cross-examination will be permitted to be tendered and incorporated in the transcript as if they were called;
(ii) statements of the past earnings losses, out-of-pocket expenses, comparable earnings and workers' compensation paybacks are to be settled so far as they can be agreed and incorporated in the transcript as if the relevant witnesses were called;
(iii) The number of jury matters listed will be increased and the practice of avoiding the end of the week for such trials is to cease.

12. The parties should be offered an opportunity at the time of the preliminary conference (in the case of expedited and complex matters), at the time of set down (in the case of standard track matters), and at the time of the Issues and Listings Conference (all matters), to refer the matter to either arbitration or mediation by individual members drawn from a panel of experienced Counsel and Solicitors. Arbitration would follow the District Court model; mediation would involve an informal "weighing" of the

claim by an experienced practitioner and would be more suitable to cases where the liability issue was unlikely to be substantial.

These measures will go a long way towards facilitating settlements. They should also remove the "advantage" perceived by some insurers of not making an offer until the case is called on for hearing.

13. The court is also to adopt a case flow management programme for new listings. This will apply to all new filings from the start of 1989.

The guiding principle of this program is that the court will establish clear, realistic and achievable time standards for case processing. The profession will be expected to maintain and keep to those timetables. The court will take control of each new case from filing until disposition. Events will be scheduled within fixed time limits, dates for hearing will be certain dates and a firm adjournment policy will be respected.

14. The present method of instituting proceedings in civil causes by summons and statement of claim will be preserved. But there will be 6 separate "tracks" for their processing. They are:

(i) Applications - short matters in the Friday application list, or before a Master;

(ii) Administrative law.

(iii) Standard - i.e. run of the mill cases, including most personal injury cases not requiring special directions or supervision.

(iv) Complex - matters because of the number of parties, likely issues or special features requiring hearing time in excess of 7 days or special directions e.g. cases of professional negligence, spinal chord trauma.

(v) Defamation.

(vi) Expedited - matters which because of urgency or simplicity of issues permit of or require a prompt hearing.

15. Matters will be allocated as "expedited track", "standard track", "complex track", "defamation track" when the proceedings are commenced by statement of claim. The plaintiff should endorse the initiating process with a statement as to the track considered appropriate.

16. Where the claim is the "run of the mill" personal injury case or debt recovery action then it should be endorsed "standard track" in which event the usual rules for pleadings and interlocutory steps will apply.

Each standard track matter which has not been settled or finalised by summary or default judgment within four months should then come before a Registrar or Master for a preliminary conference at which its place in an appropriate track would be considered and appropriate directions given.

Within this period of four months the parties would be expected to conclude the pleadings and interlocutory procedures and to exhaust the default and summary procedures in debt recovery actions. If this has not been done, cost sanctions will apply, including the non-recovery of costs for steps later taken, unless good cause to the contrary is shown.

17. Where the matter is complex it should be so endorsed and an appointment for a preliminary conference obtained when the statement of claim is filed and served.

Complex matters will remain under the continuous supervision of the Court. A timetable for directions will be given by the Registrar. Disputes about it will be referred to the Master. Afer the time for the last step in directions has expired the matter will be called up for review. When all interlocutory matters are concluded the matter will be set down as ready. It will then be called up for an Issues and Listing Conference after which a hearing date will be allocated.

18. Defamation matters will continue to be managed under the supervision of the Defamation Judge.

The solutions proposed by the Committee depend upon maximising the opportunities for settlement. It considers that the existing delays should be capable of reduction by the new roster which will allow greater certainty of listing and better use of available judge time in civil cases, more effective pre-trial narrowing of issues and greater certainty of hearing, with limited opportunity for adjournment or risk of not being reached, and by the use of Acting Judges.

The Committee suggests that without additional judicial resources there is no prospect of making any real in-roads into the existing backlog. Only limited gains can result from improvements in internal procedures and it is unrealistic to expect judges to increase their personal workload. In this regard it is evident that there has been a substantial increase in individual case disposition rates over recent years and the pressure of work upon judges in hearing cases and deliverying judgments in the wide variety of work assigned to them is already burdensome.

The Attorney-General, Mr. John Dowd, spoke at the seminar and it was apparent from his words that the Government is aware of the considerable problem of delay in the courts. It was equally apparent, however, that the Government did not propose to solve this problem by throwing money at it and that it was looking to the court itself to attempt to alleviate some of the difficulties.

The implementation of the proposals of Mr. Justice Woods' Committee will go some way towards achieving that objective. ❑

Fees Committee

1. Recoveries

In the financial year ended 30 June 1988 a total of $285,989.69 has been recovered from solicitors on behalf of 258 members. This compares with $263,501.90 in the previous financial year.

An increasing number of matters are being referred to arbitration in accordance with the Joint Statement between this Association and the Law Society. From 1 July 1987 to 30 June 1988 16 matters were so referred to arbitration. The Fees Committee would especially like to express its thanks to those Members who give their time to act as arbitrators.

A survey of awards made by arbitrators in the last few years indicates that the majority of awards made was in favour of counsel.

There are a number of aspects of recovery of fees for Members which still remain troublesome. A not infrequently occurring problem is that the solicitor responsible for payment of counsel's fees may sell his practice, die, be struck off or, for a number of other reasons fail to continue to hold a practising certificate. In these circumstances, the Fees Committee is at present powerless to help counsel whose fees still remain outstanding but the problem is being investigated. Indeed, it is hoped to arrange, in consultation with and co-operation of the Law Society, a thorough revision of the current agreed Joint Statement in the light of experience in the operation of the current Statement.

Members are reminded that complaints about unpaid fees should be made to the Bar Council not later than four (4) years after the date of the memoranda of fees, otherwise the fees may be regarded as stale.

Any Junior member to whom is passed a brief from another barrister should always take particular care to confirm direct with the instructing solicitor -

1. that he or she is in fact formally briefed in the matter, and
2. that suitable arrangements for payment of his or her own fees are agreed.

It frequently occurs that a barrister receiving a brief will notice reference in some form or other to another barrister's previous involvement in the same matter. In those circumstances members are reminded of their obligations under Rule 64.1 which provides -

' Where a barrister who is asked to accept a brief or who has accepted a brief discovers that any other barrister has been briefed in any capacity whatsoever in connection with the same matter or substantially the same matter, whether on appeal or in other proceedings, and whether briefed by the same solicitor or not on behalf of the same client or one or more of the same clients, he shall not accept or continue to retain the brief until he is satisfied that the fees of that other barrister have been paid or that the other barrister is satisfied with any arrangements made with regard to his fees, or consents to his accepting or continuing to retain the brief.'

Members are also referred to Rules 62.2, 64.3 and 64.4.

2. Scales and Loadings

The last increase in the Supreme Court scale was on 1 September 1987. Since then there has been an increase of approximately 25% in the District Court scale of fees from 9 February 1988.

The District Court accepted a substantial increase in the rates of country loadings from 2 June 1988. A corresponding increase has been accepted in principle by the Supreme Court. The formal implementation of that increase will take a little longer and it has been indicated that the Taxing Officers in the Supreme Court will allow, pending the formal publication of a New Practice Note, loadings for counsel for Supreme Court towns at the recent increased District Court rate. A submission is currently being prepared for a further increase in the Supreme Court scale of fees together with a submission for a further increase in loadings. Corresponding submissions will be made to the District Court.

The Registrar in Bankruptcy has indicated that from 1 July 1988 fees for Counsel will be allowed on taxation at an increased rate which was published.

The Legal Aid Commission also published a revised scale of junior counsel's fees, representing a 20% increase, applicable to work done on and from 1 July 1988.

The State Attorney-General's Department also indicated that there had been a review of the fees paid to private counsel briefed by the solicitor for Public Prosecutions to prosecute on behalf of the Crown. The Attorney-General approved of a 20% increase in those fees in respect of briefs delivered on and after 1 July 1988.

The Legal Aid Commission published a fresh scale of fees to apply in Tenancy (Local Court) matters. They are intended to apply to grants of Legal Aid after 1 November 1988. The Bar Association initiated helpful negotiations with the Commission for two variations to that scale. First, there had previously been no fee allowed for a conference with a client as distinct from a witness. That has now been included. Second, the refresher fee was increased from the normal two-thirds to four-fifths after negotiations concerning the inappropriately low rate of refresher fee.

Members are assured that the Committee is mindful of the need for continuous monitoring of fees and loadings. The present Committee has tried so to arrange matters as to ensure at least a regular annual review.

In the matter of fee and loadings scales, the committee would like to note in particular the continuing assistance of Webb Q.C. who, although not a current Council member, has much helped the current Committee as a co-opted member with years of past experience of dealing with Courts and officials on these ever sensitive matters. ❑

Law Reform

The Law Reform Committee of the Bar Council has, this year, taken on a different role. Whereas the Committee in past years has comprised a number of members of Council who have, themselves, taken on the task of preparing submissions on behalf of the Association to be made to Government with respect to matters of law reform, the new Council determined in November, 1987 that its Law Reform Committee would comprise but two members of Council whose function was to consider bills of the New South Wales and, in some cases, Federal Parliament and then determine whether there were matters raised in the bills which required further consideration. If they did, then the Committee would co-opt members of the Bar who were not members of Council but whose expertise was such that they were aptly qualified to prepare a submission on a particular bill for consideration and adoption by Council as the submission to Government of the Association.

The Bar's interest and concern, in this context, was to ensure that the proposals contained in bills of the Parliament adequately protected and safeguarded those members of the public who would otherwise be affected thereby and to ensure that the judiciary and the administration of justice generally were safeguarded and enhanced. Except in certain particular matters, the Bar has no part to play in the political decisions brought forth in particular legislation provided otherwise that the rights of affected citizens are properly and adequately protected.

It was in the light of this policy that the Committee has considered the various bills of the Parliament. In respect of a number of them it co-opted members of the Bar to provide Council with a draft submission. In this respect, submissions have been made by the Association on the following bills:

Anti-Discrimination (Amendment) Bill 1987
Companies and Securities Legislation (Federal)
Australian Securities Commission Bill 1987 (Federal)
Defamation (Criminal Defamation) Amendment Bill 1988

The Council has also made submissions to the Australian Law Reform Commission on Class Actions. An ad hoc sub-committee has also been formed to prepare submissions with respect to the draft New South Wales Evidence Bill.

Both the Council and the Committee have referred a number of bills in the criminal law field to the Criminal Law Committee. That Committee will refer to its work in this regard in its own report.

The Committee would like to take this opportunity of expressing its sincerest thanks and appreciation to those non-Council members of the Bar who have given so generously of their time, expertise and experience in preparing submissions which have been adopted by the Council on behalf of the Association. The submissions so prepared have been of a universally high standard and we are confident that they have and will influence Government with respect to the legislation to which they relate. ❑

Legal Education and Reading

Currently there are 136 barristers with a condition of pupillage attached to their practising certificate. This represents 8.9% of barristers holding practising certificates in New South Wales.

The Reading Committee is presently re-drafting the Reading Rules to reflect the changes which have occurred as a result of the introduction of the Legal Profession Act. A form of certification by Masters will also be introduced early in 1989.

With the opening of some new Chambers and floors in 1989 most pupils seem to have been able to secure accommodation in advance of, or soon after, commencing practice. However, with an increase in the number of people coming to the Bar, the Bar must continue to be vigilant in its search for suitable accommodation.

The reading programme continues to emphasise the need for practical training for barristers. For the past year or so each pupil has participated as Counsel in a moot. Such performances are recorded on video and in future each Master will review the performance of his or her pupil.

An increasing number of lecture and workshop segments are also being devoted to 'on their feet' training for readers with the benefit of comment by Judges and Masters. The Masters and Registrars of the Federal, Supreme and District Courts are especially thanked for their interest in developing these segments.

The Reading Committee acknowledges with thanks the continuing assistance of all those who give freely of their time to lecture in the programme. ❑

Library

There has been a pleasing increase in the use by members of the Library's collection and services in the past year. The number of loans processed in the Library last year was 15,707; 10,351 of those items were borrowed by members from Selborne/Wentworth Chambers and 5,356 by members from all other chambers. The number of members of the Association located in Selborne/Wentworth Chambers was 681 and in other chambers 622. To help correct this imbalance and to encourage greater use of the Library's facilities by members of the Association in chambers outside Selborne/Wentworth, it was decided to provide special services to save those members the inconvenience of

personally attending the Library. Thus -

(a) A facsimile machine has been installed in the Library. Its number is 231.1904. Members in chambers outside the Central Business District may have materials faxed to them between 8.30 a.m. and 4.30 p.m. Monday to Friday. Members within the Central Business District and outside Selborne/Wentworth Chambers may have use of this facility between 8.30 a.m. and 10 a.m. only when their staff is unavailable to attend the Library and materials are required for Court. Members within Selborne/ Wentworth Chambes should have no problems in their staff attending the Library. However, requests cannot be made by floor juniors.

(b) A printed catalogue of the Library's major serial and textbook holdings has been completed. A copy has been sent to all floor clerks. Additional copies of the catalogue may be purchased for $5 each. Cumulative supplements are published every three months and supplied at no charge to subscribers. It is planned to reprint the entire catalogue every two years.

(c) Telephone enquiries may be made to ascertain the availability of materials in the Library.

(d) Materials not held in the Library may be obtained by inter-library loan.

The Library has recently acquired new sets of law reports including the Canadian Criminal Cases, Building Law Reports, Ontario Reports and Queensland Reprint Statute Service. These acquisitions were made possible by a grant from the Law Foundation.

The Library Committee has resolved that as the Library now contains an extensive collection of reports and journals and due to the vast increase in the cost to members of practice materials, future acquisitions to the Library's collection will consist primarily of practice materials rather than serials. However, the Library will continue to subscribe to new Australian sets of journals and reports. Multiple copies of popular texts will also be purchased to meet user demands.

The staff is continuing the policy of expanding the legislation holdings of the Library. The legislation collection now comprises annual volumes and reprints of all States' and Territories' acts and ordinances. Due to staff restrictions only the Commonwealth and New South Wales acts have been consolidated with amendments.

To further assist members, the staff compiled an index of New South Wales rules and regulations. This index fills the gap left by the published index after 1976. The Library's index will be completed by the end of 1988.

Members would be aware that admittance to the Law Courts Library is now strictly policed. Barristers' support staff can only gain admittance by attending the course of instruction in the use of the Library conducted by the Bar Association's Librarian. To date 146 persons have attended the course.

In conclusion, it is appropriate for the Committee to publicly recognise the continuing unstinting efforts of the library staff, Mrs. Farmer, Miss Willard and Miss Ackland, during the past year. Without their unfailing courtesy and assistance the library could not possibly have provided the high standard of service to members which has been achieved. The gratitude of all concerned is accordingly acknowledged. ❑

Legal Aid

The past year was bitterly disappointing. Our main goal was to secure decent fees in criminal matters. The Legal Aid Commision evidently considered substantial increases, e.g. about 80% for District Court refreshers, to be justified. Yet budgetary constraints resulted in the scale being increased across the board by a paltry 20% with effect from 1 July 1988. This matter was discussed at a special meeting of the Bar on 31 May 1988, and it is anticipated that there will be another special meeting on this topic soon.

The Committee continues also to assist members with specific problems in their dealings with the Commission. However, it is worth emphasising that any fees outside the set scales must be agreed upon prior to the work being undertaken. ❑

Professional Conduct Committee #1

PPC #1 has dealt with 30 complaints during the course of its fortnightly meetings in 1988. Fourteen were dismissed or resolved on the basis of a ruling, one barrister was counselled, one was referred to a Disciplinary Tribunal and fourteen are still current. One matter in which proceedings were commence in the Court of Appeal for disbarment was discontinued as a result of insufficiency of evidence. In NSW Bar Association v. Maddocks the Court of Appeal delivered judgment removing a barrister from the Roll* and in a further matter proceedings for disbarment are still pending.

The nature of the complaints included the propriety of counsel's conduct in the cross-examination of witnesses during an inquiry, matters of competence in the pursuit of a client's interests during an arbitration, the improper solicitation of fees relating to a local court case, the propriety of certain advice where criminal proceedings may be brought, the failure to have in attendance and obtain instructions through a solicitor and the impropriety of self advertisement.

In the course of investigation of some complaints there was revealed in some instances a lack of comprehensive awareness and understanding of the Bar Rules. The breadth of Rule 21 which provides that:

> "A barrister shall not engage in unprofessional conduct or do anything contrary to the standards of practise becoming a barrister"

was considered in a number of complaints. The Bar's attention should also be drawn to Rule 10(1)(b) dealing with the return of a brief, Rule 15 relating to incompatible vocations, Rule 29B prohibiting direct soliciting of fees from a client, Rule 33 which defines the limited circumstances in which an instructing solicitor may be dispensed with, Rule 49(1) relating to pleadings alleging fraud or other serious misconduct and Rule 67 relating to requests from the Bar Council or a committee of the Council.

The Committee also considered a number of non-disciplinary type matters in which rulings were requested as to the propriety of certain conduct. There were a small number of requests for urgent oral rulings. Members are encouraged in areas of uncertainty or complexity as to their obligations or duty as counsel to avail themselves of the opportunity of seeking the guidance and assistance of one of the Professional Conduct Committees.

Once again PCC #1 was greatly assisted by Sir Frederick Deer whose contribution has been significant particularly in the areas involving deliberation upon mattes touching the public perception of the Bar and maintenance of the high standards of the Bar. The Committee also takes this opportunity to record its appreciation for the efficient assistance of Yvonne Grant and the Registrar. ❑

* (See separate report this issue - Ed.)

Professional Conduct Committee #2

Since PCC #2 was reconstituted following the 1987 Bar Council elections, it has received 24 complaints against barristers. Of these, 10 have been dismissed, 5 have been referred to Disciplinary Tribunals (including 1 referral to a statutory Disciplinary Tribunal under the Legal Profession Act, 1987) and 9 are still under investigation. The complaints have included 5 arising out of workers' compensation proceedings (of which 3 have been dismissed and 2 have been referred to Disciplinary Tribunals), 4 arising out of family law proceedings (of which 1 has been dismissed and 3 are current), 2 arising out of criminal proceedings (both of which were dismissed), 3 arising out of personal injury proceedings (of which 2 have been dismissed and 1 is current) and 2 arising out of bankruptcy proceedings (both of which are current). The balance have included complaints arising out of medical negligence proceedings (dismissed), a building case (current), a Local Court arbitration (current), and an alleged contempt of court (referred to a statutory Disciplinary Tribunal).

A feature of the complaints arising out of workers compensation and family law proceedings has been an apparent lack of understanding on the part of complainants as to what has transpired. Sometimes these misunderstandings appear to be due to a failure on the part of the legal advisers to ensure that the client is kept fully informed and that some of the less familiar practices (such as morning tea with the Judge) are fully explained. The Committee cannot stress too strongly that in all probability many complaints would not be made if there was a greater degree of communication between counsel and client so that the latter is made fully aware of and clearly understands the nature of the proceedings, especially where settlement occurs. In this respect, it is vital that any such communication take place in the presence of counsel's instructing solicitor so that there is corroboration of counsel's explanations to the client in the event of any future misunderstanding on the client's part. ❑

Professional Conduct Committee # 3

PCC #3 had carriage of 23 cases during this year. They comprised matters in the areas of Fees (1), Coronial Inquests (2), Workers' Compensation (3), Family Law (2), Ethics (5), Industrial Commission (1), Criminal Law (5), Personal Injuries (2), Building (1) and Uncategorised (1). Of those 23 matters, 13 were dismissed or resolved, 2 referred to a disciplinary tribunal adn 8 remain current.

Following are examples of some of the matters which have come before PCC #3 in the course of the year.

1. A barrister was briefed to appear for a client in a committal. The committal commenced in the beginning of May 1988 and was adjourned, part-heard, to September 1988. A significant piece of evidence comprised entries in the client's diary. The barrister had access to that diary shortly before and during the May hearing. A policeman gave evidence, in May, about one of the entries in the diary. During the adjournment between May and September the barrister had access to the diary for a short time to assist him to prepare his cross-examination. His solicitor and client also had access. When the case resumed in September the same policeman went into the witness box again and gave evidence that the entry he had formerly referred to had been altered since the May hearing. There was the obvious implication against the barrister, ad others, that he or they had made the alteration. The barrister sought, and was granted, an adjournment in order to obtain advice from the Bar Association and was also granted leave to withdraw from the case. The barrister asked whether he could, in any circumstances, continue to act for the client in the committal proceeding. He was advised that there appeared to be no alternative but for him to return the brief in circumstances where it was obvious he would have to give evidence in the committal of the fact that he had not been a party to altering the entry in the diary. It ws also recommended that hemight atempt to seek out a member of the bar of equivalent seniority and ask that member to take his place and to read the transcript without charging a fee for the reading (but charging a fee for the appearance).

2. A barrister was offered a brief in a common law industrial accident claim upon the basis that he would not be paid if the claim was lost. The barrister was available on the days upon which the case was listed for hearing but did not want to take the brief upon the basis on which it was offered. He was advised that he was not obliged to take the brief on that basis.

3. A barrister was contacted directly by a client by telephone one Friday evening. The client rang him from a hospital to which he had been compulsorily committed. The barrister advised the client to contact a solicitor. The client evidently had limited access to a telephone so the barrister assisted the client by contacting a solicitor on behalf of the client. It was a Friday evening at the end of term and the barrister was at a function. The client needed to be in contact urgently with a solicitor in order to gain curial assistance for his release. Rule 30 of the Bar Rules provides that a "barrister shall not save in urgent and exceptional circumstances retain a solicitor on behalf of any person." It was resolved that the case fell within the "urgent and exceptional circumstances" provision of that rule.

4. Proceedings in the Compensation Court sometimes give rise to particular complaints. Many of those complaints come down to communication between the barrister and the client. Some complaints concern the circumstances of discussions with the client regarding regarding settlement with particular reference to the time and pressure involved. Other complaints concern the client being informed for the first time on the hearing day of significant difficulties in the case when no mention was made of such difficuilties at preliminary conferences. Other complaints somtimes concern comments made by a barrister regarding the state of preparation of the brief. Particular complaints were usually dismissed after full reports from the barrister but they emphasise the need for clear and patient communication between the barrister and the client. ❑

Practising Certificate Committee

On 1 January, 1988 the Legal Profession Act 1987 came into effect. The President in discussions with the Attorney-General sought and was granted a deferment of the effective date for Practising Certificates for barristers from 1 January 1988 to 1 July 1988. This was done in order to synchronise the commencement of the new system with the commencement of the Bar Association's financial year, the 1988/89 budget and to enable the Association to establish a computer system for its Membership and Practising Certificates records. A timetable for the issue of Practising Certificates by 1 July 1988 was prepared and implemented.

One of the early tasks of the Committee was to settle the form of the Practising Certificate and application and in the course of so doing to assist in refining the specifications for the computer programme.

It was also necessary for the Committee to establish the categories of practising barristers who would be entitled to a practising certificate and the restrictions if any to which they would be subject.

The Committee has had carefully to consider the provisions of the Legal Profession Act 1987 governing Practising Certificates in making recommendations to the Bar Council with respect to formulation of Council policy on the concept of "practising as a barrister" concerning the issue and refusal of certificates.

As of 20 September 1988 Certificates had been issued, in the following categories:-

(a)	Restrictions:	
	1. Parliamentary Counsel (QC's) + Statutory Appointments	2 + 6
	2. Pupils	132
	3. Academics	29
	4. Junior Parliamentary Counsel	11
(b)	Crown Prosecutors	59
(c)	Public Defenders	18
(d)	Practising Barristers/QC's (without restrictions)	1,274
Total Certificates Issued		**1,531**

The following table lists the categories of those who were refused Practising Certificates under the respective provisions of the Act

Government Employed Persons	27
Legal Advisors for Companies	10
Interstate/Overseas Practitioners	5
Not Presently Practising	6
Parliamentary Counsel refused [s.32(1) but offered S32(4)]	4
Persons refused unrestricted S.32(1) Certificates and offered Academic Certs.	3
Total	**55**

In October 1987 the number of practising barristers who were members of the Association was **1,092**

In October 1988 the number of practising barristers who are members of the Association is **1,279**

The number of non-practising barristers is **277.** ❑

Full reports from the Common Law Liaison & Listing, Finance, Criminal Law and Commercial Liaison and Rules Committees were published in the Spring issue of Bar News - Ed.

The Role of the Judiciary

*In 1987 the University of New South Wales published a special issue of its Law Journal devoted to the subject of "The Judiciary". The Chief Justice of the High Court, Sir Anthony Mason A.C., K.B.E. wrote the foreword . **

The judiciary continues to be a fashionable topic of discussion. The essays in this volume pursue some of the themes of contemporary debate here and overseas. The essays are perceptive and instructive, none more so than Mr. Justice Thomas' "Epistle from a Judge on Circuit". It provokes me to some reflections on the role of the judiciary in the light of its past and present condition.

One of the Epistle's messages is that the status and importance of the judiciary, as perceived by the community, have diminished significantly in recent times. Why? Partly, I suppose, because we live in a brave new world, created by the media, a world of froth and bubble and sensation, of fleeting images and impressions. There is no place here for detailed and accurate reporting of court cases, with a focus on the legal issues, though such reporting was once a feature of our newspapers, metropolitan as well as provincial and local. Nowadays sensational and bizarre cases are reported. So are those which concern high-profile personalities. Witness a recent contest in the Supreme Court before Hodgson J. over the ownership of a luxurious harbourside mansion bearing a miscellany of exotic names like "Toison sur Mer" and "Paradis d'Or", names which evoke dazzling visions of halcyon days and glittering nights at Cap Ferrat or Cap d'Antibes. One counsel was reported as describing his opponent's submission as sounding like a "press release". The submission attracted much publicity. Perhaps the media thought it was a press release. There followed a flurry of press statements by the parties or their legal advisers culminating in the issue of a writ or writs for defamation and then - mercifully - silence.

Of course there are reports of important cases, but the quality of the reporting, particularly on television, leaves much to be desired. Take the recent television coverage of the application for an interlocutory injunction relating to the Daintree rain forest which I heard in the Coal Industry Tribunal premises in Sydney. The reporter stated quite accurately, if a little resentfully, that the hearing took place in a small room above a coffee lounge. Meanwhile the camera lingered on the entrance to a rather undistinguised looking coffee lounge. For reasons never explained the camera later focussed on the majestic entrance to the Law Courts Building with its coat of arms while the narrator spoke of the case without managing to disclose what were the actual issues. This was understandable if you were watching, rather than listening. Our narrator was enmeshed in a time and place warp for the camera revealed the stern visage of Theo Simos Q.C. manfully leading the Spycatcher cast into the Supreme Court many months earlier. There were some shots of me purposefully striding down a street and of "Geoff Davies Q.C.", to use the reporter's description, at an intersection, looking anxiously at the heavens as if half-expecting a Messerschmitt to dive out of the sun. Then some revealing footage of the back of our respective heads - more revealing in my case than his. The comparison was entirely favourable to Geoff Davies Q.C. His hair, though short, was abundant and kempt - like the Daintree as depicted in the film clips which were part of the report. All this is no doubt explained by the fact that it was Christmas Eve, a time when newspapers and television stations are on the look-out for filler material - a speech by Mr. Justice Kirby or an "in-depth" report on the High Court, these being staple elements in our end of year newspaper reading.

These incidents indicate that, if court proceedings lack dramatic impact, the media will report the "real" story behind the proceedings, using them as an element in that story. The media's quest for material with dramatic impact no doubt encourages some litigants to present court cases in such a way that will result in favourable publicity and it encourages plaintiffs to issue press statements placing the commencement of proceedings against a favourable background. The media's treatment of court cases tends to trivialize the issues and to increase the risk that litigation will become a vehicle, or even a theatre, for public relations or political exercises.

Quite apart from the problems of this brave new world, the area of responsibility of the judiciary, using that term in its restricted sense, has contracted vis-à-vis the executive. With the growth of the welfare state the citizen's rights against government are probably more valuable than his rights against fellow citizens. And rights against government increasingly depend on the decisions of officials and tribunals. There is now a vast network of tribunals outside the established court system. Sometimes specialist tribunals exercise jurisdiction which could as readily be entrusted to the courts. Indeed, some so-called tribunals are in truth courts, the dividing line being by no means clear. Tribunals are deciding an ever-widening range of interesting and important questions, including questions of individual and fundamental rights such as discrimination, equal opportunity and freedom of information, whereas the courts are doing work of a traditional kind. Some judges tend to regard this work as "legitimate" in the sense in which the Shakespearean actor refers to the stage as opposed to film, because the work involves the application of settled principle to facts as found. This tendency, which reflects the judicial model of a bygone era with its sharp distinction between law and policy, is an inducement to confer new jurisdiction on tribunals rather than established courts. Another reason for taking this course is the belief that court procedures are too protracted and too costly.

What I have just said illustrates how our thinking is influenced by notions of status rather than function. We tend to associate the judiciary with those persons who are called judges. But if we look at the matter as one of function, not of status, the judiciary includes not only magistrates but all those persons who exercise judicial power and determine the rights of parties.

The article by Mr. Briese indicates that at long last appropriate steps are being taken to enhance and protect the independence of magistrates as integral elements in our judicial system. Why is

it that law journals, as well as newspapers, devote so much space to the High Court and so little to the Magistrates' Courts? The High Court is predominantly a forum for the resolution of institutional conflicts to which governments, statutory authorities, corporations and trade unions are parties. The Magistrates' Courts dispense justice at the grass-roots - a function of vital importance in a democracy and one deserving of the closest scrutiny.

I have ventured a long way from Mr. Justice Thomas and his Epistle. What I have written will scarcely allay his misgivings. The point is that, if the importance of the judicial function is under-estimated today, it is because the citizen does not see the courts as a valuable source of protection of his rights, particularly his rights against the government. And, assuming this to be so, the fault perhaps lies not in the stars but in ourselves and in the reluctance of judges to embrace any jurisdiction by way of enforcement of individual or fundamental rights. Yet it is a jurisdiction exercised by courts in many other countries with the result that those courts are visibly and tangibly identified with the protection of the rights of the citizen. In Australia, we have not seen this as a function of the courts or the judiciary.

Possibly the time has come for viewing the judiciary and its role through a wider lens and to place more emphasis on the primary role of the Supreme Courts as courts of review. In this way the value of the work of the judicial branch of government in the widest sense of that expression could be more clearly seen and appreciated. This development would bring a greater sense of unity to the judiciary, greater symmetry to our court structure and a more uniform elaboration of the principles of law. ❑

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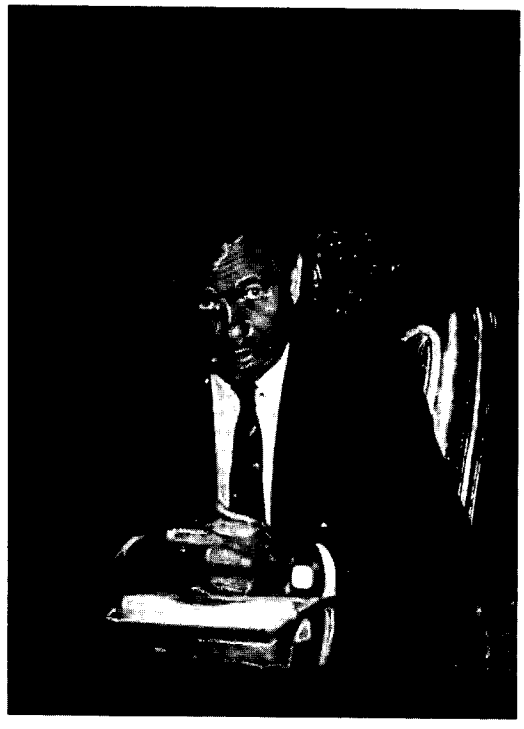
Criminal Liability of Professional Advisers

Speaking at the A.B.A. Conference in Townsville, R.V. Gyles Q.C. examined the fine line between legal advice and legal impropriety.

In recent years a number of professional advisers have been charged with criminal offences. Solicitors, accountants and a barrister have been charged with criminal offences in relation to income tax and sales tax schemes and a number have been convicted. A barrister has been convicted of conspiring with drug dealers. A solicitor was charged with conspiring with clients to evade immigration laws. Another solicitor was charged with conspiring with clients to evade taxes on interstate hauliers. These are only some of the examples. Whereas, upon closer examination, a number of these cases do not relate to the consequences of giving professional advice, they have occasioned concern amongst professionals, and there is a perception that a new and unwelcome hazard has been added to professional practice.



The case which has undoubtedly caused the greatest controversy in the legal profession is the prosecution of a leading Victorian silk in connection with advice he gave concerning a tax scheme. [1.] As the case is unresolved great discretion is called for in commenting upon it, but it has been the subject of judgments by the Federal Court and findings by the magistrate hearing committal proceedings and it is impossible to discuss this topic without some reference to it.

I propose to deal with professional advice given before or during the transactions giving rise to the allegation of breach of the law. I will not deal with the different problems which a lawyer faces when advising a client who has already done something which might constitute a breach of the law.

As Government regulation of the community inexorably increases with more and more statutes making conduct illegal, those affected - particularly those whose livelihood depends upon it - require and demand advice as to how best to regulate their affairs in the light of these statutes. The topic is by no means confined to lawyers. The accountant advising upon tax schemes or the form of company accounts, the merchant banker advising on a takeover, the stockbroker advising promoters of a public company floation, the architect, engineer or town planner advising as to town planning and building regulations, the valuer or other expert providing an opinion for inclusion in a prospectus are just some illustrations.

Indeed, if, as seems possible, the National Companies and Securities Commission (or its successor) and the Trade Practices Commission decide to place more emphasis on actually enforcing the laws which they administer than hitherto, the problems will become more acute - particularly perhaps for those advisers not bound by a clear set of professional ethics who charge on results rather than on a time basis.

As I shall seek to demonstrate later, the Courts have said time and again that a client is entitled to order its affairs to its best advantage having regard to the law as it stands. If that is correct then lawyers and other advisers have a legitimate role in assisting the client to do so. The ethics of doing so may be debated, as they have been, but the lawfulness of so doing should not. What, then, are the problems?

The most obvious is the danger of the adviser becoming or being seen to become a participant in the transactions - to be one of the organisers or entrepreneurs. The degree of participation can vary. It is most obvious when the adviser becomes an actual "equity" principal or partner in the activity, taking a share of the proceeds. It may be by acting as a lieutenant in taking active steps going beyond advice to assist the activities and reap consequent rewards. Examples could include the referring of clients in return for secret commissions, the provision of a respectable front through the provision of offices and other services, by "warehousing" a parcel of shares on behalf of a client to give a false appearance to a transaction; utilising a trust account as the "bank" for the illegal activity; the creation of a set of false and misleading documents or records; or actually making corrupt approaches to officials. [2]

Brennan J. in Leary v. Federal Commissioner of Taxation (1980) 32 A.L.R. 221 at 239-40 said:

> "The evidence in this case suggests that the scheme was promoted by members of the legal and accounting professions, who assumed the mantle of entrepreneurs. — it has not been material to consider whether it is possible for the role of a professional adviser and the role of an entrepreneur properly to coincide or overlap, but the apearance of solicitors performing these respective roles in the present case leads me to invite attention to significant differences between the two functions. These differences do not arise out of any judicial view as to the lawfulness or morality of tax avoidance —. They arise because the field of professional activity is co-extensive with the lawyer's professional duty. That duty is to give advice as to the meaning and operation of the law and to render proper professional assistance in furtherance of the

1. O'Donovan v. Forsyth (1988) 76 A.L.R. 97

2. R. v. Ryan (1984) 55 A.L.R. 408

client's interests within the terms of the client's retainer. It is a duty which is cast upon a lawyer as a member of an independent profession, whether his services are sought with respect to the operation of taxing statutes, the provisions of the contract, charges under the criminal law or any other of the varied fields of professional concern. It is a duty which arises out of the relationship of lawyer and client.

But activities of an entrepreneur and the promotion of a scheme in which taxpayers will be encouraged to participate falls outside the field of professional activity; those activities are not pursued in discharge of some antecedent professional duty. Entrepreneurial activity does not attract the same privilege or the same protection as protect professional activity; and the promotion of a scheme in which particular clients may be advised to participate is pregnant with the possibility of conflict of entrepreneurial interest with professional duty."

If the activity is in fact illegal then the adviser who participates becomes liable either as a "common purpose" principal in the substantive offence or as a co-conspirator.

In my view the giving of advice known to be false or misleading to the participants in an illegal action in order that it may be used by the participants to be shown to third parties in furtherance of the activity, or by providing such advice directly to third parties at the request of the participants would be quite sufficient to render the party giving it a participant in the transaction for the purposes of the criminal law. It may also, of course, be in itself a substantive offence. Examples which come to mind are lawyers' opinions as to validity, architects or engineers' certificates, auditors' certificates, and expert's reports for inclusion in a prospectus.

What then of some evidence which emerged in a trial of, inter alia, an accountant and a solicitor charged with conspiring to defraud the Commonwealth by promoting and implementing a scheme to evade sales tax. [3.] The person who devised the scheme (a former Commonwealth Taxation Office employee) obtained an opinion from senior counsel to the effect that if the scheme were implemented neither wholesalers nor retailers who entered the scheme would incur a liability for sales tax. This was apparently what was known as a "marketing" opinion deliberately given in order that it be used to "sell" the scheme by promoters to wholesalers and retailers. On the same day the same senior counsel gave a second or "internal" opinion to the deviser of the scheme headed "Supplementary Advice", the effect of which was that he was not optimistic about the success of the scheme at least so far as the promoters' entities were concerned.

A barrister was called to give evidence on behalf of the solicitor. He was asked whether he was aware of a practice that had grown up whereby counsel gave two opinions in respect of a tax avoidance scheme. The question was objected to as irrelevant, but it was said to be the foundation for further questions as to whether it would be regarded as proper for counsel to advise in the "marketing" opinion that a scheme was effective, and in another opinion to express a different view. The trial judge refused to allow the witness to give his view of the propriety of the suggested course, but said that evidence of the practice of giving a "marketing" and "internal" opinion might be adduced. This ruling was upheld in the Court of Criminal Appeal.

What answer would the barrister have given? It is possible that counsel could genuinely hold the opinion that a tax scheme would be effective for those third parties who "entered into" it, even though the "scheme" might not avoid tax being levied upon one of the promoters' entities. It might also be possible for the marketing opinion to be bona fide without any qualification. As the text of the two opinions are not reproduced in the report it is not possible to express any view about the particular case. However, if, looking at all of the circumstances, a jury came to the conclusion that it was false or misleading to promulgate the unqualified "marketing" opinion knowing it would be used as such, then they would in my view be entitled to regard the counsel concerned as a party to the activities of the promoters of the scheme.

The next area of jeopardy is where the professional adviser restricts himself to giving advice which he genuinely believes, and only charges his normal fee for doing so, but gives advice designed actually and directly to assist a client in a client's disclosed illegal purpose or in concocting the criminal activity.

A lawyer who coaches drug couriers on a story that they should tell in the event of apprehension, [4.] advises as to extradition arrangements, gives guidance as to the covering up or destroying of evidence, counsels the construction of sham transactions or documents, or outlines the best means of corruption of public officials without being detected and so on is plainly implicated.

The most illuminating discussion of this topic is in R. v. Cox and Railton (1884) 14 Q.B.D. 153. The decision turned upon the existence or otherwise of legal professional privilege, but the reasoning is relevant. Some of the relevant passages are as follows:

"In order that the rule (legal professional privilege) may apply there must be both professional confidence and professional employment, but if the client has a criminal object in view in his communications with his solicitor one of these elements must necessarily be absent. The client must either conspire with his solicitor or deceive him. If his criminal object is avowed, the client does not consult his adviser professionally, because it cannot be the solicitor's business to further any criminal object. If the client does not

3. R. v. Edwards and Collie Court of Criminal Appeal (Victoria) 6.7.87

4. R. v. Lawrence (1981) 38 A.L.R. 1

avow his object he reposes no confidence for the state of the facts which is the foundation of the supposed confidence, does not exist."

"Where a solicitor is party to a fraud no privilege attaches to the communication with him upon the subject, because the contriving of the fraud is no part of his duty as a solicitor; I think it can as little be said that it is part of the duty of a solicitor to advise his client as to the means of evading the law."

"The reason on which the rule is said to rest cannot include the case of communications, criminal in themselves, or intended to further any criminal purpose, the protection of such communications cannot possibly be otherwise than injurious to the interest of justice and to those of the administration of justice. Nor do such communications fall within the terms of the rules. A communication in furtherance of the criminal purpose does not "come into the ordinary scope of professional employment". "

"The client must either conspire with his solicitor or deceive him."

"The only thing which we feel authorised to say upon this matter is, that in each particular case the Court must determine upon the facts actually given in evidence or proposed to be given in evidence, whether it seems probably that the accused person may have consulted his legal adviser, not after the commission of the crime for the legitimate purpose of being defended, but before the commission of the crime for the purpose of being guided or helped in committing it. We are far from saying that the question whether the advice was taken before or after the offence will always be decisive as to the admissibility of such evidence."

(See also: O'Rourke v. Darbishire 1920 A.C. 581 at 613,621)

All of that is relatively straightforward when what is planned is a murder or a rape or a bank robbery or a drug importation. If the disclosed object is to defraud creditors, or the revenue, or investors, whilst the advice may be more sophisticated, the criminality is just as plain. The lawyer, or other adviser concerned, has become a party to the criminality.

The real difficulty exists where no overt criminal purpose is disclosed by the client, but a course of conduct is posed or devised which may be a breach of the law. The client may propose the scheme and seek advice as to its legality; the client may propose his objectives and seek advice as to the best manner of effecting them; or there may be a joint consideration of the problem by adviser and client arriving at a joint solution. If it turns out that the scheme or conduct is illegal what is the position of the adviser?

Usually, the "borderline" cases will involve potential breaches of a statute or allegations of evasion of statutory duty. In Bullivant v. Attorney General (Victoria) [1901] A.C. 196, 207 Lord Lindley said:

> "As I have said, there are two ways of construing the word 'evade': One is, that a person may go to a solicitor and ask him how to keep out of any Act of Parliament - how to do something which does not bring him within the scope of it. That is evading in one sense, but there is nothing illegal in it. The other is, when he goes to the solicitor and says, 'tell me how to escape from the consequence of the Act of Parliament, although I am brought within it.' That is an act of quite a different character."

This passage was adopted by Gibbs C.J. in Attorney General (N.T.) v. Kearney (1985) 158 C.L.R. 500, 513-4. The same principle would apply to breaches of the general criminal law. The passage I cited from Brennan J., and the authorities to which he referred are to the same effect. [5.]

Applying this principle, in my opinion there should be no jeopardy in a lawyer giving bona fide advice that a proposed course of action would not be a breach of the law, even if that opinion is incorrect.

However, one learned commentator has recently expressed the view that in these circumstances it would be open to a jury to conclude that the client was relying on the lawyer's advice and was encouraged to carry out the prohibited conduct by reason of it and that thus the lawyer was an accessory before the fact of the principal's offence and liable to prosecution. [6.]

This proposition is both novel and startling, and, if correct, would have extraordinary consequences. It would mean that no citizen could obtain guidance from those qualified to give it as to the lawfulness of a proposed course of action. It would give rise to criminal liability in the adviser in circumstances where there may well be no civil liability if there was no negligence in forming the incorrect opinion.

The same learned commentator expresses the view that when the lawyer, having knowledge of relevant facts, draws such documents as are necessary to give effect to the advice, that act constitutes aiding and abetting any offence which is committed. This is apparently upon the view that by going "beyond advice" the lawyer or the adviser necessarily "aids" the

5. Baker v. Campbell; see also Bullivant v. Attorney General (Vic.) (1901) A.C.

commission of the offence.

As a proposition it is similarly novel and startling. It is a proper function and duty of a lawyer to draft documents to effect transactions. If a lawyer is asked to advise upon the legality of proposed transactions, and, if in the affirmative, to draft the necessary documents, it does not seem to me, with respect, that drafting the documents adds anything to the substance of the matter. In drafting the documents the lawyer certainly does not step outside his proper professional role. That role is not restricted to the giving of advice. In any event the documents add nothing to the effect of the advice.

Pincus J. neatly made the point when he said in O'Donovan v. Forsyth 76 A.L.R. 97, at 120:

> "There is an 'underlying principle of the common law that —a person should be entitled to seek and obtain legal advice in the conduct of his affairs — without the apprehension of being thereby prejudiced.' Baker v. Campbell (1983) 153 C.L.R. 52 at 114 per Deane J. That principle must be weakened if the entitlement is to consult lawyers who are under threat of prosecution if their advice turns out to be wrong and the external reliance on the advice unlawful. In Baker v. Campbell concern was expressed that the proper functioning of the legal system might be inhibited by compulsory disclosure of legal advice: See in particular per Dawson J. (C.L.R. at 127, 128). The prospect of imprisonment for giving advice held to be erroneous would no doubt be an even more potent inhibition."

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6. Mr. Justice McHugh "Jeopardy of Lawyers and Accountants in Acting on Commercial Transactions." Taxation in Australia April 1988 p.542.

   cf: R. Merkell Q.C. "The Lawyer as a Client" Aust. Business Lawyer Vol. 1 No. 2 p.11

   J. Rapke "Aiding and Abetting, Inciting and Encouraging Criminal Acts" Papers of Lectures Centre for Commercial Law. Faculty of Law, Monash University October 1985.

7. See also R. v. Tannous (1987) 10 N.S.W.L.R.303; Gollan v. Nugent (1987) 5 N.S.W.L.R. 166; Gillick v. West Norfolk A.H.A. (1986) 1 A.C. 112 particularly Lord Scarman 190:

   " The bona fide exercise by a doctor of his clinical judgment must be a complete negation of the guilty mind which is an essential ingredient of the criminal offence of aiding and abetting the commission of unlawful sexual intercourse."

The answer surely lies in an analysis of the necessary ingredients to be found before a person can be implicated as an accessory - whether it be aiding, abetting, counselling or procuring or any of the synonyms which express those meanings.

In Giorgianni v. R. (1984-85) 156 C.L.R. 473 at 479-480 Gibbs C.J. adopted the following passage from Judge Learned Hand in United States v. Peoni (1938) 100 F. 2d 401 at 402)).

> "It will be observed that all these definitions have nothing whatever to do with the probability that the forbidden result would follow upon the accessories conduct; and (that) they all demand that he in some way associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used - even the most colourless 'abet' - carry an implication of purposive attitude towards it."

His Honour also adopted a statement by Cussen A.C.J. in R. v. Russell (1933) V.L.R. 59 at 67, (the same passage being cited by Mason J. at 493):

> "All the words abovementioned are, I think, instances of one general idea, that the person charged as a principal in the second degree is in some way linked in purpose with the person actually committing the crime, and is by his words or conduct doing something to bring about, or rendering more likely, such commission." [7.]

As in my view the authorities establish that a lawyer has a proper professional role in advising clients as to the lawfulness or otherwise of proposed action, and in drafting documents to effect transactions regarded as lawful, the exercise of that professional function cannot, without more, amount to any purposive association or any evidence of it. The simplistic argument that says that the client would not proceed if the lawyer advised that the course of action was unlawful, and that therefore a lawyer's advice that it is not unlawful is a cause of the client's actions and thus associates the giver of advice in purpose with the client is, it is submitted, both bad in logic and in law. In short, a lawyer giving bona fide advice, and drafting documents to give effect to that advice, does not in any relevant sense cause the client to act in accordance with the advice.

It is necessary to look to the authorities relied upon in support of the proposition being examined.

In National Coal Board v. Gamble, [1959] Q.B.11 a weighbridge operator, employed by the Coal Board, was held guilty of aiding and abetting the driving of an overloaded lorry on the highway when, knowing of the overload, he completed the sale by handing the weight ticket to the driver to give to the purchaser of the coal. Whilst it is true that there was no suggestion that he was inciting, urging or encouraging the driver of the vehicle, he did an act which actually facilitated the offence before it took place which he had no duty to do, and indeed a

positive duty not to do.

In R. v. De Marny [1907] 1 K.B. 385 the conviction of an editor for aiding and abetting the sale of obscene books by publishing advertisements relating to the sale of those books was upheld. Again, whilst there was no evidence of actual incitement or encouragement, a positive act was done which actually encouraged the offence in circumstances where there was no proper role or function to do so.

In Wilcox v. Jeffrey [1951] 1 A11 E.R.464, a musician was allowed to enter England on condition that he did not take employment. However, he performed at a concert at which the appellant was present, and the latter wrote a laudatory article about performance. The appellant was aware of the terms of the musician's entry into England. It was held that the conduct of the appellant in going to the concert and writing an article about it was evidence from which the magistrate could find that the appellant's presence at the concert had aided and abetted a breach by the musician of the Aliens Order, 1920. Even if the decision be correct (a difficult assumption to make) it relates to voluntary actions by the journalist not in the performance of any function or duty.

"....the gravamen of the decision was that the solicitor had actually taken part in the transaction..and was thereby implicated."

The decision in Johnson v. Youden [1950] 1 K.B. 544 requires closer examination. The Building Materials & Housing Act 1945 (United Kingdom) provided:

> (1) "where a house is being constructed under the authority of a licence granted for the purposes of a Defence Regulation ... and the licence ... has been granted subject to any condition limiting the price at which the house may be sold ... any person who, during the period of four years beginning with the passing of this Act, sells or offers to sell the house for a greater price than the price so limited ... shall be liable on summary conviction to a fine ... or to imprisonment....
> (5) In determining for the purposes of this section the consideration for which a house has been sold or let, the Court shall have regard to any transaction with which the sale or letting is associated — ."

A builder offered a house for sale, and obtained from the purchaser 250 pounds which was to be in addition to the price permitted by law. The builder instructed a firm of solicitors to act for him in the sale. Two of the partners did not know that the builder had received the extra 250 pounds; just before completion the third partner heard about that payment. He called upon the builder for explanation, read the Act, formed the opinion that the receipt of the extra 250 pounds was in the circumstances lawful, and called on the purchaser to complete. The builder was convicted of offering the house for sale at a price in excess of that permitted. The three partners were charged with aiding and abetting in the commission of that offence. The two partners who did not know of the facts were held to be not guilty because they did not know the essential matters which constituted the offence. The case is commonly cited for that proposition. It is worth setting out the whole of the judgment in relation to the third partner.

> "With regard to their partner, the third defendant, a different state of affairs arises. His client, the builder, told him a story which, even if it were true, was on the face of it obviously a colourable evasion of the Act. The builder told him that he had received another 250 pounds, that he had placed the sum in a separate deposit account, "and that it was to be spent on 'payment for work as and when he, the builder, would be lawfully able to execute it in the future on the house on behalf of the said purchaser.' " It seems impossible to imagine that anyone could believe such a story. Who has ever heard of a purchaser putting money into the hands of the builder when he bought a house from him because he might want some work done thereafter? Surely, if the builder did not think that the purchaser could pay for the work, he would say: "Will you pay something on account?" A story of that kind, on the face of it, is a mere colourable evasion of the Act. It is more than likely, I think, that, in reading the Act, the third defendant did not read as carefully as he might have done sub-s.5, of s.7. If he had read that subsection carefully, I cannot believe that he - or indeed any solicitor, or even a layman, - would not have understood that the arrangement which the builder said that he had made was just the kind of thing which that sub-section prohibited.
>
> 'How could anybody say that the story which the builder told the third defendant was not a story with regard to a transaction with which the sale was associated? If that sub-section had been read by the third defendant and appreciated by him, he would have seen at once that the extra 250 pounds which the builder was obtaining was an unlawful payment; but unfortunately he did not realise it, but either misread the Act or did not read it carefully; and the next day he called on the purchaser to complete. Therefore he was clearly aiding and abetting the builder in the offence which the latter was committing."

In my view the gravamen of the decision was that the solicitor had actually taken part in the transaction by calling upon the purchasers to complete, and was thereby implicated. It thus has nothing to say about the question that I am presently considering. I agree, however, that, if correct, the decision does

have serious consequences for solicitors, and others, who are actually involved in effecting transactions on behalf of clients if those transactions involve any illegality.

I would respectfully suggest that the decision would not necessarily be followed if the participation is bona fide. The point hardly appears to have been argued, and the trend of modern authority would at least cast serious doubt upon the actual decision.

What if an opinion is given which represents the lawyer's bona fide view of the law, including all necessary qualifications, but is provided on the basis that it is a "marketing opinion" - that it would be used by the client to show third parties for the purpose of inducing them to enter into the transactions.

"A lawyer should be able to express his bona fide view as to the lawfulness of the proposed action without fear of criminal consequences if it be incorrect."

The views that I have expressed above as to liability for bona fide advice are based on the assumption that the lawyer concerned is simply answering a question posed to him as to the lawfulness of a formulated scheme, and that in so doing he or she does not step outside a proper professional role. It is certainly no part of the professional role of a lawyer to assist the client in the conduct of his business. That is not the purpose of obtaining and giving professional advice. Of course, a professional adviser appreciates that the client wishes the advice for the purposes of his business, and that sound advice will assist that business. But that does not make it a purpose of the advice.

Where, however, there is evidence aliunde of the actual existence of such a purpose the question arises as to whether that would amount to aiding, abetting, counselling or procuring any offence which is committed. If correct, this would have the consequence that a professional adviser, giving an opinion which he knows will be used in this way, runs the risk that if it is wrong, and an offence is committed, he will be implicated in that offence.

The contrary view is that provided an opinion is given bona fide it does not matter what the adviser knew or believed would be done with it. The client is entitled to receive legal advice as to the lawfulness of proposed actions, and the public policy and interest which this represents should not be categorised by fine distinctions as to what the lawyer knew or did not know in the particular case about the client's proposed use of the opinion. A lawyer should be able to express his bona fide view as to the lawfulness of the proposed action without fear of criminal consequences if it be incorrect.

A "marketing" opinion given to a tax promoter for the purpose of inducing taxpayers to enter the scheme charged for at very high rate is not likely to attract much sympathy. However, we either know or have good reason to believe that opinions may be used for many purposes, including disclosure to the other side during negotiations; for the purpose of being shown to the police or Crown authorities if a charge is contemplated or anticipated; or for provision to various regulatory bodies including statutory regulatory bodies in the event that the transaction is later questioned.

Whilst I have no doubt that there have been many abuses of the so called "comfort" opinion, I prefer the view that criminality should turn upon the bona fide nature of the advice, rather than the use which may be made of it. If there is evidence that the advice was not bona fide, and was purely a sham "comfort" opinion, then the necessary preconditions for criminal liability would normally be met.

What difference does it make, if any, if the lawyer either devised the course of conduct or participated in devising it? It is superficially attractive to say that this has a different quality about it compared to merely giving advice as to a formulated scheme. If I be correct in my thesis that the real touchstone is the proper professional role and responsibility of the adviser concerned, and if I am further correct in arguing that clients are entitled to advice as to the best method of arranging their affairs so as not to breach the law, then it is a proper function of lawyers (and others) to assist clients in doing so. This can be done by considering the substance of the matter, and then suggesting a series of steps which would not breach the law.

In conclusion, the words of Street C.J. in R. v. Tighe & Maher (1926) 26 S.R. (N.S.W.) 94 at 108 are as necessary now as they were in 1926:

> "I think therefore that the conviction must be quashed, but before parting from the case I wish to say this. Although, in the inception of the transactions which have been under review, Tighe acted as solicitor for Martin and for his daughters, he was not their regular solicitor, and he only acted for them on one or two isolated occasions. In all, or at all events in nearly all, the transactions which have been relied upon for the purpose of proving a criminal conspiracy between him and Maher, he was acting as the solicitor of the latter. It is expected of course of every solicitor that he shall act up to proper standards of conduct, that he shall give his clients sound advice to the best of his ability, and that he shall refrain from doing anything likely to mislead a Court of Justice; but, in the course of his practice he may be called upon to advise and to act for all manner of clients, good, bad or indifferent, honest or dishonest, and he is not called upon to sit in judgment beforehand upon his client's conduct, nor, because he does his best for him as a solicitor within proper

limits, is he to be charged with being associated with him in any improper way. In acting for a client, a solicitor is necessarily associated with him, and is compelled to some extent to appear as if acting in combination with him. So he may be, but combination is one thing and improper combination, amounting to a conspiracy to commit a crime or a civil wrong, is another thing. An uninstructed jury may easily fail to draw the necessary distinction between such combined action as may properly and necessarily be involved in the relation of solicitor and client, and such acts on the part of a solicitor, over and above what is required of him by his duty as a solicitor, as may properly give rise to an inference of an improper combination. I think, therefore, that it may be useful to point out the importance, in cases where a solicitor is charged with entering into an agreement with his clients which amounts to a criminal conspiracy, of seeing that the jury are properly instructed as to a solicitor's duty to his client, and that it is made plain to them that, before a solicitor can be convicted of conspiring with his client to commit a wrong, it must be proved that he did things in combination with him, over and above what his duty as a solicitor required of him, which lead irresistibly and conclusively to an inference of guilt." ❑

Swing Leader *

Boris Kayser was cross-examing a kidnap victim, and attempting to show that a co-accused was the obvious ringleader.
Kayser: *He was subject to violent swings of mood, was he not? Witness looks puzzled.*
Kayser: *If you don't understand my question you only have to say so.*
Dugan S.M.: *He might think you are referring to Benny Goodman.*

Melbourne Magistrates' Court, January, 1982 ❑

Best Advice *

A man with a number of convictions for exceeding 0.05 was applying to be allowed to be relicensed:
S.M.: *How long since you had your last drink?*
Applicant: *Two years ago.*
S.M.: *Was that on medical advice?*
Applicant: *No, on yours.*

Coram Curtain S.M., Cohuna Magistrates' Court, June, 1981 ❑

* *See Motions and Mentions*

Motions and Mentions

Metamorphorsis

From Friday September 30 the legal and professional publishing company, Methuen LBC has reverted to its former name of the Law Book Company. This move follows the company's purchase last year by International Thomas and the subsequent sale of the General and School Divisions coupled with an increased commitment to the provisions of information to the legal and professional community. The company has adopted a new logo and typeface and a motto "Leaders in Legal and Professional Publishing Since 1898", to highlight the company's role in legal publishing as publishers of the Commonwealth Law Reports and the Australian Law Journal. ❑

Death of Irving Younger

The Bar would be sad to know that Professor Irving Younger died in March 1988 of cancer. Professor Younger visited Australia last year and lectured the New South Wales Bar. Few of those who witnessed him on that occasion, or any who were fortunate enough to see a video of one of his lectures could never forget the vivid and entertaining way in which he approached the task of educating his audience on various aspects of the law, in particular cross-examination. Fortunately, many of those videos still remain to educate future generations of lawyers. ❑

Changing Roles

The following persons transferred from the Roll of Barristers to the Roll of Solicitors on Friday, 23rd September 1988:

Shane Boesen
Stephen William Cavanagh
Gary Cleary
Michael John Connell
Peter Ernest Lowry
Christopher John McArdle
Robert Paul McMahon
Geoffrey Vincent Murphy
Mary Anne Peattie
John Colin Perrin
Irene Anne Rusak
Peter John Speirs
Brendan John Whelan

Order in the Court

The cartoon which appeared with the article "Trial by Jury" and the snippets which have appeared scattered throughout this edition of Bar News cross-referenced to this column are taken from a book extracted from the Verbatim Column of the Victorian Bar News entitled "Order in the Court - the Lighter Side of the Law". From reading it one would think that members of the Bar and the judiciary in Victoria spend a lot of their time thinking up witticisms for inclusion in the Victorian Bar News and, of course, faithfully reporting same to the editor of that publication. (Oh, that the profession in New South Wales were so humorous and punctilious! - Ed.)

The book is available in New South Wales through Angus and Robertson, Imperial Arcade and Constant Reader - Crows Nest. It is published by Lothian Publishing Company. ❑

Obituaries

With deep regret the Association records the names of those members and ex-members who have died since the last Annual Report.

The Honourable Sir Richard Blackburn OBE
The Right Honourable Sir Victor Windeyer KBE DSO
R.G. Marden Esq.
The Honourable Mr. Justice T. O'L. Reynolds
T.J. Martin Esq. Q.C.
M.M. Shepherd Esq.
R. Stewart Esq.
R.A. Adams-Smith Esq.

Religious Services

Services to mark the beginning of the Law Term were held as follows:

On Monday 1 February Red Mass was celebrated in St. Mary's Basilica. The Celebrant and Preacher was His Grace, The Most Reverend Edward Clancy, Archbishop of Sydney.

Also on Monday 1 February His Grace, The Most Reverend Sir John Grindrod, Archbishop of Brisbane and Primate of the Anglican Church of Australia preached at a Service held in St. James', Queens Square.

On Saturday 6 February a Law Sabbath Service was held in the Great Synagogue. The Minister was the Rabbi Raymond Apple.

Trial by Jury : A Matter of Discretion

In 1988 trial by jury went to the brink of judicial abolition and back. Graham Ellis and Ruth McColl look at the controversy and the Court of Appeal's solution.

By Act no. 163 of 1987, effective from 18 November, 1987, s.89 of the Supreme Court Act was amended and now provides:

> "In any proceedings on a common law claim (except proceedings to which section 88 applies), the Court may order, despite sections 85, 86 and 87, that all or any issues of fact be tried without a jury".

(The corresponding provision in the District Court Act is s. 79A).

The history behind the amendment may be briefly stated. Faced with a plaintiff suffering from pleural mesothelioma alleged to have resulted from the defendant's negligence in exposing him to asbestos dust and fibre, Clarke J. (as he then was) held that the contested issues involved a "scientific investigation" within the then wording of s.89(1): Peck v. Email Ltd. (1987) 8 NSWLR 430. Thus, a plaintiff with a short life expectancy was able to obtain an earlier hearing via an application which overcame the defendant's requisition for a jury. Having ordered that the issues of fact be tried without a jury, his Honour added:

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> "I would make this final observation. I am informed that there are a large number of cases presently awaiting trial in which plaintiffs are dying or very ill. In most cases the defendant has applied for juries. As I have said the pressures of business of the Court make it extremely difficult for the Court to provide expeditious jury trials for the concerned parties. It is far easier to order urgent hearings for trial by a judge alone given the greater flexibility of this mode of trial and the judge's ability to adjourn the case from time to time. In these circumstances there is a need, it seems to me, for judges of this Court to be given an unfettered discretion to order trial by judge alone, except in respect of proceedings to which s.88 applies, to accommodate cases in need of an urgent hearing." (emphasis added)

For once the words of the Court were heard beyond the Supreme Court building.

Consequential amendments to s.89 of the Supreme Court Act were debated in the Legislative Assembly on 16th and 23rd September, 1987. Those debates disclose that, whilst the amendments were motivated by Peck's case, the discretion thereby conferred was not to be limited to such cases. The then Attorney-General, Terry Sheahan, explained:

> "In practice, the right of a party to a common law action to elect to have a matter tried by jury will continue, but subject to this new discretion which will allow a Court to direct otherwise. In exercising this discretion, the Court will be able to have regard to all relevant circumstances and be able to make a decision consistent with the needs of justice in each particular case".

In particular he stressed:

> "This legislation provides, not for the abolition of juries but for an increased discretion for judges to dispense with juries". (Hansard, p.4100 emphasis added)

Following the introduction of the amended legislation, a diversity of views rapidly developed amongst Common Law judges in the Supreme Court and in the District Court as to what matters would be considered in applications to dispense with a jury. Issues which became unclear included whether regard may be had to the general state of the list and matters common to all jury trials; whether a judge could dispense with a jury of his or her own volition and whether the applicant (usually the plaintiff) had to show special circumstances.

Cole J., in Smoje v. Trend Laboratories (27 May, 1988 unrep.) considered that the defendant no longer had a "right" to trial by jury and that the plaintiff-applicant did not need to show "sufficient circumstances" to persuade a judge to dispense with the jury.

After referring to the plethora of judgments of his fellow Judges which had been given as a result of the "weekly" applications to dispense with a jury brought since the amendment to s.89, the absence of any guidelines from the Court of Appeal and the position in England where a practice has developed of a judge alone hearing all personal injury cases, whether motor vehicle or industrial accident, his Honour concluded (p.35) :

> "In my view, the position which had been reached in England by 1964 that in the interests of uniformity, savings

in time, savings in c. t to immediate parties, to other litigants and to the community generally - in short in the interest of justice generally - juries in civil actions arising from industrial accidents should be dispensed with except where special circumstances dictate otherwise, has, in 1988, been reached in New South Wales".

On the other hand, Yeldham J. in Loranz v. George Morman (unrep., 8 July, 1988) spoke of the "prima facie right to a jury". From the judgments of Finlay J. in cases such as Landers v. McPherson & Davies Shopfitters Pty. Ltd. (unrep., 1 December, 1987) and Grady v. White Industries Limited (unrep., 2 December, 1987) it is clear that his Honour considered that juries should not be dispensed with, in the absence of consent, unless special circumstances were shown.

In Croke v. Haines (unreported 8 April 1988) Carruthers J., took into account the general state of the list and did his own calculations based upon figures provided to him by the Senior Deputy Registrar, Courts and calculated that, at the current rate, it would take 34 year to finish the list as it then stood at present. He concluded the hearing of an action in the Common Law Division by a jury was a "luxury".

"...the hearing of an action in the Common Law Division by a jury was a "luxury".

In Begg v. Rice Growers Co-Operative Mills Ltd. (unreported 7 December 1987) Mathews J. noted that if the current state of the Court lists were to be taken into account in each case then it would be hard to envisage a case in which a civil jury would be retained: That being so, it may be argued that considering the state of the Court lists would achieve that which Parliament did not intend, namely the removal of juries in all personal injuries cases.

Given the differences of opinion among the first instance judges of the Supreme Court and six applications to dispense with juries in the Applications list on Friday 8 July, Yeldham J. stated a question for the Court of Appeal pursuant to Part 12 Rule 2(1)(b) of the Supreme Court Rules asking the Court to determine:

> "Whether in relation to the exercise of discretion under Section 89(1) [of the Supreme Court Act]:
>
> (a) the Court can take into account the state of the list;
>
> (b) the Court can take into account the prospects of being heard due to the state of the list;
>
> (c) the Court can take into account general factors affecting a country circuit;
>
> .....
>
> (e) the Court can take into account delay, settlement prospects and increase in costs;
>
> (f) the Court can exercise the said discretion upon any of the matters (a) to (e) above without there being any other factors;
>
> (g) the Court should only exercise the said discretion upon a personal or particular prejudice, injustice or circumstance to which the general litigant is not exposed or by which the general litigant is not similarly affected?

That question was stated in three cases: Whalan v. Blue Mountains City Council, Gallagher v. Slim Dusty Enterprises Pty. Limited & Anor. and O'Sullivan v. R. Booth Pty. Limited. Those cases came to be heard on 15 July, 1988 in the Court of Appeal on the same day as the case of Pambula District Hospital v. Herriman, an appeal from a decision of Cole J. ordering that the proceedings be heard without a jury and the Estate of Williams & Anor. v. Marshall - also a case involving the exercise of the discretion under Section 89(1).

The decision in all of these matters was delivered on 5 August, 1988. Pambula is the main decision. In it Kirby P. and Samuels J.A. (Mahoney J.A. dissenting) held that in exercising the discretion in s.89(1) the judge is required to consider the circumstances of the particular case and not general matters such as the duration and the expense of jury trials and procedural difficulties inherent in such matters. In so finding their Honours recognised that s.89, even as amended, acknowledged the significance to be accorded to a litigant's decision to elect to have a case tried by jury. They distinguished the English position as based upon a policy decision (Kirby P. at 16) or legislation reposing an "even and unweighted discretion" in the judge as opposed to s.89 which recognises an accrued statutory right to a jury (Samuels J.A. at 10). Samuels J.A. said (pp.13-15):

> "The Parliament has decreed that juries are to be retained and that means warts and all. The presence of the warts cannot be used to destroy the picture. They are part of the picture. Accordingly, in order to make good an application to dispense with a jury it is not enough to point to the supposed deficiencies of jury trials. It is necessary to show grounds which are particular to the case in hand. These may of course be produced by the pressure of singular circumstances upon the general character of a jury trial. For example, the state of the jury list, if it entails a delay likely to exceed a plaintiff's life expectancy, would be a matter involving the particular application of a general condition. But the argument (however correct in fact) that to dispense with a jury or two at the top of the list would accelerate hearings at the bottom, would not....
>
> "In approaching the exercise of discretion under s.89 the judge must be satisfied that there are circumstances particular to the case in hand which require an order to be made in order that justice may be done between the parties. In this context,

I think that the doing of justice will usually involve the protection of legitimate expectations. The judge is not to act as a court administrator, seeking to clear the list as expeditiously as possible and seizing upon the removal of jury trial as a means of doing so, without regard to the interests involved in the particular case."

In his dissenting decision, Mahoney J.A. held that in exercising the power given by s.89, it may be appropriate for a judge to refer to guidelines or to a general practice appropriate to the kind of case or the occasion, secondly that it may, in the exercise of a particular discretion, be appropriate that it be exercised so as to achieve consistency of judicial adjudication and thirdly, that care should be taken to ensure that the use of guidelines did not convert the discretion into an inflexible or almost inflexible rule. (pp.10-13). It was not, however, appropriate under s.89 for a general ruling to be given that all cases are to be tried with or without a jury.

All of the members of the Court of Appeal were clearly acutely aware of the problem of court delays and the correlation between such delays and jury trials.

In addition, Kirby P. and Samuels J.A. recognised that defendants often requisitioned juries because they were perceived to give lower verdicts than judges and also because the delays which existed in trials presented obvious advantages for underwriters, sometimes inducing settlements for less than full value because of the frustrations of delay (see Samuels J.A. at 15).

Both Kirby P. and Samuels J.A. expressed sympathy with the position which had led judges to dispense with juries upon grounds which reflected their frustration with the serious delays in the court list which had caused hardship and injustice to litigants. They were, however, of the view that it was a matter for Parliament to legislate in such a way as to give judges a wider discretion in respect to trial by jury than was provided in s.89.

The remaining cases which had been heard on 15 July by the court were disposed of on the basis of the principles enunciated in Pambula with the result that the questions asked were answered:

"(a) - (e) : Not as such, except as such matters are shown to have consequences particular to the proceedings in which the application is made.
(f) No.
(g) Yes."

It is gratifying to see a problem which affected many cases in the Common Law Division and the District Court being so expeditiously resolved by the Court of Appeal. It may well be, however, that the position now established by the decision in Pambula is temporary and that a political response to delays in the Common Law Division, both in Sydney and in the Circuit Courts, can be expected from a Government anxious to "clear the backlog". ❑

Gifts

The following gifts were presented to the Association since the last Annual Report:

Ian Pearson's oil painting "Hunters and Collectors" in memory of the late Mr. Justice T. O'L. Reynolds by

Mr. Justice J.B. Kearney
W.J. Holt, Q.C.
Mr. Justice J.S. Cripps
J.D. Heydon, Q.C.
Mr. Justice P.A. McInerney
J.R. Sackar, Q.C.
Mr. Justice W.M. Gummow
P.G. Sheldon
Master G.S. Sharpe
R.P. Hennessy
P.J. Kenny, Q.C.
T.P. Lonergan
F.J. Gormly Q.C.
J. Poulos
R.P. Meagher, Q.C.
R.R. Bartlett
L.M. Morris, Q.C.
C.C. Branson
P.R. Capelin, Q.C.
S.M. Hamman
W.H. Nicholas, Q.C.
M.F. McDermott

F. Kaufman's "The Admissibility of Confessions", 3rd editon, by P. McEwen.

Thomson's "The Judges" by B.W. Walker.

Marr's "Barwick"; Ellis' "Lachlan Macquarie, His Life Adventures and Times"; Tennant's "Evatt, Politics and Justice"; Sir John Kerr's "Matters For Judgment, an Autobiography"; The Honourable E.G. Whitlam's "The Whitlam Government 1972-1975". All donated by the Barristers' Clerks Association of New South Wales. ❑

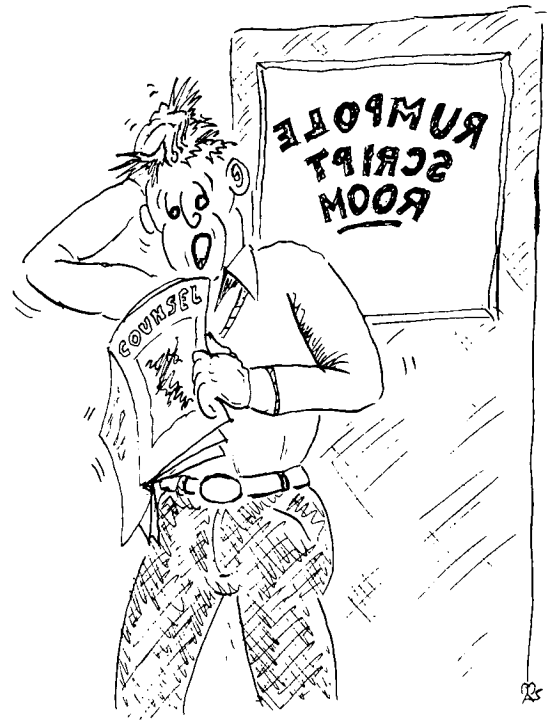
"You mean a solicitor has to employ you, plus a junior, to talk for him? Now that's what I call job creation."

COURTLY LANGUAGE

Lord Justice Staughton of the Queen's Bench Division in England continues what appears to be the thankless and unrewarding task of persuading the English Bar to move into the twentieth century - "language-wise".

Fifteen months ago I suggested a New Year's resolution for those who draft affidavits - not to write anything "verily". Some adopted it, but like most New Year's resolutions it has not proved to be of lasting effect. Prospective immigrants to this country must find the use of the term in affidavits not the least puzzling aspect of our immigration procedure.

This year's first target is "learned". Why do barristers refer to an opponent as their *learned friend*, thus exposing themselves to an accusation of untruthfulness on two grounds? Would not "my friend" do? Again it may not be true; but it serves as a reminder that advocates should be polite towards each other if they can. It is distracting for a judge to have to quell angry abuse at the bar, instead of getting on with other more important aspects of a trial.



"BUT THEY CAN'T DO THIS! IT'LL CUT EACH EPISODE TO ONLY TEN MINUTES!"

When counsel for the prosecution opens a case in the Crown Court he first introduces his "learned friend" for the defence. What do the jury make of that? I suspect that it merely confirms an impression already formed, that those who work in the law live in a remote enclave where ordinary human behaviour and common sense have little place.

And what of "learned" judges, Lords Justices at al? Apart from the occasional use by way of irony ("the 'learned' judge in the court below completely overlooked an elementary rule of law"), this usage adds nothing of any value to legal proceedings. The judgments of Lord Denning, conspicuous for their economy of language, rarely referred to counsel or a judge as *learned*; and they were none the worse for that.

Use of the word is not encouraged by the capricious basis on which, technically, it is earned. Henry Cecil in *Brief to Counsel* summed it up well "...Some practitioners think that they ought to call everyone 'learned'. It has been said that counsel once referred to the 'learned usher', but this may be apocryphal."

In the occasional dull moment during an appeal from arbitrators, I have reminded myself (and others) which members of the London Maritime Arbitrators Association are "learned" and which are not. These reflections are not entirely frivolous. They bring out the point that the word draws no useful distinction and serves no useful purpose.

Our legislators must share some of the responsibility. In the House of Commons QCs are honourable and learned members; but in the House of Lords it is only the Lord Chancellor and present or past Law Officers, judges of the Superior Courts of the United Kingdom and Lords of Appeal in Ordinary who are noble and "learned". Thus Mr. Peter Rees QC was *learned*, but Lord Rees QC is not.

"As he then was" is another irritating phrase, referring to a barrister or judge who has since risen to a higher sphere. Readers who already know that will not find the information useful; those who do not already know it will not find it of much interest. But I would not discourage the habit of referring to judges by the name which they subsequently acquired on promotion to the peerage (eg Bigham J as Lord Mersey, or Brett LJ as Lord Esher). The reader has to work out for himself who is meant - unless the law reporter is kind enough to add a footnote providing the answer.

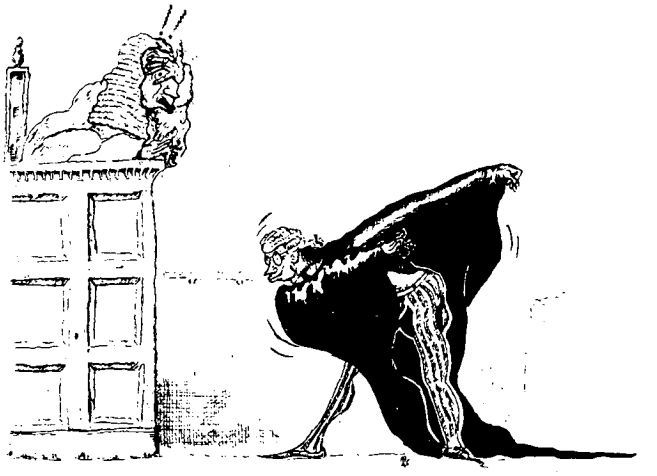
My next proposal is that those who do not understand Latin should use it with considerable care. The plural of "forum" is "fora", although "forums" could be thought acceptable; but you cannot convert "quorum" into "quora", as an eminent silk (now a Lord Justice of Appeal) tried to do some years ago. Nor is there much to be said for the advertisement that once appeared for "one of the finest vade meca on the market". The word "addendae" does have a meaning in Latin - women who ought to be added; it does not mean lists of additional items. Readers had better work out the meaning of "agendae" for themselves.

Some people seem to have an extraordinary addiction to the word "said" in pleadings and affidavits. Its only purpose is to distinguish the noun that follows from others of like kind, by referring back to what has been said already. The worst abuse is to use the word when there is nothing to refer back to, because nothing has already been *said*. Such idiocy is mercifully rare.

Mannerisms in speech or gesture afflict us all, and can be distracting. Like the scorer at a cricket match, I sometimes feel tempted to note how many times an hour one barrister says "in my respectful submission". If we repeated ourselves like that at home, our spouse or children would lose no time in saying so. But a court of law is no place for mentioning such trivia.

I understand that students at the Council of Legal Education are shown a video recording of their early efforts at advocacy in the practical exercises. Could not the same service be provided for established barristers and silks? As Burns put it "O wad some pow'r the giftie gie us. To see oursels as others see us! It wad frae mony a blunder free us, And foolish notion."

Like a medical check-up every few years, it would be valuable to have an opportunity to see and listen to oneself in court. The recording would be entrusted to the subject only, to make such use of as he pleased. In-service education is now a popular topic. This might be a start. Perhaps a similar service should be provided for judges, by the Judicial Studies Board. Of course, as Plato wrote, when one is already perfect any change is for the worse. But it is to be hoped that not many would turn the offer down on that ground. ❑



Intrepid Scot

One of the Attorney-Generals of Scotland, known as the Lord Advocate appeared in the House of Lords with four propositions in support of his appeal. The court was presided over by Lord Diplock who, some think, thought Counsel were superfluous and probably also the fellow court judges who sat with him and that one could find out the real point by reading the papers beforehand. From doing the latter he had concluded that the fourth point was the best. He said to the Lord Advocate who was developing his first point: "Lord Advocate, we are very interested in your fourth point". "We are very grateful to your Lordship" said the Scotsman in return and continued with his first point. A little while later Lord Diplock said: "Lord Advocate, we think your fourth point is a particularly good one". "I am very heartened to hear what your Lordship has to say" he said, and continued with his first point.

Eventually Lord Diplock could stand it no longer and he said: "Lord Advocate, we are inclined to think, of course, we keep an open mind on these matters, but we are inclined to think that if you win this case, and again we have an open mind, we think you will win it on the fourth point."

The Lord Advocate said: "Are your Lordships inviting me to depart from my pre-stated order". "Well" said Lord Diplock: "Yes, yes, we are Lord Advocate." "Then the invitation is declined." ❑

Unpersuaded *

Counsel, in the course of a plea for a drug offender, stated that his client was repentant, that a crushing sentence would be inappropriate and that the Judge should be confident that he would not sin again.

His Honour: *There is no way of really assessing it.*
Counsel: *You can only judge that after the sentence is served, Your Honour.*
His Honour: *And you never know.*
Counsel: *Well, you know if they come back, Your Honour.*
His Honour: *The judge never knows or rarely knows.*
Counsel: *Sometimes they do, Your Honour. Sometimes they are unfortunate enough to come back before the same judge.*
His Honour: *In ten years they have not come back before me.*
Counsel: *I was just wondering, Your Honour, whether they were all still in.*
His Honour: *Thank you. Well, that must a very encouraging note to sit down on so far as the accused is concerned.*

His Honour sentenced the accused to 12 years with a minimum of nine years.

November, 1981

* *See Motions and Mentions* ❑

NEW SOUTH WALES BAR CRICKET

On the 20th March, 1988 a New South Wales Bar Eleven travelled to Melbourne to play in the annual New South Wales, Victorian Bar Cricket Game. The 50 over game was played at the magnificent Fitzroy/Doncaster District Cricket Ground.

Prior to departure a number of the "Old Guards" were forced to withdraw. Clarrie Stevens (discovered on last season's tour to England/Ireland) Denis Benson, David Wilkins and Malcolm Holmes presented themselves for selection.

After a pleasant flight to Melbourne, the tean found itself booked into "Fawlty Towers" along St. Kilda Road. Needless to say, the wives and girlfriends were not happy!

Stirling Hamman had thrust upon himself the mantle of captaincy and without any committee decision elected to bat on what was a wet wicket. A team talk was held and these immortal utterances were recorded:-

"This is the ground wher Neil Harvey learnt his cricket. We will show Gillard (the Victorian Skipper) we've got the same make-up as the Harvey brothers", whose photograph Hamman happened to be looking at as he spoke,

"Remember discipline play straight, no flashy stuff!"

The two openers were out, playing wild shots and Hamman was out for 6 attempting a square cut some distance outside his off stump when the score was 3/18. Fortunately Guy Reynolds (26) and Peter Hastings (23) were able to halt the collapse.

A seventh wicket stand of 80 by David Wilkins (41) and Peter Maiden (40) gave some respectability to the innings, however, the score of 150 was always vulnerable.

After a lengthy lunch the wicket had improved considerably and was by then perfect for batting. The bowlers, namely Hamman, King, Naughtin, Stevens, Benson and Laughton bowled quietly but without success. Only Laughton (2/5) was able to enjoy success. A number of the bowlers commented that the Victorian opening batsman, a chap by the name of Ian Dallas, who scored 88 not out not only looked like, batted like and even sounded like the former Australian opening batsman Kepler Wessels. It appears that the Victorian Bar has been able to acquire some of the recruiting skills of the Australian Cricket Board/ Kerry Packer alliance, i;n their single-minded determination to win at any cost!

Once again we were feted to an excellent meal at the Victorian Bar Common Room. The following day some respect was regained when a number of the members were able to beat their Victorian counterparts at tennis at Gillard Q.C.'s home at Brighton. Unfortunately his swimming pool was not long enough to allow competitive swimming but an attempt was made by some members of the team who will remain nameless.

The New South Wales/Queensland game ws due to be held on the first weekend in April. The game was cancelled before the Queenslanders came down, however, the dinner in their honour was still held at the University/Schools Club. This happened to coincide with President Handley's party in the adjoining room. As ever an enjoyable night was had by all. The Queenslanders management volunteered that in next year's game they would be able to put on as a team one current Sheffield Shield player, namely Andrew Courtice and one former Shield player, Roger Traves as well as a number of current grade players.

In recent years the fortunes of the New South Wales Bar cricket team have not enjoyed the success of earlier years. It has been suggested that there needs to be an injection of a number of younger players who are either currently playing or recently retired from competitive cricket. Recent social games between various chambers has resulted in a number of players being "discovered", the most recent being David Wilkins and Denis Benson. It has been suggested that there be an annual "probables" versus "possibles" game to encourage players to come forward before being selected for inter-state service. Would those who are interested or who know reluctant cricketers kindly contact Larry King, Peter Maiden, or Stirling Hamman to put their or other names forward. ❑ **P. Maiden**

Sticky Wicket

In a recent case in the Privy Council Lord Templeman, mindful that the merits of the case were quite contrary to the interests of the Senior Counsel who was addressing him, bowled him some very insidious in-swingers during the course of his address with fairly lethal consequences. When the silk sat down, exhausted, the presiding Lord said to his junior: "Mr. Robinson, do you wish to follow?" To which the cheerful answer came: "Not without a helmet, my Lord".