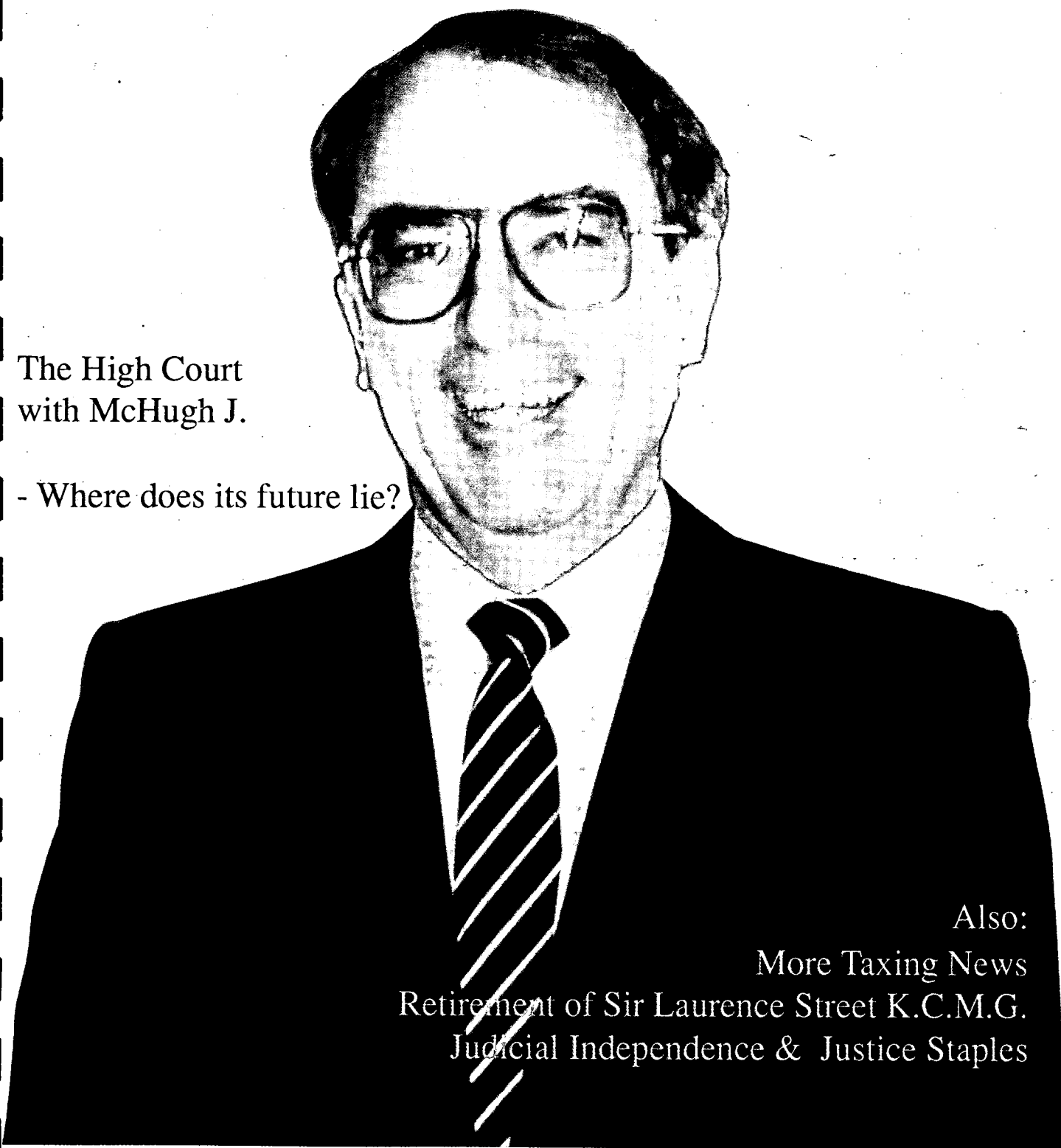


Bar News

The journal of the NSW Bar Association

The High Court
with McHugh J.

- Where does its future lie?



Also:
More Taxing News
Retirement of Sir Laurence Street K.C.M.G.
Judicial Independence & Justice Staples

Autumn 1989

In this issue

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COVER: Mr. Justice McHugh -
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Mr. Justice Robert Marsden Hope A.C. C.M.G.

On Australia Day it was announced that Mr. Justice Hope had been appointed a Companion of the Order of Australia for services to law, government, learning and conservation.

The Companion of the Order of Australia is, of course, first in precedence of the Australian honours and is awarded for "eminent achievement and merit of the highest degree in service to Australia or to humanity at large".

His Honour's services to law are well known. He took silk in 1960 and was appointed a Judge of the Supreme Court in September 1969 and a Judge of Appeal in August 1972. For many years he lectured in law at the University of Sydney - mainly in property law.

It has been through his services to government that His Honour is best known to the public. He has served the past three Federal Governments, particularly reporting on the Royal Commission into intelligence and security matters. From 1974-1977 he was Commissioner in the Royal Commission into Security and Intelligence. In 1983 he was Commissioner in the Royal Commission into Intelligence and Security which became known as the Hope Royal Commission. It included the controversial Coombe-Ivanov Inquiry. In 1979 he conducted the Inquiry into Protective Security for the Federal Government.

His Honour's contribution to conservation includes his involvement in the Committee of Enquiry into the National Estate to which he was appointed as Chairman by the Whitlam Government in 1973. The report of that committee became the foundation of modern government and legislative approach to conservation. In 1978 he was appointed the first Chairman of the Heritage Council, a position he still holds.

The honour also recognises his contribution to learning. He served on the senate of the University of Sydney from 1970-1975 and has been Chancellor of the University of Wollongong since 1975. He was Chairman of the Old Tote Theatre from 1970 until the late 1970s and was on the board of the Nimrod Theatre from its inception until the late 1970s. He is presently on the board of Musica Viva. He was President of the Australian Council for Civil Liberties from 1967-1969. □

Frederick Jordan Chambers

On Wednesday 5th April 1989 Counsels' Chambers Limited purchased Frederick Jordan Chambers, 233 Macquarie Street, Sydney for \$14.5 million. The building is presently occupied by 80 barristers all of whom will be invited to become members of Counsels' Chambers. This purchase further secures the presence of the bar at its traditional location.

Masterful

Bill Windeyer, senior partner of Windeyer Dibbs and immediate past President of the Law Society of New South Wales is to be sworn in as Master in Equity in the Supreme Court on 29 May, 1989. Mr. Windeyer has had an extensive equity/probate practice and considerable litigation experience in his 28 years as a solicitor. The Bar Association welcomes his appointment. □

Australian Bar Association

The new office bearers of the Australian Bar Association are:
K.R. Handley Q.C., (President)
E.W. Gillard Q.C., (Senior Vice-President) (Victoria)
G.J. Lunney Esq., (Junior Vice-President) (A.C.T.)
D.L. Harper Q.C., (Treasurer) (Victoria)

Robing in the Family Court of Australia

Justice Ellis has indicated that counsel should only robe when appearing in contested matters in the Family Court.

This is in keeping with the Chief Justice's direction that Judges should only robe when hearing substantial contested proceedings. Judges do not currently (and will not) robe when sitting on duty lists and when hearing undefended dissolutions of marriage and the like.

In the case of urgent and ex-parte duty matters, counsel should go to the Court prepared to robe, notwithstanding that most such matters are listed before the Duty Judge who would normally not robe. As members will appreciate, urgent duty matters are often referred to a Judge other than the Duty Judge should such other Judge(s) become available to assist the Duty Judge during the course of the day. The requirement to robe or not can then be made upon the basis of the particular Judge's circumstances. □

Visiting Counsel to the Northern Territory

Many counsel from other jurisdictions are admitted to the Bar and have signed the roll as "visiting counsel" of the Supreme Court of the Northern Territory. Not all such counsel also join the Northern Territory Bar Association, although many do.

In view of recent events, I believe that many visiting counsel do not realise that it is an offence under the Legal Practitioners Act for them to practice in the Northern Territory unless they hold a current practising certificate. Worse, they cannot seek payment for their services.

In order to obtain a practising certificate, visiting counsel should write to the Secretary of the Law Society of the Northern Territory, P.O. Box 2388, Darwin, N.T. 0801 seeking the appropriate application forms and advice.

In the next few weeks, the Law Society will be writing to all Law Societies and Bar Associations enclosing guidelines to admission in the Territory and details as to practising certificates (how to apply; cost etc.).

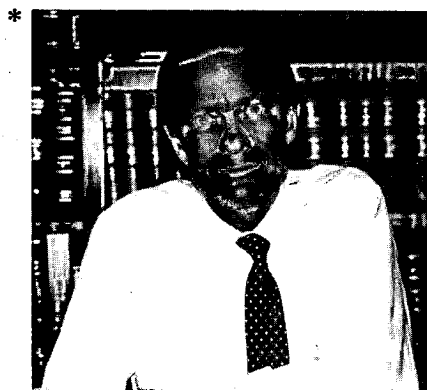
Practising certificates, for those who already have them, fell due for renewal on 1 October 1988.

The purpose of this note is to ask that you bring to the attention of all members of the A.B.A. the need for visiting counsel to the Territory :-

- (a) to be admitted here;
- (b) to sign the roll as "visiting counsel"; and
- (c) to have a current practising certificate.

DEAN MILDREN Q.C., President
Northern Territory Bar Association □

From the President



When I wrote the Editorial for the last issue of Bar News which came out in November 1988 I was able to report much activity but few results. Since that time results have started to come through. State Parliament has passed the Motor Accidents Act 1988 which retrospectively repeals the Transcover legislation and substantially restores the common law rights of seriously injured road accident victims. The Opposition and the minority parties did not oppose this legislation. The Act is expected to commence on 1/7/89. The Bar Council and I again wish to place on record our appreciation for the efforts of Coombs Q.C. and Graham Ellis who worked so hard to achieve this result.

Meanwhile the Workcover Review Committee established by the Honourable John Fahey M.P. Minister for Industrial Relations has been hard at work. The Bar representatives on this Committee Poulos, McCarthy Q.C. and Ferrari worked during vacation to assess the voluminous actuarial and other material and to prepare the Association's case for submission to the Committee. The Committee's recommendations and the Minister's decisions on the shape of this State's new industrial accident legislation will probably be known by the time this issue of Bar News is available to members.

The Council has supported the initiatives of the Chief Justice and the Attorney General in appointing a large number of acting Judges to the Supreme Court to assist in overcoming the backlog of cases in the Common Law Division. The Bar can take pride in the fact that senior Silk who practice in that Division have been prepared to undertake this public duty and of course have done so at some cost to themselves.

The Council is represented on the committee chaired by Mr. Justice Wood which is examining other ways of reducing and abolishing delays in the Common Law and Criminal Law Divisions. A number of changes have already been made including the rescheduling of most country circuits. As this year unfolds it is hoped that further reforms can be implemented. The Bar made many constructive suggestions for change in the listing arrangements in the Common Law Division in its submission to the Premier in May 1988. Some of these suggestions are only now being adopted.

There have been few changes in criminal trial procedure in this State this century and the Council believes that a great deal can be done to shorten and simplify such trials without any prejudice to the rights of the accused. Reforms in this area not only promise reductions in the present delays but also substantial cost savings to the State and to the Legal Aid budget. The Council is hopeful that an active working committee will be set up in the near future with Bar representation to examine these matters. In fact an informal

meeting was arranged between members of the Bar Council and a number of other Silk who practise in the criminal field with the Attorney General in May last year during which a whole range of possible options were canvassed.

The Council remains extremely concerned at the low level of fees available through the Legal Aid Commission for Counsel engaged for the defence in criminal cases and is continuing to explore possible solutions.

We have spoken out in support of significant increases in judicial salaries at both Federal and State levels and will continue to do so. At the same time we have sought to protect the Bar from unfair attack based on inaccurate statistics. Members will be aware of the action taken by the Council in relation to the Australian Bureau of Statistics survey of lawyers professional incomes and expenses of practice which was received by some members of the Bar in the latter part of 1988.

The Lord Chancellor's Green Paper on the organisation of the legal profession in Britain has confronted the English Bar with the same challenge to its practices and indeed its very existence as our Bar faced in recent years. We are maintaining close contact with the General Council of the Bar in England and have provided them with information on the history and development of independent Bars in Australasia and our successful defence of the independent Bar in this State between 1976 and 1987. In particular we have made it clear that our history demonstrates that an independent Bar does not need to be protected by any legal monopoly against competition from solicitors.

These events in Britain underline the continuing need for the Bar to be vigilant in maintaining its professional and ethical standards and in keeping its overheads well below those of the large city firms. The availability and cost of Chambers in Sydney therefore remains a matter of continuing concern.

Last year the New Barristers' Committee conducted a survey of all floors in Sydney to determine which floors did and which did not permit "floating" by new barristers. I was surprised to learn how many floors prohibited or discouraged this practice. I have recently written to the floors concerned asking them to reconsider their policies. I trust that all floors will be generous in this matter as I believe that it is an effective means of encouraging promising lawyers to come to the Bar and assisting them during the critical first 12 months.

It is a matter of great satisfaction and pride to all of us that Mr. Justice McHugh has been appointed to the High Court. His appointment marks the culmination of a remarkable career at our Bar which included periods as President of this Association and of the Australian Bar Association. McHugh came to the Newcastle Bar in 1961 without capital or connections. He moved to Sydney shortly afterwards and after "floating" for 6 months was able to buy Chambers. Could some new McHugh do the same today?

Mr. Justice McHugh's appointment indicates that the Government accepts the principle that appointments to our highest Court must be based on merit alone and that it is not appropriate to adopt any form of quota system. The merit principle has generally been followed in the past with occasional exceptions but from time to time suggestions have been made by ill informed persons that appointments should reflect some

"balance among the States". We don't select our national sporting teams in this way and it would be even less appropriate to select the members of our highest Court on such a basis.

The death of Mr. Justice Higgins in 1929 reduced the number of Victorians on the High Court from four to three but fortunately this did not prevent the Government of the day from appointing Owen Dixon K.C. to the Court. In 1969 the death of Mr. Justice Taylor reduced the number of New South Wales Judges on the Court from six to five but fortunately again this did not prevent the number of New South Wales Judges being restored by the appointment of Mr. Justice Walsh.

It is indeed fortunate that the Government was not deterred from appointing Mr. Justice McHugh on his obvious merits merely because his appointment would increase the New South Wales Judges on the Court to four. One might venture the hope that henceforth the merit principle will be accepted by Governments of all political persuasions and that we will hear no more of proposals for appointments on any other basis. □

K.R. Handley

** Hirsute appearance affected by Handley Q.C. so he could pass as a Tibetan monk while trekking in the Himalayas at Christmas.*

Letter to the President

Dear Ken,

Black Xmas

For the last 3 years I have taken the hat around, with Carolyn Simpson, for Shirley Smith AO (Mum Shirl) to raise money for her Xmas party.

This year we raised six thousand seven hundred and ninety five dollars and 44 cents (\$6,795.44). The greater part was from the N.S.W. Bar, with some from Judges and a few solicitors looking for injunctions on Xmas Eve. A few cheques are trickling in still and only two knockbacks.

The money was used for (i) the Xmas party (ii) a new second hand fridge (iii) 143 hampers for black families in Redfern.

There are too many for us to thank personally: Could this letter be tabled and noted in the Association's minutes. See you next year.

En passant, Mum Shirl's house in Stanmore was extended and repaired by the brothers Finnane.

Regards, Ken Horler.

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The High Court with McHugh J.

D.F. Jackson Q.C. considers the events which have brought the High Court, which McHugh J. has just joined, to its position as Australia's ultimate appellate court.

I believed, ingenuously in the event, that this was to be a standard "Bar News" article, i.e. (as for Gleeson C.J.¹) a short taped "interview"² with the subject, followed by some (probably insufficient) pruning and sub-editing. But that was not to be. Oral history is suddenly out of fashion, and something more cerebral is required. Hence the turgid prose which follows.

The High Court in 1989

McHugh J. has joined a Court very different from the Court of twenty, or even ten, years ago. Its decisions are no longer subject to any appeal to the Privy Council, and the Privy Council is no longer an alternative avenue of appeal for appeals from the State courts. Nor does there remain any case in which there is an appeal as of right to the High Court. The Justices have power to remit cases to other courts³ and sit only rarely at first instance. They are also liable to retire on attaining seventy years. Each of these factors has played its part in altering the role of the High Court (and the role of the intermediate appellate courts) and the changed roles are not yet, I think, fully understood. During McHugh J.'s time on the Court, a greater public perception of the changed role will be achieved, albeit gradually.

I shall discuss now the factors I have mentioned above.

The retiring age

Until s.72 of the Constitution was amended in 1977, the interpretation given to it in 1918 in Waterside Workers' Federal of Australia v. J.W. Alexander Limited⁴ was that all judges of federal courts, were appointed for life.

The statistics from the early days of the High Court⁵ suggest that the right to hold office for life was treated by some as an obligation to hold on to office for as long as possible. It was the norm for Justices appointed prior to World War II to continue sitting beyond the age of seventy, the exceptions being O'Connor J. (who died), Knox C.J. (resigned to take up an interest in business⁶), Piddington J. (resigned before sitting) and Evatt J. (resigned to go into politics). No doubt in accordance with trends in the community generally, the position was rather reversed in the case of Justices appointed during and after World War II. Of those Justices, only Webb J., Owen J., Windeyer J. and Barwick C.J. continued to sit after attaining seventy, the first three sitting only one or two years thereafter.

During that period, however, there remained on the Court a number of Justices who had been appointed before 1939, and

who were Justices for extraordinarily long periods. Rich J. was a Justice from 1913 to 1950, Starke J. from 1920 to 1950, and McTiernan J. from 1929 to 1974. They were well over seventy on retirement, of course. To that was added the fact that three Chief Justices in succession were members of the Court for long periods, and again were well over seventy on retirement (Latham C.J. sat from 1935 to 1952, Dixon C.J., as Justice and as Chief Justice from 1929 to 1964, Barwick C.J. from 1964 to 1981). One can understand the existence in 1977 of a public perception, whether statistically soundly based or not, that the High Court was "too old".

The 1977 amendment provided for retirement at seventy and it is interesting to note that whilst there have been many changes in the composition of the Court since then⁷, the only retirement directly in consequence of the amendment to bring about retirement was Gibbs C.J. in 1987. (There have been some other consequences of the amendment⁸).

The other vacancies have been the result of death (Aickin J., Murphy J.) or resignation (Jacobs J., Stephen J., Wilson J.).

It is unlikely that in the immediate future there will be much change in the composition of the High Court, but the introduction of the retiring age is likely in the long term to have the effect that its membership changes more frequently. Unless "Grey Power" becomes a dominant political force and turns the clock back, it is unlikely that there will ever again be appointees to the High Court who serve terms of the order of Rich J., McTiernan J. and Dixon C.J. McTiernan J.'s "record" seems safe because to exceed it a Justice would now need to be twenty four or twenty five on appointment.

That seems a little precocious, even for the New South Wales Bar. I also think that the Court, because it will not have any members over seventy, is likely to be a little less fixed ("certain", "confirmed" [?]) in its views than it has been in the past. Age can bring with it a liberalisation rather than a firming of views, I know, but I do think that the more prevalent trend with age is to revere the past. In any event, there will be fewer Justices whose continued presence over many, many years gives them an influence which they otherwise might not have.



D.F. Jackson Q.C.

1. "Bar News", Summer 1988, p.5.
2. In other words, a dozen "Dorothy Dixers".
3. Judiciary Act 1903, s.44.
4. (1918) 25 C.L.R. 434.
5. See the "Table of the Judges" in Fricke, *Judges of the High Court*, 1986, pp. 288-231.
6. Fricke, pp.97-98.
7. Mason C.J. is the only member of the Court who was also a member ten years ago.
8. The indirect operation has been that on becoming Chief Justice, Gibbs C.J. and Mason C.J. ceased to be "lifers" and become liable to retire at 70: see the last paragraph of s.72.

Comments have been made that one of the long-term effects of the retiring age will be that appointments to the High Court will be made at a younger age. I doubt this proposition if it means that the "normal" age for appointments - to the extent to which a normal age can be gleaned - will be lower, but I think it has some validity in the sense that it is less likely that persons over, say, sixty will be appointed.

Finally, mandatory retirement at seventy may prevent, to some extent, a retirement being delayed pending the defeat of an existing government. For example it was speculated of Rich J. and Starke J. that they had delayed their retirements until after the defeat of the Labor Government⁹ and the retirement age prevents that. The retirement age, however, does not prevent early retirement to allow an appointment, nor does it prevent a Justice, under seventy, who might otherwise have retired earlier, from staying on until that age to prevent an appointment of a replacement by a government of different political colour. It is sad to have to mention these matters, but quite a few Justices have been active politicians until appointment, and to believe that that will not recur requires an innocence which I have lost.

Abolition of appeals to the Privy Council

The removal of the Privy Council from the Australian judicial system was a slow, perhaps evolutionary, process¹⁰, which was not completed until 1986¹¹.

Whilst the Privy Council eventually ceased to hear appeals from the High Court in consequence of the Privy Council (Limitations of Appeals) Act 1968 and the Privy Council (Appeals from the High Court) Act 1975, its continued presence as an alternative avenue of appeal from the States in some cases meant that the Australian judicial system was not entirely autonomous, and that the High Court was not quite the final court of appeal for Australia. Litigants, not unnaturally, would

seek to outflank decisions of the High Court adverse to their interest by going to the Privy Council¹². The situation was unsatisfactory, and always potentially productive of tension¹³. The High Court is now free of that "competition".

Abolition of appeals as of right

The immediate practical result of the abolition of appeals to the High Court as of right has been that the Full Courts/Courts of Appeal/Courts of Criminal Appeal are the final courts in almost every case. That was always so in criminal cases, but not so in many civil matters. The new function which the intermediate appellate courts perform has given their work greater importance, an importance which I suspect is not always realised by members of the legal profession, and occasionally, I fear, is not fully appreciated by members of those courts, or the governments responsible for them. Intermediate appellate courts are final courts for most purposes and there is a need for judges sitting in those courts to have time to "think about" their decisions and their implications, without working in a pressure-cooker atmosphere. I think it likely, I may say in passing, that the tendency to permanent courts of appeals (de jure or de facto) will manifest itself further¹⁴.

The abolition of appeals as of right has also made a significant change in the role of the High Court. Because that Court now selects the matters which it hears, it selects as a general rule those which are likely to be of public importance. It is possible, but rare, that the Court will entertain an appeal by reason of the way in which a particular case was disposed of, if the case raises no issue of principle. Thus a decision by an intermediate appellate court may involve an error of law, but it does not follow that special leave to appeal will be granted. The case will probably not be of sufficient general importance.

The method of deciding cases in the High Court also has changed with the change in its role. Only a little of the Court's time is taken up now with resolution of questions of fact; in the main the Court is determining, for the future, what is to be the law. Inevitably, that involves a choice between alternatives, and the resolution of those questions involves, to a greater or lesser degree, questions of policy. The High Court is not bound by the decisions of any other court, or by its own prior decisions¹⁵. Whilst the relative weight of earlier decisions is important, in the end the Court is searching for the proper principle for Australia. One thus sees, more frequently than in the past, that decisions of the High Court discuss much more overtly the advantage of adopting one or other approach. To an extent, of course, this may be said to "politicise" the role of the High Court but the role of an ultimate appellate court is inherently "political" in this sense. It is more so where, as in Australia, constitutional issues are also involved.

It would be surprising if McHugh J. were not aware of all this, and that he is aware was made clear from the remarks which he made at his swearing-in on 14th February 1989 when he said:

"The principal function of an ultimate appellate court, such as the High Court, is to evolve and settle the law for the benefit of the nation and not to right errors which may

9. Fricke, *op. cit.*, pp.106-107.

10. Constitution s. 74, Privy Council (Limitation of Appeals) Act 1968, Privy Council (Appeals from the High Court) Act 1975.

11. Australia Act 1986 (Cth), Australia Act 1986 (UK), and the Australia (Request and Consent) Act 1985 of the Commonwealth and each State.

12. See e.g. Coast Securities No. 9 Pty. Ltd. v. Bondoukou Pty. Ltd. (1986) 61 A.L.J.R. 285, in which it was sought to "overrule" Chan v. Dainford Ltd. (1985) 155 C.O.L.R. 533.

13. As in Beheto Pty. Ltd. v. Sunbird Plaza Pty. Ltd. (1984) 2 Qd. R.9 at 13, where the Privy Council described the construction of the relevant enactment by the High Court in Deming No. 456 Pty. Ltd. v. Brisbane Unit Development Corporation Pty. Ltd. (1983) 155 C.L.R. 129 as a "surprising construction" which it said, was "not surprising corrected" by an amending Act.

14. See Sir Anthony Mason, *The State of Australian Judicature* (1987) 61 A.L.J. 681 at 685.

15. For a recent discussion see John v. Commissioner of Taxation (1989) 83 ALR 606.

have occurred in the course of trials or in the intermediate appellate courts. When this Court grants special leave to appeal, ordinarily it does not do so on the ground that the rights of a litigant may have been infringed. It does so because in addition to that factor the case raises a question of great general importance. This means that, unlike the position which existed before the amendments to the Judiciary Act in 1984, almost every private law decision made by this Court has great significance for the people in Australia. Moreover, since this Court is not bound by its own or other court's decisions, it can and must examine the functional operation of legal rules and questions of policy to an extent denied to intermediate appellate and trial courts." ¹⁶

Remitter

At earlier stages in the Court's history, Justices sat at first instance in original jurisdiction to try matters instituted in the Court. The power to remit matters conferred by s.44 of the Judiciary Act is now used extensively to remit such cases to the courts where they would ordinarily be heard. In consequence the Justices seldom sit alone, but for practical purposes sit as one of a multi-member court hearing appeals and constitutional matters.

Conclusion

McHugh J. joins a High Court which is an ultimate appellate court in the fullest sense. It is also more than just that in that it has in addition a jurisdiction in constitutional matters. Australia is only now seeing the full effect of the "new" High Court, and McHugh J. will make a significant contribution. He joins it with the advantage of considerable experience in broad general practice as a junior and leader, and with a breadth of experience on the New South Wales Court of Appeal. I think that the Court needed another "generalist", and it now has one.

It will be noted that I have so far said nothing of consequence concerning constitutional matters in the High Court of the future and, in particular nothing concerning the role of McHugh J. The difficulty which I find in that regard is that I really don't know what approach he is likely to take. His observations at his swearing-in, with respect, revealed little:

"It goes without saying that this Court's role as ultimate interpreter of the Constitution places a burden of responsibility on its members which cannot be shared by the members of other courts. The oppression of that burden is increased by my belief that, from time to time in important constitutional cases, competing views concerning the resolution of issues cannot be characterised as simply right or wrong. In the resolution of difficult constitutional questions, sometimes all that a judge can do in the end is to select the solution which seems constitutionally preferable to other possible solutions. Although the proper exercise of the judicial function requires that the choice of the preferred solution be justified by a reasoned decision based on considerations external to the judge's own set of values and not by reference to what Mr. Justice Jacobs once called "individual

predilections ungoverned by authority", reason and logic are not always conclusive. As closely split decisions of this Court demonstrate, opposite conclusions are reached because the individual judgments, although logically impeccable, commence with different premises based on different constitutional values, none of which is logically irrelevant or inappropriate to the resolution of the question to be decided."¹⁷

All I would say, as I have suggested above, is that it was an appropriate time for the appointment of a lawyer whose background had not involved a commitment to any particular cause in constitutional matters. ¹⁸ □

16. Transcript of Swearing-In of Justice McHugh, 14.2.89

17. Ibid..

18. In 1978 the Attorney General for the Commonwealth gave an undertaking to consult with the States in relation to new appointments to the High Court. That arrangement was followed in relation to the appointment of Wilson J., and was made mandatory by s.6 of the High Court of Australia Act 1979:

"6. Where there is a vacancy in an office of Justice, the Attorney-General shall, before an appointment is made to the vacant office, consult with the Attorney-General of the States in relation to the appointment."

Three of the seven appointments after the Attorney-General's undertaking were of Solicitors-General for the States. There will always be former State Solicitors-General appointed to the High Court, but there does need to be a satisfactory mixture overall.



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Obituary

Harold Hyam Glass

Harold Glass, who became one of Australia's most distinguished lawyers, was born in Sydney in 1918, the son of a lawyer S.B. Glass, a man of literary and historical tastes. He was educated at Sydney High School, where he excelled in languages and was a prominent debater. At Sydney University he took an Arts Degree, majoring in French and German. He served in the Royal Australian Navy from 1942 to 1946.

Returning to Sydney, he took his Bachelor of Laws degree, was articled to Mr. Ray Tobias, of Lieberman & Tobias, for two years and was admitted to the New South Wales Bar in 1948, where he practised until his appointment to the Bench on the New South Wales Supreme Court in 1973. During his time at the bar he built up an enormous practice, specialising mainly in common law negligence cases, although in his last five years he applied his talents to equity, commercial law, constitutional law and maritime and admiralty cases. He took silk in 1962, and was President of the New South Wales Bar Association in 1973. He was appointed a Judge of Appeal in 1974, and he retired in 1987.

As befitted a man of his education and culture, he also did some important academic work. He lectured in contracts and torts at the University of Sydney soon after he graduated. Later he lectured at that University in procedure, and after he retired he became a visiting professor at the University of New South Wales. He was the co-author of The Liability of Employers, one of the few really first rate Australian legal treatises, and the editor of the valuable Essays on Evidence. In addition, he contributed articles to the leading legal journals.

He had many interests outside the law. One was the Navy, which he rejoined as a Commander Special Branch, ARNR as a member of the Reserve Legal Panel in 1966, being promoted

to Captain Special Branch in 1963. He was appointed to the office of Judge Advocate-General with the rank of Rear Admiral in 1978 and was promoted to Rear Admiral in 1980, shortly before he was placed on the retired list. He continued to serve as the Judge Advocate-General for the Navy until 1983. He was Australia's leading counsel at the Board of Enquiry at Subic Bay into the collision between the Frank E. Evans and the HMAS Melbourne.

He was a remarkable linguist. He read both Latin and ancient Greek. He read and spoke Hebrew, Yiddish, German, Italian and French. He delighted in the nuances and minutiae of each of them. He also loved music, particularly vocal music. He was immensely well read in English literature and contemporary politics and sociology. He was a keen student of Jewish affairs and an ardent supporter of Israel. He was an inveterate traveller.

As a lawyer his chief gifts were, perhaps, a keenly analytical mind married to a great power of brief lucid exposition, often couched in witty terms and always in elegant ones. His judgments on all aspects of the law of negligence will always be hallowed, as will his discussions of such subjects as what constitutes a prima facie case, the difference between a question of law and a question of fact and similar topics.

He had many personal friends both in the law (for example, Sir John Kerr, Mr. Justice McHugh, Mr. Justice Samuels) and outside the law (for example, the politician John Wheeldon and the poet James Maccauley). He was a most social and amusing companion, a brilliant raconteur and an accomplished conversationalist. He will be missed.

Our sympathies are extended to his wife, Irma and sons, Arthur and Jonathon - to whom he was profoundly devoted. □

Surrogate Motherhood

The NSW Law Reform Commission's Report on Surrogate Motherhood was tabled on 2 March 1989 by the Attorney General, the Honourable J.R.A. Dowd, LLB MP. This is the final report in the Commission's reference on Artificial Conception. Two previous reports dealt with the topics of Human Artificial Insemination and In Vitro Fertilisation.

In its report the Commission takes the view that surrogacy should be discouraged by all practicable means available to the law. The principal reason given by the Commission for its opposition to surrogacy is that it is not in the interests of the community or the children created by its use for surrogacy to become a widely used method of overcoming fertility. For the same reason, the Commission also recommends that IVF surrogacy be prohibited.

Other major recommendations in this, the Commission's sixtieth law reform report, are:

- The welfare of the child should be the paramount consideration. The Commission recommends that, as in all matters of custody and guardianship, the interests of the child should prevail over those of everyone else.

- Commercial surrogacy should be prohibited. The Commission defines commercial surrogacy to extend to the activities of all who "pay, receive, offer or solicit any reward for participation in or facilitation of a surrogacy arrangement". The prohibition is designed to prevent all surrogacy

arrangements in which money changes hands and to impose criminal sanctions on anyone who pays or receives money to assist the parties in coming to an arrangement or carrying it out.

- Criminal sanctions should be imposed on anyone who knowingly assists the parties to organise or carry out a surrogacy arrangement. This prohibition would extend to anyone (including a lawyer or doctor) who knowingly assists the parties, but not the surrogate mother, her partner or the commissioning couple themselves.

- No legal effect should be given to surrogacy agreements. They should be void and unenforceable. The Commission hopes that by denying legal recognition to the agreements, people may be discouraged from entering into them. The parties should not be able to rely on an agreement to ensure transfer of the custody of the child or payment of any sums promised under it, even expenses.

- The surrogate mother should be legislatively presumed to be the legal mother of the child.

- Adoption should not be automatically available to those who commission a child through surrogacy. The Commission's view is that an adoption order should only be made when the interests of the child demand it.

Copies of the report, Surrogate Motherhood, are available from the NSW Law Reform Commission, Level 12, ADC House, 189 Kent Street, Sydney. Telephone (02) 228.7213. □

A Long Way from 22 Church Street

Alan Sullivan and Bruce McClintock tell the true story of Mr. Justice McHugh's progression to the High Court.

The High Court is indeed a long way from the junior barrister's chambers at 22 Church Street, Newcastle which the Court's most recent appointee, Michael Hudson McHugh, occupied early in his career.

Although his Honour insists that the possibility of concluding his career as a judge never occurred to him while he shared one of a row of 19th century terrace houses opposite the court house with solicitors, doctors and other barristers, there has been something inexorable about his rise since being called to the bar in July 1961.

Nevertheless anyone who knew his Honour 10 years before his admission when he was 15 might well be forgiven for thinking his prospects of a career, any career, were dim at best. At that age he had dropped out of school without obtaining his intermediate certificate, because he says, he did not know what to do with his life. The events which preceded that departure are illuminating. Even at that age he was an enthusiastic, even fanatical, devotee of sport. Naturally, his first love was rugby league and he occupied the position of centre three quarter for the local Marist Brothers First Thirteen with, so he says, poise, pace and flair. The positional preference will surprise no one who knew him later. When banished from the team for some forgotten infraction of school rules, he abandoned the Brothers for a brief flirtation with Newcastle Boys (with neither parental knowledge nor approval). He remained there for six months.

From the time he left school until he was 20, he worked at an extraordinary range of jobs - among them, clerk, telegram boy, sawmill worker, crane chaser, general labourer and even insurance salesman (the last occupation may suggest where his subsequent ability tenably to propound the barely tenable to the superior courts of this state originated).

In the same period, he was a regular visitor to the greyhound tracks of the Hunter Valley, although again his Honour insists that it is "stretching the truth" to say that he was making a living out of the dogs, although they formed a large part of his life at the time. It is said that he could recognise and name every racing greyhound in New South Wales by appearance. Examples of his photographic memory could be multiplied - he can still name every Melbourne Cup winner since Archer by year. Later, his Honour's ability to pinpoint where on a particular page of the Commonwealth Law Reports the apposite quotation appeared was well known.

In March 1957, he was walking past the Hamilton Public School and saw a sign offering evening classes for the Leaving Certificate. Disillusioned with the aimlessness of his life, he made the first of several snap decisions which had a crucial effect on his life and enrolled. He passed and went on in 1958 to the Barristers Admission Board. His Honour asserts that he

then absented himself from the race track to devote himself to studying and between 1958 and 1969 was seen on the race track only three times.

Despite the fact that he was working full time as a clerk for BHP, he qualified for admission in three years. His admission was delayed for six months not because, as some have said, he knew no lawyers who could move it, but because there was no one in the categories of occupations able to swear the affidavits of character and fitness who had known him the requisite five years.

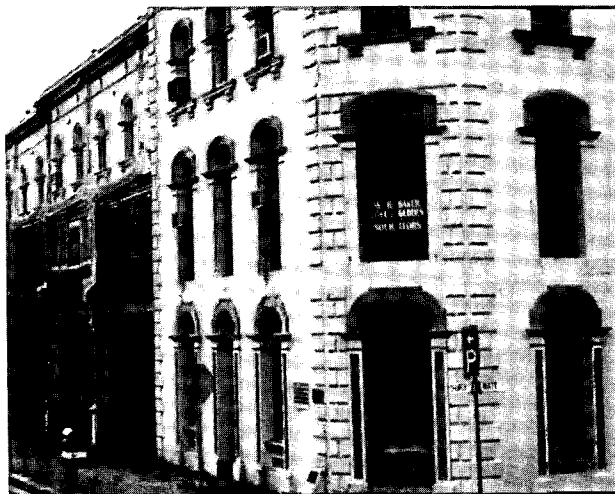
After admission he moved to Sydney and commenced practice. He moved back to Newcastle in April 1962 after a successful period in Sydney - for example, within his first year at the bar he had appeared at least once unled in the High Court and as junior in Commonwealth v. Cigamatic Ltd. 108 C.L.R. 372.

In January 1965 after a conversation with the great Jack Smyth (who told him he was wasting his time in Newcastle) he returned permanently to Sydney and a room in University Chambers which he shared with John Nader (now of the Northern Territory Supreme Court).

The Sydney Morning Herald quotes C.A. Evatt as saying that his Honour sat in a corner of C.R. Evatt Q.C.'s room picking up the crumbs that fell from his untidy table. His Honour never did so. Indeed, his first contact with C.R. Evatt Q.C. and C.A. Evatt occurred when both father and son managed to get themselves jammed on the second day of a jury trial before

Isaacs J. in 1966 and his Honour took over. More important influences upon his Honour and his style of advocacy were Smyth Q.C. and Mr. H.H. Glass Q.C. Smyth's approach appealed because of its logic - he applied a set of principles to the conduct of a case and never proceeded on an ad hoc basis, always showing a deep knowledge of the law combined with a keen appreciation of the facts. Glass Q.C., with whom his Honour co-wrote what became the standard work in its area The Liability of Employers in Damages for Personal Injury in 1966, passed on his deep knowledge of law and principle and his ability to distinguish them from fact.

By about this time he had started appearing in the defamation cases which ultimately were to make up so large a part of his practice in his last years as a junior and his first years as a silk. He always appeared for plaintiffs until 1968 when Mirror Newspapers was sufficiently impressed by his performance for the plaintiffs in Yarwood v. Mirror Newspapers Ltd. (1968) 1 N.S.W.R. 720 to offer him its junior retainer. He then at the invitation of D.B. Milne Q.C. moved to the sixth floor of Selborne which was to be his home for the rest of his time at the Bar. By this time his practice was enormous particularly in defamation cases - he had already adopted his distinctive stance (since much emulated in defamation cases, at least) when addressing a jury - backside resting on the bar table, face perhaps two feet from that of the closest juror,



Barristers' Chambers, Church Street, Newcastle

complete concentration on the emotions passing over their faces. The jury's response to him was usually the same as that of the bird to the mesmerizing cobra.

He took silk in 1973 at the insistence of Les O'Brien, his clerk. O'Brien's version of this story which his Honour does not dispute is that he, O'Brien, appeared in his Honour's room with a completed application form for silk and this dialogue followed:

O'Brien: "Sign that document."

McHugh: "What is it?"

O'Brien: "An application for silk."

McHugh: "Don't be stupid - you're crazy."

O'Brien: "I've thought about this - I'm your clerk - I'm telling you sign."

McHugh: "I'm a man of impulse - I'll sign it - but if I don't get it I'll never apply again."

He did get it, of course.

As a silk, his practice broadened into one of the most wide ranging ever seen at the Sydney bar. Consider a small sample of his cases in his last few years before appointment to the Court of Appeal - United States Surgical Corporation v. Hospital Products Limited [1983] 2 N.S.W.L.R. 157 (fiduciary obligations), Bickel v. John Fairfax & Sons Limited (defamation), Chamberlain v. R., (crime) and the Combe-Ivanov Enquiry.

His style of advocacy was robust and he was never one to shirk the bold proposition - no-one who appeared in the Hospital Products litigation will ever forget his submission that there were four and only four circumstances when it

would be held that fiduciary obligations arose. Despite the fact that he never had too much use for his juniors (except to carry his red bag) and did all the work himself, he had a remarkable run of successes as a silk, particularly in defamation trials. He was extraordinarily versatile.

Shortly after his two successful and hard working years as President of the Bar Association he accepted the then Premier's offer of an appointment to the Court of Appeal.

It is perhaps too soon fully to assess his contribution to that Court - although there can be no doubt that it will be seen as exemplifying the best traditions of the common law, that is, the organic development of the law through the application of history and principle to the facts of the case before him in the manner exemplified by his judicial hero, Sir Owen Dixon. His Honour's attack on the doctrine of privity of contract in Trident General Insurance Co. Ltd. v. McNiece Bros. Pty. Ltd. 8 N.S.W.L.R. 270 is an example.

His Honour's appointment as the 37th Judge of the High Court was universally acclaimed and so far as we are aware not one dissenting voice was raised. Even B.A. Santamaria seemed to approve.

As is well-known, his Honour is married to Jeanette, the member for Phillip in the House of Representatives. They have three children, one of whom, Richard, shows fair signs of following his father to the Bar. His Honour is no doubt looking forward to seeing more at least of Jeanette as the sittings of Parliament this year largely coincide with those of the High Court.

We wish them well. □



Mr. Justice McHugh with (l. to r.) son Richard, wife Jeanette, daughter Giselle and Michael Jr.

Journey's End

Bar News reproduces Mr. Justice McHugh's speech delivered at his swearing-in on 14 February 1989.

Mr. Attorney-General for the Commonwealth, Mr. Handley, Mr. Byrne, I thank you for the generosity of your remarks and the goodwill which is inherent in them. They will remain a continuing source of support for me in discharging the high responsibility which acceptance of the office of a Justice of this Court imposes.

The presence of this gathering and the congratulatory communications which I have received from those who are unable to be present today will also serve as a source of support for me in carrying out the arduous work of the Court. Many of those present are personal friends. Many, indeed most of those present, have travelled considerable distances to be here. I thank you for the respect which you show for this Court and for the honour you do me by your attendance.

I am especially honoured by the presence on this Bench of one of its former members, His Excellency the Governor-General, Sir Ninian Stephen.

I am also honoured by the presence on this Bench of the Chief Justices of most of the States and Territories including the Chief Justice of the State of New South Wales. It is not without regret that I leave his Court so soon after his appointment to that high office.

I record my gratitude that also present are the President and Judges of the Court of Appeal of New South Wales on which I served for over four years, Judges of the Federal Court of Australia and the Supreme Court of the Australian Capital Territory, my former Chief Justice, Sir Laurence Street, the Solicitors-General and the Presidents and representatives of the professional organisations of the States and Territories.

Last, but certainly not least, I am grateful for the presence of the former Prime Minister of Australia, Mr. E.G. Whitlam, QC, and Mrs. Margaret Whitlam.

Twenty-seven years have now elapsed since I left Newcastle, the city of my birth, to become admitted to the Bar of New South Wales. For me, the journey which began in Newcastle in 1961 and brings me to this Court today has been an immensely satisfying one, and rewarding beyond my wildest anticipations. But that journey was only possible with the support and encouragement - and in some cases the love and devotion - of many people. On the occasion of my swearing-in as a Judge of the Court of Appeal in 1984, I expressed my gratitude to all those persons who have given me support and encouragement over the years. Many of them are present today. Without naming them, I again express my gratitude. Each of them will know to whom I speak and as to how grateful I am for his or her support and encouragement.

There are, however, two persons who were present in 1984 who are not present today. One is the Honourable Harold Glass, QC, my former colleague on the Court of Appeal, whose unfortunate illness prevents him being present this morning. For more than twenty-five years he gave me great support and encouragement and the benefit of his monumental legal skills. I will be ever grateful to him. The other person

who was present in 1984 but who is not present today is my father who unfortunately died in 1987. It is a matter of immense regret to me that he did not live to see this day.

As you know, I come to the High Court after four years as a Judge on the New South Wales Court of Appeal. The litigious spirit of the people of New South Wales, the aggressive nature and the wealth of much of the commerce of that State, and the skill and ingenuity of the New South Wales legal profession result in the regular presentation of many complex and important legal issues before the Court of Appeal. The high quality of my judicial colleagues and predecessors on that Court has given it a reputation throughout the common law world as an outstanding intermediate appellate court. I learned much about the nature of the judicial process as a member of that Court and I know that my experience there will be invaluable to me in discharging my duties on this Court.

Nevertheless, I am deeply conscious that the role of this Court is very different from the role of any other court in Australia including the intermediate courts of appeal and that experience in the discharge of the duties of other courts does not necessarily fit one for the unique responsibilities of this Court.

It goes without saying that this Court's role as ultimate interpreter of the Constitution places a burden of responsibility on its members which cannot be shared by the members of

other courts. The oppression of that burden is increased by my belief that, from time to time in important constitutional cases, competing views concerning the resolution of issues cannot be characterized as simply right or wrong. In the resolution of difficult constitutional questions, sometimes all that a judge can do in the end is to select the solution which seems constitutionally preferable to other possible solutions. Although the proper exercise of the judicial function requires that the choice of the preferred solution be justified by a reasoned decision based on considerations external to the judge's own set of values and not by reference to what Mr. Justice Jacobs once called "individual predilections ungoverned by authority", reason and logic are not always conclusive. As closely split decisions of this Court demonstrate, opposite conclusions are reached because the individual judgments, although logically impeccable, commence with different premises based on different constitutional values, none of which is logically irrelevant or inappropriate to the resolution of the question to be decided.

Outside the field of constitutional law, the role of this Court also differs from that of an intermediate appellate court and other courts although the difference is not always perceived even by members of the profession. The principal function of an ultimate appellate court, such as the High Court, is to evolve and settle the law for the benefit of the nation and not to right errors which may have occurred in the course of trials or in the intermediate appellate courts.

When this Court grants special leave to appeal, ordinarily it does not do so on the ground that the rights of a litigant may have been infringed. It does so because in addition to that factor the case raises a question of great general importance.

"... experience in the discharge of the duties of other courts does not necessarily fit one for the unique responsibilities of this Court."

This means that, unlike the position which existed before the amendments to the Judiciary Act in 1984, almost every private law decision made by this Court has great significance for the people in Australia. Moreover, since this Court is not bound by its own or other courts' decisions, it can and must examine the functional operation of legal rules and questions of policy to an extent denied to intermediate appellate and trial courts.

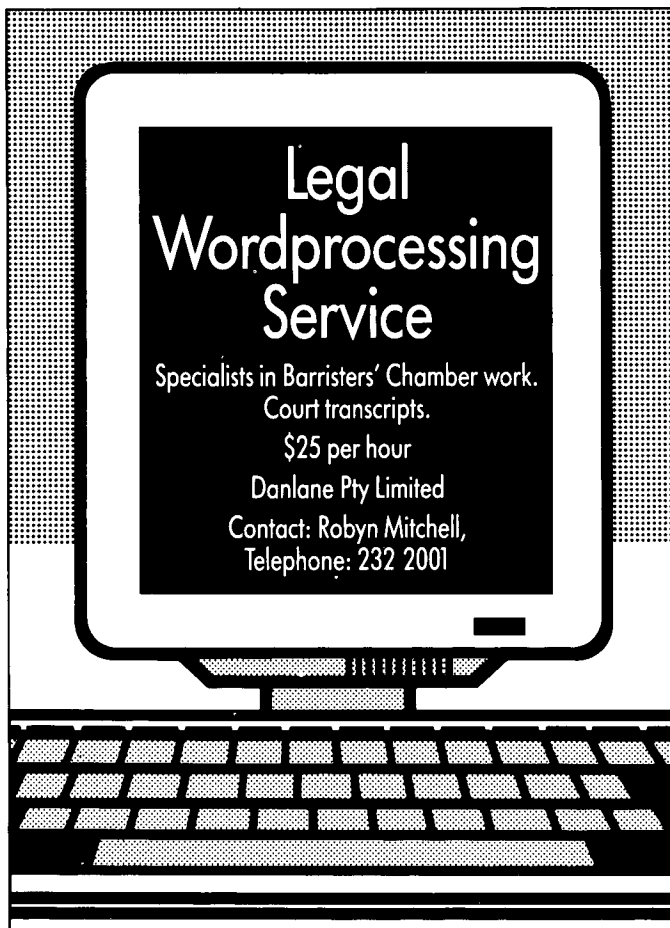
Against that background, it is inevitable that, no matter what legal experience a person has had, reflection on the nature of this Court's role must induce a measure of anxiety as to his or her capacity to discharge the responsibilities of a Justice of this Court. I am no exception. My anxiety is not lessened by the knowledge that my appointment follows the retirement of that much loved and highly respected judge, Sir Ronald Wilson, and that the Court to which I now come consists of outstanding lawyers of immense capacity and reputation.

Although I am only too well aware of the difficulties involved in discharging the duties of a Justice of this Court, nevertheless, I remain confident that, with your goodwill, the co-operation and assistance of the legal profession and my fellow judges, and my own determination and experience, I will discharge my duties to your satisfaction. □

Shrinking Jurisdiction

"Powell J. (talking about Protective Business) "I'm the only Judge mad enough to take this work"

Nelson: "I appreciate that your Honour". □



Interviewing Witnesses - A Reminder about Rules 37 and 38

A ruling was recently sought from the Bar Council relating to the propriety of counsel for the plaintiff in a motor vehicle accident case interviewing the owner or driver of the vehicle on whose behalf the Government Insurance Office is the party on the record. The Bar Council adopted the view that the matter was sufficiently clear from the provisions of Rule 37 and Rule 38. The owner or driver in such case, not being the party on the record, are merely witnesses in whom there is no property and that prior to conferring with the owner or driver the Counsel or representative appearing on behalf of the GIO should be notified and given the opportunity of advising the owner or driver following which conferring may take place subject to counsel then advising the owner or driver of any possible adverse consequences either to his indemnity or insurance policy or under Section 14, paragraph 20(1)(d) of the Motor Vehicles (Third Party Insurance) Act.

Counsel on behalf of the GIO in the above instance as with any other witness may not seek to prevent or discourage a witness from being interviewed by opposing counsel.

Insofar as there are any judicial determinations criticising or prohibiting counsel in a personal injury case from conferring with owners or drivers on whose behalf the Government Insurance Office is the party on the record, such decisions cannot be supported on ethical grounds where the steps referred to above have been taken.

The interesting question as to what evidentiary use an admission of liability may be put after the introduction of paragraph 20(1)(d) to Section 14 of the Motor Vehicles (Third Party Insurance) Act is open to debate. On one view the admission of liability may have no effect against the Government Insurance Office except for the purpose of cross examination of the owner or driver as to credit. On the other hand the admission of liability may do no more than expose the owner or driver to a penal liability and has no impact upon the evidentiary use of an admission of liability. It is however common ground that the mere giving of a version of the facts which may establish negligence does not constitute an "admission of liability" within the statutory provision. □

Brysonalia

(1) "A person who reckons his future in months or years and not decades may reasonably have a different attitude to preserving and disposing of property and a different attitude to people generally. A character in Lawrence Durrell's *Alexandrine Quartet* said that when one is dying, one finds oneself in funds."

(2) "There would be few debates in which the defendant would prevail and few minds which he could ever overbear or persuade."

(Moon v. James, Bryson J., unreported, 24 November 1988)

Bar News Interviews Ian Temby Q.C.

The Independent Commission Against Corruption (ICAC) opened its doors on 13th March, 1989. Greg James Q.C. interviewed Ian Temby Q.C., the head of the Commission.

James: Ian, most of the Bar in New South Wales don't know you personally. They have met you at various of the Bar's informal functions but have little idea of your background. You come to New South Wales from the august office of the Commonwealth Director of Public Prosecutions and originally from Western Australia. As we understand it, in Western Australia you took silk and there had a busy practice, particularly in crime. Could you tell us a little about your background in Western Australia?

Temby: Yes, well as you know, the profession there is organised on a slightly different basis than in New South Wales. So, as is typical, I started doing articles with a firm of solicitors and then joined that firm and became a partner. After about 12 years with them, mostly working in litigation, and in the last few years mostly doing advocacy work, I went to the Bar and a couple of years thereafter took silk. I think it is assumed because of the work I have been doing in the last few years that I am predominantly a criminal lawyer. That was never really the case. In Perth my practice was a fairly general one, with emphasis upon administrative law and industrial law, probably each of those in precedence over criminal law, but really a very general practice.

James: When you went to the Commonwealth Director of Public Prosecutions as the first director of that office, you went as a lawyer, but the tasks that you were asked to perform involved a massive burden of administration, in dealing with Government, in particular in relation to setting up the office and your budget. How did a lawyer come to handle that and what are your views about whether you enjoyed it or not?

Temby: I wish to distinguish between administration and management. I consider the job as D.P.P. - even first D.P.P. - as being a lawyer's job with added management responsibility, but not responsibility for administration. I see the present job as being much the same. I have people of high capacity who looked after matters such as budget, indeed I was quite spoiled with the D.P.P. because I had to deal with filthy lucre very little indeed. As a management job it basically involved getting in the right people and providing them with the right strategies to get on and do the job. Now I found that work very satisfying. Indeed I think that if you are going to do big things, they really have to be done on a group basis. I enjoy working with groups and I enjoyed setting up that office. I enjoyed ultimately setting up the I.C.A.C., but I have to say it has been more difficult setting it up, because now I know the pitfalls. I don't have the same naive confidence that I had five years ago.

James: Whilst you were in the office of Direction of Public Prosecutions there were a number of very difficult matters, in particular, of course, the Murphy prosecution. From time to time you delivered speeches and wrote articles. One article and one speech in particular, dealing with what has come to be known as the "Tall Poppy Syndrome" has attracted a great deal of notice. Is there anything you wish to say now you are out of the office concerning that article, that speech and the attitude taken by your office and by persons to your Office?

Temby: The speech in question was given at a fairly early stage before we had developed our own prosecution guidelines. When they were developed they became the bible for what everyone in the office had to do. The way I would now put the matter is that it is of fundamental importance that the law should operate in such a way that people with high positions in society should not be effectively free of its operation. That

can very easily happen in relation to the criminal law especially. It is easy to spend most of the time concentrating upon those who use drugs and steal video recorders in order to pay for their habit. The law cannot operate like that. It is very important it should operate so that nobody is beyond its reach. I hold to that very strongly indeed. I also think it is of great importance that the public should have confidence in the basic institutions such as the Parliaments and the Courts. In order to ensure that that confidence is not lost, it may be necessary to scrutinize with special care those who are working in those basic institutions. I don't think what I have just said is in truth in contrast to what I was saying some four years ago.

"...it is of fundamental importance that the law should operate in such a way that people with high positions in society should not be effectively free of its operation."

James: What you are saying, I think is different in expression and in emphasis but not different in content. The bottom line is equal treatment before the law.

Temby: Well I think that is right. But even when it comes to equal treatment, you have to realise that the sort of resources that are necessary to tackle the very large tax fraud case are very different from those that are necessary to tackle even a substantial defended bank robbery case. You have got to realise that if you are going to take on, as is unhappily necessary from time to time, wealthy and very well-connected adversaries who cannot always be relied upon to keep the kid gloves on, then you have got to take the litigation very seriously indeed as they do. I am also for equal treatment of all before the law so long as the law is organised so that all are truly being treated equally and so long as appropriate resources are allocated for all cases. Some contend the law must always operate equally irrespective of who the person is at the other end of the process. By that they mean that you have always got to just roll up and do your best, adopting a basically sort of passive and neutral attitude. I think that it is entirely wrong. Of course there are special obligations upon a prosecutor to be fair, but you can be fair while at the same time adopting an active role to what is in truth an adversary process.

James: Ian, to turn from the relationships of the office with the public and profession generally to the relationships within the office, it is rumoured that whilst you were Director of Public Prosecutions you encouraged the entire office to spend sybaritic weekends at Berrida Manor. Would you like to comment on that?

Temby: That is quite wrong. Once we went to Milton Park for a couple of nights - about a dozen people from around the country - for a national planning session. As anyone who worked there will testify, that was a serious office. We weren't even very good at having lunches.

James: And to turn from relationships with the staff to relationships with the clients, that is to say the criminals. The Director's office has increasingly made use of immunities - probably necessarily. What is your view first, about the morality of the use of the immunities, and secondly, the necessity?

Temby: The necessity does sometimes arise. The classic example relates to major drug importations. It is a notorious fact that the catching of the mule used to carry the drugs is a relatively simple matter. It is a very difficult matter indeed to apprehend and convict the operational captains and the ultimate financiers. I think that sometimes to deal with a courier in a relatively gentle fashion when it comes to sentencing or even not to proceed against such a person in order to achieve successful outcomes up the line can be justified. It is always troubling to indemnify anyone and very great care needs to be exercised in the indemnity process. I am gratified that in four and half years we never came unstuck. There was a bit of luck as well as a lot of good management involved in that. Anyone who is going to deal in indemnities is going to come unstuck one day. You are bound in the end to indemnify a major criminal to catch a minor one rather than the other way around. All else I would say is that while we adopted what I described as a modern attitude to the grant of indemnities, whereas Commonwealth practice previously was antediluvian, we were never wild enthusiasts about it. We were always cautious, and indeed in the last year or two the figures went down quite significantly.

James: To turn then from your office of Director of Public Prosecutions to your new task. First, did you feel it was appropriate for New South Wales to appoint a person coming as it were from outside to an independent corruption commission.

Temby: I think there are some advantages in that. I hope I come with an open mind and without too many preconceptions. I suppose not having local knowledge might be a disadvantage, but if that has to be traded for a lack of preconceptions I think it is worth that price being paid. I don't take for granted any particular level of corruption in this State's public sector. I don't take for granted that corruption is to be found in one sector rather than others. I am getting some idea from the material flowing to us which are the areas of concern, but all of this remains matters upon which conclusions have to be reached.

James: Ian, it is all very well to say you don't see corruption as lying in any particular sector, but do you find it ominous that the premises that you presently occupy were the premises previously occupied by the New South Wales Director of Public Prosecutions who succeeded to them on Rex Jackson's departure from political office?

Temby: Well, there is a certain irony there. □

Ian Douglas Temby was raised and educated in Perth, his place of birth on May 5, 1942.

He attended Perth Modern School before testing real life as a jackaroo for a year on a sheep station in Gascoyne in the north of Western Australia.

He then attended the University of Western Australia where he completed a straight law degree, graduating with honours in 1964 with a thesis on private international law.

Temby has had a full and demanding career with a strong emphasis on community service.

He practised as a solicitor in Perth for some years before going to the Bar in 1978. He took silk in 1980.

He was a part-time law teacher at WA Law School for many years and was a foundation commissioner of the WA Legal Aid Commission from 1978 to 1981. He had earlier been chairman of the WA Law Society's Legal Aid Committee, a position he held for several years, during which time the Flying Solicitor and Duty Counsel schemes were established. Temby also served as President of the Society in 1983.

Together with Peter Dowding and Fred Chaney, he set up Perth's first Legal Advice Bureau in the mid 1970's when they were all still practising solicitors.

Temby became President of the Law Council of Australia in 1983. It was from this position that he came to the notice of the Federal Government and was chosen as the first Commonwealth Director of Public Prosecutions, a demanding job he held from March 1984 until October 1988.

He now faces his latest challenge, another first, as the head of the Independent Commission Against Corruption.

Temby has not always confined himself to things strictly legal in his career. During his early years of law practice he became involved in Local Government serving for seven and a half years on the Subiaco Council, including two periods as Deputy Mayor.

ENGINEERING-SCIENCE-ENVIRONMENT

Campbell Steele, M.A. (Pure Mathematics) Cert.
Env. Impact Assess. (Syd.Uni.) Chartered Engineer.
Fellow Inst. of Engineers Aust. Mem. Royal Soc. of
NSW, Aust. Acoustical Soc., etc. Expert Witness
17 Sutherland Crescent, Darling Point (02)

More Taxing News

Capital Gains Tax on Compensation or Damages

Is nothing sacred? The possibility that damages verdicts or settlements may attract the tax man's beady eye is discussed by Neil Forsyth Q.C. and Peter Searle.

One facet of the Tax "Reforms" of recent years which has particular importance for barristers is the impact of capital gains tax on damages or compensation payments. If a cause of action arose on or after 20th September 1985 the proceeds may well be assessable pursuant to the provisions of Part IIIA of the Income Tax Assessment Act 1936 ("the Act"). Accordingly, the impact or possible impact of tax is very relevant to the amount claimed and the amount accepted in settlement or obtained in damages. From a defendant's point of view, there is also the possibility of realising a capital loss.

Broadly speaking Capital Gains Tax (CGT) applies where:

- (i) there has been a disposal or deemed disposal of an asset;
- (ii) the asset was acquired or deemed to have been acquired on or after 20th September 1985; and
- (iii) the disposal of the asset occurs on or after 20th September 1985.

For the purposes of CGT, 'asset' is defined in s.160A to mean -

"any form of property and includes:

- (a) an option, a debt, a chose in action, any other right, goodwill and any other form of incorporeal property.."

Rights which one acquires pursuant to the provisions of a contract are "property" and therefore assets for the purpose of Part IIIA of the Act. In O'Brien v. Benson's Hosiery (Holdings) Limited [1980] AC 562 the House of Lords held that the rights of an employer company under a contract of employment were property and therefore an asset even though they were not assignable and did not have a market value. The sum of 50,000 pounds received by the company in return for the surrender of its rights under the service agreement was held to have been for the disposal of an asset and therefore assessable as a capital gain.

Further, in Zim Properties Limited v. Proctor (1984) 58 TC 371 Warner J. was required to determine the issue of whether a sum received by a plaintiff in settlement of an action against his former solicitors in negligence was a capital sum derived from an asset and therefore assessable to capital gains tax pursuant to the provisions of the Finance Act 1965 (UK). The definition of "asset" there was drafted broadly along the lines of s.160A of our Act. Warner J. held, following O'Brien v. Benson's Hosiery, that the sum received by the plaintiff in settlement of such an action was a capital sum derived from an asset (being the plaintiff's claim in negligence against his former solicitors) and therefore assessable.

Given that an actionable claim is an asset subject to CGT, one must determine with some accuracy both the time at which the asset was acquired and the cost base (if any) of that asset. Many actions before the courts will be based on acts of alleged negligence which occurred prior to 20th September 1985, but where much of the damage has been suffered (and the writ issued) after that date. It is beyond the scope of this paper to provide examples which illustrate the difficulty in ascertaining the time a particular cause of action was complete.

All the complicated law concerning the time when a cause of action accrues for the purpose of the Limitations of Actions Act appears to be equally applicable for the purposes of CGT. An asset may be acquired not only by the entering into of a transaction, etc...but also by "the occurrence of any event": para 160M (21(f)).

Paragraph 160M(3)(b) provides that a change of ownership (disposal) shall be taken to have occurred by "the cancellation, release, discharge, satisfaction, surrender, forfeiture, expiry or abandonment" of an asset being a debt chosen in action or any other right. Thus, the recovery of judgment, or rights under a compromise, in relation to a cause of action which was acquired (or deemed to have been acquired) before 20th September 1985 may attract tax. In ascertaining the amount of relevant profit, there is to be deducted, from the consideration, receivable, the "indexed cost base" (if any).

In some instances the cost base of the asset to the plaintiff is likely to be the market value at the time the damage was suffered and that sum would in turn probably equal the damages awarded. Accordingly, no capital gain would arise. However, the cost base of the asset is often likely to be nil, and unless the gain is specifically exempt, the judgment debt (or settlement figure) would be included in the assessable income of the successful plaintiff.

Exemption of damages for personal injuries

Sub-section 160AB(1) contains an important exemption:

'A capital gain shall not be taken to have accrued to a taxpayer by reason of the taxpayer having obtained a sum by way of compensation or damages for any wrong or injury suffered by the taxpayer to his or her person or in his or her profession or vocation and no such wrong or injury, or proceeding instituted or other act done or transaction entered into by the taxpayer in respect of such wrong or injury, shall be taken to have resulted in the taxpayer having incurred a capital loss.'

In the Explanatory Memorandum accompanying the CGT legislation the Treasurer stated that "damages for personal injuries or for libel, slander or defamation and insurance monies under personal accident policies" fall within this exemption of "any wrong or injury suffered by a taxpayer to his or her person or in his or her profession or vocation". Any cause of action not within the exemption is *prima facie* subject to the CGT regime.

It should be noted that sub-section 160ZB(1) specifically excludes the claim for a capital loss in respect of the personal wrong or injury claims specified therein. It is implicit that capital losses may be claimed by taxpayers in respect of other damages or settlement payments. Note, however, that capital losses are not deductible against assessable income generally, but only against assessable capital gains.

Mixed capital/income claims

In revenue cases, the courts have traditionally refused to dissect an "undissected lump sum" which includes both capital and income components (Allsop v. FC of T (1965) 113 CLR 341 and McLaurin v. FC of T (1961) 104 CLR 381, recently applied in FC of T v. Spedley Securities Ltd. 88 ATC 4126).

Thus, taxpayers have traditionally been able to obtain a financial advantage by settling a case for one undissected

lump sum which includes compensation for various heads such as loss of earnings, loss of goodwill and loss of capital assets. Although there may still be an advantage in such a technique as far as revenue items are concerned, it should be noted that Part IIIA of the Act specifically allows for apportionment. Sub-section 160ZD(4) provides:-

“Where any consideration...relates in part only to the disposal of a particular asset, so much of that consideration as may be reasonably attributed to the disposal of the asset shall be taken to relate to the disposal of the asset.”

Counsel should give consideration to assisting the Commissioner of Taxation in “reasonably attributing” a portion of the lump sum settlement figure to the disposal of particular assets.

Family Law Act transfers

Finally, it should be mentioned that Part IIIA specifically provides for roll-over relief from CGT where there is a court sanctioned or court directed transfer of assets between spouses under the Family Law Act. As from 28th January 1988 the roll-over relief is extended to court directed or court sanctioned transfers of assets between a company or trust and one of the spouses to the arrangement. As is often the case concerning income tax amendments in modern times, this extension of the roll-over relief provisions is contained in an announcement made by the Treasurer on 28th January 1988 and will not be embodied in legislation until the draftsman gets back from holidays.

Conclusion

This brief comment should illustrate that there are vast opportunities as well as pitfalls for members of the Bar in relation to the impact of CGT on damages claims. A plaintiff who settles a claim for \$100,000 might be very angry if he finds that the Commissioner of Taxation is entitled to take almost half of that amount. On the other hand a defendant who refuses to settle a claim for \$100,000 might be more than willing to settle a claim for \$175,000 if he can be assured that the full \$175,000 will be a claimable capital loss. In either event, both sides should be quite certain as to the type of asset they are dealing with, because the Commissioner is likely to be resistant to the idea of allowing a capital loss on the payment of an amount by way of compensation or damages if he cannot have the corresponding sum included in the plaintiff's assessable income. □

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Last with the First

"Judge Appointed

Justice Roderick Pitt Meagher QC, has been sworn in as a judge of the NSW Court of Appeal. Justice Meagher was appointed to fill the position left by Justice Michael McHugh, who now sits as a judge of the High Court. Justice Meagher, 56, became a barrister in 1960 and took silk 14 years later."

.....Sydney Morning Herald 10 March 1989.

His Honour was sworn in on 31 January 1989.

The Skeptical View

Skeptics (sorry about the American spelling) are not cynics - necessarily. They are not sarcastic - all the time.

What are Skeptics?

In Australia they are members of the Australian Skeptics, an association inspired by the Committee for the Scientific Investigation of Claims of the Paranormal (CSICOP) in the U.S.A. They deserve closer attention from the Bar.

Surprisingly few lawyers are members. Perhaps the title emphasises science and deters them, but in reality reason and logic - rational argument - are its foundations.

It is quite a respectable organisation. The American body has on its committee eminent persons including Isaac Asimov, Murray Gell-Mann, Stephen Jay Gould, Paul Kurtz, James Randi, Carl Sagan, Dick Smith and many others perhaps not so well-known in Australia.

The NSW Branch of the Australian Skeptics (P.O. Box 575, Manly 2095) has as its president a witty and patient man with an interest in Egyptology, among other things - Barry Williams. What does it do?

It offers a standing reward of \$20,000 (offered by Dick Smith and Phillip Adams, the patrons) to the first paranormal claim proven genuine under controlled tests and not attributable to any other non-psychic cause.

It awards two prizes at its annual conference at Easter (usually in Sydney or - as for 1989 - Canberra):

1. The Bent Spoon Award - for the most outrageous paranormal claim of the year (in 1988 Anne Dankbaar won it for her claimed discovery of the Colossus of Rhodes - complete with bulldozer scrapes. Peter Brock's "energy polariser" won in 1987).
2. The Skeptical Journalism Award - for the best reporting of a paranormal topic (in 1988 the ABC's Investigators won for its piece on a supposed "fuel polariser" which it was said would improve a car's fuel consumption).

Apart from lawyers, members include scientists in all fields, medical practitioners, teachers, journalists and magicians (who duplicate Yuri Geller's spoon-bending with ease). It is consulted regularly by the mass media for comment on current paranormal crazes.

Psychic and/or paranormal claims are made daily: astrology, telepathy, scientology, clairvoyance, channelling, water divining, telekinesis, tarot, ouija, homeopathy, graphology, crystallography, pyramidology and so on. The list is limited only by the imagination of the proponents. The gullible are gulled, the ignorant are parted from their money. The Skeptics struggle mightily to keep the facts before the public mind.

Its activities and interests are fun, intellectually challenging and useful in the field of consumer education and protection. Lawyers would revel in it - hence this article.

For \$15 per annum there are an annual convention, a quarterly magazine (tall tales but true), occasional talks and demonstrations, contact with CSICOP and its Legal and Consumer Protection Subcommittee and a wealth of information and entertainment.

There is no scope in Australia for a Legal Sub-Committee: but first become a member. Write to the address given above or contact me for an application form. Help the Bar broaden its horizons □

N.R. Cowderly Q.C.

**THE HONOURABLE SIR LAURENCE STREET, K.C.M.G.
LIEUTENANT GOVERNOR OF NEW SOUTH WALES**



Dargatzis '82.

On 4 November 1988, the NSW Bar Association gave a dinner in honour of Sir Laurence Street on the occasion of his retirement as Chief Justice of New South Wales.

Mr. Senior's Speech Delivered by R.P. Meagher Q.C.

MR. MEAGHER: Mr. Chairman, the Honourable Mr. Justice Mason, Chief Justice of Australia; The Honourable Mr. Justice Bowen, Chief Justice of the Federal Court; The Honourable Mr. Justice Gleeson, Chief Justice of New South Wales; The Honourable Mr. Justice Fisher, Chief Judge of the Industrial Court; The Honourable Judge Staunton, the Chief Judge of the District Court; The Honourable Mr. Justice Cripps, who is the Chief Viewer of the Parks & Gardens Court; all your other Honours; ladies and gentlemen:

I first met Mr. L.W. Street when I was an articled clerk. On behalf of an unfortunate plaintiff I had to brief the fashionable junior Mr. Ian Sheppard in the District Court. The other side had secured Mr. Street's services. The plaintiff's evidence in chief went as planned. Mr. Street then began cross-examining in a very gentle voice. Within twenty minutes I noticed that he was saying to our client "Everything you said to Mr. Sheppard was false, wasn't it?", and he said "Certainly, Mr. Street". Then Mr. Street said in a quiet voice "You are a fraud, aren't you?", and he said "Certainly, Mr. Street".

Outside the Court, after our humiliation, there was a terrible scene. In those days Mr. Sheppard seemed to suffer from a physical affliction which I can only describe as seeming like having epileptic fits. He went bright purple in the face, his neck swelled like a lizard and he seemed to go into an ungovernable rage. There was a storm before every calm. He went into another of his fits and then said to our client "Why did you tell Mr. Street the opposite of what you told us in conference?", and he received the reply "But Mr. Street is so nice. I didn't want to upset him".

Now, I bet you no client has ever made a similar remark about any other person in this room.

Mr. Street in those days was a very fashionable counsel, the progeny of great lawyers and the progenitor of others to come, a dashing Naval officer, a social lion. He was engaged in all the important cases, from the Petty Sessions Courts to the Privy Council - and usually in all of them simultaneously.

He darted urbanely around the Courts amongst his various cases, petting someone on the head over here, and inserting an elegant stiletto in somebody else's ribs over there; "Fin faux et fanfaron" as Talleyrand once said of Metternich at the Congress of Vienna.

I know that is what Talleyrand said, because Tony Larkins told me, and he was there at the time!

As well as conducting his extensive and fashionable practice Mr. Street also lectured in the Law School in Company Law. They were vintage days because at the same time Mr. A.S. Mason was lecturing in Equity. I can remember Mr. Victor Maxwell in those days taking me to a window on the seventh floor of our building to observe Mr. Mason lecturing across the road in Phillip Street. He said to me "Look at him lecturing in Equity. He looks just like a constipated ostrich. Besides that, he knows nothing about the subject because I beat him at it in the Law School".

But I digress.

At the end of 1964 the student magazine Blackacre

published epitaphs on various lecturers. Mason's was: "He was a sane and practical man", not a very amusing quotation, one would have thought, from Bernard Shaw. Street's epitaph were the lines of Shakespeare:

"The courtier's, soldier's, scholar's eye, tongue, sword,
The expectancy and rose of the fair state,
The glass of fashion and the mould of form "

A more handsome compliment, one would have thought, though perhaps just hinting at a preference for style over content.

But beginning in 1965 there come ten years of Street's undisputed greatness as an Equity Judge, and by "greatness" I simply mean greatness.

First he disposed of an incredible volume of work: twelve complicated reductions of capital in a day, and three not-short injunction applications in a day. That was nothing to him.

Secondly, he was quick. Few judgments were reserved and all work was disposed of with despatch. Thirdly, his reasons for judgment were comprehensible, felicitously expressed and eminently quotable. His reasons for judgment did not resemble the "position papers" now churned out by our Court of Appeal, lengthy ramblings on matters that their Honours deem to be of current social interest - which have no resemblance to the issues which are actually before the Court.

Nor did his Honour favour that judicial technique of writing pioneered and ultimately perfected by Mr. Justice Moffitt, of writing totally verbless sentences.

Fourthly, he had what Sir Robert McGarran said is the greatest possible judicial attribute. I appeared often before him but can hardly remember ever winning a case. Yet I never left his Court feeling any sense of grievance.

Fifthly, his judgments amounted to a significant contribution to equitable learning. This has been recognised overseas as well as in Australia. For example, his judgment in re Dawson on a defaulting trustee's obligation to compensate his beneficiaries is the leading authority on that subject quoted in all the main English textbooks, although not with the percipience with which it is quoted in our local textbooks.

In the 1974 Annual Survey of Commonwealth Law Mr. Hackney of Wadham College who was well known for his dislike of all judgements of all Judges, wrote of Mr. Justice Street's judgment in re Hilder on charitable trust to the aged, "This is a splendid contribution to our jurisprudence. We are shown the workings of the law in action. The choice is made between conflicting lines of authority, on the basis that overtly stated social policy, with relevant public law legislation at the front of the Judge's mind".

And, lastly, by way of example, there is an important decision of his Honour in a case called re Dinari. In that case I persuaded his Honour to hold that the now repealed provisions of the Conveyancing Act, dealing with prohibitions on accumulations of income, had no application to settlements

"His reasons for judgment did not resemble the 'position papers' now churned out by our Court of Appeal."

made by a corporation. That is a proposition which only a common lawyer would regard as less than riveting. I remember it well for two reasons. One is that it is the only case I can ever remember winning before his Honour. The other is when the decision became known Handley, our beloved and saintly President, said - with that degree of tact and delicatessen, which I notice from his recent speeches has not abandoned him - that the only reason that decision was given was because neither counsel nor Judge understood the principles involved.

However, it has been approved in recent English decisions and followed regularly both here and abroad.

Then Sir Laurence became Chief Justice. What exactly he did in that office I am not quite certain, because I was never afforded the opportunity of appearing before him. But I understand that he was a dab hand at drafting interjudicial memoranda, and that he devoted a lot of his time to "administration" - which I gather is a buzz word for that policy which prevents barristers drinking coffee in the corridors outside the Courts.

I understand also that he made newly admitted female members of the Bar feel - I was going to say "at home", but I suppose that depends where they came from.

But one thing he certainly did was to preside over the Court of Criminal Appeal two or three times a week, usually being the Judge who delivered that Court's reasons for judgment. Again one saw the same qualities: quantity of work, speed, elegant immaculate judgments. And he was almost always correct. There have been very few applications for special leave from the judgments of the Court of Criminal Appeal, and such applications are usually refused. In 1987 there were twelve such applications, ten of which were refused. The previous year there were seventeen out of eighteen applications refused, and two years before that ten out of twelve applications were refused. That is a very impressive record.

I have consulted with persons at the Bar who function in that rather grubby area of the law and have been assured by them, even by the caring and sharing prisoners' rights loony left members of the Bar, that Sir Laurence's behaviour in criminal matters was, amongst other things, warm hearted, humane and even compassionate.

In view of the change which has taken place with Chief Justices one must ponder these things very deeply; because one can only appreciate the past if one takes cognisance of the grim realities of the present and the awful possibilities of the future. Charles the Second is dead! And James the Second has ascended the throne. Of Theloneus it was never said that smiling came to him as naturally as flight comes to a porcupine! The physicians never had difficulty in locating his heart. When he was in command no ice age had dawned. In his day the Yeti was not the only person who felt comfortable in Court. No signed portrait of Gleeson hangs, or ever will hang, in Kings Cross on the walls of the Bar Coluzzi.

It is not generally known that Gleeson is, amongst other things, the visitor to a convent of nuns. He descends on these hapless women once a week. He inspects their cells to see they contain no bottles of French perfume or books of Protestant theology. He pokes his finger into their pillows to ensure they are made of kapok instead of down. The terrified holy women huddle in their cloisters, praying for him to go away. That is how he developed an extensive commercial practice.

I am sure that if Sir Laurence had been the visitor they would have had fears of an entirely different kind.

When Gleeson's appointment was announced the inmates of Long Bay rioted and flung themselves on the barbed wire, raising their heads to heaven and crying out "Come back Sir Laurence, all is forgiven".

Ladies and gentlemen, I am inclined to agree with them.

Mr. Junior's Speech delivered by LLOYD Waddy, R.F.D., Q.C. _____

"Please to remember, the 5th of November,
Gun powder, treason and plot "....

Welcome to Parliament House on the eve of the 383rd anniversary of the attempt to blow up Parliament. They couldn't actually let this dining room to any members of Parliament tonight. Don't touch the food...!

John Street, (the son of Francis de Strete, who for five years from 1563-1568 was a member of the House of Commons under Elizabeth I), is best remembered for killing two of the conspirators of the Gunpowder Plot, in 1605. Those killed did not include Guy Fawkes, but Catesby and Percy. As Street killed them both with one shot from his gun this gave rise to the Street family motto:

"Two birds with the one (when) stone(d)"

John's son became mayor of Worcester in 1635, (just prior to that Civil War, when even the King had his head cut off), and he had two sons: Thomas and Laurence.

Thomas Street served in four successive parliaments from 1659 to 1678 until he became a Sergeant-at-Law. He was

appointed Baron of the Exchequer in 1681 (at the age of 56) and Judge of the Court of Common Pleas in 1684. When, in 1686, King James II claimed the power to dispense with the oaths of allegiance and supremacy required by the Test Act, ten judges were consulted of whom only one, Sir Thomas Street, (as he had become), found against the King's claim. To popular acclaim he was dubbed "faithful amongst the faithless" and in truth this has become the family motto since "fidelis inter perfidos"

or, more latterly,

"Why am I the only one in step?"

Needless to say it was Sir Thomas's younger brother and our Guest of Honour's namesake, Laurence, who in the time of James II bought the family seat of Birtley in Guildford, Surrey. A branch of the family remained there for a couple of centuries producing, eventually, the famed architect George Edmund Street, who designed the Law Courts in London and is buried in Westminster Abbey. (At least no one has ever claimed to be the architect of the present Supreme Court of NSW or he could be buried too.) I could digress on Sir

Laurence's contribution to Court design, the "Great Glass Wall" controversy and battle - but I shall not.

Any person who has stopped to read a Supreme Court Writ will know the names Laurence Lillingston Whistler Street. Many of us have known the man.

"Street" - The Paternal Heritage

How did the Streets happen to be in Australia at all? Was it "assisted passage" or worse still, "remittance"?

From Laurence the Squire of Birtley in 1690, four generations of Street Squires lived on there until John Street of Birtley, aged 22, married, in 1780, Lucy Duncombe then 18, the daughter of the local rector and had by her four sons and one daughter. Then he procured a Bill of Divorce in the British Parliament and married again. On the second round he had one son, Henry and six daughters. (He died of exhaustion, but with his spurs on.) (But not, be it noted, in a motel!)

As the second wife bailed the family out financially, her son Henry got Birtley and the Colony of New South Wales got John Street, eldest son of his first marriage. On his voyage to Australia he met his future bride, as she sailed to take up a position as a governess in Tasmania.

The end result of this shipboard romance was that in 1825 John the Australian pioneer married Maria Wood Rendell. They settled near Bathurst and called the property "Woodlands" after her mother's family. Street had in fact married into a famous English family. Maria was the niece of Sir Matthew Wood, 1st Baronet and Lord Mayor of London, a cousin of the Lord Chancellor William Page Wood (Baron Hatherley), (of whom we were reminded on Tuesday that it was said, "he was a cloying bundle of virtues with not one redeeming vice") and a first cousin once removed of Field Marshal Sir Evelyn Wood VC.

But there was also a heritage of a different kind - there was another cousin once removed: Annie Besant. She was famous (or infamous) as a 19th century campaigner for birth control and the limitation of the size of families and she was world famous for her advocacy of theosophy (see ex parte Collins (1888) NSWLR 497; for her prosecutions for obscenity see R v. Bradlaugh & Besant 2 QBD 569; 3 QBD 607; for the denial to her of custody of her child for these reasons (inter alia) see In Re Besant 11 Ch D 508).

"Whistler"

We have now established where the "Street" came from, but where does the "Whistler" come from? Well, our Guest of Honour's grandfather, Sir Philip, was the first and only one of that generation to become "Whistler Street", and each generation of his branch has passed that distinctive name on to each male child. But why was Sir Philip called Whistler?

His stepmother was Anna Smith - the granddaughter of the Rev William Whistler - but young Phil was aged 20 when he acquired her. The name seems to have been given to him to honour his father's brother-in-law, Whistler Smith, so although there is a connection by marriage it is a given name only. How many Supreme Court writs have issued in that name of Whistler which commemorates that family friendship?

"Lillingston"

But how many of you know aught of our Guest of Honour's maternal heritage? This is where the "Lillingston" comes in!

When "young Ken", the middle Chief Justice married Jessie Lillingston, it sounded like more of the same. Jessie was a girl who through both her paternal grandparents could trace her lineage to King Edward III and Philippa of Hainault, and through King Edward III back to William the Conqueror to Alfred the Great, and even to Ceawlin, (King of Wessex from AD 560-596). The line also takes in Charlemagne (782-814). With your permission I shall skip the intervening copulations.

Of more recent reference, Jessie was a great grand-niece of William Wilberforce, known for his work in the abolition of slavery and of Sir George Grey, (later Viscount Grey), who, as British Foreign Secretary almost single handedly caused World War I on some views of the matter.

Jessie's mother was born Mabel Ogilvie of Yulgilbar Castle, a hugh Moorish-style edifice built in the mid 19th century on the banks of the Clarence River in northern New South Wales. In this castle stood a ship's washstand that Lord Nelson had given to the pioneer William Ogilvie, R.N., who called his first property "Merton" after Nelson's home in Surrey.

Ogilvie had married into the great landed family of de Burgh of Ireland. Jessie in fact then came from families that could out-Street even the Streets.

Jessie's career repays study.

Jessie Mary Grey Lillingston was born in India, educated at Wycombe Abbey in England and in 1912 graduated in Arts at Sydney University.

Sir Kenneth listed his wife's achievements as:

- . founder and first honorary secretary of the Sydney University Women's Sports Association (1910);
- . officer of the New York Probation Association (1915);
- . Hon. Secretary of NSW Racial Hygiene Association (1916-17);
- . Hon. Secretary of National Council of Women (1919);
- . member of Women's College Council (from 1920);
- . Founder of House Service Company and Home Training Institute (1923);
- . President of Feminist Club (1928);
- . Founder and first President of the United Associations (of feminist activists) (1929);
- . A foundation member and Vice President of The League of Nations Union.

(See "Annals of the Street Family of Birtley", by Kenneth Whistler Street, Sydney 1941).

Jessie and Ken had four children:- Belinda (1918); Philipa (1919); Roger (1921) and Laurence Lillingston Whistler Street, born 3 July 1926.

"Laurence"

He was named "Laurence" after his uncle Laurence who had been killed on Gallipoli on 18th May 1915 when the Turks

attacked McLaurin's Hill.

Sonow we have covered the "Laurence", the "Lillingston", the "Whistler" and the "Street".

Maternal Heritage

I recommend Jessie Street's autobiography ("Truth or Repose", Sydney, 1966) to all interested in Australian History. Jessie adds the detail to her life - and the spice!

Here is a woman who vowed never to let the fact that she was a woman interfere with anything she wanted to do. She claimed that she fulfilled that pledge to herself (ibid p.15).

Here is a woman who writes of the power of prayer and who says

"there was hardly a night when I did not read at least a few verses of the gospels before going to sleep" (ibid p. 15);

Again she wrote:

"The truth shall set you free," adding, "even it is does make you unpopular" (ibid p.36).

Her basic motto from childhood was "God helps those who help themselves - and God help those who don't". (ibid p.59).

Her experiences with prostitutes at Waverley House in New York, bathing and de-lousing the new arrivals, etc., (ibid p.64) led her to a deep anger about the debasement of women by men. As a result she set up the NSW Racial Hygiene Association (ibid p.79).

It is sobering to read her account of the disabilities under which women then laboured. Here was a woman who in London in 1911 actually marched with the Pankhursts to secure the vote for women (ibid p.49). Another fight she started in 1931 was to enable women to sit on juries (ibid. p.125).

During the Depression, women were fired before the men and such was their deprivation and the insensitivity of men to their plight, that it was during the Depression Jessie first connected feminism with politics (ibid p.114). Despite her campaigns, as late as 1947, women teachers who married were still dismissed under an Act that had been introduced in 1932 (ibid p.126-7).

In 1936, Jessie led the Council of the United Associations in a campaign for child endowment and by 1941 she had such a Bill, with the money to be paid to the mothers, in place (ibid p.128).

Jessie's "Equal Pay for Equal Work" campaign led to an increase in women's wages from 54% to 75% of men's wages. It was only after her death that full equality was gained as late as 1975 (Peter Sekules: "Jessie Street", Univ Q. Press 1978, p.81).

Greater success in her lifetime was achieved by her campaign for Aboriginal rights, culminating in the great referendum of 1967 which for the first time gave full citizenship to aboriginals (ibid p.163). (I might interpolate that many of us still wait anxiously to see full Aboriginal welfare successfully implemented as a matter of high priority.)

There was also Jessie's hatred of Nazism and the problem of her infatuation with Russia. By the latter she excited extreme reactions in Australia. Married to the Chief Justice and Lieutenant Governor of New South Wales, her position

was difficult. So was his. Her forays into politics as a Labor candidate, (and a female one at that!), her enthusiasm for the peace movement and her nomination by the Labor Party to accompany Dr. H.V. Evatt to the setting up of the United Nations, all served to attract scorn upon her in this State, even within her own party.

Jessie publicly proclaimed that in the USSR she found women had achieved the status she had worked for in the West (ibid p. 51). The charitable collection of "Sheepskins for Russia", an essential war effort to help a gallant ally, turned sour when the Iron Curtain descended and Australia and USSR were locked in a "cold" war. Jessie remained president of the Australia-Soviet Friendship Society through the Korean war, the referendum to alter the Constitution to ban the Communist Party and the Petrov enquiry, indeed, until her death in 1970. (ibid p.69). She was no waverer or fair weather sailor.

Such then is the paternal and maternal heritage with which our guest of honour came to his high office.

If I were to summarise that heritage I would highlight: the family tradition of public service especially on the bench; service in the armed forces; landed interests; a good aim when firing at traitors and a true sense of economy of shot; courage in unpopular undertakings; being found faithful amongst the faithless; a tendency for multitudinous and vociferous offspring; a reforming zeal to encourage women in the legal profession; an obsession with physical fitness; a compassion for the poor, dispossessed and minorities in general.

That completes my introduction!

Let us now explore with what success "Lorenzo the Magnificent" has acquitted himself of that heritage. Some of this will be anecdotal, but I imagine you may be ready for some anecdotes by now!

Of Laurence Lillingston Whistler Street it can truly be said "One man plays many parts."

The Bench

If one allows for 75 years of judicial service from the past three generations of Streets, spare a thought for their potential wealth had they chosen instead to pursue their own advancements.

In our Guest of Honour's instance, take the financial sacrifice of the leading Equity and Commercial junior with four young children spending only two years as a silk and then 25 years on a judge's salary. Take the annual differential you choose and multiply it by 25 for him and perhaps 75 (with a discount?!) for the family.

The Navy

Sir Laurence has had three careers in the Navy.

Firstly he joined up in World War II straight from Cranbrook at the age of 17 and served as an ordinary seaman during 1943 to 44.

He rose to be a midshipman during 1944-45, and served as sub-lieutenant from 1945 to 1947. He served in Corvettes, especially "the Ipswich" and is now patron of the Corvette Association.

His second naval career I shall come back to.

His third naval career took him from 1964 to 1965 as a Commander in the RANR and Senior Officer of the RAN Reserve Legal Branch. From 1971 to 1974 he sat as President of Court Martial Appeal Tribunal.

I have witnessed his performance of some of these duties, and I must say that becoming as full-bottomed wigs and red dresses with bunny fur may be, our guest of honour wears the Naval uniform as though he were William Ogilvie himself on Nelson's flagship.

His presence in naval uniform was such that he only had to enter a mess to stop the conversation.

His second naval career I stepped over: it is NOT public knowledge. It is high time it was.

Let me say at once that the past President of the Court Martial Appeals Tribunal has not been guilty of the service crime of double enlistment nor of impersonating an officer. But he has come very close to it.

You see, when he was at naval headquarters just after the war he had three terrible temptations. He could order up staff cars; he could authorise petrol supplies; and he could send the cars wherever he wanted. If you look in the old movement orders, you will see an inordinate number of cars needed after hours to transport Dirk McClaggan (alias Derek McLaren) and Lance Steele (alias the little naval Whistler) and copious quantities of naval amber liquid refreshment and sundry passengers of that gender now known as "persons".

It was not, shall we say, the same interest in matters feminine, for which his mother Jessie was famed.

The Land

Now I'm back to Jessie, let me tell you that even in her seventies she could crack a stock whip with either hand. It was at Golden Valley, the "Judge-from-Snowy-River's" rural retreat, that she taught the grandchildren that trick. So the next time you wonder why I always kiss Sylvia, or her husband Arthur is so quiet, it is because we all know who cracks the whips in the Street family.

Speaking of Lady Street, it is at Golden Valley, that she and Sir Laurence have indulged their great love for Quarter Horses. Breeding from the stallion "Doctor", "Bronco-Buster-Street" broke in the yearlings himself - giving rise to Sir William Morrow's plea to Susie when Sir Laurence was appointed Chief Justice -

"Do me a favour; persuade him never to break in another horse!"

She did. He didn't; but only after one had bucked and broken his jaw in several places. It was a judicial season that gave new meaning to the stock judgement:-

"I concur, but can add nothing."

Courage and Faithfulness

A strong sense of duty and a rear-guard action to protect the independence of his court from diverse attacks on its integrity, has been the lot of our former Chief Justice. Tonight is not the night to detail the issues or the politics. But be it noted that Sir Laurence has never shirked his duty, no matter how unpopular that may have made him in State or Legal affairs. Avoiding so far as possible confrontation, the Street way has been by conciliation aided by the ability to see the difference between the inevitable and the avoidable. As was said of Sir Thomas Street in 1685 -

"in him, at all times, and on every occasion, his country found a strenuous asserter of her civil and religious rights."

Marriage and Children

Sir Laurence is a dynast. Not only has he inherited great traditions, he has augmented them by also marrying well - so well, one might say, that with Susie he married well above his station. I have watched the children grow with great interest: Ken, who can buy and sell them all with his degree in management; my little "brother", Sylvia and her husband Emmett QC; Sandy - yet another Street on the Seventh Floor, and Sarah, now a solicitor.

There are six grandchildren. Laurence once told me the secret of raising his children:

"They have a mother and a father - but only one parent."

My wife and I learned from him never to let our children play one parent off against the other.



Kindness

Part of my Air Force duties have included honorary service at Government House. There I knew Sir Kenneth Street, and later Sir Laurence when he was administering the Government. His hospitality is legendary. I should like to thank him publicly tonight for his great kindness when the Lord Chancellor and Lady Hailsham were my guests here for the Menzies Oration, and Lady Hailsham was so tragically killed. The understanding and courtesy of the Lieutenant Governor was a great consolation to Lord Hailsham, and an immense support to my wife and myself. Such kindness of Sir Laurence, I must say, is innate. It is under real stress the true man appears and in a crisis one finds out the true nature of those on whom one can rely.

Feminism

Sir Laurence has always encouraged the entry of women into the ranks of the profession, and made a point of seeking

to include them in all functions and made sure he has had a word of encouragement for each. In such a practical way he has smoothed the way for many not only with gallantry but lending the prestige of his office as encouragement to them.

Physical Fitness

I wonder if you realise that Sir Laurence has a passion for exercise. For years he has been a 5BX fanatic, keeping to Canadian air crew standards. Only lately has he relaxed into aerobics. His physical fitness is only a little short of Roddy Meagher's or my own.

Compassion for Minorities

I spoke earlier of his interest in protecting the rights of minorities. It is fitting that his last judgement should have been to alleviate some of the great distress of a much maligned group - the transsexuals. Some of you who wish to use the conveniences here (be careful they are all bugged) should consider Sir Laurence's last judicial words delivered on Monday in Regina v. Lee Harris. Agreeing with Matthews J. he said,

"It is not easy to perceive the legitimate interest of the State in probing behind the physical attributes of an individual, who is to all intents and purposes a woman, with a view to having her clinically classified as a male person for the purpose of fixing her with guilt under a section such as s81A. It is often said that the law takes people as it finds them. On the night of this alleged offence it found Lee Harris with the physical attributes of a woman. I am satisfied that this precludes it being held that she was a 'male person'. Is it really to be said that he should have used the men's change room? Or is the law so lacking in responsiveness to current community perceptions and to physical reality that he is to be denied the use of either change room?"

(R. v. Harris and McGuines, C.C.A. 31 October 1988 unreported.)

It is fitting too, that his final judgement should have been delivered in the unspectacular but compassionate jurisdiction of the Court of Criminal Appeal where he has ever tempered justice with mercy and human understanding.

The Man Himself

Sir William of Wykham is often quoted for his aphorism "Manners makyth man."

Let us then spend a few concluding moments contemplating what manner of man Sir Laurence is.

Firstly let me share with you an incident I am sure is forgotten by all but myself.

When I was a law clerk articled to John Westgarth, I was sent to deliver two briefs. One was to the old Selborne Chambers, and I entered the chambers of a junior, stated my business, heard a grunt from a man who never stirred, and left humiliated and somewhat bemused. He is a prominent silk today, and possibly identifiable by that description, possibly not!

The other brief was to be delivered to L.W. Street.

The difference in manner was electrifying. The courtesy, the charm, the level of engagement were all exceptional and so were the distractions, the telephone calls, the negotiations, the munched sandwiches.

"Do come in. I won't be a minute." (Bite, swallow.)

"Excuse me." ("Hello, no we won't settle for \$100,000.")

"What can I do for you?" "Excuse me." "I won't be long." "Oh, a brief. Thank you so much. Here, let me show you to the lift."

And he did. All the way around the corridor to the lift on the 7th floor.

"Perhaps you'll excuse me now" he said, "I'm a little pressed...."

Since that lesson in courtesy under stress, I have always shown everyone to the lift myself. I imagine that Sir Laurence little thought that an anonymous courtesy would boomerang and return on a night like tonight, some twenty five years later.

Sometimes his courtesy to me was not always so welcome. I once had a case in Equity. (Don't laugh!) It went, like Bleak House, from mention to mention, four counsel for eight months. Eventually Street J. (as he then was) said in that crowded courtroom of his in Mena House

"What day suits you, Mr. Waddy?"

I glowed!

It was to be short-lived. Turning to the other counsel, he said:

"Gentlemen, I intend to fix this case to suit Mr. Waddy. All four counsel keep coming here and this is unsatisfactory for you all but particularly for Mr. Waddy. You all have other work here. This is Mr. Waddy's only case."

It was certainly my last case in Equity!

A vision now of Sir Laurence at home playing with the children as he dressed. Sandy was two and the proud custodian of the neighbour's pet cat whilst the neighbours were away on holiday.

Sandy hid Laurence's shoe behind the door:

"All gone shoe."

It seemed to be a happy game so, entering into the spirit of it Laurence hid his own socks

"All gone socks" he laughed.

Not to be outdone, Sandy raced to the window - it was the second storey - and grabbing the cat, put it out the window. He beamed to his father

"All gone pussy!"

Whatever you do tonight, do not ask Susie what the Vet's bill was after six weeks feline reconstructive surgery.

Can you envisage our Guest of Honour - as a pianist? He managed to progress as a pianist to gain Honours in Grade 1. Jessie said he could have been a concert pianist. But what mother doesn't say that of her son?

Can you see the Street family travelling back at night in the car from Golden Valley - the children safely asleep in the back? All, that is except Sylvia, who asked her Dad to explain all about the birds and the bees. (Typical Sylvia, always go straight to the leading authority!) After a detailed explanation the dutiful father added

"Always feel completely free to discuss this in the family, but it is not something we mention outside!"

"Thanks, Dad," says she, "I won't say a word."

And then Ken's voice from the back of the car:

"You won't have to worry about me, Dad, I haven't heard a word."

Other Careers

I won't tell you about Sir Laurence's nine years as Chairman of the Cranbrook School Council, nor of his work on the Company Auditors Board and the Public Accounting Registration Board or the many, many things he's done in the law outside his judicial office. Suffice to say there has never been a dull moment.

Conclusion

With what then do we end? The regal lineage, the Street dynasty, the reforming zeal of Jessie, the subordination of

personal gain to public service? Some may so desire. They would not be in error.

I desire to end where I first met him, as a nameless article clerk. The true measure of greatness, I venture to suggest, is within and not without. Achievements are salutary, even admirable, but for my measure I would turn to Wordsworth and his Lines Written Above Tintern Abbey -

"...Those timeless, unremembered acts,
Of kindness and of love".

No one in this room could number the courtesies in this kind and courtly life. And in a family to which greatness is no stranger, if a family roll is made of those who have loved their fellow men, then, I venture to suggest, that like the name of Abou Ben Adam, on that list, Sir Laurence, your name will lead all the rest.

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Reply by Sir Laurence Street K.C.M.G.

SIR LAURENCE: It will be in order now for those members of the profession who have suffered innumerable exposures to this exhortation to leave if you so wish and thereby escape being bored to tears having to sit through it again.

In thus recalling to you at the outset of my remarks this evening the customary opening of the admission ceremonies address, I should make a confession. It was proposed that Tim Duchesne, instead of manipulating as he has with such obvious dedication to the task in hand the electronic wizardry underneath this lectern, which I suspect is likely to blow up at any moment, should bring over to these proceedings, at a carefully contrived pre-arranged time whilst I was speaking, the baby which customarily resides in the Prothonotary's Office. Unfortunately the Office was found to be locked. It proved impossible to get hold of the baby. Profound though is my respect for the fecundity of the members of the New South Wales Bar, I did not anticipate anybody could produce a baby on demand so as to be available immediately. This could be beyond even the members of my own family, who are not lacking in capacity or track record in that regard.

I was grateful to Ken Handley when he told me that he had asked Meagher and Waddy to speak this evening. I thought I wouldn't need to come with anything prepared because I would have my time taken up defending myself. As it happens, I am greatly moved by the kindness and generosity of the previous speakers. I am inclined to think it is my successor who needs a defence more than I do. But I don't know that he would trust me to put forward a defence on his

behalf. I appear before you accordingly as a litigant in person, responding to Roddy and Lloyd, but at the same time somewhat overwhelmed by the warmth of what they have said.

I may say that I have a healthy respect for litigants in person. One of my early ventures at the Bar involved appearing for David Jones in the District Court against a defendant in person to try to recover an unpaid balance of account - a notoriously difficult exercise. I finished up being non-suited by that defendant in person - a forensic experience I was never allowed to forget on the seventh floor. But if, as a litigant in person before you this evening at first instance, I suffer an adverse judgement, I shall repair with confidence to my erstwhile colleagues and their new Chief Justice in the Court of Appeal reassured by anticipation that I shall there receive the very cosy reception that that Court has become renowned for extending to all litigants before it and which I am indeed glad to see from a recent issue of the Bar News will be perpetuated under my successor. McColl's footnote will, I am sure, be omitted from later editions as familiarity gives way to servility.

I suppose I should attempt to lay one or two rumours about the reason for my early retirement. In the first place I am not going back to the Bar. Sir Anthony Mason was kind enough to reassure me that the High Court had now removed what would otherwise have undoubtedly been an impediment confronting me: in consequence of the recent High Court decision members of the Bar are not liable for negligence. I could accordingly have repaired back to Phillip Street with

some reassurance of immunity from negligence. But, as we all know, there is no such thing as a negligent barrister.

There are, of course, degrees of competence. They vary very much amongst the ranks of the Bar but, when a question of competence arises, the members of the Bar have a significant array of fall-back positions. When a case has been lost the first fall-back position is to blame the Judge and reflect on his competence. The next fall-back position is to blame the incompetent client. The next fall-back is to blame an incompetent witness. One can then move on through to the solicitor, although that needs to be handled with some care lest word gets back to the solicitor that he or she has been blamed for losing the case; when that happens one has to telephone the solicitor and firmly identify opposing counsel as the source of such a scurrilous suggestion. Finally, the ultimate fall-back position is to reflect upon the competence of either one's leader or junior, as the case may be according to your rank in the profession. But whatever the particular excuse may be it is axiomatic that no member of the Bar would countenance for a moment any thought that his or her competence is questionable. It is really very similar to suggestions of unethical behaviour - the classic definition of unethical behaviour is that it is the conduct of one's opponent.

I was always intrigued at the Bar when hearing an account by counsel of a recent case in which he or she had appeared. You would think they were talking about two quite different cases. Each extolled the magnificent heights of forensic skill that he or she had brought to bear - the witticisms, the discomfiture of witness and Judge alike. Opposing counsel had exactly the same story to tell and it was not remotely recognisable as the same case. I became used to this - as I am sure everybody at the Bar does; indeed, I was not backward in participating in these self congratulatory exercises.

I discovered when I went on the Bench that there is yet a third dimension to every case - the Judge's version of it. A Judge's account of a case that he or she has heard utterly surpasses the recollection of either of the barristers. It invariably commences by recalling incredible deficiencies and blunders of advocacy; it then moves to its principal theme - the brilliance and keenness of the Judge's perception, the witticisms perpetrated upon unsuspecting counsel, the efficiency and expedition brought to bear in deciding the case. Invariably it reflects great personal credit on the Judge who tells the story and utter discredit on members of the Bar. There is also, dare I say it, the subtle innuendo that other Judges would not have performed nearly so well.

However, to return to my subject, notwithstanding immunity from negligence, I can give an unqualified negation of any rumour that I contemplate returning to the Bar.

Sir Anthony was unkind enough, however, to add another possible hypothesis in relation to my retirement. He said he had heard a rumour that one of the causative elements in my going was that the High Court had held that journalists had to disclose the source of their information. This, he said, would significantly hamper me in going about my daily affairs.

The third rumour has nothing to do with me but I think I should mention it, nevertheless. The rumour is that the current plague of bogong moths is due to Meagher having done something quite unprecedented: he let a cleaner into his chambers. The cleaner inadvisedly moved his sofa, and the

moths emerged in their hordes. The rumour, I should say, is not proved. The entomologist called in to investigate it has not been able to identify any positive link between the moths that are pervading the Sydney scene and Meagher's chambers. They have found one or two other odd species, I understand, in his chambers in the course of their researches.

I myself don't regard the rumour as proven, although there is, I must admit, some inherent probability about it. I remember, however, two principles of the criminal law that I have to administer to myself in evaluating this rumour. The first is that one does not find a fact upon the ground of a mere propensity on the part of the person about whom one is deliberating. So I must necessarily place aside Meagher's propensities in considering the source of the bogong moths.

In the second place, in the criminal law we do not permit any element of assumption of guilt by association. There again I felt it was unfair to Meagher to associate him with bogong moths as a basis for concluding they came from the sofa in his chambers.

But the rumour, such as it is, will, I am sure, now go forth and spread very widely, like the moths have themselves, and I hope, Roddy, that I have not embarrassed you by letting that little secret out tonight.

A positive reason why I am going - and this, I think, comes as no surprise to anybody - is that we are on the eve of computerisation. I happen to share with my brother Yeldham an awareness of utter inadequacy to cope with computerisation. I have read about it a lot. I have thought about it a lot. I have been the fortunate guest on a number of occasions at the home of David and Annabel Bennett and have seen all of the gadgetry which pervades that home, including the computerised systems that he has installed there. But when I come face to face with the computerisation of his magnificent cellar of Grange Hermitage which was all entered down on a computer I felt that some of the magic had gone out of life; I prefer a sip or even a gulp to a byte. I felt that I should go into my retirement before the time arrived when I would have to accept the necessity of having to acquire, I think it is called, a software package - even worse to contemplate in the evening of one's life the advent of a floppy disc.

I did receive some comfort from a letter that was sent to me from an anonymous source in relation to my impending retirement. The letter struck a responsive chord with me and likewise with some of my colleagues. I in fact have referred to it on an earlier occasion such as this. I think it might bear my reading it again. It came from the address of a cleric, whose name I shall not cite, a member of a religious order, which again I shall not quote. The letter reads:

"Dear Sir,

Perhaps you have heard of me and my world wide campaign in the cause of temperance. Annually for the past four years I have toured extensively delivering a series of lectures on the evils of drinking and on these tours I have been accompanied until now by my friend and assistant, Clyde Dinson.

Clyde, a man of good background and family, was a pathetic example of a life ruined by excessive indulgence in whisky and women. Clyde would appear with me at the lectures and sit on the platform, drunk, wheezing and staring

at the audience through bleary and bloodshot eyes, sweating profusely, making obscene gestures at the ladies, while I would point him out as an example of what overindulgence can do to a person.

Late last year, unfortunately, Clyde died. A mutual friend has now given me your name as you are retiring from your present position and I wonder if you would be available to take Clyde's place in my 1990 tour of the British Isles?"

I was able, by some deductive skill, to be able to identify the author - I should say authoress - and she has suffered due retribution for originating that letter. She is a member of the personal staff of one of my ex-colleagues on the Bench. She had at one stage been my Secretary but she has plainly been debased by her present employment.

Let me turn briefly to my post-retirement plans.

I don't intend to follow the example which is attributed to a retired elderly clerical gentleman who decided that he would spend his retirement visiting the sick. His first such visit was made to a hospital where he was shown into an intensive care ward by a very sympathetic sister in charge, who said "Look, there is a poor Chinese gentleman over there who has not had any family come to see him. We have a Chinese interpreter but the interpreter has no personal links with him. Perhaps you could go over and try to comfort him".

The cleric was ushered over to a bed where there was a Chinaman lying with a tube down his throat, bristling with other tubes and all the gadgetry that hospitals impose upon people when they are in intensive care. The cleric was much impressed by the obvious state of debility of this unfortunate Chinaman. So he drew close and lent over and sought to establish some form of communication with him. It was, of course, quite impossible as the man had a tube down his throat and apparently did not seem to be able to understand English.

Whilst the cleric was there murmuring sympathetic sounds to him, this patient began to exhibit some signs of rapid deterioration. The cleric was much alarmed at this and concluded that the man's end was plainly at hand. In accordance with the best traditions of his profession, he commenced to administer the last rites to him. The man was gesturing with his hand and the cleric realised that he wanted to try to leave some last word that the cleric believed would be a confession. So he put a pencil in his hand and guided it to a piece of paper. The Chinaman scribbled some Chinese characters which were, of course, quite meaningless to the cleric. He then resumed administering the last rites to this man who was plainly about to depart this life and, sure enough, a few moments after he had received absolution he gasped his last and expired.

By that time the Chinese interpreter had come on the scene and was shown proudly by the cleric this piece of paper that the cleric was sure was a confession. The interpreter read it out. So far from being a confession, what the Chinaman had written was: "You are standing on my oxygen tube. For God's sake, get off."

Ladies and gentlemen, I am not going to undertake visitations to the sick.

I see in the menu tonight that I have been identified as the Lieutenant-Governor, an office that I shall be retaining only for a brief period, at the request of the Premier, until the middle

of next year when I shall hand it over to Murray Gleeson.

I have had a few chancy adventures at Government House. I am sure this particular one may strike a responsive chord with Sir John. I found myself on one occasion having to officiate at an investiture. At an investiture the recipients come in with a little hook pinned on their clothing upon which you can hang the medal. If the hook is properly affixed you simply hang the medal on it and shake hands, with appropriate words of congratulation.

A woman came down the aisle, her name having been called, and I could see as she came near that the hook was not properly affixed: it was obviously going to fall out as soon as I attempted to hang the medal on it. I deliberated in the split second that I had whilst she advanced upon me as to whether I should attempt to refix the hook from the outside and risk sticking it into her with the prospect of an unseemly startled protest from her, or whether I should venture a hand inside her blouse with a view to enabling me to fix the hook more safely and more firmly. The latter course obviously had some undesirable ambiguities about it. Ultimately when she came up I weakly placed the medal in her hand and wished her well.

I was recounting this particular eventuality to a colleague from another State who said that he had had exactly the same thing happen. He, however, had opted for putting his hand in the recipient's garment and restoring the pin to stability. Unfortunately, however, he happened to be wearing gloves at the time and he pinned it through the garment on to his glove, a miscarriage which became apparent to all when he attempted to withdraw his hand.

Such are the vicissitudes that can beset one in Vice-Regal office. I am sure that Murray Gleeson will, when the time comes, be more than equal to them.

The evening is to me one which has very great personal significance. I have always valued my links with the Bar. As was mentioned the other day, out of 153 Judges in this Court since 1824, I have served as a judicial colleague with 92. Most of those 92 had been colleagues of mine at the Bar and it has been my experience that, one and all, we look back with happy nostalgia to our days of fellowship at the Bar. I myself was particularly appreciative of the help of my erstwhile fellow barristers when I first joined the Bench. I found myself rostered to do three months of undefended divorce before moving into Equity. It was something of a culture shock to me. I had not actually ventured inside an undefended divorce court for some years. I lived in constant horror that I might have to refuse an undefended divorce. Happily, with the unfailing help of the Bar, I got through my first three months without having to do that.

There has been some mention made of the independence of the Judiciary and reference in conversation to the "glass doors incident". I shall yet again take the opportunity to identify that particular issue as being part of what I conceive to be the necessary protection of the independence of the Judiciary. When we moved into our new building in neighbourly relations with the Federal Court, it turned out that the Commonwealth Police regarded it as part of their duties to police the whole of the ground floor of the Supreme Court Building as well as the Federal Courts' lobby. Now, I happen to have a firm conviction that access to the Supreme Court should be utterly unhindered by anybody at all, let alone by

uniformed policemen and let alone again by uniformed Commonwealth policemen. I found it wholly unacceptable to contemplate that there could be any obstruction of this nature to free access to the Supreme Court.

The Commonwealth Police, however, were adamant that, in the interests of security, they were going to patrol throughout the whole of the ground floor. So I met that by closing the doors and putting a guard on them. They remained closed for some six weeks. There was no formal protest or claim of right from the Commonwealth and the closure was plainly inconvenient to everyone. I accordingly removed the guard. The doors were re-opened and no Commonwealth Police officer on patrol duty has ever dared to put a foot into the Supreme Court lobby since.

I was very grateful for the support of the Bar Council at the time when that issue arose. It was generally misunderstood as nothing more than an exercise of narrow-minded State territoriality. In fact there was a deep principle of the independence of the Judiciary from any interference with access to their courts that underlay the action that was taken. The Bar Council understood the significance of the issue, as did the Council of the Law Society. Both professional bodies lent their support to what was an unpopular action on my part but one, nevertheless, for which not only do I make no apology but which I would do again if anyone sought to interfere with free access to our Court through our lobby.

I have always been privileged to share a very happy relationship with the Bar. I believe that this is essential for the proper discharge of the important responsibilities that we all bear. I am particularly delighted that my successor is an ex-President of the Bar. Another of his exes (I do not use the word in a matrimonial sense) is that he is an ex-reader of mine in my chambers. In fact I may as well admit now that that is really how I got to take silk. I rode in on the shoulders of a number of incredibly competent readers. I had Murray Gleeson; I had Ken Handley; I had Bill Priestley; and there were others, too, with whom I cherish my past links. I can remember that, as each one came near the end and I had grown utterly dependent upon him, it became essential that I should drum up another of comparable quality to take his place. Had I failed to achieve this I am sure my practice would have perished. I managed to keep it alive for just long enough until I was able on the strength of their combined support to take silk. Thereafter I moved on from dependence on readers to dependence on juniors.

Coming back, however, to my successor, I should like with warm sincerity to express my personal delight at the awareness that Murray Gleeson is to fill the great office that I am relinquishing. This augurs well for the future of the Court and it augurs well for the strength of the relationship between the Court and the Bar.

There are, of course, problems ahead. There is the problem of the personal injury aspect of the work of the Bar. This prompts me to recount the anecdote of the drover who was on horseback, with his dog in attendance, droving a cow along a country road. A car came sweeping around the corner, ran into the cow, ran over the dog, knocked the horse over and rendered the drover unconscious. The drover was quite seriously injured and in due course he brought a personal injuries claim. In the course of his evidence he was being

cross-examined about the account of the accident he had given to the policeman who came on the scene. He was asked, "Didn't you tell the police that there was nothing wrong with you at all?" He said "Yes, I did". And counsel, being an incautious cross-examiner, said "Why did you say that?" "Well," the drover replied, "when this accident happened I was knocked unconscious. When I came to there was a police car there, with a big country police sergeant with a revolver in his hand. I saw him go over to the cow. He discovered that the cow was badly injured, so he shot it. He then looked at the horse and saw that it, too, was badly injured, so he shot it also. The dog was already dead. Then he came over to me and he said "And how are you?" "Oh", I said, "I'm fine. Nothing wrong at all. I never felt better in my life". Yet another example, perhaps, of the risks of imprudent cross-examination.

Well, now, ladies and gentlemen, I have perhaps detained you unduly long in these remarks. I venture to tell just once again a story which is fresh to my mind, because I have told it a couple of times recently, about a view to an outback construction site that I went on with a senior silk many years ago. We were housed in a twin bunk room for the night. It turned out that my leader was a very heavy snorer and about half past ten he was snoring away hard. So I clapped my hands to wake him up. This succeeded. He woke up and turned over and all was peace for a brief time. Half an hour later he was at it again. I clapped once more and it worked again. This sequence went on at intervals throughout the night until in the end about 5 a.m. I was utterly distraught. I had had no sleep. My leader was constantly reverting to snoring and I was constantly clapping to wake him up. So, at about 5 a.m., I said "This is appalling. I have got to wake you up every half hour. You may not know it, but you snore in your sleep". He came back at me aggressively: "I snore in my sleep!" he said, "That's fine, coming from you. I suppose you don't realise you clap in your sleep!"

Mr. President, I am very grateful to you for having arranged this dinner for me, and to the Attorney for having arranged such a fine venue for it. It has afforded me the opportunity of being able to join with so many members of the Bar in this farewell dinner.

I am most grateful to Roddy Meagher and to Lloyd Waddy. Lloyd has obviously done a considerable amount of meticulous historical research. Roddy Meagher's trenchant comments were in characteristic fashion, as we have learnt to expect, delightfully expressed and sprayed fairly at random throughout the gathering. I do thank you both very sincerely, Roddy and Lloyd, for all the thought you put into your speeches and for what each of you has said. It is no exaggeration to say that your speeches have made the occasion for all of us and, so far as I am concerned personally, I carry away a happy memory that will remain with me always.

I thank the Bar for all that it gave me in my time whilst I was in practice and for the warmth of the on-going friendship that I have enjoyed with the members of the Bar. I am particularly appreciative of so many having taken the trouble to turn out tonight to this dinner.

And now, ladies and gentlemen, I venture, if I may, to close these remarks just by saying that, if anybody is kind enough to clap me as I sit down, I hope it won't be for the purpose of waking up a snoring neighbour. □

The Archbolder

"Wearing all that weight of learning lightly, like a flower"

If Tennyson had *Archbold* in mind, it must have been a very early edition; for the weight of learning in it is now quite exceptional. My relationship with *Archbold* began when it was in its early 30s and I was in my early 20s. Our association has been a close one; and as the years have passed, surprisingly, our numbers begin to reach equality. Rather less surprisingly, both our weights have gradually increased. I firmly believe, however, it is not simply my own increasing girth which causes me to pant so heavily upon reaching the Robing Room. It is partly the greatly increased weight of my companion, *Archbold*.

The approximate figures back up my belief; 39th edition approximately 5lbs weight; 40th edition approximately 5 1/2 lbs weight; 41st edition just under 6 lbs; 42nd edition 6 lbs, including supplement. The 43rd, published in November is in two volumes and weighs 8lbs 7 oz.

It was lightheartedly suggested to me, when I discussed in the Robing Room the increased weight which the criminal practitioner was expected to carry that the publishers were aiming to offset the increase in weight of the book by a corresponding lightening of the wallet! But the problem, in truth, is a real one; how is the criminal man to cope with Robes, notebook, heavy *Archbold*, and sometimes authorities too?

It was thus with enthusiasm that I recently undertook a long term Circuit test of the new *ARCHBOLDER*. This cunning device (in effect no more than a tailor-made trolley) almost completely relieves the user of the burden of carrying *Archbold*. It comes in two models, the standard, which I tested, and the deluxe electrically powered. The standard model comprises a small oak carrying box, with removable out-rigger wheels. To the front of the box is attached a collapsible handle which enables the trolley to be wheeled along behind the user. The diagram shows the *ARCHBOLDER*'s full specifications and the photograph shows the *ARCHBOLDER* in use outside a set of Chambers in Manchester.



The standard model, which I tested over several weeks up and down many streets and Court corridors, proved almost entirely satisfactory in use. Negligible effort was required to pull *Archbold* when mounted in its carrier, and the assembly of the *ARCHBOLDER* took, after some little practice, hardly more than a minute. I had two complaints only: that in the wet, the book tended to get splashed when being pulled at foot level; and there was some difficulty in negotiating long flights of stairs. Originally, I tried to lift the *ARCHBOLDER* complete with the book up flights of stairs. But having discussed the matter with the designer, I learnt simply to ease the whole trolley gently up each step. Although this required a little practice, it makes the ascent of short flights of stairs relatively easy. I maintain, however, that long flights of steps remain something of a problem.

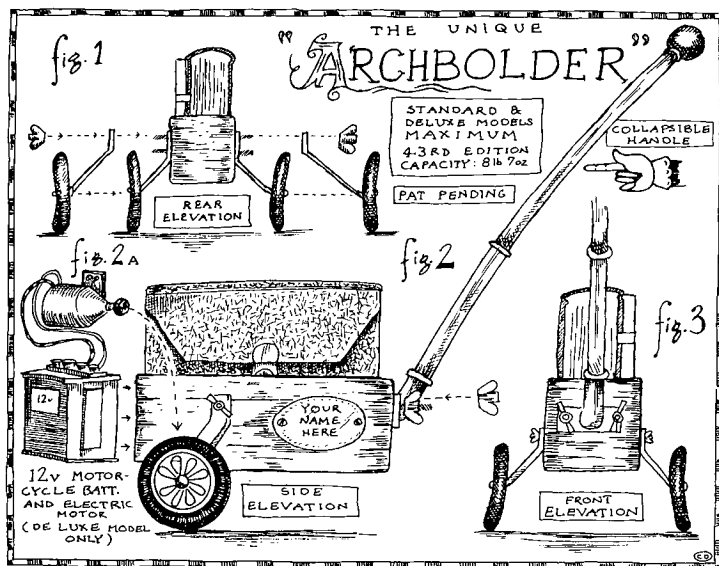
The deluxe, electrically powered model (Diagram 2) is rather wickedly recommended in the catalogue as "suitable for Silks and elderly Juniors." It is fitted with a small 12 volt motor cycle battery, driving an electric motor which rubs against one outrigger wheel. The designer asserts (and I see no reason to doubt this) that one charging will power the deluxe *ARCHBOLDER* for six hours of continuous use: more than enough for several days' work.

The *ARCHBOLDER* was conceived, designed and constructed by a criminal practitioner on the Northern Circuit. Each one individually made to the customer's requirements, though there is a range of standard optional extras. The photograph depicts the *ARCHBOLDER* in its 43rd edition capacity; design alterations are in hand to cope with the new two-volume edition.

The standard range of optional extras includes a small copper plate for the "Circuit engraving" of the owner's initials and a leather cloth tonneau cover. This extra would in fact completely have met one of my complaints with the standard version.

And the price of this useful accessory? £75 for the standard version; £150 for the deluxe model. It is assumed that both prices would be fully allowable against Tax, as the *ARCHBOLDER* must surely be considered to be wholly and exclusively used for the purpose of practice at the Bar.

The designer will be pleased to deal with any enquiries, which should be directed through the Clerk to Chambers, 28 St. John Street, Manchester M3 4DJ. □ Howard Bentham



(Reprinted with the kind permission of Counsel).

Evidence by Satellite Television

A problem that arose in a recent patent extension case, *Bayer A.G. v. Blewett* (Minister for Health), was that an expert witness who was required for cross examination was not readily able to leave the United States where he lived to give evidence in NSW. By consent of the parties and with Mr. Justice Young, the trial judge's concurrence, arrangements were made with the Overseas Telecommunication Commission for the evidence to be taken by satellite television.

At 8 am one morning, counsel and the Judge proceeded to the Sydney offices of OTC and we could there see the witness sitting in the corresponding offices in Boston. The parties had booked three hours of time for the evidence and the available time was continually signalled by a clock on the wall.

The Judge's request that space be available for the public who wished to hear what was going on was met, at least to a limited degree in that there were about three rows of seats for interested public though naturally enough these were occupied by persons associated with the parties and the press. After ensuring that all systems were in order, the witness was sworn in by a notary public in Boston according to the law of Massachusetts. A theoretical problem arises here in that it might be argued that a witness who tells a lie on oath when he has never left America does not commit perjury in NSW. Query whether he can be prosecuted in Massachusetts. This would depend on the local law. The Judge felt there might be some problems as to whether the witness might be in peril about giving evidence on oath when physically in the United States to a foreign tribunal, but was informed by the parties that this was not a problem.

Evidence in the case was by affidavit. The witness was thus asked by the counsel calling him for his name, address and occupation and to affirm the correctness of the two affidavits which he had sworn. He was then asked, by leave, several supplemental questions. Cross examination then took place. The cross examiner had available to him facilities of a facsimile machine by which documents could be transmitted from Australia to Boston or vice versa and there was also a screen available on which one could put documents face down so that they could be seen on a screen at the other end. The only document that was put on the screen, unfortunately, was a blurred copy which did not reproduce with sufficient clarity but as another copy was available at the other end, this did not cause any problem.

The procedure had the advantage that Judge and cross examiner could see the demeanour of the witness and could see if he referred to anyone else or to any piece of paper at his end. Although perhaps a little was lost in the way of projection of the witness's personality in much the same way as one loses a little in the difference between a live performance and a video tape of a song, this loss did not make any difference in the case of an expert witness. In the patent extension case the method of taking evidence was extremely successful and enabled the material from the witness to be put before the Court relatively inexpensively in almost as pure a form as if he had been in a witness box in Sydney.

The present cost of the service is \$5,000 per hour to the United States and \$10,000 per hour for England or Europe.

Apart from the minor matter referred to above, the only inconvenience to be put against the large expense that would

otherwise be caused in moving the Court to the United States or bringing the witness to Sydney, is having to assemble the Court at odd hours in relatively cramped quarters for an hour or so. However, the Judge thought that was a small price to pay in this instance.

In case there was failure of the equipment, two shorthand reporters from the Court Reporting Service were present. However, in due course a transcript was prepared from the video tape of the evidence which is available as part of the service because the accommodation for the shorthand writers was not sufficiently well positioned to enable them to catch every word of the evidence over the legitimate conversations between the lawyers for the various parties who were stationed between the Court reporters and the screens.

The taking of the evidence of this witness is to be contrasted with that of a British witness. This eminent person was evidently so busy that he could only be available in Court on a Friday intending to arrive in Sydney at 6 am on a Friday and fly out back to England at 9 pm the same night.

Unfortunately for him the plane was delayed in Bangkok and he only arrived in Sydney at 3.30 pm on the Friday. The Court sat between 4 pm and 6 pm to take his evidence and he was back at the airport two hours later for his plane back to London so that he could be at work the following Monday. In the circumstances his evidence was remarkably clear and he showed no signs of jet lag. One wonders, however, how one can really expect people who are as busy as this person to travel thousands of kilometres for two hours of cross examination when the facilities are now available to take the evidence in a far more convenient way. □

1990 Commonwealth Law Conference

Some leading Commonwealth lawyers will be among speakers at the 1990 Commonwealth Law Conference to be held in Auckland, New Zealand, between 16 and 20 April 1990.

As at 1 March 1989, the Organising Committee has already received acceptances to speak from many, including

- Lord Mackay of Clashfern, the Lord Chancellor of England.
- Justice Mchamed Shahabuddeen of the International Court of Justice.
- Dr. F.M.B. Reynolds, Editor of the Law Quarterly Review.
- Sir William Wade of Cambridge University, one of the Commonwealth's leading academic writers and expert on administrative law.
- Justice Sujata V. Manohar of the High Court of Bombay.
- Justice James Muirhead of the Supreme Court of Western Australia.

For further information and a pre-registration form contact:
Commonwealth Law Conference
P.O. Box 12-442 Auckland New Zealand
International Facsimile: 64-9-525.1243. □

Judicial Independence & Justice Staples

M.D. Kirby *

An Alarming "Removal"

In February and March 1989 the Australian legal community was alarmed by steps which accompanied the abolition of the Australian Conciliation and Arbitration Commission and the consequential creation of the Australian Industrial Relations Commission.

The unusual feature of this legislative development, achieved by the Industrial Relations Act 1988 (Cth), was the purported extinguishment of the old commission of one of the Deputy Presidents of the old Commission (The Honourable Justice J.F. Staples). He alone of the Deputy Presidents and available Commissioners of the old Commission (numbering 43) was not appointed to the new Commission. He was originally commissioned in 1975. By 1989 he was one of the most senior of the Presidential members of the Commission. The purpose of this note is to record some of the main developments in what has become known as the "Staples affair".

The Australian Conciliation and Arbitration Commission was set up in 1956 when the High Court of Australia held, in the Boilermakers' case, that the old Arbitration Court (which had preceded it and which had existed in various forms from 1904) was constituted in a way which was incompatible with the Australian Constitution. Because the "Court" was performing functions held not to be strictly "judicial" in character (such as devising compulsory awards for the settlement of industrial disputes), it was held that it could not be a "court" strictly so called. This required the urgent restructuring of the Federal bodies dealing with industrial relations disputes. The result was the creation of the Conciliation and Arbitration Commission and the Commonwealth (later Australian) Industrial Court.

Nevertheless, many of the judges of the old Arbitration Court were appointed in 1956 to the new Conciliation and Arbitration Commission. By the Act of Parliament establishing that Commission, all Deputy Presidents of the new Commission continued to have the same rank, status, precedence, salary and immunities as judges of the old Court. Those who were legally qualified were also to enjoy the same designation as Federal Judges - i.e. the honorific "Mr. Justice" or "Justice".

Following a national enquiry in 1978 by the Hancock Committee, the new legislation was passed by the Australian Federal Parliament in 1988, as mentioned above.

Apart from abolishing the Conciliation and Arbitration Commission, this legislation established the new Industrial Relations Commission. It clearly contemplated the appointment of members of the old Commission to the new, as in fact occurred. The President of the old Commission was appointed the President of the new. So were all of the other members except Justice Staples.

The Isolation of Justice Staples

Following a speech which Justice Staples made in 1980 to an industrial relations conference and remarks he made in the course of giving decisions in the Conciliation and Arbitration Commission, the then President of the Commission (Sir John Moore) thereafter declined to assign the normal duties of a

Deputy President to him within the commission. Initially, he was excluded only from sitting at first instance. Later, when Justice B.J. Maddern was appointed President in 1985, Justice Staples was excluded totally from all duties as a Deputy President of the Commission including sitting on Full Benches. From 1985 he did not sit in a single case.

Although no public reason was ever given for this differential treatment, privately, this exclusion of a person with the rank of a Judge from the performance of his statutory duties was justified by various commentators as being based on Justice Staples' tendency to be a "maverick" and to express his opinions in colourful and unorthodox language. It was also pointed out that industrial relations, including the settlement of large national disputes, requires particular sensitivity and confidence in the decision maker on the part of both parties to the arbitration. It was suggested that neither the employers' nor the employees' national organisations supported the appointment of Justice Staples to the new Australian Industrial Relations Commission.

Following the abolition of the old Commission in 1989, a question has arisen concerning whether its abolition has the effect, in law, of abolishing Justice Staples' personal commission. Upon that question, which may come before a court, I express no opinion. Under the former Act, he could only be removed, namely by an address to the Governor General by both Houses of Parliament asking for his removal on the ground of proved misbehaviour or incapacity. Although the Australian Constitution protects judges of Federal Courts from removal except in this manner, the constitutional provision may not, as such, apply to protect persons such as Justice Staples whose tribunal has been declared not to be a court strictly so called. The Federal authorities claim that the guarantee in his case was extinguished with the abolition of the Arbitration Commission and the repeal of the old Act.

Three Aspects of Concern

Nevertheless there are a number of aspects of the Staples affair which have caused concern to the Australian Section of the International Commission of Jurists, the Law Council of Australia, the New South Wales Law Society, the Victorian Bar Council, the Victorian Law Institute, the Law Institute of Victoria, individual judges and other citizens in Australia. These include:

- The refusal or failure of the President of the Commission to assign duties to Justice Staples over more than three years although he was still a member of the Commission, had the rank and title of a judge and had not been removed by the Parliamentary procedure as the statute provided;
- The failure of the Government, the Minister or any other Federal official to state the reasons for the decision not to appoint Justice Staples, alone, to the new Industrial Relations Commission. Ordinary rules of natural justice would seem to require that he should know and be given an opportunity to respond to alleged criticisms of him before a decision was made, in effect, depriving him of his office; and
- The failure of the Government to initiate any steps for his

removal on the grounds of misconduct or incapacity as was provided under the statute pursuant to which he had been appointed in 1975.

Departure from International Principles

Although some lawyers in Australia, notably at first the New South Wales Bar Council, laid emphasis on the technical point concerning the suggested distinction between "real judges" and Deputy Presidents of the Arbitration Commission, this was not the view adopted by most lawyers. If an Act gives a person the title of a Federal judge; provides that he or she should have the same "rank, status and precedence" as a judge; provides for the same immunities, protections and mode of removal as a judge and the same salary and pension rights, most legal observers would conclude that that person is, for the purpose of independence and tenure, a judge. The U.N. Basic Principles of the Independence of the Judiciary were developed in a number of international meetings of jurists held in recent years. They have been adopted by the United Nations General Assembly, supported by Australia. They and associated international resolutions apply to set out the principles which civilised countries recognise to limit the removal of judges from office. It is submitted that at least those persons who are by local law given the status, title and privileges of judges are covered by the Basic Principles.

The Basic Principles are to be observed as much in the case of Justice Staples as in the case of other undoubted judges upon whose removal the Australian legal profession has lately been most vocal. (e.g. in Fiji, Bangladesh and Malaysia). They require that judges be guaranteed tenure and only suspended or removed for incapacity or misbehaviour that renders them unfit to discharge their duties.

On the eve of the abolition of Justice Staples' commission, an outcry occurred in many quarters throughout Australia concerning the treatment of Justice Staples and the breach of Australian conventions and international rules involved in the procedures adopted. On 29 February 1989 five senior judges of the Court of Appeal of New South Wales (including myself) took the "unusual course" of issuing a public statement expressing concern about the precedent set in the Staples case. The Prime Minister (Mr. R.J. Hawke) dismissed the expressed concern by "members of the legal fraternity" as "contrived nonsense". The Australian Labor Party Government and the Liberal and National Parties Opposition in Federal Parliament defeated a proposal by the Australian Democrats in the Senate for an investigation of the treatment of Justice Staples. Nevertheless, a Joint Parliamentary Enquiry was set up by Parliament to investigate "the principles that should govern the tenure of office of quasi judicial and other appointees to Commonwealth tribunals". This was a compromise. But the terms of reference of the Joint Committee may permit exploration of related questions concerning Justice Staples.

An Unfortunate Precedent

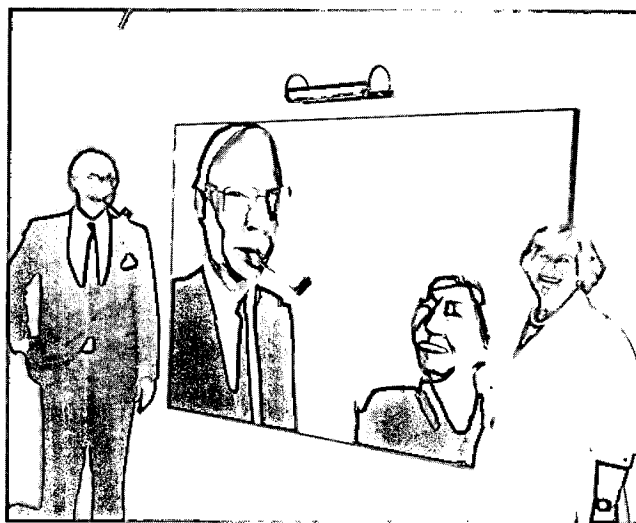
The significant outcry over the Staples affair may itself inhibit similar procedures being adopted in Australia in the

future to remove judicial and quasi judicial office-holders by the reconstitution of their courts or tribunals. But, perhaps ominously, within days of Justice Staples "removal" a proposal was made public to "restructure" the Industrial Commission of New South Wales. The relevant Minister has since given an assurance that all Presidential members of the old Commission will be appointed to the new.

Meanwhile, Justice Staples is contemplating other measures defensive of his position. He has declined to leave his office. He is reported to be considering legal proceedings in the High Court of Australia to require the recognition of his commission until he is removed from office following a Parliamentary enquiry such as he was promised on his appointment. Another avenue open to him may be a challenge to the failure of the Federal authorities to accord him natural justice and to confront him with the accusations which were thought sufficient to justify his "removal" from an office with the status and title of a Federal Judge. An analogous challenge succeeded in New South Wales when brought by magistrates not appointed to the restructured Local Court. See Macrae v. Attorney General (1987) 9 NSWLR 268.

The public controversy about the affair continues. It has already attracted attention overseas, notably in the Centre for the Independence of Judges and Lawyers in Geneva. It is a matter for close attention by all Australian lawyers concerned about the independence of judicial office and of offices declared by Parliament to be equivalent to judicial office. □

** President of the Court of Appeal of New South Wales; Commissioner of the International Commission of Jurists. One-time Deputy President of the Australian Conciliation and Arbitration Commission (1975-1983). The views stated are personal.*



Real people with character, Sir Ninian and Lady Stephen.

His Honour Mr. Justice Meagher

Roderick Pitt Meagher was sworn in as a Judge of Appeal on 31 January 1989. This was another milestone in a remarkable career.

His Honour was born on St. Patrick's Day - 17 March, 1932 - and grew up in the country town of Temora. He was the second eldest child in a family of four boys and one girl. The name "Meagher" was well-known in western New South Wales as his family ran a chain of department stores in that part of the State. His family was known as the "Royal Family of Temora", a reputation which was well deserved and which may throw some light on his Honour's subsequent conduct. His ancestral home in Temora was called "Marathon" but this auspicious name did not engender any enthusiasm in the young Meagher or athleticism of any kind.

In his youth he displayed the early qualities which characterise his adult life: "as the twig is bent....". His brother Christopher, extremely athletic and well co-ordinated, once attempted to entice young Roddy into playing football with him. He offered Roddy a toy soldier if he would kick the football with him. Roddy, after a moment's reflection, said "two". Reluctantly Christopher agreed and gave him two toy soldiers. Roddy walked outside, kicked the ball once, turned around and went back inside to play with his toy soldiers. Little wonder, that some years later he summed up his view of all sport thus: "I don't believe in any movement unless it is absolutely necessary".

He was educated at St. Ignatius College Riverview of which he was, predictably, dux. Despite his antipathy to athletic performances he was a surprisingly good tennis player. As many opponents found to their dismay, it was a mistake to judge his tennis ability by his body shape and apparent lack of co-ordination. He has been known to play a game of cricket. He has never been known to play rugby.

After his success at school he went up to the University of Sydney where he resided at St. Johns College. It was here that his talents came into full flower.

His academic career at the university was remarkable. He was awarded the Cooper Scholarship for classics. He won the University Medal for both Latin and Law. He was recognised as an accomplished classical scholar and the influence of Professor A.D. Trendall on his intellectual development was profound. He has retained his interests in classics, having been Challis Lecturer in Equity and Roman Law in the Faculty of Law at Sydney University since 1960.

He was regarded as the worst motor car driver in the history of St. Johns College. This was no small achievement amongst the members of a college which was notorious for its bad drivers. It is not clear when or how he obtained his driver's licence but what is certain is that he never learned how to engage reverse gear or to drive backwards. Little wonder that he has never purchased any other car than "a brown one".

He was admitted to the Bar in 1960 and rapidly established a substantial practice and wide reputation in the field of Equity. He has co-edited the second, third, fourth and fifth editions of Jacobs on Trusts and is the joint author of Equity, Doctrines and Remedies. The latter book has become widely

accepted in Australia and in the United Kingdom as an authoritative text. It frequently surprises and delights its readers by its many incisive and pungent comments: eg § 254 "The fusion fallacies.... are depressing evidence of the damage done to equity in England since 1873 as one epigonous generation has succeeded another."; § 2040 n.34 ... "this is surely to overstate the effect of a decision by a bare majority whose decision is not free from obscurity." His Honour is never obscure.

He is particularly scornful of attempts by common lawyers to encroach upon the equity jurisdiction, a point he made in his foreword to Sir Frederick Jordan's Select Legal Papers where he said that Sir Frederick, despite coming from "an almost exclusively equity background.... also proved himself to be a consummate master of the common law." The reverse process he pointed out acidly "never happens".

At the Bar he was a founding member of the eighth floor of Selborne Chambers. This floor he shared with many of the great and famous members of the Bar with most of whom he had cordial relations. He provoked his floor members, Glass Q.C. and Reynolds Q.C. by burning incense. It was only the threat of an injunction which restrained him from this practice and he took up smoking Havana cigars instead. History does not record whether this was regarded as an improvement.

His Honour's contributions to the social life of the eighth floor were prodigious. His charm and wit will be greatly missed by his many friends at the Bar but his pithy statements have gone into history. His piscatorial description of the present Chief Justice is now folklore; he described McInerney Q.C. (as he then was) as having a "sympathetic tolerance of an opposing point of view which was equalled by his passion for Chancery"; of another Silk, he said: "his knowledge of the law was intuitive and vocal rather than learned and subtle". Some cannot understand or appreciate his wit. They lack perspicacity.

His enthusiasm for paintings and objets d'art had a marked civilising effect on the other members of the eighth floor. He distributed the overflow of his enormous art collection from his chambers amongst the chambers of his floor members. Kenny Q.C. in return placed a left-over exhibit - a car tyre - in His Honour's chambers among the paintings, sculptures and New Guinean artefacts (bought in darkest Paddo!) . It was never found again.

Entrants to his chambers were confronted by a seventeenth century cannon. Briefs which had toppled off his desk and rested precariously atop the cannon were classified "not urgent".

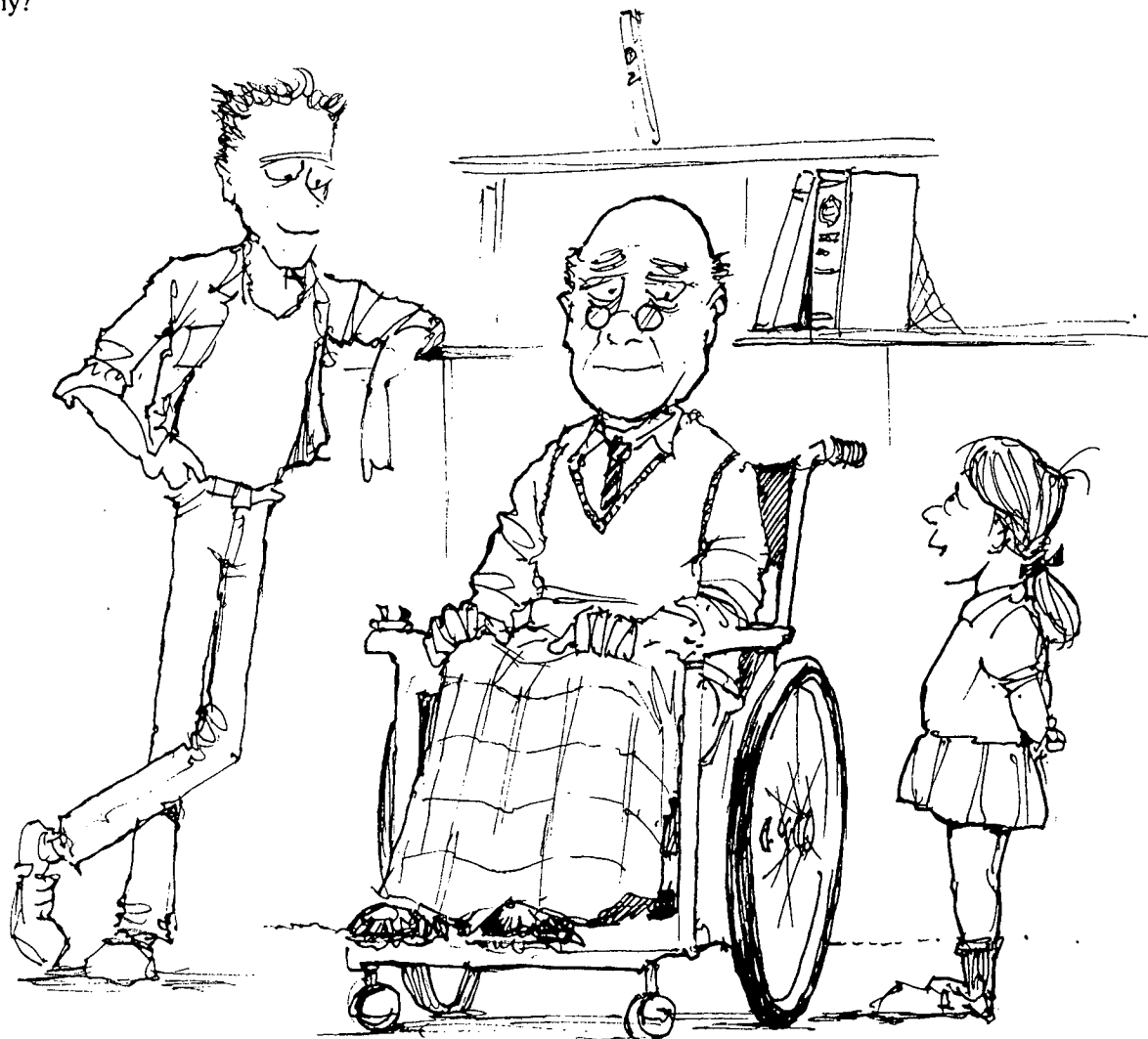
His art collection now hangs more comfortably in the corridors around the Court of Appeal judges' chambers. He sits on quantum appeals et tout cela. He has not lost sight of the good things of life. When counsel argued on past 1.00 pm one day he announced solemnly: "The Court is hungry." The Court adjourned at once.

He will remain popular as an orator and a contributor to Bar News. It is not known yet whether he will become a consummate master of common law. □



How the Giannarellis made a Real Barrister Out of Me

- Gd Grandpa...Grandpa.
Gf mmm.
Gd Wake up Grandpa.
Gf What is it?
Gd Were you a barrister once?
Gf Oh that...yes...So was your grandmother.
Gd When?
Gf Oh, I don't remember exactly.
Gs In 1988?
Gf Yes.
Gs When barristers ate vogel bread and drank light beer.
Gd That long ago. Were you a real barrister? Were you fearless and powerful?
Gf Fearless..powerful..let me think....Powerful....well of course I was powerful, as I have often told you over dinner; but fearless...I wasn't the only one.....
Gd Tell us about it again Granpa....what was it like to be a barrister in 1988.
Gf There was a fear.
Gd I bet Grandma wasn't afraid.
Gf Yes even your grandmother....but it was the Victorians who were most afraid.
Gs They still are, but what were they afraid of then?
Gf Section 10 of the Legal Profession Practice Act.
Gd Why?
Gf They thought it meant that barristers were like solicitors.
Gd You never thought that did you Grandpa?
Gf Certainly not. We didn't think much about Victoria; that is until our premiums started to rise, thanks to Marks J.: and then we heard rumors about.....them.
Gd Who was them?
Gf The Giannerellis
Gd Gee, where did they come from?
Gf The docks.
Gd What for?
Gf For being wrongly sentenced: one on a bond; and two to prison.
Gd Who did they blame?
Gf Three barristers.
Gd What did they have to do with it?
Gf They appeared for them, one at the committal, one at their trial and the third in the appeal court.
Gs What did that Victorian Act have to do with us?
Gf That tricked a few people. At first we felt O.K.; only the Victorians' houses were on the line. As it turned out that Act shouldn't have worried them either, it had nothing to do with work in court.
Gs Didn't Toohey think it did?
Gf Oh yes....he did.



Gs Gaudron agreed with him.
 Gf Her! She was a dissenter!
 Gs So was Deane.
 Gf Who cares about dissenters. You probably don't remember Bob Askin.
 Gs Who was he?
 Gd Were the barristers negligent Grandpa?
 Gf No-one knows, but they were immune anyway.
 Gd Why doesn't anyone know if they were negligent?
 Gf Because it was decided on a preliminary question not pleadings after a trial.
 Gd What were pleadings Grandpa?
 Gf They were an art last practised in New South Wales in the 60's my darling.
 Gs Did the preliminary question clarify anything?
 Gf No, it never does.
 Gs Did it clear up anything?
 Gf Of course.
 Gd What?
 Gf A lawyer can't be sued for what he does in court no matter how badly he does it. He is immune.
 Gd Did many people enjoy immunity.
 Gf Most didn't appreciate how enjoyable it was until they lost it. Politicians in Parliament and judges in court enjoyed it; but it was being lost systematically: local councils found theirs shrank in the 80's.
 Gd Grandpa, is it good to be immune?
 Gf Yes, it's good for everyone - well, practically everyone.
 Gs Why?
 Gf It stops the fear!
 Gs Why shouldn't you be afraid if you are negligent?
 Gf Public schools! You don't understand the fear. It was the fear of being sued when you were not negligent.
 Gd What was that?
 Gf The fear of the claim that was likely to fail.
 Gs Oh...that fear.
 Gd Was there anything else good about immunity?
 Gf Oh yes, it stopped the fear of endless lawsuits arising out of the same incident, some of which might succeed although the first failed. And then there was the "cab rank" principle.
 Gs Most of the Court didn't think it justified immunity.
 Gf Them!.....Well....It was a principle I often expounded in our Common Room.
 Gs Deane wasn't convinced either.
 Gf Him! All he could think about was negligence, gross and callous in its nature and devastating in its consequences. It is hard to accept that he had been a member of the New South Wales Bar.
 Gd Did you change after the Giannarellis' case Grandpa?
 Gf Oh yes, and so did your grandmother.
 Gs How?
 Gf After the Giannarellis' case I became totally fearless.
 Gs Let me help you with your rug....There now, tell us about the fearless bit.
 Gf After the Gianarellis' case, I became decisive in Court.
 Gs No more unnecessary arguments, defences, questions or witnesses?
 Gf Well, I don't remember that so well. But once I realised he couldn't make me a cross defendant I stopped asking

my solicitor if I had forgotten any questions.
 Gs Did you become manifestly independent?
 Gf What is independence?
 Gs Did you use your immunity to strip away false issues?
 Gf "Strip away".....that sounds like your old Grandad.
 Gs Did you use this immunity to dismiss witnesses who would waste time?
 Gf Always, at least before lunch I always did.
 Gs Did anything else change for you after the Giannarellis' case?
 Gf Oh yes, my premiums went down. And the Bar Council and the brokers both claimed credit.
 Gs Did you lower your fees?
 Gf Did I what?
 Gs Remember what Brennan said.
 Gf He didn't say anything wrong, he was in the majority.
 Gs He said the immunity to the extent it was based on the "cab rank" principle was in turn based on reasonable fees.
 Gf Oh, reasonable fees, Oh yes, I missed you the first time. I thought for a moment you said lower fees.
 Gd What else did you do after the big case Grandpa?
 Gf I told my solicitors that only barristers should settle pleadings.
 Gs That's not what the headnote in the A.L.J. said.
 Gf You know that, and I know it; but a lot of them didn't, and the ones that did, I told to read Wilson J. again. He never said solicitors were immune for out of court work.
 Gs Aren't barristers in the same boat?
 Gf What was that?
 Gs All Wilson's remarks were confined to advocacy in court. So there was no majority on that point. And even Brennan left aside a failure where that failure impairs the conduct of the case in court in the way intended.
 Gf Intended by whom?
 Gs He didn't say. Anyway all that stuff about work out of court was obiter if you read the questions carefully.
 Gf It was! But what about the headnote in the A.L.J.?
 Gs You could have read the headnote in the A.L.R..
 Gf It read more like a novel than a note.
 Gs Grandfather, after the Gianarellis' case was your mind entirely free?
 Gf I liked Brennan J.'s idea that a barrister lends his exertions to all, but himself to none; but he didn't say that anything had to be free: ha ha ha.
 Gd Ha ha.
 Gs Were you prolix before the Giannarellis' case?
 Gf I don't think I ever laboured under such a reputation. I wouldn't have listened to such a suggestion. I feel sure I can say, without fear of contradiction, that I learned nothing on that particular subject.
 Gs Indeed.
 Gf Let me reiterate.
 Gs Must you.
 Gf I suppose I can sum it up in this way. It was the Giannarelli's case that made me a real barrister. □

P.M. Donohoe

The author acknowledges his indebtedness to W.C. Fields, Cat Stevens, Whoopi Goldberg and the Giannarellis.

Equity Division Expedition List

On 11 November 1988, Mr. Justice Young, sitting in the Equity Division announced the course he proposed to adopt in administering the Expedition List in 1989.

When a new Magistrate goes to a country town I believe it is customary for the local solicitors to hold a welcome dinner and after the ice has been broken for the solicitors to ask questions to find out the new Magistrate's attitude to various matters, such as his tariff for sentences for prescribed concentration of alcohol, etc. As there is no hope of people here taking me to dinner to find that out, I am giving my policy speech on this, the first time I preside over the expedition list, to try and be helpful as to some of my attitudes.

I would like to commence with a couple of anecdotes. The first concerns Sir Thomas More who in the 1500's, so I am reliably told by Mr. McLaughlin of counsel, told his officer to call the next case and the reply was, "My Lord, there is not another cause in the whole Court of Chancery awaiting trial." Oh that my days were his days, except perhaps not my end. Then it is also said in the 1930's that a solicitor briefed a well-known silk for the following month, but the brief was speedily returned and the silk said quite heatedly "I already have a brief for next month."

We are not like the 1500's, we have got plenty of cases awaiting trial and all of us are doing more than one case a month. The Attorney-General's Department report for 1988 shows that there was a 13 percent increase in cases filed in this division between 1986/1987 and 1987/1988. There is no increase in the number of Judges or Masters to hear those cases. Our internal statistics show that despite our efforts the general list is getting further and further behind. In July 684 matters were within that list; in August there had been an increase of 49 to 733, a further increase of 42 in September up to 775 and a further increase of 34 in October bringing it up to 809. So despite our efforts the list falls further and further behind. So far as the expedition list is concerned, we have 95, 78, 133 and 84 cases in the list. Of these only 16, 12, 14 and 9 were granted expedition. A very small percentage. The short notice list has remained static at 101 to 104. It is taking six to eight months for a non-urgent short notice matter to be heard. The time between entry into the general list and hearing is one and a half to two years. There is no real chance of any further cases being listed before a Master before July.

Now as the general list gets further and further behind so the number of cases in the expedition list will increase and that is natural because everyone wants to get their case on. Indeed, justice can only be done if it can be done reasonably quickly. I recognise that, but I also recognise that the statistics show that on an average only eighteen cases a month will get fixed for hearing in the expedition list and obviously it depends on the length of the case; a six day case takes three items as long as a two day case, but that is the way things have worked out.

So of the thirty-two cases in the list today I would only be able to fix nine. What is going to happen to the other twenty-three, even if they are worthy of expedition? Not only have we got limited judicial facilities, we have also got limited back

up facilities. It would be best if this list could be computerised, but although we are very grateful for the provision of computer facilities this year, unfortunately the budget does not go to software so that we cannot process the list, so it is still being done by bits of paper.

Despite all these problems I will use every case management tool in my armoury to move this list along. I will, with the parties consent, pre-read each affidavit and document. I will insist on all these being filed before the hearing. I will sit at 8 am, if necessary, 5 pm if necessary. I will cancel fixtures if people are not complying with pre-trial directions, unless it is a case where obviously one party is trying to delay. I will expect the profession to co-operate by giving me proper information by people who know what they are talking about, by proper skill and by proper compliance with directions. I am told that the only way for case management is to call the list through often, but that is a great cost to the litigants. The more



pre-trials you have, the more costly litigation is. I am endeavouring to work out some administrative system to enable a lot of these motions for expedition to be dealt with on paper so that there only should be one or two appearances. I am currently talking with various senior members of the Bar to see if we can work out a scheme that I can disclose generally, but everyone is entitled to have their notice of motion for expedition heard and, if they wish it, to get reasons and so I do not want anyone to feel that if the list is moving rather quickly they cannot stand up at

any stage and say "I want reasons as to why you are dismissing my notice of motion for expedition." But it must be realised on the statistics that I have given that even if a case is one which needs to be heard before one and a half to two years that it would take it to come up from the bottom to the top of the general list, it still may not have as much priority as some other case. Is it really kind to put the parties to the cost of being in this list month after month, floating around as about fortieth priority? The client having to pay each month for representation when really there is no prospect of the case every being one of the nine or eighteen that will be set down for hearing. I tend to think not. So it may well be that cases that should be heard will in fact be dismissed on the basis that I think it is unfair to hold out prospects of hearing when I know the resources are too limited to go to those cases.

What I will try and do is each month assemble the cases in rough order of priority on the first hearing date of each month, which will normally be the second Friday in the month, and fix them about six weeks ahead. The other motion day during the month will be used for sorting through matters that are in the list for the first time. Eventually I hope to start this list at 2 o'clock and sit on the Friday morning for a short notice matter or half day urgent matter because I think 2 pm to 4.30 pm or something of that nature is probably far better for the profession than 10 o'clock. This week, next week, and 2 December we will try 10 o'clock and see what happens.

I will be grateful if you have any particular comments, when mentioning your matter, about how the list should be handled, to speak your mind. □

Documentary Evidence in Australia

(R.A. Brown - Law Book Company 1988 - \$43.50)

Some textbooks show at once an author whose depth of learning breathes through each page. Meagher, Gummow and Lehane on Equity is one such. A second class of textbook shows some attempt to induce some general principle or guidelines from a series of decisions. A third class is made up of books which are merely a workmanlike collection of authorities.

Brown on Documentary Evidence is in this third class though perhaps not quite.

The author is a professor of law in Tasmania. He was a lecturer in evidence at the (then) NSW Institute of Technology for some years and practised at the NSW Bar at the same time. He is however more an academic than a practical lawyer.

There is a strange trend towards academics writing works on evidence and it is stranger too to see their criticisms of a system that really one can only fully understand through years and years of practice.

When a reviewer sees that on page 1 the author commends one of these academic writers and then on page 3 attacks the approach of the Australian edition of *Cross on Evidence* as fundamentally flawed, he wonders whether it is of much use proceeding to read page 4. However, when one makes that effort, one finds a workmanlike discussion of the Business Records provisions of the Evidence Act and many of the cases decided on them. It is disturbing to see from time to time however comments indicating that the author thinks some decisions were just stupid (eg p.120 "The court insisting that the best evidence of the prices were the books themselves, although Owen, J. did note the inconvenience entailed in producing 400 volumes in Court"). Again the mention of the "jargon" developed in NSW about the "produced without penalty" rule indicates to me, with respect to him, that Dr. Brown perhaps should have had a few more years practical experience in the superior Courts before penning this book.

Despite these criticisms the work contains a workmanlike treatment of the cases. It is fairly detailed in its discussion of the Evidence Act and on computer produced records, but a little light on with respect to some other aspects. Videotapes are only briefly mentioned on p. 45 (cf *Beaton v. McDivitt* [1985] 13 NSWLR 134, 142-3) and newspapers not at all. This last comes to my attention particularly as I have just had to research this very topic for *Paton v. Public Trustee* (8 December, 1988 ED 1269/88).

It is hoped that in due course a senior barrister will tackle this subject in a published work. Until that occurs, Dr. Brown's book will serve as a useful collection of the authorities.

Peter Young□

Injunctions, A Practical Handbook

(N.R. Burns - Law Book Company 1988 - \$30.50)

The busy New South Wales practitioner is not shy of works of authority to consult on the topic of injunctions. Meagher, Gummow and Lehane adequately cover the area. But when one moves from the theoretical to the purely practical there is not much around. The standard works on injunctions

rarely stop to tell the practitioner about the more mundane practicalities of obtaining an injunction. This book by one of the most experienced equity juniors in the State aims to fill this void. It not only contains a potted summary of the law relevant to final, interlocutory, *qui a timet*, mandatory and Mareva injunctions, it also contains useful advice on drafting of summonses and affidavits, taking instructions and enforcement of injunctions. It is brief and concise and an ideal work of reference for those occasions when an injunction must be obtained in great haste. Although the experienced equity practitioner will doubtless find nothing novel in this book, it is an ideal summary for those whose trips to equity are infrequent or the barrister who has just begun practice. □

Lane's Commentary on the Australian Constitution

(P.H. Lane - Law Book Company 1986 - \$131.00)

Professor Lane has previously confined his attentions to one magnum opus (*The Australian Federal System*), a number of students books and some monographs. In this his latest foray into the area of Federal Constitutional Law, Professor Lane has produced a section by section commentary on the Constitution in the tradition of Quick and Garran and Lumb and Ryan. The commentary analyses each section of the Constitution in exhaustive detail and concludes with chapters on State-Commonwealth relations, the meaning of constitutional terms and severability clauses. However, this work of over 700 pages is far more than a bare annotation on each section of the Constitution. Indeed each case decided on each section has been exhaustively catalogued and digested much in the manner of *The Australian Federal System*.

In style the commentary is quirky, didactic, idiosyncratic and often abbreviated to the point of being ungrammatical. And yet this mode is often refreshingly direct and engaging. As the most recent and up-to-date commentary of its kind the book is destined to be a work of first reference for all who dip into this area. The commentary is kept up to date by regular supplements (the first of which has already been published).

Cross Purposes

Wheelahan QC : And do you tell this court that you have been unable to explain to your parents the concept of changing value in currency? — My father still at this stage thinks the Australian dollar is a US dollar.

That is just nonsense is not it, Mr. ? — No, I do not think so.

Your father, a man of business in this country since the late 50s, thinks an Australian dollar is a United States dollar; is that what you say? — Hard to believe but it is correct.

It is incredible, Mr....., I agree with you. Does he think that a French franc is a Swiss franc as far as you know? — Possibly.

Or a Huttons frank perhaps? — Possibly.

(*Dauids Securities Pty. Limited & Ors v. Commonwealth Bank of Australia & Ors, Federal Govt. of Australia, 2 March 1989*)

26th Australian Legal Convention

The 26th Australian Legal Convention in August this year will be one of the most exciting ever held in this country.

To be held at Darling Harbour, Sydney's newest and most exciting convention and recreation centre, this convention will be the largest ever held in the Southern Hemisphere.

The Darling Harbour setting will be magnificent. It sits close to the water on one of the world's best harbours and has facilities, shops and activities second to none.

A large contingent of overseas lawyers are expected to attend due to pre-conference publicity in the USA, Europe, New Zealand, Pacific and Asia, and advance bookings from the United States are already very strong.

The programme of speakers and social functions are all virtually in place. The papers are designed to touch most areas of legal practice and many of the emerging issues such as multi-disciplinary partnerships, contingency fees and class-actions to name a few.

A wide variety of social activity has been planned. As well as evening entertainment after each convention day, an extensive "accompanying partner" programme has been organised.

The theme for the convention is "Building Bridges". This not only relates to the venue of Sydney - using a stylised Sydney Harbour Bridge as the logo, but it also relates to bridging the many gaps that exist involving the Law.

The convention will attempt to build bridges between the Australian legal systems in each state, between Australia and legal systems throughout the world - particularly with our closer neighbours. It will attempt to build bridges between the legal profession and other professions such as doctors, architects, accountants and journalists. Finally it will build bridges between the legal fraternity and the "man (person) in the street".

Keynote speakers from throughout Australia and throughout the world have been invited - notable amongst the early acceptances are Lord Mackay of Clashfern, the Lord Chancellor of the United Kingdom; Sir Gordon Slynn, Judge of the Court of European Communities and Justice Anthony M. Kennedy - the newest appointee to the Supreme Court of the United States of America.

These keynote speakers will relate their experiences to Australia. For example Sir Gordon Slynn will discuss how the different countries of Europe are working towards a uniform legal system by 1992. He was recently involved in a case involving West German Breweries who were, he alleged, stopping free trade of beer throughout Europe via an ancient "anti-preservative law".

Lord Mackay will discuss his "deregulation" of the English system of Law. A great reformer of the law in England, the Lord Chancellor will add interesting arguments for many of the emerging issues in Australia.

Justice Kennedy will discuss law in the U.S.A. A fascinating figure, he was appointed to the Supreme Court after two earlier nominations by the Reagan Administration had been rejected.

The Law Society of NSW and the Bar Association of New South Wales, hosts of the 26th Australian Legal

Convention, will bring you updates on the Convention. Please remember that if you register before May 1, 1989 you receive a \$100.00 discount. Any enquiries should be directed to Robyn Johnson, Law Society of NSW (02) 220.0333. □

B.S.J. O'Keefe A.M., Q.C.

It was announced on Australia Day 1989 that our Senior Vice President, Barry O'Keefe Q.C., had been honoured by admission to the Order of Australia as a Member. This honour was granted him in recognition of his services to local government, for which he would be well known to all our members living anywhere in the vicinity of the near North Shore.

The more prominent of O'Keefe's roles in which he has served the cause of local government have been his record number of terms as Mayor of Mosman (9 terms since 1977) and as President of the Local Government Association of New South Wales (1986 to 1988). In the latter role he was in the forefront of the debate in favour of a Constitutional amendment to recognise local government nationally.

The base from which O'Keefe has been able to sally forth in his various battles on behalf of Mosman's foreshores and the like and local government's interests generally has been a very secure one: he has topped the poll for aldermen in Mosman since 1968, and has been a member of the L.G.A.'s executive since 1976.

Those junior counsel who have worked with Barry will be well aware of both the extent of his involvement in local government matters, and also the amazing way in which that involvement does not prevent him from devoting as many hours as are necessary to the preparation and presentation of his cases. Of course, this has been known to interfere with juniors' leisurely rising from bed - so much so that it is now suggested that the expression "O'Keefe A.M." designates a time which may vary, but is always before dawn. □



B.J.S. O'Keefe A.M., Q.C. Mayor of Mosman

COUNSEL feel it may be helpful to the Bar to publish the following *Worst Practice Guide on the Instruction of Counsel*, kindly made available by a well-known firm of solicitors.

Choice of Chambers and Counsel

1. This firm always goes to one of the six sets of chambers we have used since 1893. In 1967 it was suggested that this might be a short-sighted approach and a Chambers Investigation Sub-Committee was set up. In 1974 the sub-committee's report identified three new chambers to be tried out, but by 1977 none of them had answered the telephone so the idea was dropped.

2. Each of those firms must only be used in its designated area of work, as follows: (1) turbary, (2) piscary, (3) emblements, (4) advowson, (5) disaster litigation (a growth area of this firm), (6) everything else.

3. There is also a set of chambers extensively used by this firm for professional negligence, but we have never actually instructed them on behalf of a client.

4. At least half a day should be set aside to make telephone contact with the clerk.

5. Ask who is available to deal with the matter immediately and say that the papers will be down within a couple of hours. They must not actually be sent for several days, which should ensure that the chosen barrister is up to his eyeballs when they do arrive.

6. Familiarise yourself with the special language of barristers' clerks: "knows about this area of law" (*might have heard of it*); "knows all about it" (*has heard of it*); "does a lot of work in this area" (*has heard of it and even knows what it is*); "expert at this sort of thing" (*once did a case in this area, though has probably forgotten all he ever knew*); "about 10 years' call" (*about 5 years' call*); "very good on his feet" (*useless at paperwork*); "chambers' paperwork specialist" (*useless on his feet*); "can probably squeeze it in" (*has got no work at all*); "one of my best barristers" (*has got no work at all*); "I'm sorry, I thought he was available, but I'm just looking at the diary" (*you should have said it was legal aid*).

Preparing instructions

7. For many years it was traditional in this firm for instructions to counsel to be in a standard form: "Counsel has papers herewith and will see the nature of problem". That was unnecessarily prolix. "Papers herewith, please advise" is quite sufficient, if excessively polite.

8. It is nearly always a waste of time to sort the papers, or list them in the instructions. There would be little point in a divided profession if we had to do counsel's job for them.

9. If the enclosures are listed, one or two must be omitted from the papers. It keeps counsel on their toes. For example, if counsel is to advise on construction of a document, take care to omit that document. If the instructions are to settle a defence, ensure that the statement of claim is missing (assuming there is one you may always ask counsel to settle a defence to a generally indorsed writ).

10. The physical preparation of the papers is important. Bear in mind the following:

(i) Our red tape specialists are usually able to find a piece of tape of exactly the right length (i.e. not a millimetre to spare) to ensure that when tied with the recommended quintuple granny knot it will burst asunder in counsel's chambers and

scatter papers all over the floor.

(ii) Those spiky things that go through the corners of papers should be used whenever possible. If there is blood on the papers when they come back (in addition to the usual coffee rings and smears of marmalade and chocolate) make sure you report the matter to the senior partner; there have been several instances of employees of this firm failing to get full credit on the annual salary review for even quite serious injuries to counsel.

11. A vital point: If the limitation period is likely to expire in the next few days, draw counsel's attention to the risk by mentioning it obliquely somewhere *inside* the papers.

Chasing up and collection of papers

12. Contact counsel's clerk (but see 4 above) about 15 minutes after the papers have been delivered to chambers to ask if they have been done yet.

13. After that you have a choice of two approaches: (1) telephone every half hour every day to ask when the papers will be done; (2) do nothing for about two months and then telephone every 15 minutes.

14. The next stage after 13 is as follows:

(1) inflict a barrage of telephone calls on counsel's clerk (or counsel, so that he can't get on with any work at all) complaining that it is now a matter of life and death that the papers are ready that day;

(2) tell counsel's clerk you are making special arrangements for urgent collection from chambers the moment the papers are ready; and

(3) leave it for at least a fortnight before bothering to have them collected.

Payment of fees

15. Counsel's clerk may never send a fee note, in which case you can forget about the whole thing. Regrettably, many barristers these days are not gentlemen, so we are frequently asked to pay for counsel's work.

16. If a fee note is sent at the end of the case, the firm has three months to pay or challenge it. A challenge should normally be made, but not until the very last day of the three month period (and in the meantime any letters or telephone calls from counsel's chambers should be ignored).

17. The precise form of challenge will depend on the circumstances. A suitable challenge in the case of a fee note for £25,000, for example, is to say that this firm can trace no record of (say) the telephone conference on June 16th. There is not the slightest chance, of course, that this firm would ever have a reliable record of anything.

18. In particularly difficult cases, where it looks as if the firm is in danger of having to part with actual money, it is essential to arrange a letter from a partner. If the case was lost, the letter will make it clear that the outcome was entirely counsel's fault, though avoiding details of how (which might make it too easy for counsel to refute the point).

19. Criticism of counsel's handling of the case is more difficult if the case was won, though there is often scope for suggesting that in the hands of a competent barrister the damages would have been greater or the costs award more favourable.

20. When all else is lost, send the cheque second class - and don't forget to forget to get it signed. □

(Reprinted with the kind permission of *Counsel*).

Availability of Suitors' Fund

Practitioners are reminded that under the Suitors' Fund Act, clients may be eligible for payment towards costs incurred in litigation.

The Fund is available where costs have been awarded in appeal matters, where a successful appeal is made to the Court of Appeal on quantum or where proceedings are aborted, e.g. on the death or protracted illness of a Judge. (However, funds are not available where matters are discontinued where the Jury fails to agree, or where there is default or neglect by the parties (civil proceedings) or the accused (criminal proceedings)).

Amendments to the Act which became effective on 13 January 1988 allow the Secretary of the Attorney General's Department (with the concurrence of the Attorney General) to allow payment from the Fund in cases where no specific entitlement exists, but where such a payment would fall within the spirit and intent of sections 6, 6A and 6B of the Act.

For further information, please contact Mr. Peter Baldwin at the Attorney General's Department on (02) 238.8629. □

Federal and Territory Choice of Law Rules

Lionel Bowen, the Commonwealth Attorney-General, has referred the following matters to the Australian Law Reform Commission:

- (1) whether the laws to which the *Law Reform Commission Act 1983* applies relating to the choice of law and of procedure to be applied in proceedings in federal courts, other courts exercising federal jurisdiction, Territory courts and other courts exercising jurisdiction under laws for the government of a Territory are adequate and appropriate to modern conditions;
- (2) the appropriate legislative means of effecting any desirable changes to existing laws in relation thereto, having regard to any constitutional limitations on Commonwealth power; and
- (3) any related matter.

The Commission is to report particularly on:

- (a) the resolution of the question which law applies in a case where the subject matter of the proceeding is, or arises out of circumstances, connected with two or more of the States and Territories;
- (b) the law and procedure that should apply where a proceeding is remitted or transferred from one court to another; and
- (c) statutes of limitations as they affect proceedings in the courts referred to above.

The Commission's Report is due by 30 June 1991. Any members of the Bar who wish to contribute their views on these issues should get in touch with Stephen Mason, The Law Reform Commission of Australia, DX 1165. Telephone (02) 231.1733. □

Fair Weather Bar

From time to time the Bar Council receives complaints about Barristers who have failed to appear at intra- or inter-State Courts as a result of adverse weather conditions preventing or delaying travel on the morning of the hearing.

Barristers should be aware that in many jurisdictions Judges will not grant adjournments on this basis and should ensure that they are familiar with the local practice before making their travel arrangements. Practice notes are sometimes issued dealing with the local practice.

To avoid misunderstandings, Barristers should also ensure that they reach express agreement to travel on the morning of the case with their instructing solicitors and satisfy themselves that their clients have been made aware of the risks should they choose not to pay Counsel's expenses of travelling to the required destination the night before the hearing.

A barrister's fundamental obligation is to appear when briefed to do so. Failure to satisfy this obligation due to travel being delayed or prevented by bad weather may well constitute a breach of the Bar Rules or professional misconduct. □

Preliminary Notice

The Australian Bar Association will be holding its next Law Conference in Darwin commencing on Saturday 7th July 1990. It is also hoped to arrange an add-on conference in Singapore through the weekend of 14th and 15th July in conjunction with the Singapore Law Society.

Watch this space for further announcements. □

Demise of the Nominal Defendant

The Claims against the Government and Crown Suits Act 1912 has been repealed and replaced by the Crown Proceedings Act 1988 which commenced on 1 February 1989. It is no longer necessary to petition the Governor to have a Nominal Defendant appointed to represent the Crown. Under the new Act, proceedings against the Crown (with the exception of claims against statutory corporations representing the Crown) can be brought against the "State of New South Wales" (s.5 [2]). All documents to be served on the Crown in such proceedings are to be served on the State Crown Solicitor. (s.6 [1]). □

Transcript Enquiries

Members of the Bar who wish to telephone the Reporting Services Branch to make enquiries about transcripts from courts covered by court reporters only, e.g. Court of Appeal, Supreme Court, District Court, Industrial Commission and some tribunals should ring: **228 7335** This is the direct number. Calls through the Attorney-General's switchboard are frequently transferred to the wrong extension. □

Changing Roles

The following persons transferred from the Roll of Barristers to the Roll of Solicitors on Friday 4 November 1988:

Geoffrey John Bellew
Edwy Frederick Bunt
David Leslie Crawford
Colin John Crossland
Bernice Mary Finlayson
Beverley June Hasset
Helen Sue McKenzie
Murray John McPherson
John Oxley-Oxland
Trevor John Stevenson
John Herbert Tuchen
Robert George Williams
Robert Hilary Williams
Iain Edward Worrall

The following persons transferred from the Roll of Barristers to the Roll of Solicitors on Tuesday, 20th December 1988:

Robert John Bennett
Jennifer Joy Bright
Sharyn Vicki Ch'ang
Alan John Cullen
Raymond Gregory Drake
Wayne James Freakley
Erlinda Lulu Geronimo
William Robert Ghioni
Sivaran Singh Gill
Edward Charles Goddard
Jeanette Samantha Hagarty
Elizabeth Gai Jackson
Charles Leslie Langburne
Connie Choo Lian Lee
David Michael Lennon
Denis Andrew McGrane
Graeme Robert Morgan
Margaret Christine Quinn
Terry Alexander Steer
John Alexander Taylor
Alfred William Witton
Paul Burgess
Trevor Ernest Carter
Bruce Thomas Dickson
Christine Margaret Hafey
Leonard Peter Hawthorne
Barry Charles Ingold
Kevin George Nettle
Colin Peter Robinson
Francis Kenneth Ticehurst

The following persons transferred from the Roll of Barristers to the Roll of Solicitors on Wednesday 21st December 1988:

John Gregory Field
Graeme Keith
John Heckenberg
Wayne Edward Russell

The following persons transferred from the Roll of Barristers to the Roll of Solicitors on Friday 10 February 1989, and have not been admitted for five years:

Lynnette Christine Ainsworth
Robyn Louise Bailey
Peter Michael Capodistrias
Kerry Chrysiliou (nee Moore)
Reginald Langan Connolly
Wayne Covell
Mirelle Curtis
Grant Raymond De Fries
Ian Walter Fathers
Amanda Graham
Peter Douglas Gurney
Jane Bowe Houston
Annette Margaret Johnson
Jeffrey Keith Johnson
Jennifer Sue Jude
Janet Anne Kirkham
Garry Vincent Lane
Christopher Hugh Levingston
Kenneth William Linegar
John Robert Miller
Gregory John Morahan
Tracy Catherine Morgan
Brian Alan Scott Moyle
Lawrence Scott Moyle
Reginald George Muddle
Andrew Christopher Martin Mulcahy
John Trevor Murn
Helen Florence Nolan
Anne Therese Perrens
Cheryl Peterson (nee Lipman)
Teresa Mary Pilkington
Joanne Mary Rees
Robert Anthony Reitano
Marilyn Joy Scheidel
Kathiravelu Sivananthan
Jane Ellen Tape
John Gwynne Tarlinton
Kim Randall Turner
Mark Allan Macdiarmid

The following persons transferred from the Roll of Barristers to the Roll of Solicitors on Friday 10 February 1989, under the L.P. Act:

Ian William Angus
David Ian Catt
Grahame Ralston Herron
Severian Ignatius Hill
Matthew Edmund Browne Playfair
David Myer Samuels
Prithvi Pal Singh Sidhu
Ian John Stanley
Terrence Herbert Weston

Reform of Criminal Procedure

The NSW Attorney General, the Hon. J.R.A. Dowd, MP, has announced that his Department is preparing a White Paper on the Reform of Criminal Procedure. It is envisaged that the paper will be released for public comment around mid-May this year. Upon its release and distribution, the Attorney will be attending numerous meetings to speak on the proposals in the White Paper, and to discuss their significance.

The closing date for comment will be the end of June and submissions on the proposals from the public and from the legal profession will be welcomed.

The paper will be looking at all aspects of committal proceedings. It will examine the existing delays from charge to the commencement of committal proceedings; from the conclusion of a committal proceeding to the "no bill" stage; and from the "no bill" stage to the commencement of trial, and will explore ways in which such delays can be reduced.

The paper will also contain statistics, focussing on areas of delay between charge and trial, and will give details of the number of remand prisoners who have been neither convicted nor sentenced.

The paper will discuss the role of the Director of Public Prosecutions in relation to the conduct of preliminary hearings for offences triable only on indictment, and in relation to hearings for offences covered by Section 476 of the Crimes Act 1900.

If committal hearings are to be reduced, or avoided altogether, then some compensatory mechanisms must be put in their place. The paper will discuss the possibility of introducing rules allowing pre-trial criminal discovery of the

prosecution, and provisions allowing the defence to seek leave to cross-examine individual prosecution witnesses before trial.

Officers from the Attorney General's Department and the Department of Police and Emergency Services are currently examining proposals designed to produce rules that govern the audio and video recording of Police interviews will also be canvassed in the White Paper.

We presently endure intolerable delays in the criminal process, with the typical time between charge and trial of anything up to 18 months. In NSW prisons, there are approximately 800 prisoners on remand of which 300 stand convicted of no charge at all.

The thrust of the White Paper will be to explore ways in which changes to criminal procedure can be made, which will achieve significant reductions in these delays, whilst at the same time, improving, or at the very least maintaining, the current protections which the criminal law rightly affords those accused of crime. It must be emphasised that

the White Paper will not be an exercise simply in efficiency. No changes will be made which will degrade the significance the law has always attached to protecting the rights of accused.

Finally, the White Paper will canvas the feasibility of introducing into legislation appropriate time standards which will regulate the maximum times between charge and commencement of the committal hearing, and between committal and commencement of trial. Those time standards would be affective on proclamation, with such proclamation being made regionally as each district within NSW is ready to comply. □



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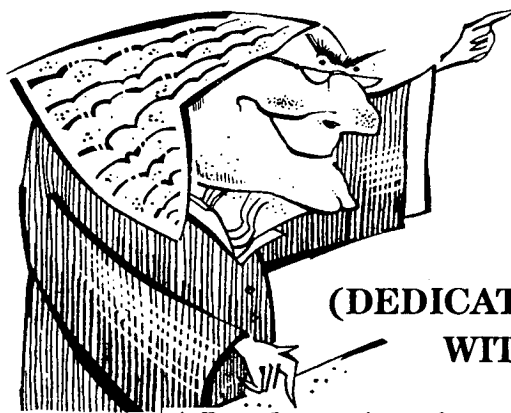
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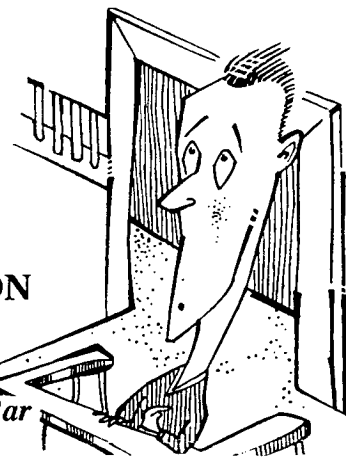
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LEGAL SPEAK

(DEDICATED TO MR JUSTICE STAUGHTON
WITH THE *UTMOST* RESPECT)

*A Punch-eye view of communications between Staughton J. and the Bar
(vide Bar News, Summer, 1988).*



- | | | | |
|---|---|---|--|
| 1. Ex parte. | 1. Slightly hung over. | 17. It is with a heavy heart. | 17. I only accepted this job because sentencing people is fun. |
| 2. I hesitate to interrupt my learned friend. | 2. I do so with unmitigated delight and no hesitation whatsoever. I hope it will put him off his stride. | 18. May it please your Lordship. | 18. I trust you are in a good mood, as I have not read my brief. |
| 3. Beyond reasonable doubt. | 3. Whoever heard of a policeman lying? | 19. Suspended sentence. | 19. Not what I would like it to mean. |
| 4. A Puisne Judge. | 4. A Judge who lets rapists off with a caution. | 20. I submit ≠ I give in, but... | 20. I shall go on and on until by sheer erosion I win the day. |
| 5. My client, who is a single man. | 5. The poor bugger has but months to live. | 21. Polenta non fit injuria. | 21. Pasta is good for you. |
| 6. My Lord, might the witness be seated? | 6. He comes of a good family. | 22. Qui s'excuse s'accuse. | 22. It is an offence to do certain things in certain places. |
| 7. The crime of which you stand convicted is much too prevalent. I intend to make an example of you. | 7. My own house was done last week. I lost my golf clubs, the Magimix, everything. | 23. Plausible though the accused is... | 23. Even you feather-brained, simple-minded, empty-headed gits on the jury can surely read him like a book. |
| 8. Contra preferentum. | 8. There is a lot in what President Reagan says. | 24. I hear what you say. | 24. Sod off. |
| 9. My client, who is a man of unblemished character. | 9. My client whom the fuzz have been after for years, but who, until now, has always been just too smart for them. | 25. If I am wrong in law, Mr Scott-Hopkins, then you have a remedy elsewhere. | 25. If your client has surplus funds and wishes to throw good money after bad he can always appeal. He will lose, of course. We Judges stick together. |
| 10. I do not know whether your Lordship would be prepared to indicate whether, in the event of a plea of guilty, your Lordship would be prepared to consider the possibility of a non-custodial sentence? | 10. Yes – then I can cut along to the Test match/the Derby/have my hair shampooed – it's beginning to tickle under my wig/Cynthia Payne's party/lunch at the Garrick. No – they will give me another case to try when I wrap this one up, so why rush things? | 26. I must advise you, members of the jury, that you should not hold it against the accused that... | 26. For the eleventh time, this inadmissible evidence conclusively proves him guilty. |
| 11. Res Ipsa Loquitur. | 11. Ray has decided to conduct his own defence. | 27. Expert Witness. | 27. A second-rate accountant/doctor/marine biologist/etc who, being unable to earn a living following his vocation, is driven by necessity to hire himself out as a professional perjurer. |
| 12. A hung jury. | 12. A jury which includes at least three friends of the accused. | 28. As your Lordship pleases. | 28. If we are on opposite sides of the net at the Bench v. Bar tennis match I suggest you wear a box. |
| 13. Liquidated Damages. | 13. A case of Latour '61 sent round to the Judge's Lodgings in a plain wrapper may well tip the balance in favour of the accused. | 29. My Lord, perhaps I might take instructions on that point? | 29. Perhaps I might have five minutes alone with the accused so that we can cobble together another skein of wool to pull over the eyes of the jury. |
| 14. Volenti non fit injuria. | 14. Confidential treatment is available. | 30. De Minimis non curat lex. | 30. The Irish (i.e. the Little People) have scant respect for the law. |
| 15. I put it to you. | 15. I am a bully by nature. | 31. Mr Scott-Hopkins, could you assist me as to the meaning of the expression "belt up"? | 31. Why not my Lord? Why not indeed? |
| 16. Let me put it to you once more. | 16. I shall go on until you burst into tears. | | |

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Welsh Rarebit Not Good Enough for Coombs

With the abolition of appeals to the Privy Council (which your correspondent as a matter of principle entirely approves although on all other grounds deploring) work in the United Kingdom is sparse. Commercial arbitration however turns out to be a lode for mining. During December, a timely settlement gave me opportunity to drive to the north of Wales. Readers of "The Spectator" will not be surprised that I stayed at the Seiont Manor Hotel just beyond Caernafon. This is an imitation Manor House, 18th Century in style, but 1980's in plumbing and comfort.

There I had one of the finest meals I have ever eaten. In the absence of the party of the third part (or a party of any other damn part for that matter!) I was forced to four courses just to give the chef a fair testing. The watercress soup, made on a beef stock strong enough to prevent the bitterness which often intrudes, green and thick with garlic croutons, was superb.

Wild Gravalax Salmon shaped and wrapped in English spinach and served with a light mayonnaise followed, elegant and delicious.

A fair pause before Welsh lamb cooked en crouete with spinach, fresh rosemary and thyme, carefully extracted from the salt pastry, sliced at the table and garnished with its own juices. This was served with a vegetable accompaniment, a layer of aubergine with slices of courgette fanned, topped with tomato coulis and an overlay of more garden green spinach. Acorn, Pincraig and Llanbeydig Welsh cheeses (roughly Cheddar, Brie and Blue respectively) finished a superb repast.

If you are in Wales, go there, stay the night, get up late and have the full Welsh breakfast of home made sausages, bacon egg black pudding and tomato. You won't eat lunch that day! Mention the Bar. □ J.S. Coombs

Seiont Manor Hotel, Caernafon, Gwynedd LL55 2AQ
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Silks Need Not Apply

The Editor's challenge to the Bar to contribute a review to this journal on the subject of a perfect restaurant is one which I, for one, undertake with a great deal of hesitation. Otherwise - cordial relations with the restaurateur, might easily be affected by encouraging barristers to dine at his restaurant, and not only because they have difficulty with a knife and fork, let alone chopsticks, and frequently don't know how to behave in public. There is also to be considered, a possible difficulty in obtaining a seat at your own favourite restaurant.

I put all these considerations out of my mind to advise your readers as follows. The Da Ly, 559 Crown Street, Surry Hills, 669.8041 (about a hundred yards north of Cleveland Street) serves a selection of Malay and Vietnamese dishes. The menu is in two parts for this purpose and a mixture is recommended. The entrées are all outstanding and there is a good choice of main courses. The modest prices will have particular appeal to those struggling juniors described by Bloom Q.C. in the last Bar News as "trying to make ends meet until they take silk". It will have little appeal to silks, however, as they will find it impossible to spend here at a rate to match their earning capacity. □ A.D.M. Hewitt

Fine Food

Dear Editor,

It is not true that barristers get the food they deserve.

John Close has taken over the Bar Association's take-away food bar and the dining room. He brings catering experience from France, Switzerland and Canada. He was Food and Beverage Manager of the Sydney Opera House. Now he does special sandwiches and carries accounts.

The food is superior to anything else within quick reach of Phillip Street.

He squeezes fresh orange juice every day. If you are too early he won't sell you yesterday's. He personally bakes scones down there fresh every day.

Why does this man prepare food with such care when it is so easy to have pre-prepared orange juices and bakery products?

Do we notice the difference? Is it possible that we may appreciate the superb viennas and cappuccinos (\$1.20), deluxe sandwiches (\$2.50) and boxed lunches (from \$2.00 to \$11.50) that can be eaten on the roof in the brilliant sunny days of autumn in Sydney?

Probably not.

But if anyone appreciates good food and wants to confine her experience of railway refreshment room catering then she might give this bloke a go. He needs to have cash flow or he will have to cut down soon. He simply doesn't have the big capital to carry credit.

But he doesn't cook like a bank manager.

Barristers don't deserve to eat at the bank.

Escoffier (L.L.B. [without hons.] Syd.)

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Bar Wins Soccer Cup

In the Bar Association's 1987 annual report stated forlornly that "The Bar has been indolent since the last issue and has either played no sport of note or has been too busy to write it up for posterity".

Could it be then that the Bar, which once participated in a range of team events each year, is becoming a race of Norms? Not so if you play that game of real football - soccer.

Once more the Bar turned out to play its annual game against the Solicitors XI for the Challenge Cup. Once more the Bar won. The score 2-1.

The game was played in the usual friendly spirit against an overall younger and fitter side which was altogether unlucky not to have succeeded, having created many more chances and shots on goal, denied on several occasions by the Bar's goalie, John Harris (Wardell) who won the Best and Fairest Player trophy for the match.

The game was played on Sunday 9 October last on the University of N.S.W.'s soccer ground at Little Bay, in warm but pleasant conditions and on an excellent full international-size field.

Things began badly for the Bar. Within the first three minutes after kick-off, the Solicitors had worked the ball into the Bar's goal area and created a scramble in front of goal which ended with the goalie sprawled on the ground and losing the ball, leaving the Solicitors to slot home a simple first goal.

Things just did not look good for the Bar after that. Most of the first half was played in the Bar's half of the field with the Solicitors passing the ball about in effective build-ups and repeated raids into the Bar's goal area. Only tenacious defence kept the ball out, allowing the teams to go in at half time with the Solicitors in front by 1-nil.

The second half began with much the same pattern of play, but with the Bar now floating the occasional long pass forward into the Solicitor's half with varied attacks on goal. Then with fourteen minutes to go, Dennis Flaherty (Chalfont) was denied by the woodwork as a high cross from the left bounced off the Solicitors' goal post and was cleared away.

With seven minutes to go, and with the Solicitors looking for a second goal to seal the match, the Bar quickly cleared the ball from its goal area, ran it behind the Solicitors' defence, short-passed it back from Nick Tiffen (Selborne) around the goalie to Dennis Flaherty who this time found the back of the net.

With the score now 1-1 the Bar's Team suddenly found new legs. Then, with just two minutes to go and in a see-sawing finish which found the Solicitors missing several great chances against the solid defence of players like Alan Goldsworthy (University) and Billy Purves (Chalfont), a long-passed ball was taken down the right flank and floated over the keeper by Mark Waine and into the Solicitors' net. The Bar then managed to hang on grimly for a 2-1 victory and to retain the Challenge Cup which they had last won in 1986 (there being no match last year).

Nick Tiffen, as usual, organised the Bar's Team (whose names appear below) and Aaron Mucsnik (of Snelgrove Mucsnik & O'Brien) again organised the Solicitors' Team. John de Meyrick (Edmund Barton) was the man in the middle

with the whistle, but denies all allegations of favouring either team (nor is it true that he was promised several briefs before the match, or if true, is denied same by reason of the result).

The Bar's Team comprised: Paul Boulwood (Selborne), Mario Di Lizio (Wardell), Dennis Flaherty (Chalfont), Peter Gray (Wardell), John Harris (Wardell), Alan Goldsworthy (University), Billy Purves (Chalfont), Michael Read (Selborne), Nick Tiffen (Selborne), Mark Waine (A.G.S.), David Williams (Windeyer). □



Golf - Victory over Solicitors

The Sir Leslie Herron Trophy for annual competition between the Bench and Bar versus the Solicitors' Golfing Society is now in the custody of the Registrar following a great win of twelve matches to nine when this event was held in January at Elanora Country Club.

Close inspection by Judge Sinclair on presentation of the trophy revealed that the Bench and Bar had not won since 1976 and complacency by the Attorneys had led to their failure to inscribe the result for the last three years. This has now been remedied (see photograph below) with a bill for engraving to be sent under cover of a letter requiring payment before next year's re-match otherwise a lien will be claimed irrespective of the outcome of future competitions.

The Bench and Bar's performance would seem to have been due to better overall consistency (possibly because of previous experience on the course which has been the venue for the annual match against the Services for the last two years). The best card of the day with 47 points went to the Solicitors who also took out the best first nine and best second nine. Paul Menary and Allan Hughes were the best pair for the Bench and Bar with 44 points on a countback. Nor did the Bench and Bar figure in the nearest to pin to competition although John Steele took out the long drive, a prodigious hit which the Master of Ceremonies sought to explain together with Steele's absence from the prize giving ceremony by some reference to "early feeding time at the Zoo".

The next event was the internal match between the Bench and Senior Bar versus Junior Bar held at Pymble Golf Course on Easter Tuesday 28th March 1989 which was won by the Junior Bar. See next Bar News for details.. □

Great Bar Race Provides a Memorable Finale to the Law Year

The Fifth Great Bar Race was sailed in moderate NE winds and provided an exciting event for the many hundreds who enjoyed the day including 40 odd skippers, their crews and other less energetic participants.

Sydney Harbour turned on one of its truly sparkling summer days for the race and the presentation of trophies on Store Beach where a veritable army of mainly lily-white, overweight and semi-clad indulgents prompted Foster J., when presenting the Law Book Company Sailing Trophy to remark, with his customary aplomb - "the best argument I have yet seen for the retention of robes."

This year's race saw the presentation for the first time of the "Gruff Crawford Memorial Panache Trophy" being a magnificent tankard donated by some of his friends and colleagues at the Bar for annual presentation to the member of the Junior Bar who displays the greatest degree of panache, either prior to, during the course of or after the race.

The trophy was presented by Mahoney D.C.J. who delivered a reserved judgment on the first winner Talbot R.N., whom it was said had the misfortune to be granted this title by his parents but whose life's endeavours (many of which were shared with Gruff) were stamped with such panache that he was thought to be the logical choice and sentimental favourite for this year's trophy.



"The best argument yet seen for the retention of robes" - Foster J.

There were, nevertheless, many other contenders for the trophy which will do much to ensure that the race never becomes too serious or stuffy. There was Walsh (the winner of the First Great Bar Race) in "The Pink Boat" (a Ben Lexcen design) with his crew dressed in matching cerise and blue sailing shirts and his tactician Peter Sorenson of 18 footer fame. The writer was heartened to be informed that it was not a Joey's old boys reunion!

There was Buchanan Q.C., who skippered "Sounds of Silence", the majority of whose crew apparently missed the start but showed great ingenuity in catching a water taxi to Shark Island where they were able to clamber aboard as he



Morris with Law Book Company Sailing Trophy

rounded the Shark Island mark. This unbounded enthusiasm brought the reward of the "Chalfont Cup" for competition amongst Judges and Silks. There was Kelly who, for some unknown reason, fell overboard when "Blind Justice" had reached the safety of its mooring pen at the CYC.

Unfortunately, the Deed of Gift precluded Wheelahan Q.C. from being eligible. However, as the Officer of the Day, he lent his own unique brand of panache to the day's activities as he held Court on the "MV Lennox", to its skipper O'Connor and a large group of the Bar, who shall remain nameless, and some scantily clad women. More of this dash and panache is promised for next year's race. It is clear, notwithstanding the many distractions of the day, that he kept a firm eye on the race and ensured that the Official Starter did not follow the precedent set in the last year's race and declared that the skipper who was first was in fact first rather than last!

Peter Mooney who skippered "Freight Train" a Freyers 65', gave more than one hour's start to the first boats and literally mowed down the field to finish a creditable sixth. The Law Book Company Sailing Trophy was keenly contested between two old rivals, "Nina", skippered by Peter Morris, and "Freedom Bound" by Nock. It ultimately was Morris who got the nod and Nock the knock (sailing parlance). Third place went to Michael Robinson in the Farr 43 "Vanguard" the steering wheel of which towered over Horler Q.C. when he took the helm at one stage of the race.

All three place getters received pewters kindly donated by the Bar Association and presented by Shand Q.C. who it is said crewed with great distinction, if not panache, on "Anthanta VI".

All in all it was a magnificent day and one that no doubt will be long remembered by all those involved. Congratulations to the Race Committee and thanks to David Goode the official handicapper. Thanks also to John Barrett of the CYC for lending his time and authority as the official starter.

P.S. Congratulations to "Ragamuffin" on its Sydney - Hobart win. Readers will recall that it competed with distinction in the "Third Great Bar Race."

□ Des Kennedy