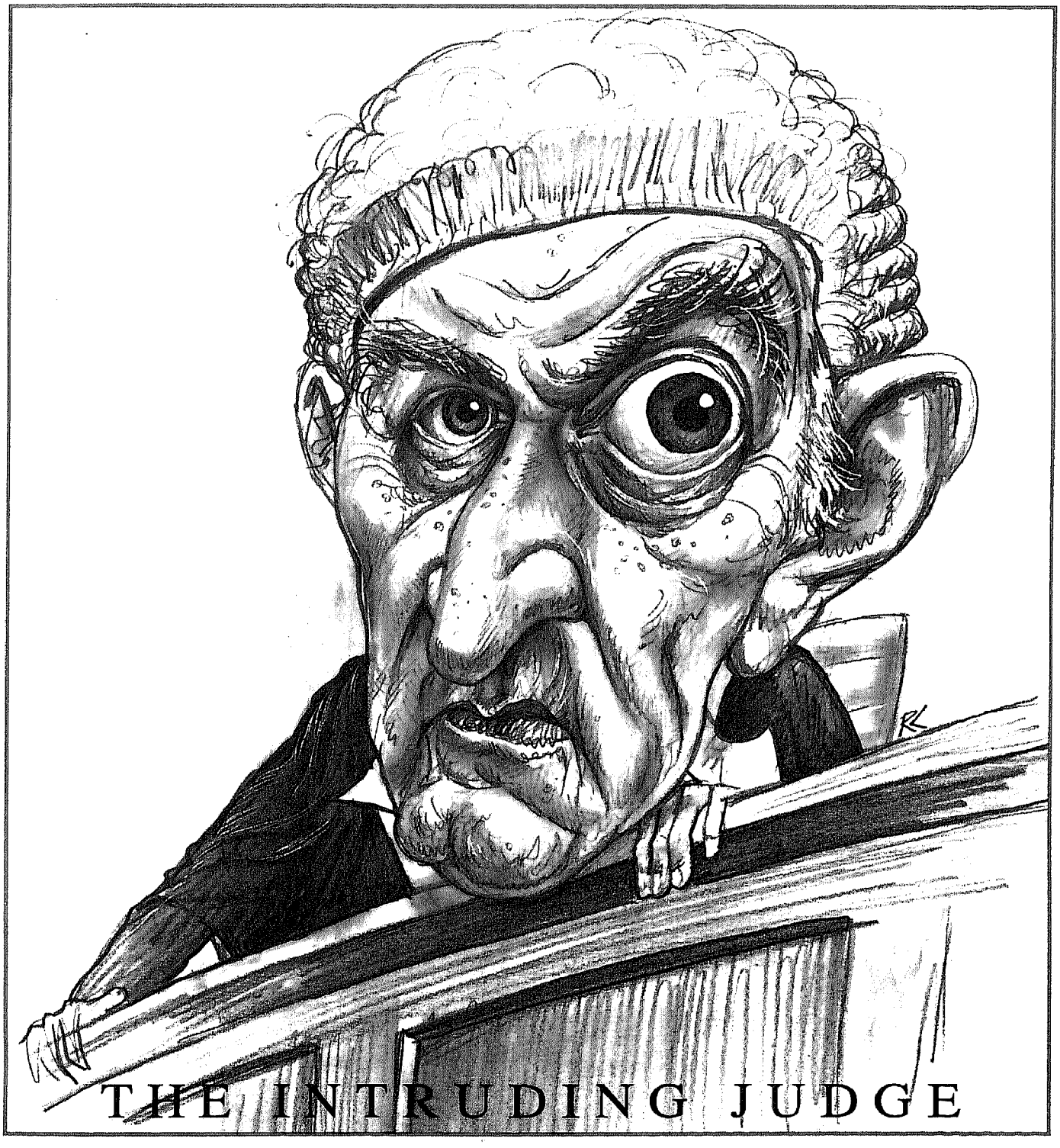
Bar News

The journal of the NSW Bar Association



THE INTRUDING JUDGE

Winter 1991

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Bar Notes

Commercial Division Timetables

The Chief Judge of the Commercial Division, Justice Andrew Rogers, has drawn the profession's attention to the undesirable practice of practitioners agreeing between themselves to extend times for compliance with orders of the Court. Although his reminder is principally addressed to solicitors, members of the Bar should be aware of these concerns. His Honour points out that when interlocutory orders for the preparation of a case are made in the Commercial Division they are designed to achieve fairness not only between the parties but also serve to satisfy the public interest in the orderly conduct of commercial litigation. Insofar as arrangements inter partes to extend times serve to impede the efficient preparation for the hearing of disputes they are unacceptable to the proper administration of justice. The Court strongly discourages practitioners from making such arrangements and urges them to bring matters before the Court if there is non-compliance with the timetables laid down. The Judges recognise and regret that restoring matters to the list in such circumstances occasions unnecessary additional expense, nonetheless point out that it is unacceptable that for whatever reason there should be a risk that when a matter is called on for hearing it is not ready. In a recent case a matter was unable to proceed for the first two days allotted to it due to non-compliance with the timetable in circumstances where the hearing had been expedited due to the illness of one of the parties to the litigation. Members of the Bar should take heed of the Court's concern and, whenever appropriate, dissuade their instructing solicitors from private adjustment of Court directed timetables. ❑

The Evidence Bill 1991

The Evidence Bill 1991 was introduced into Parliament on 20 March 1991. According to the explanatory note, its objects are to reform, and provide a comprehensive statement of, the law of evidence to be applied in New South Wales courts and in some legal and administrative proceedings. If enacted, it would replace the Evidence Act 1898* and the Evidence (Reproductions) Act 1967 and exclude the operation of most principles and rules of the common law and equity relating to evidence.

The Bill is 108 pages long and contains 195 sections and a dictionary of terms used in the Bill. It is largely based on the Bill contained in the Australian Law Reform Commission's Report "Evidence" (1987) on the laws of evidence in Federal and Territory courts (ALRC 38).

The Attorney General's second reading speech makes it clear that he seeks comments on the substance of the Bill. Members are urged to read the Bill and consider its provisions. The Bar Council's Law Reform Committee, headed by Beazley QC, is scrutinising the Bill with a view to preparing a submission to the Attorney General, and will welcome comments from members.

The Bill appears to contain at least one provision which would produce undesirable results. Headed "Exclusion of evidence of settlement negotiations", s.117(1) of the Bill, in general terms, prevents the admission into evidence of communications made in connection with an attempt to negotiate a settlement of a dispute. But s.117(2)(d) states that the general rule does not apply if:

> *"The communication or document relates to an issue in dispute and the dispute, so far as it relates to that issue, has been settled;"*

Were this exception enacted, it apparently would reinstate the holding of the English Court of Appeal's decision in *Rush & Tompkins Ltd V Greater London Council* [1988] 1 All ER 549. That decision was reversed on appeal by the House of Lords in a unanimous decision reported at [1989] AC 1280.

If enacted, the exception would seem to have the effect that nothing said in a successful negotiation (one that resulted in a settlement of the dispute) would be privileged from discovery and admission in later court proceedings. This result would be most unfortunate. One could without difficulty think of cases where parties would be most concerned at the possibility of subsequent disclosure of communications made during the course of their negotiations. ❑ Robert Angyal

Flicking

Of more recent times the Bar Council has become aware of an increase in complaints by both Attorneys and Clients in relation to the incidence of the flicking of briefs at a late stage of proceedings. The increase is noted both in volume and in terms of the percentage of complaints generally received.

The Bar Rules clearly require that a brief involving the hearing of a serious criminal offence shall not be returned except in the most compelling circumstances and Bar Rules C 8 and 9 refer. Members should bear in mind three important considerations where they find themselves in a position where two briefs may or will clash in point of time.

(a) The complexity of the brief.
(b) The time remaining within which that complexity may be mastered.
(c) The experience and practice of the barrister to whom it is intended to pass the brief.

Members will be familiar with the other requirements of Rules C 10 and 11 in relation to the express consent of the solicitor involved and the over-riding consideration of any adverse effect upon the interests of the client.

It may be that the Bar Council will need to adopt a more severe outlook in regard to breaches of these rules.

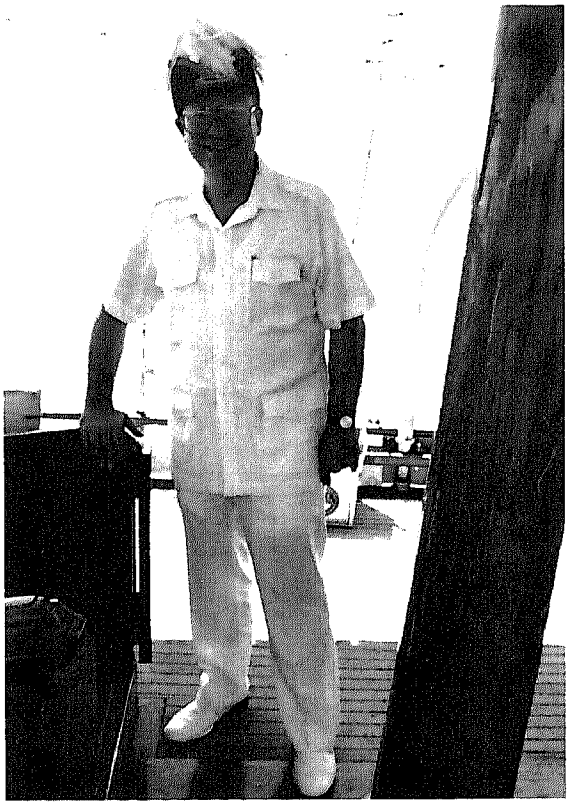
It is important that members keep abreast of the contents of their diaries more than just a couple of days ahead and when a problem is likely to arise it is best to deal with it when it first becomes apparent rather than waiting in the fond hope that it will resolve itself. It is the last minute situations created by the belief that matters will solve themselves that has led to the increase in complaints. Above all always ensure that the recipient of a brief is of sufficient competence and standing in relation to the matter as will ensure that the client or solicitor is not left with the impression that an apprentice is being thrown in over his head at the last minute.

Failure to adhere to what after all are simply rules of common sense may from now on result in more serious penalty especially for some of the more flagrant breaches.

Identify any problem at an early stage and solve it then and there, and not later. ❑ T.J. Christie

From the President

The motto of the Bar, servants of all and yet of none, embodies two elements which are of the essence of barristers. We must meet the needs of those who require expert legal representation and advice. At the same time we must maintain an independence from influences which distract from the provision of that representation and advice, whilst at the same time maintaining an independence from the client. Barristers are not merely mouthpieces in the way in which our American counterparts have come to be painted. We are professionals. Our continued existence depends upon the maintenance of professionalism and excellence.



Collegiality has always been part of the ethos of the Bar. At a time when there were only male barristers they were described as "brothers-in-law". I am not sure what the appropriate description would be in gender-neutral terms, but the concept remains unchanged. The most senior should be available to assist the most junior. That is our tradition. It is a tradition which should not be lost as a consequence of changes in the Bar.

The great dream of people such as Barwick, Manning, Kerr, Toose, McGuire and others in the early 1950s was to provide the Bar with a home of its own. By bringing all, or nearly all, members under the one roof they saw that the collegiality of the Bar would be strengthened, the quality of practice further improved and the Bar united so as to be a force to be reckoned with. Strength and excellence were considerations which helped motivate the construction of Wentworth and Selborne.

The numbers at the Bar have increased dramatically over recent years. At the same time there has been a dispersal of the courts within the central business district. The opening of the Downing Centre and plans for the extension of that Centre, so as to house even more courts, have highlighted this tendency. A proliferation of Chambers housing small numbers of barristers has taken place. There is a possibility that this could lead to feelings of separation and hamper the free interchange of experience between the senior and experienced on the one hand and the junior and less experienced on the other. There is a real risk that all these factors in combination could weaken the cohesion and collegiality of the Bar.

I believe passionately in the value of an independent Bar. The experience in other States and parts of the Commonwealth has demonstrated that the market shares that belief. How then can the Bar retain its cohesion and collegiality? How best to meet the challenges? Do we, for instance, establish a second home for the Bar? If so, where should it be? Should there be refurbishment of Wentworth and Selborne, and if so what form should this refurbishment take? When and how should this be undertaken? These questions will no doubt continue to exercise the minds of the Bar Council after my term as President has come to an end. They are, however, questions which must be addressed by the Bar as a whole, senior and junior alike. I would welcome suggestions from as many members as possible so that the plans which are formulated to meet the challenges which confront us will be soundly based and enjoy the support of the Bar as a whole.

❑ Barry O'Keefe QC

Easements to Heaven

During the hearing by the New South Wales Court of Appeal of *Dobbie v Davidson* on 11 April 1991 in Sydney the Court (Kirby P, Priestley and Handley JJA) was hearing a case involving an alleged omission by the Registrar General to register a right of way when land was bought under the *Real Property Act*.

Mr T E F Hughes QC was appearing for the appellants when the following exchanges occured:

Kirby P: Where is the notice which the Registrar General gave to interested property owners?
Mr Hughes: It is the one given to the Church of England Property Trust shown in the appeal book. It was common ground that this was a pro forma.
Kirby P: The Church of England Property Trust must own large tracts of land in this region?
Mr Hughes: The Church owns a lot of land near Goulburn.
Handley JA: No unregistered right of way, I trust.
Mr Hughes: Except, one hopes, to heaven! ❑

"Costs of Justice?"

"Improbable though this may sound, in the south, at Tralee, the articles of a race for a plate donated by 'the Gentlemen of the Profession of the Law in the County of Kerry' had an even more bizarre provision. The owner of each entry was required to have expended at least £200 in 'adverse litigation', those who had spent £1,000 and upwards in the same cause being given a weight allowance of 3lb. These conditions were drawn up and settled by none other than Daniel O'Connell in his seventh year at the Bar. The race was run on 29 August 1805 and was won by a Protestant clergyman, Rev. Mr Denis of Wicklow! The exact meaning of the words 'adverse litigation' was, to say the least, difficult to define, and, as might have been expected, the result of the race led to a dispute. This was only settled by the intervention of the Stewards of the Turf Club, who were gradually assuming wider authority and greater powers."

(John Welcome,
Irish Horseracing - an illustrated history, p.14)

This is getting ridiculous!

SUPREME COURT OF NEW SOUTH WALES
QUEENS SQUARE, SYDNEY Thursday 13th of June 1991
COMMON LAW DIVISION

MR JUSTICE SMART

6:30AM 231 ELIZ ST
EXAMINATION
1 010497/90
BRENDON JOHN WHELAN v JOHN FAIRFAX & SONS LIMITED

A letter from the Managing Editor of CCH Australia Limited

Its metamorphosis from its intended role as a residual consumer protection provision to a versatile and significant action for purely inter partes and essentially commercial litigation is of a magnitude without parallel in Australian jurisprudence.

The subject of that comment? The prohibition against misleading and deceptive conduct enshrined in sec 52(1) of the *Trade Practices Act*. Who said it? Deborah Healey and Andrew Terry. Where? In their just published book ***Misleading or Deceptive Conduct*** where in 450 pages they analyse this most litigated section.

Note also Laurence Maher's comment on the beginnings of sec 52:[1]

> "The business community and business lawyers decried such brevity saying that the meaning of section 52 was unclear. Murphy was, however, well aware of the shortcomings of specific State consumer protection laws. Section 52 was designed to reverse (within the constitutional reach of the *Trade Practices Act*) the common law rule of *caveat emptor 'let the buyer beware'*. It was to be a flexible means of dealing with the most ingenious of the hucksters. The great irony is that it has turned out to be a remedy used more by, than against, the business community."

Coming fast upon the publication early in the year of the two volumes of the ***Australian Corporations & Securities Legislation***[2] have been four volumes of ***Australian Income Tax Legislation***.[3]

Needless to say we try to achieve two imperatives in these publications. Get them out fast and, above all, Get them *right*.

Undoubtedly the most disarming explanation of error, ever, was Dr Johnson's "Ignorance, Madam, pure ignorance", on being asked how in his Dictionary he had come to define *pastern* as the knee of a horse.

When you received this year's ***Australian Master Tax Guide*** (and on sales figures it's a fairly good guess that most lawyers' offices have at least one copy) your reaction may well have been that we'd left a chapter or two out ... so slim is it compared with previous editions.

The answer isn't that anything has been omitted but just simply that for its portability, and therefore your convenience, we've used thinner paper this year!

Usually we send out one of our special dispatches (the yellow sheet with the red arrow through the words "CCH Dispatch") when something so urgent breaks that we feel it shouldn't wait till the next loose-leaf report. Things covered are, for example, tax legislation that is announced today and will start from today, increases in costs, important rulings and the like.

Rarely does a court decision have such immediate consequences as to require such urgent dissemination.

In late February, however, the Full Bench of the High Court handed down a single judgment decision in *MBP (SA) Pty Ltd v Gogic* which ruled that one of its earlier decisions (*Cullen v Trappell*[4]) was in part bad law.

The issue concerned the rate at which statutory interest is to be allowed on damages for pain and suffering referable to the pre-trial period.

The editor of our ***Australian Torts Reporter*** regarded this as so important in its implications for current cases that a special dispatch was sent out two days after the court handed down its judgment.

Clearly the full text of that judgment will go to subscribers a.s.a.p.

Professor Baxt (TPC Chairman) was reported as having told the Australian Pacific Insolvency Conference in February that the restrictions limiting insolvency work to accountants were an example of structural regulation in a market for professional services, and he is reported to have supported the greater involvement of lawyers in insolvency matters either alone or jointly with accountants.

If this suggestion should come to pass and should (in terms of the heading for that press article) lawyers be given a slice of the insolvency action, then it's worthwhile noting that our two-volume service ***Australian Insolvency Management Practice*** would be pretty useful for a lot more legal practitioners.

And talking still about insolvency, it was that arch cynic Groucho Marx who said: "No one is completely unhappy at the failure of his best friend."

Until the courts start to develop a body of law clarifying and defining provisions of our new Corporations Law, probably the most valuable guides to how that law should operate will be per the releases of the body administering that law. Certainly it will be through the commentaries of expert legal writers and editors (in, for example, our ***Australian Corporations & Securities Law Reporter***) that most practitioners will obtain their understanding of the way this new regimen for companies and securities will operate.

To meet the need for a handy compilation of releases and guidelines, we're publishing, in one loose-leaf volume, ***Australian Securities Commission Releases*** where all the important media releases, information booklets and practice notes will be housed. Because in this new publication of ours they'll be summarised on release, filed under their appropriate tab, and accompanied by a legislation finding list and an index, this CCH volume will probably be the first place the practitioner will turn to, in regard to many company law problems.

It's a publication certainly worth having a look at.

Extract from transcript:

Plaintiff's counsel: What doctor treated you for the injuries you sustained while at work?

Witness: Dr J.

Plaintiff's counsel: And what kind of physician is Dr J?

Witness: Well, I'm not sure, but I remember that you said he was a good plaintiff's doctor.

1. Chapter 3, "Murphy the Attorney-General", in *Lionel Murphy — A Radical Judge*, McCulloch Publishing Pty Ltd, 1987.
2. Vol 1 Corporations Law; Vol 2 Regulations and other legislation.
3. Vol 1A and 1B *Income Tax Assessment Act*; Vol 2 Regulations, Fringe Benefits Tax, Rating Acts, etc; Vol 3 *International Agreements Act, Occupational Superannuation Standards Act*, etc.
4. (1980) 146 CLR 1.

If you're interested in seeing any of the publications noted on this page — or indeed any publication from the CCH group — contact CCH Australia Limited A.C.N. 000 630 197 • Sydney (Head Office) 888 2555 • Sydney (City Sales) 261 5906 • Newcastle 51 7122 • Melbourne 670 8907 • Brisbane 221 7644 • Perth 322 4589 • Canberra 273 1422 • Hobart 134 088 • Adelaide 223 7844 • Darwin 27 0212 • Cairns 31 3523.

NSWSL 1/91

What Is A Lawyer's Emporium?

A new bookstore has brought a change of pace and style to legal bookselling in this city. More a lawyer's emporium than a simple bookshop, POINT OF LAW fills a long-neglected gap in the marketplace by combining a range of goods and services aimed specifically at satisfying the wide diversity of lawyers' requirements with a variety of tempting indulgences.

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A broad selection of publications from the mainstream legal publishers is enhanced by the addition of publications, many of which are not carried by other booksellers, from the less well-represented Australian and international publishers.

As an added incentive, all these books are sold at discounts ranging from 7.5% to 15%. And, if you need that hard to come by title, a special order service is available.

Purchase and sale of secondhand and antique books is a specialty, with everything from legal fiction and anecdotal titles, text and practice books to sets of Law Reports on sale and in constant demand.

A number of framed antique title deeds are also available - including the original 1853 land grant for Darling Harbour and a Conveyance dated 1881 relating to the Luna Park site in Sydney's Milsons Point.

Situated in the GIO Building at 60 - 70 Elizabeth Street (or 153 Phillip Street) directly above the Document Exchange, the spacious well-appointed shop is a pleasure to browse through.

If you have the time, relax into a leather armchair (the staff will be happy to provide a cup of coffee or a glass of wine) while you peruse the latest titles or take in the array of paintings, prints and sculptures from leading Australian artists, the African artifacts, the antique furniture and the fine Italian leathergoods and ties which are just some of the aforementioned indulgences on offer!

The owner, Ross Wishart, also offers a number of services not otherwise readily available including library valuations for insurance or sale, chambers fitouts, and on behalf of the NSW Bar Council operates a scheme to provide free of charge - as an alternative to costly subscription - to members of the Bar of less than 3 years' standing, loose parts of reporting services and journals.

Officially opened in March by Barry O'Keefe QC, Point of Law is a unique establishment leading the way in providing real service to the legal profession and as such is a very welcome breath of fresh air. ❑

The Intruding Judge

There is a fine line between judicial control of a trial and judicial intervention to which counsel may object. R.S. Hulme QC explains where that line runs.

One of the problems counsel, particularly fairly junior counsel, have to contend with from time to time is a judge who wishes to interfere with counsel's running of a trial. Despite a number of decisions extending back at least as far as 1945 - and observations as far back as Lord Bacon - both experience and authorities show that not all judges both know and accept the limitations to such interference. It has been suggested that the writer might contribute, if not to the learning in this area, at least to the dissemination of such learning.

The most recent case in the field seems to be that of *Government Insurance Office of New South Wales v Glasscock* (NSW Court of Appeal, 19/2/91 - unreported) wherein Handley JA. observed:-

> "One of the most difficult and distasteful tasks a barrister is ever called on to perform is to have to make an application to a trial judge to disqualify himself or herself from hearing or further hearing a case".

The task is even more difficult if the barrister is young, possesses a decent degree of humility and is conscious not only of the judge's position but also that the judge should and presumably does know how trials should be conducted. On the other hand the task is easier if Counsel is conscious of how far a judge is and is not entitled to go. It is hoped that this article may widen the spread of knowledge in this regard.

The overriding principles are that a trial shall be conducted according to law, shall be fair and shall appear to be fair. These principles of course have operation outside the current topic - operation which it is not intended to pursue here. It suffices for present purposes if it be recognised that these principles lie at the heart of the instant topic.

So far as the first of the elements mentioned is concerned, it is to be borne in mind that -

> "Under our law a criminal trial...is a trial, not an inquisition: a trial in which the protagonists are the Crown on the one hand and the accused on the other. Each is free to decide the ground on which it or he will contest the issue, the evidence which it or he will call, and what questions whether in chief or in cross-examination shall be asked; always, of course, subject to the rules of evidence, fairness and admissibility. The judge is to take no part in that contest, having his own role to perform in ensuring the propriety and fairness of the trial and in instructing the jury in the relevant law" - per Barwick CJ. in *Ratten v The Queen (1974)* 131 CLR 510 at 517.

McTiernan, Stephen and Jacobs JJ. agreed.

To similar effect is perhaps the best known of the cases in this area of the law, *Jones v National Coal Board (1957)* 2 QB 55 at 63 -

> "In the system of trial which we have evolved in this country the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large ... ".

See also *Titheradge v R (1917)* 24 CLR 107 at 116.

Furthermore excessive judicial intervention is seen as reducing the judge's chances of fairly appreciating and weighing the case put forward by a party.

> "A judge who observes the demeanour of the witness while they are being examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a judge who himself conducts the examination. If he takes the latter course he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation. It is further to be remarked, as everyone who has had experience of these matters knows, that the demeanour of a witness is apt to be very different when he is being questioned by the judge to what it is when he is being questioned by counsel, particularly when the judge's examination is, as it was in the present case, prolonged and covers practically the whole of the crucial matters which are in issue." - *Yuill v Yuill (1945)* 1 All ER 193 at 198.

This principle has been accepted in *Jones v National Coal Board* at p.63, *R v Butler (1953)* 70 WN (NSW) 222 at p.223 and *Galea v Galea (1990)* 19 NSWLR 263 at 280.

Indeed, the party helped by a judge may have only a pyrrhic victory.

> "The questions were, after all, leading questions inviting the answers they got, and they were put by the judge, not by counsel. They could not have been put in chief, and would not have been put in cross examination. I do not believe a judge may make impregnable findings of fact by expressing a belief in evidence which he has put in a witnesses's mouth". - per Meagher JA *Commonwealth Bank of Australia v Mehta* (NSW Court of Appeal 28/3/91 - unreported).

Fairness involves each party having the opportunity of fully advancing its case and challenging that of the other side by way of evidence in chief, cross-examination and address and in the case of a jury trial having a summing up which fairly presents the issues to the jury. So far as the presentation of evidence is concerned -

> "There is no reason why the Judge should not from time to time interpose such questions as seem to him fair and proper. It was, however, undesirable in this case that, beginning in the way which I have described, the Judge

counsel of a witness who is himself accused should be constantly interrupted by cross-examination from the Bench. Cross-examination in cases of this kind is usually quite efficiently conducted by counsel for the Crown." - *R v Cain (1936)* 25 Cr. App. R. 204 at 205.

The substance of the above was approved in *R v Bateman (1946)* 31 Cr. App. R. 106 at 112 where the Court added -

"We would adopt those observations and apply them to any witness, whether called by the prosecution or the defence."

To similar effect is the following extract from the judgment of Street CJ., with whom Owen J. agreed, in *R v Butler (1953)* 70 WN (NSW) 222 at 224 -

"Quite apart from the judge's view of the demeanour of a witness there is the matter of the jury's view of the demeanour of the witness, after hearing the summing up, and for a judge to take part, as if he were counsel, in an elaborate examination or cross-examination of a witness is unfair to the witness himself, is unfair to counsel, and may destroy a line of examination-in-chief or of cross-examination which counsel had carefully decided upon beforehand. It must be remembered that counsel examining-in-chief obviously has thought how that examination is to be conducted in the light of the information before him in his brief, and it would be impossible for him to maintain the thread of his examination if he were subject to constant interruptions or if the examination were taken out of his hands. So also in regard to cross-examination. So much may often depend upon the way in which counsel intends to conduct his cross-examination, the matters up to which he proposes to lead by appropriate questions, and the stage at which he intends to put a crucial question. The whole object and effect of his cross-examination may be destroyed by an unduly hasty intervention on the part of the presiding judge."

Notwithstanding the circumstances that often a judge will be more experienced than counsel and perhaps, by an abstract test, better, he usually has not the benefit of knowing what information is available to counsel or of preparation of an overall cross-examination.

"In cross-examination, for instance, experienced counsel will see just as clearly as the judge that, for example, a particular question will be a crucial one. But it is for counsel to decide at what stage he will put the question, and the whole strength of the cross-examination may be destroyed if the judge, in his desire to get to what seems to him to be the crucial point, himself intervenes and prematurely puts the question himself." - *Yuill v Yuill* at 185.

Timing is a recognised ingredient in the art of cross-examination. There are often doors to be shut or counsel may defer a question so he can ask it of two witnesses without the intervention of an adjournment. It is also a legitimate technique in cross-examination not to let the witness know which way the questioner is heading.

A party is also entitled to address fairly and fully and in this regard it is appropriate to record a passage in *R v Clewer (1953)* 37 Cr. App. R. 37 at 39-40, most of which was quoted with approval in *R v Martin* 1960 SR (NSW) 286 at 288.

"No doubt it is sometimes difficult, when the defence is one that appears to the presiding judge, whether a judge of assize, recorder or chairman of quarter sessions, to be fantastic or devoid of merit, to treat it with the same consideration as he would pay to a defence not marked by those characteristics. At the same time, the first and most important thing for the administration of the criminal law is that it should appear that the prisoner is having a fair trial, and that he should not be left with any sense of injustice on the ground that his case has not been fairly put before the jury. If counsel is constantly interrupted both in cross-examination and examination-in-chief, and, more especially, as in this case, during his speech to the jury, his task becomes almost impossible. The more improbable the defence, the more difficult it is for counsel to discharge his duty to his client adequately, and, provided that he keeps within the bounds of fair advocacy - as it is beyond question Mr Du Cann did here - it is highly desirable that he should be allowed to do his best in presenting his case, leaving it to the judge to deal with, and maybe to demolish, it in his summing-up.

Some of the judge's observations must have indicated to the jury that he himself had come to a conclusion with regard to the case that was adverse to the appellant and that he regarded the defence as devoid of any foundation. As we have already said, when he came to sum up, he summed up perfectly clearly, perfectly fairly, and as need hardly be said with regard to any summing-up of this learned judge, with meticulous accuracy as to the law, but it does seem to the court that the whole conduct of the case must have conveyed to the jury the idea that the learned judge was completely convinced of the appellant's guilt, and was disparaging the defence which Mr Du Cann was gallantly endeavouring to lay before them.

Issues of fact are under our law entirely the province of the jury. Everyday experience shows that juries sometimes accept defences which appear highly improbable to judges, and which would not be accepted if the decision rested with the judge alone. The prisoner is entitled to have his defence, even the most improbable, put to the jury by his counsel, whose task is rendered impossible if he is constantly subjected to the kind of interruptions that occurred in the present case." (emphasis added).

See also *Stead v State Government Insurance Commission (1986)* 161 CLR 141

Trials must also appear to be fair - *Galea v Galea* at p. 277 and the cases there cited. Intervention, depending on the form it takes, may make it appear that the judge has taken sides and that the trial is unfair.

"So also it is for the advocates each in his turn to examine the witness and not for the judge to take it on himself lest by so doing he appears to favour one side or the other." - *Jones v National Coal Board* - at p. 64.

Though it would appear leading questions from the bench are not, per se, objectionable - it was so held in *Government Insurance Office v Glasscock* - a significant number of them leads towards an appearance that the scales of justice are not being held evenly.

Nothing in the foregoing is intended to suggest that a judge may not question a witness either in chief or in cross-examination. The judge's entitlement in this regard is recognised in virtually all of the cases cited. Such questioning can almost always be done with little or no significant interference with counsel's conduct of the case and, particularly when a witness is under cross examination it is suggested that almost always a judge, moved to intervene, should time his intervention to avoid such a consequence. In the writer's experience most good trial judges generally do so restrict their intervention - See also *Government Insurance Office v Glasscock* per Handley JA. at page 5.

It must also be borne in mind that judges are not bound by a monastic vow of silence. While certain conduct may be deprecated, one will not succeed on appeal merely because a judge has been sorely irritated by an irritating witness, *Galea v Galea (1990)* 19 NSWLR at 283-4, or reduced to sighing, groaning and appealing to the Almighty during counsel's address, *R v Hircock (1970)* 1 QB 67 at 71, or walks up and down the bench during counsel's address (suffering from "a fibrositic condition"), *R v Boundy* 76 WN (NSW) 395.

It would seem also that a judge may be entitled to a greater degree of intervention when counsel is inept - see U. Gautier *"Judicial Discretion to Intervene in the Course of the Trial" (1980)* 23 Crim. LQ 88 at 100 and cases there cited. Furthermore, the reasons which argue against judicial intervention may well have different weight according to the nature of the trial, civil or criminal, jury or non-jury. Judicial intervention later in a witness's evidence may be easier to justify than if it occurs at an early stage of the evidence-in-chief or cross-examination - *Galea v Galea* at 281. A judge is also clearly entitled to indicate, by questions or otherwise, matters which concern him.

However, none of this really bears on the fundamental issues with which this article is concerned. A judge is not entitled to take over a trial or a significant part of it; his interventions should not be such as to suggest bias towards one or other of the parties and the interventions must not prevent counsel from effectively presenting and conducting their cases.

This then is the law. How should counsel respond when in counsel's view a judge's intervention does interfere with his client's interests?

Firstly, as soon as practicable after the intervention passes what counsel believes to be legitimate, counsel should object or ask the judge to desist or moderate his intervention. If intervention continues or is repeated, it may be appropriate for counsel to repeat, possibly more than once, his objection or request. One can not lie by and then complain on appeal - see *Vakauta v Kelly (1989)* 167 CLR 568 at 572, 577, 587 - though some latitude may be given and once complaint is made, it need not be frequently repeated. *Government Insurance Office v Glasscock*, per Handley JA. at 14-15.

Counsel should ensure that, preferably on the transcript, there is a contemporaneous record of the conduct complained of and of one's objections or applications so that an appeal court may properly consider them. *Vakauta v Kelly (1988)* 13 NSWLR 502 at 524. See also *Builders Licensing Board v Mahoney (1986)* 5 NSWLR 96. The first of these cases makes it clear one is entitled to have matters of substance noted.

If judicial intervention makes it impossible to follow a train of thought then this should be stated and recorded.

No doubt questions to and answers from witnesses will be recorded but in the writer's experience not all judicial interventions are. For example, there was one celebrated New South Wales judge some years ago who, while properly instructing a jury that they should give to the accused's defence the weight they saw fit, would hold his nose with one hand and go through the motions of pulling a lavatory chain with the other. The record as presented to the Court of Criminal Appeal was unexceptionable!

If the intrusions are sufficiently extensive then the application to have the judge discharge himself should be made.

Finally, it is suggested that counsel should recognise, as some of the cases referred to show, that not all judges accept with equanimity a submission that their interventions are undesirable and should be more limited in the future. Apologies for the mere making of a submission which amounts to a criticism of the particular judge's conduct are not required - and indeed inappropriate - but it should be remembered that tensions are apt to rise and it is desirable that counsel exhibit care in the formulation of his submissions - see for example *Government Insurance Office v Glasscock.* Subject to this -

> "Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful which he thinks will help his client's case." - *Rondel v Worsley (1969)* 1 AC 191 at 227

and those contemplating the "difficult and distasteful" task to which Handley JA refers may take comfort from the observations of Sir Owen Dixon on the occasion of his swearing in as Chief Justice -

> "Counsel, who brings his learning, ability, character and firmness of mind to the conduct of causes and maintains the very high tradition of honour and independence of English advocacy, in my opinion makes a greater contribution to justice than the judge himself". - (1952) 85 CLR p xii. ❑

Pleading!

(Extract from verified statement of claim in Common Law proceedings in the Supreme Court).

"The 2nd Defendant further says that to the extent the plaintiff suffered loss and damage, the events as pleaded in paragraphs 11 and 12 of the Statement of Claim were together events occurring and would have occurred, without any act or acts or any breach of duty of the 2nd defendant and in particular the events were caused by Mother Nature and Almighty God acting jointly and severally. " ❑

Sydney District Court Delays

The District Court introduces case management in an attempt to reduce the substantial delays in the civil jurisdiction.

At a time when the District Court's civil jurisdiction is about to increase from $100,000 to $250,000 it must be supposed that the Government proposes a very substantial increase in the number of Judges or some other radical proposal to assist the Court, because the Court is already struggling with serious delays.

In the 1960s the delay between praecipe and trial "blew out" to 20 months but was reduced to 6 months in the mid-1970s. By December 1986 the delay was 2 years. By 1990 the delay had increased to 3 years and 8 months.

The causes of the delay appear mainly to be:

(a) more cases but a disproportionately lower increase in Judges;
(b) a very substantial increase in tribunal and statutory appeals work;
(c) a high level of adjournments which are very disruptive to the organisation of a list;
(d) a significant increase in criminal work including matters which used to be heard in the Supreme Court.

The Lack of Judges

The increase in the number of Judges in the District Court (28 Judges in 1976 and 55 in 1991) has been inadequate, even with the successful arbitration and Associate Judge systems, to keep pace with the greatly increased work of the Court. At the present time, approximately two-thirds of cases that run to judgment are decided by Judges of the Court with the balance decided by arbitration. Even so, in August last year, 969 cases were disposed of. In September 1990, 836 were disposed of and in October, 910 were also completed. The rate of settlement has slowed greatly. In August 1990, 62.3% were settled. In September, 52.2% were settled and in October, 51% were settled. Some years ago, the settlement rate was much closer to 85%. The lack of sufficient full time Judges is already a problem, but will become much worse if the jurisdictional limit is increased by 2 1/2 times to $250,000.

"The increase in the number of Judges in the District Court ... has been inadequate"

Tribunal Work

The massive increase in tribunal work has caused great strain to the available Judge sitting days. The *McBride* matter alone has absorbed one Judge for most of the last 21 months. Two and a half Judge sitting days per week are spent sitting on tribunals and special statutory appeals. That level of hearing is a major increase in demand on the Court compared with even 5 years ago.

Adjournments

Adjournments, particularly on the day of hearing but at any time close to hearing, remain a seriously disruptive problem for the organisation of lists. Even the level of adjournment of call-overs has caused delays. In August 1990 1,420 matters had to be called-over to produce 969 cases ready for listing and this was after a 3 1/2 year wait in the list. Adjournments on the day of hearing are a worse problem. In one month in 1990 16% of matters were taken out of the list on the hearing date as "not ready to proceed".

Criminal Listing

The District Court has taken a great deal of work from the Supreme Court, particularly serious sexual assault trials which often prove demanding on Court time and resources. In recent times the Court has devoted much of its resources to speeding up the criminal lists. It has been able to do so largely because of the introduction of Associate Judges who sit in civil work only and the arbitration system.

The Downing Centre, while providing 5 additional courtrooms, cannot, in itself, have much impact on Court delays unless there is either:

(a) an increase in the number of Judges overall;
(b) the introduction of recorders, for example on country circuits as is used in England;
(c) some other system to increase the number of trials heard.

Past Reforms and Future Proposals

The District Court has, for the last 3 years, had in place Listing Review Committees, both civil and criminal, to explore ways of increasing the speed of lists. The general arbitration system has made a substantial impact on listings. The Philadelphia system, with 3 sitting arbitrators (soon to be increased to 5) and a running list which is usually cleared every day by hearing or settlement, is disposing of up to 15 matters per day in addition to those being disposed of by the Court and the general arbitration system (private hearings usually in chambers or solicitors' offices).

A further reform has been the introduction of the pre-trial conference, a system that is very demanding on the time of Registrars and Assistant Registrars and which is heavily dependent for case disposal on the willingness of both parties to negotiate. The pre-trial conference system, which explores issues and readiness to a much greater extent than the old call-over system, has, nevertheless, not been able to reduce significantly the level of adjournments. It is plainly not as good a system as the direct, inquiring and active supervision of preparation and issues by a Judge as is seen, for example, in the Federal Court and in the Commercial and Equity Divisions of the Supreme Court. Despite all of these reforms and the increase in cases resolved, the delays remain a serious problem.

Judge Sitting Time

The amount of work required of a District Court Judge has increased enormously. In 1988/89 Court/Judge time was 94% occupied, which is a phenomenal rate in any jurisdiction.

Associate Judges

The Associate Judge system has, undoubtedly, assisted in the District Court and it is hoped that the system will continue. It is clearly second best to permanent appointments but does allow a greater case disposal rate.

The Staunton Plan

The Chief Judge has proposed a new scheme which has the potential for radically varying the operation of the civil work in the District Court. The plan is based on schemes used in San Diego, both in State and Federal Courts, and involves a system of case management by a particular Judge which has some slight similarity to the directions schemes in the Federal Court and the Commercial and Equity Divisions of the Supreme Court.

The proposal is as follows:-

1. Initially 4 Judges will be assigned to the scheme.
2. Each Judge will be allocated 300 cases which they will retain from the time of allocation through all directions until they have heard the matter.
3. Each Judge will spend 1 day per week, initially, calling through all 300 matters, monitoring and directing the cases to ensure readiness.
4. Each Judge will be computer literate and will be provided with computer assistance to deal with the 300 matters.
5. Heavy listing penalties will be issued for failure to comply with directions or failure to be ready.
6. As existing cases are disposed of, new cases will be added to the Judge's allocation.
7. Counsel will be encouraged to attend the preliminary hearings.
8. Every matter fixed for hearing will be fixed as a special fixture. There will be no reserve list for those matters.

The system will clearly have substantial benefits including benefits for the profession. When a matter is listed for hearing it will definitely be heard on that day without any languishing in a reserve list with "not reached" markings. The identity of the Judge will be known at the outset and not minutes before a hearing. Settlement will therefore be easier to assess. Parties, including Counsel involved in the matter, will have more face-to-face exposure to one another prior to the hearing date which should assist in settlement and in determining issues. An active involvement of the Judge in a discussion of the issues prior to the hearing should have a similar effect. Access to interlocutory orders and directions will be simplified. The decaying effect on the readiness of a matter of long waits between praecipe and call-over will be avoided.

The Bar Council and the Law Society have both considered the proposal of the Chief Judge and both have given the scheme support.

Conclusion

The District Court remains a troubled Court with inadequate resources to deal with vast and increasing numbers of cases. While numerous schemes to improve case disposal numbers have been implemented very successfully, delays are still substantial, both in crime and civil work. There is a need for the appointment of more Judges, a continued use of Associate Judges and an increased use of the Philadelphia and general arbitration systems. However, even assuming the success of the Staunton plan, it is difficult to see how the District Court will manage an increase of its jurisdiction by 2 1/2 times the present level without an enormous injection of increased resources and of Judges. ❑

Recollections of Sir Frederick Jordan

Sir Maurice Byers, CBE QC, reveals some vignettes of the late Chief Justice.

If you look at Volume 42 of the State Reports you will see that the Supreme Court for the period comprised in the Volume consisted of eleven judges, the Chief Justice, the Honourable Sir Frederick Richard Jordan KCMG and ten puisne judges. For the period comprised in Volume 43 the team was unchanged. For the period comprised in Volume 44 the Honourable John Sydney James Clancy (Acting) is added. There are now forty judges including the Chief Justice.

My purpose is not to emphasise that change - it is obvious enough - in any event one would expect massive changes between this country when desperately at war and now after extensive immigration and over forty years of peace. What I propose is a record of my recollections of Sir Frederick Jordan. I should state my credentials. I was admitted to the Bar, so the Law Almanac tells me, on 26 May, 1944 and have practised as a barrister, in one capacity or another, ever since. For approximately two years before admission I was associate to the Honourable K.W. Street and an undergraduate of the Law School which then occupied a number of floors of the then University Chambers.

During the years of my associateship, Sir Kenneth's chambers were on the first floor of the old Supreme Court building in King Street and the Chief Justice's were on the ground floor. The Chief Justice and I passed in the corridor from time to time and occasionally I acted as associate to the judges comprising the Full Court where the Chief Justice usually presided and on at least one occasion appeared before him.

He was a tall, broad shouldered man who wore rimless glasses and, usually, a brown suit. His expression was remote and unsmiling. His moustache was grey and close clipped, his face pale and oblong, his forehead high. His eyes were distant - as if he was engaged in the solution of a particularly abstruse problem of quantum mechanics. He moved with an air of icy authority. He embodied, in short, a jury advocate's conception of the most formidable and unfathomable type of equity lawyer.

When presiding, he dominated the Court. Not only was he taller than his colleagues, he was also more erudite and intelligent and his brethren recognised his superiority, as did most lawyers. He gave one the impression of being engaged upon what was to him a simple and rather boring task and of enduring with a patience, at once weary and not unkind, the bumbling endeavours of counsel as well as those of his brethren. I don't mean to suggest that this is how he felt in fact. Undoubtedly he so appeared to a young and admiring barrister.

He is reputed to have said to an earnest King's Counsel who persisted in argument after being told it was unnecessary:

"Mr X, the Court has already informed you that we are with you, subject, of course to anything you may say to cause us to change our opinion."

His dominance I may illustrate with anecdote. I was arguing an appeal from a false pretences conviction. I had one good point supported by much old law and a 1936 decision of the Victorian Supreme Court. The point was that a statement of the accused's intention to perform a contract was not a statement of fact. After expressing doubt that my Victorian case really so decided, he said having had the relevant passage read:

"Very well then, we shall not follow it."

At no stage did he consult his colleagues. The Court did not follow the decision. I must say he listened to my bad points with admirable patience and patent disbelief.

The judges frequently consulted him on difficulties arising during the course of trials. That, of course, was Associates' gossip but these consultations imply no wrong. It is frequently alluded to in the older reports and assists the smooth running of justice. Judges do talk about their cases among themselves just as barristers do. The experience of others can often reveal what not to do as well as sometimes what should be done. And it is natural to consult the eminent.

The New South Wales Bench has always had an air of congenial brutality. Perhaps this was encouraged by the long reign of the Common Law system of pleading, though candour compels me to say that an occasional Equity judge, and I speak of those days, was no mean performer with bludgeon and knife. There was something about a declaration pleading, say, a cause of action in tort or contract that excited the bloodlust of the mildest of men. Sir Frederick could not be so described though he could when moved, exhibit a silky rudeness that was the envy of many.

The Bar was firmly convinced that he had no human passions and that he was only at home when plumbing the depths of Equity or when writing judgments replete with citation of authority and exposition of legal principle. Their sense of his remoteness is illustrated by the anecdote that after pronouncing a sentence of death, he went on to order that the costs of all parties be paid out of the estate.

It is amusing to compare with this Sir Owen Dixon's remarks on his retirement:

"As far as Chief Justice Sir Frederick Jordan is concerned, I really do not know what, if anything happened; but at all events he was not appointed [to the High Court] and by one of those curious twists which seem to touch the finest natures, this highly scholarly man and a very great lawyer eventually took some queer views about federation. But I do not think he would have taken them if he had been living amongst us." (1964) 110 CLR P XI.

The last sentence is not only in all probability true, it is a recognition by a Judge of a Court of ultimate appeal of out-

standing ability of the purer air and wider horizons they inhabit, an empyrean denied to those whose decisions they set right. The High Court's character as a national court, the different State origins of the Justices and the peripatetic life they led and still lead contribute to this attribute, at least so it has seemed to me.

Sir Frederick had scant regard for the moral hypocrisy with which judges felt it necessary to adorn the bare language of the Matrimonial Causes Act. By some quaint stroke of fortune, the authorities had appointed a patent lawyer to be Judge in Divorce. This led on occasions to decisions which were difficult to follow and undesirable to apply.

Suits for restitution of conjugal rights were a recognised means for obtaining divorce by consent. For the Judge in Divorce's decision to the effect that a petitioner needed to establish a subjective wish for the return of his wife or her husband, the Full Court substituted the readiness, willingness and ability that Equity required of a Plaintiff in a suit for specific performance.

Finally, I am indebted to Bruce McClintock for locating the following remarks with which Sir Frederick Jordan dismissed a husband's plea that his wife's suit failed on the ground that she had condoned his matrimonial offence.

"It was only after he had joined the Army, and had represented to her that he had obtained ten days final leave after which she would see no more of him, that she consented to be in his company for this period, although not to allow him to share her home or her bed; and it was only at the eleventh hour of what she was led to suppose would be the last day, that he succeeded in inducing her to have intercourse with him not in a matrimonial home as an incident of a general resumption of matrimonial relations, but al fresco in a motor car, as the final, and on her part unpremeditated, incident of a day's outing at the moment when all further association between them was about to be severed." *Spilsted v Spilsted* (1944) 44 SR (NSW 242 at p.245). ❑

Backsheets

(If all else fails ...)

BRIEF TO ADVISE AND TO GIVE EVIDENCE

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A. Katzmann
Barrister-at-Law
4th floor, Wentworth Chambers

Stars and Stripes Invasion

Barristers in particular may have noticed how the Australian news media's reporting of legal matters has acquired an American flavour. Witnesses are now reported to 'take the stand' in Australian courts instead of going into a witness box. Virtually every TV station and news journal uses a picture of a gavel to illustrate an item about an Australian court case. However a photographer from the Fairfax organisation went too far last month when he was called to give evidence in a criminal trial at Bathurst. After he went into the witness box the sheriff's officer tried to hand him the bible with the usual instruction: "Take the Bible in your right hand." He had some difficulty grasping the Bible and the instruction because he was standing rigidly to attention, right hand raised at shoulder level, palm outwards, just as he'd seen all witnesses do in *'Perry Mason'* or *'L.A. Law'* no doubt.

It took Judge Nash's growled reminder "This is Australia, son" to bring the young man back to the reality of the District Court at Bathurst. ❑

The Right Honourable Sir John Robert Kerr, AK, GCMG, GCVO, QC

A Service of Thanksgiving held in the Parish Church of St. James on 6 April, 1991 formally marked the end of the long and distinguished career of a former member and President of our Bar, the Rt. Honourable Sir John Robert Kerr, AK, GCMG, GCVO, QC.

Amongst those present were the Governor-General, the Hon. Bill Hayden, AC, and Mrs Hayden, the Governor of New South Wales, Rear Admiral Peter Sinclair, AO, and Mrs Sinclair, the Chief Justice of the High Court of Australia, the Hon. Sir Anthony Mason, AC, KBE, and Lady Mason, the Chief Justice of New South Wales, the Hon. Mr Justice A.M. Gleeson, AO, and Mrs Gleeson, former Governors-General, Sir Zelman Cowan and Sir Ninian Stephen, former Chief Justices of the High Court, Sir Garfield Barwick and Sir Harry Gibbs, the Prime Minister, the Hon. Bob Hawke, AC, and Mrs Hawke, the Leader of the Federal Opposition, Dr John Hewson and Mrs Hewson and the Hon. Peter Collins, MP, representing the Premier. In addition, a large number of members of the Judiciary, of the Parliaments and the diplomatic corps were in attendance, as well as political representatives of a number of foreign countries. At the invitation of the Secretary to the Prime Minister, I attended to represent the Bar.

The service was conducted by the Rector of St James, the Reverend Peter Hughes, in the presence of the Anglican Archbishop of Sydney, the Most Reverend Donald Robinson, AO. Its nature was such as to cause those who had known the late Sir John Kerr to remember incidents in which they had been involved with him. That applied to many who were present, for he was a man of great breadth of interest and his contacts were numerous and widespread.

Philip Kerr spoke movingly of Sir John as a father, a member of a talented household. He stressed the qualities of humility and understanding which he saw as the essence of his father. Donald Markwell, as Australian Rhodes Scholar and Fellow of Merton College, Oxford, spoke of the time after 1975 when Sir John and Lady Kerr had lived in England. There Sir John had done much for Australians studying abroad. He stressed the extraordinary range of interests, the quick mind and the foresight of Sir John. The Chief Justice of the High Court, Sir Anthony Mason spoke of "old silver" (as Sir John was affectionately known at the Bar) in his roles as a Barrister, a soldier and as one who helped to shape policy for the occupied countries in the period which followed World War II. He outlined the achievements of Sir John as a Judge, as Chief Justice of New South Wales and as our Governor-General. No one who heard Sir Anthony's speech could have been but convinced that Sir John firmly believed that the actions taken by him as Governor-General in 1975 were soundly based constitutionally and necessary in the circumstances which then prevailed. As time passes, the heat subsides and the dust from the political arena settles, more and more commentators seem to accept the correctness of Sir John's decision.

Sir John Kerr had a remarkable career. He was a Balmain boy, the son of a boilermaker. He attended Fort Street High where he took out every available prize and achieved three honours in the Leaving Certificate. This pass won him a University Bursary. He went straight into the Faculty of Law, from which he graduated with first class honours. After a period of military and diplomatic service he returned to the Bar where he quickly distinguished himself in the common law and industrial fields. His ability to master lengthy and complex matters was legendary. He was one of the original Directors of Counsel's Chambers Limited and remained a Director for 13 years. He worked with Barwick, Manning, Toose and McGuire to ensure that the Bar had a home of its own. When that building was complete he became head of Chambers on 10 Wentworth. He was a member of the Bar Council from 1961 until 1964 and was President in 1964. Meares describes him as full of ideas, innovative, incisive and as having an ability to motivate people. These qualities were amply demonstrated when, after a short period on the Supreme Court of the Australian Capital Territory, he became Chief Justice of New South Wales in 1972. He revitalised the spirit of the Court, introduced committees which still assist in the efficient dispatch of the court's business and he was active in the planning of the historic precinct between King Street and Hyde Park. In 1974 he was appointed Governor-General. The rest is already the stuff of history.

Sir John Kerr is the paradigm of that success which can be achieved in Australia by those who have intelligence, integrity and industry. The tributes paid to him at his Memorial Service were fitting. They were accepted by those present as the due of a great man, one I was privileged to know, one whom it is hoped will be treated well by history, a man who was a great barrister and an outstanding President of our Bar.

Vale John Kerr.

❑ B.S.J. O'Keefe QC

Major-General Kevin Murray AO, OBE, RFD, ED, QC

The death of Kevin Murray on Easter Day deprived the Bar of a fearless fighter, the Army of a senior soldier and the community of a colourful member.

Whilst each of us is the poorer for his passing, each is richer for having known him and each should be buoyed up with the knowledge that he entered eternal life on the very day The Saviour rose in signification of our redemption.

The record books tell us the facts of his admission to the Bar on 29 November, 1957 - nearly 34 years ago; that he was appointed one of Her Majesty's Counsel in 1973; that he was one of the most senior members of the Bar and that he had been a Silk for longer than more than 80% of our Bar has been in practice.

They record his decorations and honours - his appointment as an Officer of the Order of the British Empire in 1971 and as an Officer of the Order of Australia in 1982. They tell of his high military rank but they do not tell us about the real man - barrister, soldier, husband and father. They are silent about his personal characteristics, characteristics which endeared him to so many, characteristics which we remember today.

Most who are present today to do him honour will have some vignette which we carry with us, a cameo of which Kevin Murray is a part, generally central - for he was a dominant character, a big man whose presence was always felt.

I first met Kevin Murray in 1954. We were in camp at Singleton. He was a Captain in the Sydney University Regiment, I a Corporal, his assistant. As he was then, so was he throughout his long and successful career at the Bar.

I found it easy to empathise with him for he had much about him that was Irish. A gift with words, a sense of fun, an ability to laugh at himself and the world. Like much which has an Irish background he was a paradox.

He was big and tough, yet at the same time gentle and soft hearted. In Court he could be a bruising cross-examiner, a Nemesis who would pursue a witness until he got the admission he was seeking. Yet he was gentle and generous to a fault even with those, perhaps especially with those, whom the world would judge as undeserving. Kevin never judged in that way. He merely responded to need.

He did cases that won the headlines and earned for him an enviable reputation and, dare I say in today's climate, even substantial fees. That was the public perception.

However, throughout his career he did many, many cases which attracted no publicity and for which he charged no fees. In the best traditions of the Bar, he did them out of a sense of duty and because he was always one who felt strongly for the underdog and who responded to a hard luck story.

He was exuberant, extroverted and gregarious. He shared the good times, his successes, with all. He loved the limelight. That again was public perception.

But, he was also a very private person. Family life was removed from the public arena and shielded from the glare of the arclights. When he had problems few were aware of them. He kept them very much to himself.

He was a proud man - proud of being a General Officer, proud of being a Queen's Counsel, a leader at the Bar. He loved his uniform. He loved the silken gown. He revelled in the trappings of the Mess and of the Court.

Yet, Kevin Murray never forgot that he was a country lad of humble origins. Although he had made good, as a person with talent and tenacity can in Australia, he always had time for people, however down on their luck they may have been.

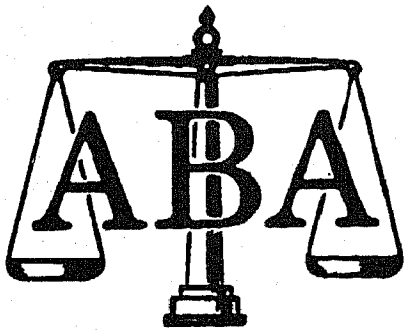
He was unconventional, yet at the same time a traditionalist. In Court, he would do the unexpected. Yet the traditions of the profession were dear to him and respect for the law and its institutions always to the fore.

Kevin was a man with a big heart. He was a man who loved his work - work that he was good at. He was a good barrister. Not for him the shirking of the unpopular cause or the unattractive client. In the best traditions of the Bar he did the hardest cases and he did them well.

I last saw Kevin in Gloucester House some three weeks ago. We spoke of old times. Of the good times. Of the happy times. He was clearly dying and he knew it. But he faced death with that same fortitude, that same resolution, that same tenacity which he had displayed throughout his professional life.

In his last days he was as he had been when I first knew him, big hearted, soft and gentle, an emotional man. He was an adornment to the profession and to our community.

To his wife Lyn and to his children on behalf of the profession I extend sincere sympathy at his passing. The members of the profession hope that his achievements, which will live long after him, will be a source of comfort for them in this the time of their loss. ❑ B.S.J. O'Keefe QC



The Independence Of

The Judiciary

A STATEMENT
BY
THE AUSTRALIAN BAR ASSOCIATION

March 1991

1. Preface

1.1 This statement is issued by the Australian Bar Association, which represents all those barristers in Australia who practice as members of an independent Bar. Each President or Chairman of each constituent body of the Association has signed the statement. It represents the considered views of the Association on a matter of national importance.

1.2 The statement is concerned primarily with the independence of the judiciary: judges, masters, judicial registrars and magistrates. They are members of the various Australian courts. There are, however, in addition to the courts, other bodies which are not courts but which must exercise their powers in a judicial manner: one aspect of which is that they must operate independently of those directly affected by such exercise. Hence the Statement is also concerned with the independence of the members of these tribunals or other judicial or quasi-judicial bodies.

2. Introduction

2.1 The institutions of a democratic society require careful guardianship. Even Australia, with its rich democratic tradition, cannot assume that the foundations of its liberty are impregnable. On the contrary, those foundations are necessarily fragile; and although not now in danger of direct attack, they are susceptible to many corrosive influences. These in turn are made the more dangerous by that complacency which inevitably accompanies an absence of a present and immediate threat.

2.2 An independent judiciary is a keystone in the democratic arch. That keystone shows signs of stress. If it crumbles, democracy falls with it.

2.3 This is not likely to happen with dramatic speed. The situation is nevertheless of sufficient concern to warrant a public warning of the danger. Moreover, although somewhat paradoxically, the fact that the danger is not immediate is its own justification for giving present attention to it. Just as the prudent sailor does not wait for the storm before commencing necessary repairs to his ship, so there are advantages in addressing the question of judicial independence at a time when it is not among the political issues of the day.

2.4 But these are not the only reasons for the publication of this statement, or for its timing. It is at times helpful, even necessary, for any society to re-assess its constitutional structures. As Australia approaches the centenary of federation, it is appropriate that the Constitution and the institutions which underpin Australian society be the subject of careful and balanced scrutiny. If this paper stimulates reasoned debate among reasonable people in an atmosphere conducive to rational argument, then it will serve one of its purposes. If it persuades those in positions of leadership and influence, whether lawyers or not, then its primary purpose will have been accomplished.

2.5 The subject is not of merely academic interest. It touches upon the eternal conflict between authority and freedom. At its core is the general truth that if power is coupled with the opportunity to use it in ways which are, or are perceived by the wielders of power to be, in their interests, then it will be so used, whether legitimately or not. It is the task of the judiciary to ensure that power is only exercised according to law. Without judicial independence, that task is impossible.

2.6 Power in contemporary Australian society resides increasingly with the executive arm of government. Parliament, for all its strengths in other areas, does not consistently control, but rather is often controlled by, the executive.

2.7 In these circumstances, it is inevitable that the executive will from time to time exceed its lawful authority unless checked by an independent body the decisions of which are binding. The judiciary is the only instrument equipped to act as guardian of the public interest in this field; and there appears to be almost unanimous community acceptance not merely of that proposition, but also of its corollary: that only a judiciary independent of the executive will be able effectively to ensure that executive power is exercised lawfully. In these circumstances, it is not surprising that the rhetoric of politics commonly includes expressions of support for an independent judiciary.

2.8 The Australian Bar Association does not doubt that, in general, these expressions are sincerely meant. In practice, however, rhetoric and reality do not invariably coincide. Those, including members of the executive, who have the power and the incentive to achieve a particular end are not always astute to guarantee a correspondence between fine sentiments on the one hand and the end, or the means adopted to achieve it, on the other. Moreover, the generalities of rhetoric are not uppermost in the minds of those preoccupied with the pressing problems of the day. Politicians and bureaucrats do not necessarily appreciate the impact which their actions and decisions may have upon the delicate structures on which judicial independence depends. It is a matter of extreme regret that some do not even

appreciate the crucial role of the judiciary in the maintenance of the democratic system which it is their duty to uphold and without which their own liberties as politicians, public servants and citizens would disappear. The result is a piecemeal, insidious, and very dangerous atrophy of judicial independence.

2.9 We emphasise at the outset that the independence of which we speak does not have as its end the provision of personal benefits to individual judges. It is conferred for a purely public purpose: to insure that the courts dispense justice and are seen to do so. Moreover, that independence is, generally speaking, restricted to the freedom from pressures which might influence a judge to reach a decision other than that which is indicated by intellect and conscience following an honest and careful assessment of the evidence and application of the law. No judge is ever independent of the law itself. He or she, of all people, must be the servant of the law.

2.10 The maintenance of judicial independence is in part the responsibility of the judges themselves. If they are to be independent, they must be impartial; and if they are to be impartial, they must free themselves of prejudices which might interfere with their ability to make a balanced assessment of the facts.

2.11 This does not mean that judges should divorce themselves from a general framework of beliefs. That would be impossible, even if it were desirable. Nor does it mean that judges should enter a cloistered world away from the pressures and influences which bear upon mankind generally. To the contrary, a good judge understands these things, has an empathy with his or her fellows, and recognises that "the great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by ": "Judicial Reasoning": paper presented by Professor C.G. Weeramantry (now Judge Weeramantry of the International Court of Justice) at the Commonwealth Law Conference, Auckland, New Zealand, 16-20th April, 1990, pp.14-15.

2.12 All of which is to say that good judges are persons of rare quality. The community, and particularly governments, must for their part maintain those conditions in which the independence of the judiciary is best nurtured and protected. It is to this issue, and to Australia's record in relation to it, that we now turn.

3. The Conditions for Independence and Australia's Record in Maintaining Them

3.1 In the first place, judges must be appointed to office until a specified retirement age appropriate for the end of a career. As a corollary, they must be protected against removal except on the address of both Houses of Parliament (a unicameral system would obviously require a slightly different provision) seeking such removal on the grounds of proved misbehaviour or incapacity. The reason is obvious if independence is to be protected. The Constitution (s.72) enshrines such a provision.

3.2 The Constitution, however, does not protect judges of State courts. Nor does it protect the members of bodies (whether Commonwealth or State) which, although having powers of adjudication over disputes between the parties before them, are not courts. Their protection, to the extent that they have any at all, comes from legislation or from the common law. That given by both combined may not amount to much. For example, the effect of ss. 7 & 99 of the Conciliation and Arbitration Act 1904 (Commonwealth) was that presidential members of the Australian Conciliation and Arbitration Commission should not be removed except by the Governor-General, on an address from both Houses of Parliament in the same session, praying for removal on the ground of proved misbehaviour or incapacity. But those provisions did not protect Mr Justice Staples (as he then was).

3.3 In early 1975, James Staples was appointed a presidential member of the Commission. Sections 7 & 99 of the Conciliation and Arbitration Act applied to him. He was appointed until he reached the age of 65 years. This will not occur until 1994. No address from either House of the Commonwealth Parliament has sought his removal. Yet he has lost his job.

3.4 The Conciliation and Arbitration Commission has been replaced. All its presidential members, except Mr Staples, were appointed to its successor, the Australian Industrial Relations Commission. By this device, the Commonwealth rid itself of someone who was not a judge, but who held an office which demanded of its occupants the independence which judges must have.

3.5 The Staples case is not unique. Indeed, the shameful record extends beyond the cases of members of bodies such as the Conciliation and Arbitration Commission to members of courts to which the Constitutional protection applies. This was graphically demonstrated when, in 1977, the Federal Court of Australia acquired the jurisdiction of the Australian Industrial Court. All the judges of the latter, except two, were appointed to the former. The two who were not so appointed, Justices Dunphy and Joske, nominally retained their seats on the Industrial Court, but the jurisdiction of that

court had been absorbed by the new body. They were, therefore, in effect selected by the Government for compulsory retirement. The appointment of each had been for life. No step was taken against either for removal based upon misbehaviour or incapacity. As with Mr Staples, a fair inference is that the Government did not like some of their decisions.

3.6 The same thing occurred in 1982. The Government of New South Wales declined to appoint to the new Local Court five magistrates who had sat in the Courts of Petty Sessions, which the new court replaced.

3.7 State judges are generally much more exposed in relation to tenure than their Federal counterparts. For example, it is within the competence of a State Parliament (except perhaps that of New South Wales) to pass legislation by which a judge is deemed to have retired. In other words, the Parliaments of the States other than New South Wales are legally empowered to remove a judge at pleasure: McCawley v The King (1918) 26 CLR 9 at pp. 58-9. They need not proceed to effect a removal by the device of forwarding an address, passed by each House, to the Governor - although, of course, such a course is open to them. And even here it is only convention which limits such an address to proved misbehaviour or incapacity. A parliament, not being bound by convention, might forward an address seeking the removal of a judge simply because he or she had, for example, ordered the production of government documents to a private litigant opposed to the Government.

3.8 The expedient of sending a judge into involuntary retirement was adopted in New South Wales early this century. Mr Justice Sly was retired by the Judges Retirement Act 1918. In Queensland, the Judges Retirement Act 1921 retired Chief Judge Cooper and two other judges of the Supreme Court (Justices Real and Chubb).

3.9 The Australian Bar Association has sympathy for any person who is wrongfully dismissed. But the personal fate of the judicial and quasi-judicial officers referred to above is not the point. We are here concerned with the public dimension of the wrong done by those who removed them. By that action, the ability of courts and tribunals to act, and be seen to act, impartially, is diminished. The colleagues of those dismissed cannot but be mindful of what has happened. The vast majority of those remaining will have that moral fortitude which will not allow the relevant events to affect their judgment. There will be some who are not so robust. Even if all remain unaffected, a public perception of partiality will be encouraged. The losing litigant is likely to think that he or she has lost because the judge was influenced by fear of the consequences if judgment went the other way. To illustrate the point, one need only imagine the reaction if the committee of a sporting club were to seek (or the consequences if it were to obtain) the power, which no other club in the association was to have, of adding persons to, or removing them from, the panel of umpires. Yet that is precisely the power which the Victorian Government, one of the litigants most commonly before the Victorian Administrative Appeals Tribunal, has over the majority of members of that Tribunal.

3.10 If the judiciary is to be independent, then judicial officers must also be protected against a diminution in their remuneration during their period in office. That principle is recognised throughout Australia. There are a number of associated principles. First, the value of judicial salaries must not be allowed to decline against wages and salaries generally, nor against the most nearly comparable salaries in particular. Secondly, judicial salaries must be set by a body independent of government: and both governments and parliaments must be bound by its decisions. Thirdly, those salaries, and the working conditions of judges, must be such as to attract to the office persons capable of meeting its extraordinary demands.

3.11 These associated principles are frequently disregarded by those who should be bound by them.

3.12 Examples of the matters about which the Australian Bar Association complains are not hard to find. We will use here but one of many. On 15 December 1989, the Federal Government, in submissions to the Remuneration Tribunal, argued for an increase in the remuneration of Federal judges. Before any decision on the matter was made by the Tribunal, the Government revised the submissions so as to argue for a lower increase. The Tribunal accepted the revised submissions, and accordingly on 23 May 1990 recommended that an increase of 6% should apply as from 1 January 1990 with a further 6% from 1 July 1990. Thus, for example, the Tribunal supported an increase in the salary of the Chief Justice of the Family Court of Australia from $135,650 per annum to $144,000 per annum as from 1 January 1990, and $154,000 per annum as from 1 July 1990.

3.13 In spite of all this, the Government, in another change of mind, refused to accept the determination of the Tribunal. First, it set the amount of the initial increase actually paid (in the case of the Chief Justice of the Family Court) at $143,709. Secondly, it determined that although this increase was smaller than that fixed

by the Tribunal, its introduction should be delayed by six months until 1 July, 1990. As from 1 January 1991, the salary of the Chief Justice of the Family Court was increased to $152,416. Other judges were treated in like fashion.

3.14 The end result was a reduction, actively promoted by the Government, in the real value of the salaries of Federal judges. Doubtless the Government believed that there was justification for this. And the Australian Bar Association accepts that wage restraint in the community generally should be taken into account, and in appropriate cases reflected in, the level and rate of increases in judicial remuneration. What is quite unacceptable is government interference in the process.

3.15 The Australian Bar Association stresses an additional fact. Judicial salaries have not kept pace with those with which they were formerly, and properly, comparable. For example, the salary of the Chief Justice of the High Court of Australia was for many years at the same general level as that of the Governor of the Reserve Bank. The latter now enjoys remuneration considerably greater both in absolute and comparative terms. The Association views this situation, which extends far beyond this one instance, with grave disquiet.

3.16 The Association of course recognises that the argument here has, again, a personal as well as a public dimension. We are concerned only with the latter. It is on the latter alone that the argument stands or falls. Thus, the Remuneration Tribunal might consistently determine levels of judicial salary below those accepted by government. That would not be a proper reason for returning the issue to government control.

3.17 Over recent years, governments have created a large number of different tribunals. The jurisdiction of many of these might with equal or greater appropriateness have been conferred upon or left with the courts. There is little legitimate point in giving independence to judges while removing from them jurisdiction which is then conferred upon tribunals which are not independent. In particular, it is totally inappropriate that presiding members of a tribunal which must decide matters in which governments or public authorities are directly interested do not have the independence of a judge.

3.18 There are many examples, apart from those to which we have referred, which illustrate, at best, government insensitivity to issues of judicial independence. We trust that the point has been made. The independence of the judiciary is not appropriately protected in Australia. Reform is therefore necessary, and must be initiated at once. It is to this that the statement now turns.

4. Reform

4.1 Removal from Office

4.1.1 Machinery appropriate to deal with judicial misbehaviour should be put in place forthwith, by suitably entrenched legislation; and judges should not be removable except on the proper operation of that machinery.

4.1.2 Allegations (which have been appropriately vetted) of such serious behaviour as would, if proved, warrant the removal of a judge should be placed before a special tribunal the membership of which is not subject to political manipulation: an appropriate scheme would include a tribunal, brought into existence only as occasion requires, consisting of not less than three judges or retired judges of superior Federal, State or Territory courts selected according to pre-determined procedures established by statute. In short, the appropriate machinery and the principles upon which it operates, should not be left to ad hoc arrangements.

4.1.3 It may be that, after proper investigation, the special tribunal or commission will not find that the case for dismissal has been made out. If so, the matter should go no further. If, on the other hand, it were found that an allegation concerning the ability or behaviour of a judicial officer is substantiated and could justify removal, then that finding should be laid before both Houses of Parliament. On the address of both Houses, the Governor-General or Governor (according to the circumstances) may remove the judge concerned.

4.1.4 The misbehaviour which might set the machinery for removal in motion should be limited to that which, if proved, would undermine to a serious degree public confidence in the fitness of the judge to perform judicial functions. Any complaint which if substantiated would, by contrast, not so undermine public confidence can be left for resolution to the court of which the judge is a member.

4.1.5 Investigations into the conduct of a judge must be confined to specific allegations which appear to have substance in fact. Disappointed litigants will always have a motive to complain about the judiciary. Care must therefore be taken to ensure that unwarranted complaints are not given more credence than they deserve. Accordingly, proper vetting processes must be introduced to guard against action upon unjustifiable complaints from disgruntled litigants. These complaints, to the extent that they are baseless, constitute a threat to

the independence of the judiciary.

4.1.6 There is another reason why investigations into the conduct of a judge must be confined to specific allegations which appear to have substance in fact. The point is made in the second report of the Commission of Inquiry into the conduct of Mr Justice Vasta. One of the tasks of that Commission was to investigate whether "any behaviour of the judge warranted his removal from office". The three retired judges who constituted the Commission said at p.39 of that report:

"The Commission, as a result of its experience in conducting this inquiry has formed the clear opinion that the holding of an inquiry into the question whether "any behaviour" of a judge warrants removal is open to grave objection. It is one thing to inquire into specific allegations of impropriety but it is quite another to conduct an inquisition into all aspects of a judge's life. An inquiry of the latter kind exposes the judiciary to unacceptable risks that pressure will be applied to its members and becomes especially dangerous if instigated by pressure groups or as a result of media clamour."

4.1.7 The protection for which the Australian Bar Association argues in this statement should extend to the judges of all superior and intermediate courts. Magistrates should perhaps be placed in a different position. They should not be removed except on motion brought by the Attorney-General before a Full Court of the appropriate Supreme Court and after incapacity or serious misbehaviour has been proved.

4.1.8 Appropriate provision, always embodied in legislation, should be made for presiding members of tribunals before which governments or public authorities are or may be parties. In many cases, such members should be given at least the same degree of protection as is urged for magistrates. In every case, the extent of protection must match the extent of exposure of the office in question to illegitimate pressure.

4.1.9 From time to time governments appoint acting judges. This is usually for the purpose of disposing of a temporary backlog of cases waiting to be heard. Often the temporary merges into the permanent. The special danger is the creation of a permanent system of temporary judges. Those who hold acting appointments but who seek or are thought to seek permanency cannot be seen to be independent of government. It would be difficult, under such circumstances, to be independent in fact. Moreover, no politician who had recently been on the wrong end of the judgment of an acting judge could be seen to be impartial if the question of that judge's permanent appointment were before that politician.

4.1.10 It is for this reason that the Australian Bar Association has grave reservations about acting appointments. It may nevertheless be that, given the strictest possible safeguards (for example, only appointing those who do not seek permanency), acting appointments can be justified on the grounds that in the particular circumstances of a particular jurisdiction there is no practicable alternative. But a permanent system of acting appointments cannot be justified.

4.1.11 One safeguard has been suggested. It is that, to ensure that the expedient of temporary appointments was only availed of in circumstances which justified that measure of last resort, no acting appointment should be made until the Chief Justice or Chief Judge (as appropriate) certified accordingly; and such appointments should only continue for such period as the Chief Justice or Chief Judge certifies to be necessary.

4.2 Control of the Administration and Operations of the Court

4.2.1 Courts cannot dispense justice according to a formula. Likewise, ordinary principles of administration do not apply to the judicial process. Their application would result in injustice, as well as much other harm. It is nevertheless tempting for a bureaucrat to assess the efficiency of the courts in terms which are incompatible with their true function. In order to avoid this, the judges must themselves be responsible for the administration of the courts of which they are members. The Australian Bar Association agrees with Mr G.E. Fitzgerald QC who, in the Report of a Commission of Inquiry pursuant to Orders in Council into possible illegal activities and associated police conduct said (at p.134):

"The independence of the judiciary is of paramount importance, and must not be compromised. One of the threats to judicial independence is an overdependence upon administrative and financial resources from a government department or being subject to administrative regulation in matters associated with the performance of the judicial role. Independence of the judiciary bespeaks as much autonomy as possible in the internal management of the administration of the courts."

4.2.2 The judicial arm of government relies upon the legislative and executive arms for the resources necessary to fund the operations of the courts. This reliance cannot be eliminated. It nevertheless carries with it the inherent risk that he who pays the piper will try to call the tune. It is vital that this risk be reduced to

the irreducible minimum.

4.2.3 Courts must therefore have the right to control their premises, facilities and staff. This is a necessary element of an independent judiciary. Otherwise, to take an extreme example, a government could hamstring the courts by removing staff and other support facilities. The Australian Bar Association agrees with the Chief Justice of South Australia, who in an article entitled "Minimum Standards of Judicial Independence" published in (1984) 58 Australian Law Journal 340 at p.341 said:

"It is essential that control of court buildings and facilities be vested exclusively in the judiciary. The court must have the right to exclusive possession of the building or part of the building in which it operates, and must have power to exercise control over ingress and egress, to and from the building or part thereof. The court must have power to determine the purposes to which various parts of the court building are to be put and the right to maintain and make alterations to the building. If a court is not invested with such rights of control over its buildings and facilities, its independence and its capacity to properly perform its function are impaired or threatened in a number of respects."

4.2.4 It is nevertheless appropriate here to make a general point. It is the duty of each court, within the limits of the resources and powers available to it, to dispose of its business as quickly and efficiently as is compatible with its primary duty: the dispensation of justice. In this context, the Australian Bar Association recognises that the involvement of government may be necessary if a particular administrative problem is to be solved. Extreme care must be exercised in those cases to ensure that such involvement does not compromise judicial independence. It should never encroach upon the judicial functions of the court. It should never be initiated until the relevant Bar Association and Law Society have been consulted.

4.2.5 An independent judiciary is a judiciary in which each individual judge is free from improper pressures. Subject of course to appropriate appeal structures, it is incompatible with an independent judiciary that one judge should be subject to the control of another in the execution of the duties of his or her office. This danger is reduced if the administration of the courts is the responsibility of the judges as a whole (or a representative committee of them) rather than the head of the court or an unrepresentative committee.

4.2.6 The right of a court to control its premises, facilities and staff should be entrenched by statute. It must then be a first priority of government, subject only to unavoidable budget constraints, to provide the courts with the necessary funds.

4.2.7 Without adequate funding, ostensible independence is reduced to a myth. The Australian Bar Association wishes to emphasise that a social order compatible with an advanced, civilised society is unattainable unless governments are prepared to provide the courts with the facilities required for the proper discharge of their duties. It follows that the number of judges must be adequate and that their support staff and facilities must be such as to enable them to work at their optimum level.

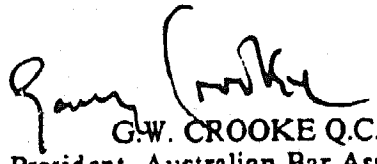
5. Conclusion

5.1 Civilised society may be judged, in part, by the restraints which it imposes upon the use of power. Human nature being what it is, unchecked power will inevitably be used in ways which are unjust. The misuse of power, and mankind's attempts to combat the tyranny which results, are central themes of the history of civilisation.

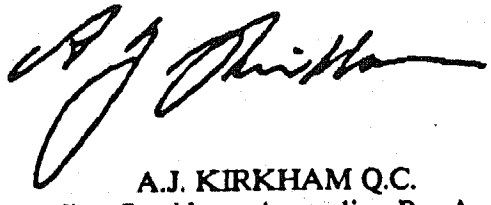
5.2 Human ingenuity has been able to devise only one effective mechanism for restraining the misuse of power. That mechanism is the rule of law, which may be roughly defined as the governance of society by laws, to which all citizens, bodies corporate and governments are subject, made with the general concurrence of society and enforced impartially. The rule of law therefore has as one of its opposites the imposition of order by the use of arbitrary might. Another opposite is the absence of order. At its apex is an independent judiciary.

5.3 An independent judiciary is an indispensable requirement of the rule of law. Only an independent judiciary can enforce impartially the exercise of power in accordance with the laws which were enacted to control that power. And it is the universal and impartial application of the law, so that the actions of every man, woman and child are ultimately controlled and limited by laws enforced by somebody else, that is the essence of a society in which freedom and order and justice each receive their due.

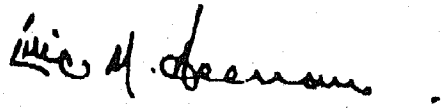
5.4 The legal profession has not in the past done enough to secure the independence of the judiciary, or to guard against the at times grossly improper interference with that independence. The Australian Bar Association will in the future do everything in its power to ensure that these mistakes are not repeated.



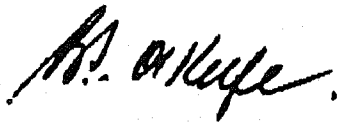
G.W. CROOKE Q.C.
President, Australian Bar Association
President, Bar Association of Queensland



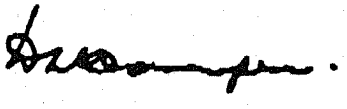
A.J. KIRKHAM Q.C.
Senior Vice-President, Australian Bar Association



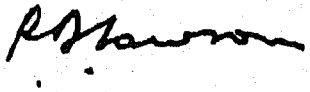
E.M. HEENAN Q.C.
Junior Vice-President
Australian Bar Association
President, The Western Australian Bar Association



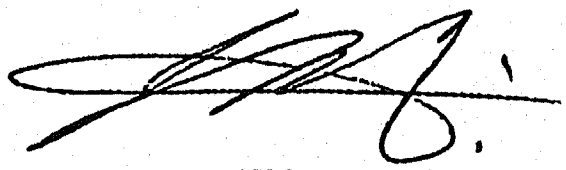
B.S.J. O'KEEFE A.M., Q.C.
President
The New South Wales Bar Association



D.L. HARPER Q.C.
Chairman
The Victorian Bar Council



R.D. LAWSON Q.C.
President
The South Australian Bar Association



F.J. PURNELL
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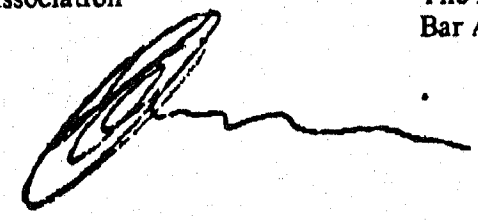
The Australian Capital Territory
Bar Association



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

March, 1991.

Patriot, Scholar and Statesman

DALLEY, WILLIAM BEDE (1831-1888), 'patriot, scholar and statesman', was born in George Street, Sydney, on 5 July 1831. On 5 July 1856 he was admitted to the Bar. He spent the first £20 he earned on a dinner that cost £25. Dalley set trends in colonial dress; colourful cravats and button-holes reflected his unique flair and style. By the mid-1860s he was renowned as the most scintillating conversationalist and after-dinner speaker in the colony. At the Bar, Dalley's eloquence and instinctive grace charmed juries, winning him many victories, particularly on the criminal side. In two notable cases, however, he did not succeed. One was his defence in 1864 of the bushranger Frank Gardiner whom he had probably known as a boy, the other in 1868 of H.J. O'Farrell for the shooting of the Duke of Edinburgh. He commanded some of the highest fees taken in criminal matters. Dalley could hold his place with any barrister, not only in advocacy but in legal argument, and at his peak he was briefed in many fields of the law.

Who is this old barrister ...and who cares?

In 1872 Dalley strongly supported a petition to the governor to exercise the prerogative of mercy and set Gardiner free. The bushranger's release in 1874 led to the fall of Parkes's government, and on 9 February 1875 Dalley became Attorney-General. In 1876 Dalley declined a Supreme Court judgeship and persuaded Sir William Manning to accept it. He became a QC in 1877. In April 1880 Dalley retired from the Legislative Council. He was a member of the committee of the Australian Club, vice-president and honorary counsel for the Society for the Prevention of Cruelty to Animals, a trustee of the Public Library, and fellow of St. John's College. He was a steward of the Australian Jockey Club, a member of the Royal Sydney Yacht Squadron and a member of the Southern Cross Masonic Lodge. He was also a magistrate of the City of Sydney and a fellow of the Senate of the University of Sydney. Yielding to his political instinct and his sense of duty and affection for Sir Alexander Stuart Dalley returned to public life on 5 January 1883 as Attorney-General. In 1886 he became Australia's first Privy Councillor. The same year, saddened by Martin's death, he declined the vacant chief justiceship, but prevailed upon Frederick Darley to accept it. He died on 28 October 1888. Buried in Waverley Cemetery, he was mourned throughout the continent as a great Australian patriot. Sir John Robertson quickly organised public meetings and a subscription to erect in Hyde Park a statue of Dalley. It is the work of the sculptor James White and is presumed to have been erected in 1897.

There is a stained-glass window and commemorative plaque in St. Mary's Cathedral, Sydney, and a plaque in St. Paul's Cathedral, London.

"The loveable William Bede Dalley, himself a lover of romance, and in whose company no man could feel dull". ❑

Reminiscences - The Opening of Wentworth Chambers

Wentworth Chambers under construction - the view from Martin Place

AUGUST 21, 1957

COLUMN 8

WENTWORTH CHAMBERS, the new home of many of Sydney's best-known legal luminaries, was opened officially yesterday with a great deal of ceremony, and some commotion.

The Police Band was there. Who was it chose the musical excerpts from the Gilbert and Sullivan comic opera, "Trial by Jury"?

Halcyon Days ... One could park under Wentworth Chambers

- 20 August 1957

And the band played ...
the building was opened on 20 August 1957.

A NOTE yesterday about the opening of Wentworth House.

This legal eagles' nest (The Eyrie?) flung its doors open before the top men in torts and malfeasances on Tuesday.

The note yesterday read: "A Union Jack was draped across a table in the foyer.

"With so many Justices, Silks, and eminent jurists about, I hardly like to mention that the Flag Act of 1954 expressly forbids the use of the Australian flag or the Union Jack as a cushion or table cover."

How do you plead, Your Honors?

◇ ◇

Sydney Harbour
from the top of the new building ...

(L to R) The Premier of NSW, Mr J.J. Cahill, Sir Garfield Barwick QC (Chairman of Counsel's Chambers Ltd.) and the Chief Justice, Sir Kenneth Street

Barbytes

Dear Editor

I read with interest the article on p. 30 of the Summer 1990 edition of your magazine. Its title was "Which Computer: IBM or Macintosh?".

I am a barrister in practice in Brisbane. I use a Macintosh computer myself. I share a secretary who uses an IBM compatible machine.

On my observations and experience there is just no comparison between the machines for ease of use. The Macintosh is far superior. The importance of this for a barrister cannot be understated as most barristers do not have the time to learn and relearn the requirements of an operating system or a particular program.

The big advantage of the Macintosh is not only its ease of use but the consistent user interface both in the operating system and in the applications that run under it. It is true to say that once you have learnt one program on the Macintosh it is very easy to use almost all the other programs available on it with little need to have recourse to manuals.

Mr Schnell said that, in general, barristers have very standard computing needs, mainly word processing. My observations of barristers who use IBM compatible machines support that conclusion. My own experience, and the experience of other barristers whom I know who use Macintosh machines is to the contrary.

I certainly use the Macintosh for word processing but I also use it to keep a cash book, to keep a database of the briefs I have to do and the fees outstanding and paid for work I have done. I use a more powerful database in my capacity as Editor of the Queensland Reports to manage the production of those reports and also use communications packages for on-line access to legal databases, spreadsheets, outliner programs and an address book program which dials telephone numbers for me.

Many of these programs also lend themselves readily to the use of graphics which can be particularly useful during submissions in a case. A complex company structure can often be better explained by a tree diagram which the outliner/word processor called More 3.0 can produce automatically. I also use text retrieval software to index trial transcripts and my own opinions and outlines of arguments so I can rapidly retrieve information when I need to. My diary is kept on the machine which also automatically reminds me of appointments and hearing dates.

With the right software and equipment the Macintosh can also respond to voice commands and can read aloud written text, albeit in a mid-western accent. Voice notes can also be appended to files in the latest machines which have fallen significantly in price.

Mr Schnell says that the two best products for litigation support are WordCruncher and Evidence.

I have seen him demonstrate WordCruncher which seemed to me to be able to do no more than the Macintosh program "Sonar Professional" which I use.

I have also seen Evidence demonstrated, although not in its most recent version, and it could then do no more than the database program called FileMaker available for the Macintosh at a much lower price than was charged for Evidence. The beauty of FileMaker is, also, that it is very flexible and can be adapted to an individual barrister's needs and the needs of a particular case. The latest version of Evidence, which, I gather, is an impressive program, is presently not available on DOS machines. It requires a Unix operating system and is very expensive. The high end Macintoshes can run under Unix although I do not know yet whether Evidence can be adapted to those machines.

A recent program developed for the Macintosh called Marco Polo is the ideal document storage and retrieval package while I doubt that any DOS database program could match the power and flexibility of 4th Dimension.

I have had very few difficulties in translating files from my secretary's machine to my machine and back again as the floppy disk drive on the Macintosh is able to read 3 1/2" diskettes formatted for IBM compatible machines with great ease.

I also question whether it can yet be said that the Windows 3.0 interface recently developed for IBM compatibles can match the advantages of the Macintosh in ease of use. To my knowledge there are very few major programs yet available which take full advantage of the Windows interface and, of course, the advantage of the Macintosh interface is particularly marked because it has such a wealth of software developed over the years for that interface.

I also question the contention that the best software appears initially on IBM compatibles. The spreadsheet program developed by Microsoft, Excel, was first developed for the Macintosh and later ported to the IBM world where it has become a significant competitor for Lotus 1-2-3. The same thing happened with Microsoft Word and is happening with Wingz, another spreadsheet program. Two of the most interesting software packages for the legal market, Document Modeller and Project Modeller, were developed in Canada for the Macintosh and only later translated for use in the DOS world.

It is not correct to say that there are significant difficulties in upgrading the cheaper Macintoshes. It is simple to add more memory, larger hard disks (internal or external) and accelerator boards.

He also refers to laptop computers. I recently used a Macintosh portable when on circuit. That machine has now

dropped substantially in price, I gather, because a new model is about to come out. One reason for its weight is that it has a large battery and a long battery life. That is particularly useful for a machine to be taken to court. Most of the IBM compatible laptops' battery lives are no more than 2-3 hours where the Macintosh's can be up to 12 hours.

It is also significant that the Macintosh can be made IBM compatible by the running of a cheap software package. I have yet to see any Macintosh user willingly cripple the machine by doing that. It was suggested to me by the sellers of CD-ROM products as one way around the problem created by the fact that their disks are at present only suitable to be used with IBM compatible machines.

Unlike Mr Schnell, I am a practising barrister. From that viewpoint, the most telling observation I have made is that almost all the barristers I know who have bought Macintoshes use them very regularly, productively and for all sorts of applications.

On the other hand, my observation of barristers who have IBM compatibles is that, very often, they do not use them, as they have been unable to overcome their unfamiliarity with the user interface. If they do use them, they are likely only to use them for simple word processing.

Even where they use them for litigation support using programs such as WordCruncher, I gather that, in many cases, the indexing required for the proper use of WordCruncher is not done by the barrister but at significant expense by companies like Mr Schnell's. The ease of use of the 'Sonar' program available for the Macintosh is such that the indexing required of a day's transcript can readily be done by me using my machine, which is, admittedly, a powerful machine, for about 10 or 15 minutes at the end of the day. All I have to do is put the disk in, open the application, start processing the file and then turn my attention to something else for the 10 to 15 minutes the computer takes to index that day's transcript.

In truth the comparison is not between a Mercedes and a BMW but between either of those cars and crunching the gears on a tank - sorry, IBM compatible.

J.S. Douglas QC
Chambers
Inns of Court
Brisbane Queensland

Double Trouble

Dr J.W. Shand under cross-examination

"Doctor, in giving your evidence you give it as a psychiatrist? — Yes.

You do not give your evidence as a surgeon or as a rheumatologist? — No, but as a doctor trained in the various areas.

But your specialty is psychiatry? — That is right.

You are not an orthopaedic surgeon? — No.

You are not a rheumatologist? — No.

And you are not a neurologist? — No.

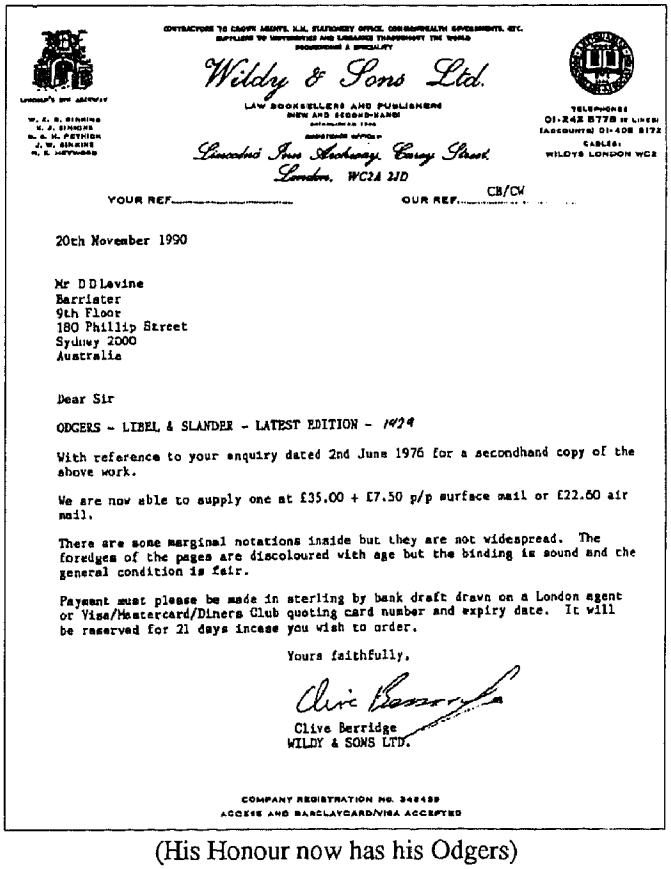
In relation ...

Mr Shore: He looks very like a barrister.

Mr Fernan: He certainly does. A very good one."

(Gjuratic v Australian Telecommunications Commission - AAT, 6 June 1990).

Perseverance



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Book Reviews

The Law of Criminal Conspiracy, Peter Gillies. 2nd Edition

The Federation Press, Sydney
Recommended Retail Price $50.00

Commonwealth Criminal Law, Deborah Sweeney and Neil Williams.

The Federation Press, Sydney
Recommended Retail Price $50.00

As case law in the criminal jurisdiction proliferates the place of the specialised criminal text in the criminal lawyer's library is a secure one. The more so when the most recent additions to this criminal lawyer's library are the two texts reviewed here.

It ought not be assumed that in reviewing them together that they are related other than in the most general way. They share the same publisher, a matter I will return to later, and they are of principal interest to the criminal lawyer although certainly not confined to those who practice exclusively in the field. Those links aside, the works have any number of points of distinction deserving of separate attention.

Mr Gillies' work, *The Law of Criminal Conspiracy* is, as one would expect from a second edition ten years in the making, a material advance on the first edition. This is perhaps to be expected given the much greater currency given to the charge of conspiracy in both Federal and State criminal prosecutions in the last decade. While Gillies has followed much the same format as in the earlier work, he has undertaken a more detailed analysis of the substantive law of conspiracy in Australia sourced as it is both in statute and at common law.

The legislative changes in both the State and Federal context in recent years have seen the inclusion of statutory offences of conspiracy where the offence was otherwise one charged at common law. This has warranted an extended treatment of the substantive law of conspiracy generally although, as Gillies says himself in the preface, this fact alone has not brought about significant changes in the way in which the offence is charged and proved.

Equally as important to an understanding of the law of conspiracy is an understanding of the quite particular procedural issues that are encountered in even the most uncontroversial of prosecutions. Mr Gillies has addressed the issues of procedure both practically and critically.

The notion of a conspiracy to commit a crime may be plain enough, given that the notion of an agreement is not unfamiliar to the lawyer whatever his or her area of practice. However, in analysing the agreement to commit a crime in the limitless range of circumstances in which it may be charged, even the most assured of criminal practitioners can be unwittingly led into error in failing to identify the issues and the problematics of proof. Mr Gillies offers a ready identification of the issues and a path, albeit at times somewhat meandering, towards resolution.

If the work is to be criticised it should in my view be laid at the feet of the publisher. While it is true that the esoteric nature of the subject matter and the author's determination to cover the field in all its complexity may have made the task of editing a difficult one, still it is remarkable that the work survived the editor's eye, replete as it is with spelling and transcription errors. This is disappointing and detracts from the quality of the work. Equally, while style and formatting is something for which the author is principally responsible, editorial assistance may well have produced a work that enabled internal cross referencing to be accomplished at greater speed by the reader. Having said this, the work is an important one and, with no other Australian text on conspiracy available, a valued reference.

Williams and Sweeney's text, *Commonwealth Criminal Law*, also serves to fill a gap that has been obvious to practitioners in crime for many years. While The Law Book Company's service *Australian Criminal Law* is a comprehensive source of relevant statutory law in an annotated service, it is of limited assistance to the practitioner when coming to grips with the principles and procedures that obtain to the prosecution of federal offenders in particular contexts. It is of even less assistance to the practitioner when searching for an understanding of the pretrial investigative processes that may have been called in aid of prosecution, often producing significant evidence for tender at trial.

Williams and Sweeney's work offers the combined advantage of being a source of both the statutory source for the relevant law and the application of relevant principle, as it is for the law that governs pretrial investigation. Four chapters are devoted to evidence gathering techniques available in the prosecution of offenders. The particular focus given for example to investigative powers under the *Social Security Act* and the *Income Tax Assessment Act* is, in my researches, not dealt with in any of the annotated works otherwise available. Whether it be in the course of dealing with principle, procedure or pretrial process, the work is accompanied by the citation of significant case law reference which is, as the authors claim it, to date as and from November 1989.

Equally as there has been a measurable upsurge in prosecutions for conspiracy in recent years, so too has there been an increase in the number of federal prosecutions over the same period. Moreover, federal prosecutions over recent years have been seen to cover a range of conduct not otherwise encountered by the criminal bar. This might be as much a result of the creation of office of the Director of Public Prosecutions and the range of matters over which prosecutorial control is now exercised, as it is responsive to shifts in the community's perception of criminal conduct and the community's perceived expectation of how that conduct ought be dealt with.

Implicitly, it might be thought, Williams and Sweeney take the current experience of the growth in Commonwealth Criminal Law on board. The work is not in its terms apparently directed to a readership well versed in criminal law nor to a readership encountering the complexities of the criminal process for the first time. This is the strength of the work. It will be a guide to the under-informed equally as it will serve to direct the more experienced to discourse and judgment on more discrete subjects of enquiry. The text and the format is accessible to both.

It is all the more remarkable then that both Gillies *The Law of Criminal Conspiracy* and Williams and Sweeney *Commonwealth Criminal Law* should be published by the same publisher. Where Gillies' work suffers from a lack of judgment at editorial level, Williams and Sweeney's work, whether it was compiled for final publication with or without editorial assistance, has all the hallmarks of textual attention. This is not meant as an indictment [sic] of Gillies' text, but rather a charge [sic] to lay at the feet of The Federation Press. ❑

Elizabeth Fullerton

Constancy & Change: Moral and Religious Values in the Australian Legal System, Keith Mason QC

The Federation Press, 1990
Recommended Retail Price $25.00

This book represents the publication of a series of lectures delivered by Keith Mason QC, Solicitor-General for New South Wales and formerly Chairman of the state's Law Reform Commission. The lectures were given at New College at the University of New South Wales in October 1989. The book comprises five chapters, each of about 30 pages.

The first chapter is called "The Myth of an Inherently Christian Legal System" and the proposition which is developed is that law, like any other human system, is sustained and moulded by values which are those of the players in the system. There is an enlightening historical review and discussion of blasphemy in the context of the law compelling or encouraging religion.

The next chapter is entitled "Law and Morality: Intersecting Or Overlapping Circles?" and the author deals with a question which must present itself to every practising lawyer: the influence of personal values upon the processes of deciding legal questions. He singles out judging and discusses the declaratory theory and judicial activism. He turns up this remark from Sir Owen Dixon at his swearing in as Chief Justice which must graphically illustrate the change in emphasis over 40 years: "It may be that the court is thought to be excessively legalistic. I should be sorry to think that it is anything else."

"How Change (Reform?) Occurs and How To Block It" is the title of chapter three. He looks at the process of changing the law and how and why it is opposed. This provides some interesting insight into the working of a law reform commission.

The next chapter is called "From Establishment to a Burr in the Saddle: Organised Religion in Australian Legal and Political Affairs" and the author explores the interaction of moral and religious values on our legal institutions (and vice versa). There is a stimulating discussion of Australian political and religious history and an examination of why there has been a marked change in the status and role of the church in this country.

The final chapter has the title "'We All Make Mistakes': Coping with a Fallible Justice System" and after a discussion of the process of trial by ordeal which was well established for some seven centuries the author looks at the question of doubtful jury verdicts illustrated in particular by the Chamberlain case. He examines acknowledgment of the inevitability of error and how that is accommodated by the appeal process. He concludes with a call for improvement in the way in which the deeper needs of those of us participating in the justice system should be addressed suggesting that "we could learn to be better carers for each other in that part of our existence in which we paddle anxiously beneath the calm or severe service of our professional roles."

The book is very readable. There are frequent references to literature, scripture, legal history, anecdote and folklore. Theories are asserted boldly, supported by arguments and illustrated by example so that the book is substantial but far from turgid. It contains a dose of humorous and insightful phrases descriptive of the institutions of the law and the church and their respective members. They carry weight coming from a faithful member of both. Two examples are -

> "Perhaps the reason lies partly in the fact that the modern busy lawyer has few meaningful experiences outside legal practice."
>
> "A great part of the time, skill and money of committed Christians of all denominations in Australia is directed to the protection of this wealth."

The author's professional career and religious viewpoint enable him to provide unique perspectives. These are sometimes delicately and carefully expressed: for example, on one page he discusses an issue "from a secular viewpoint" and then "from a more sacred stance".

The book is learned, balanced, stimulating and well worth reading, particularly if one is a practising Christian, or at least, interested in an examination of law, morality and religion in an Australian context. ❑ Richard Cogswell

Forensic Science and the Expert Witness, J.H. Phillips and J.K. Bowen

The Law Book Company, Revised Edition; Soft Cover
Recommended Retail Price $29.50

In the largest part of this short work the authors explain the major areas of forensic science; from attending the crime scene to the expert evidence given in court. Individual chapters outline the principal methods employed by experts to reach opinions or conclusions, and each is a valuable introduction to the area of specialty. The discussion ranges from the prosaic such as continuity of exhibits to ghoulish descriptions of flesh wounds from revolvers, rifles and shot guns. Each specialty is described in turn, usually with a glossary of terms included. Of particular interest to barristers are such Rumpolesque subjects as blood and typewriters as well as handwriting, tools, paints, explosives and photographs. The sections on firearms and fingerprinting have interesting historical introductions. There is also a brief introduction to the new genetic fingerprinting techniques. Further reading lists are provided to start the search for more detailed knowledge, if necessary. The text is invaluable for its store of information so it is a book you would turn to if you wanted to identify a "choked shotgun"; or discover how an expert detects "disguised handwriting"; or learn how to catch a safeblower with a botanist. The text is written in a concise and readable style, and interest is maintained with useful and colourful examples drawn from real life.

In a separate part of the book the authors deal with the respective roles of the lawyer and expert witness in preparation for court and the giving of evidence. These parts of the text will be of particular assistance to witness and lawyer alike.

A recurring theme through the text is the poorly defined role of expert witnesses in the adversarial system. Are they advocates for the cause of the party calling them? Do they owe an independent duty to disclose information to the court which is against the interest of the party calling them? This brief text does not attempt to answer but by discussing real cases, thoughtfully poses the questions for the reader's consideration.

Lawyers, expert witnesses and others associated with forensic investigation will find this a handy and interesting text.
❑ James T. Kearney

Lawyers, Social Workers and Families, Stephanie Charlesworth, J.N. Turner and Lynne Foreman

Federation Press, 1990
Recommended Retail Price $35.00

"Lawyers, Social Workers and Families" is a very good reference treatise for lawyers and social workers as well as those Bar Readers who need to hone their skills in critical legal analysis, social science and socio-legal interactions; it would be a valuable addition to the Reading Syllabus. The authors are dual professionals in law and social case work.

Unfortunately their academic, condensed, almost lecture-room narrative makes the book less suitable for the non-professional social welfare workers, including police, to whom it is also directed. Its broad scope brings into focus for social workers legal ingredients which must be recognised and dealt with in case work, often with assistance of lawyers.

There are a number of unsubstantiated generalised statements and comments, also some legal views with which this reviewer respectfully disagrees. Whilst the fields of general and family law (marriage and de facto), single relationships, adoption, fostering, legitimacy, surrogacy, artificial conception, child welfare and family law mediation are examined in depth, as legal "content" (sic) and social work "process" (sic), only the legal "content", not the "process" with two minor exceptions, is explained in lay terms, leaving the general reader in the dark as to the "mystique" (sic) of social behavioural science. This detracts from its value to lawyers who must come to terms with the social welfare ramifications of their work in family areas.

Your reviewer similarly disagrees, amongst other things for example, with some aspects of the treatment of "separation" in family law, of precedent, legal/social worker professional privilege, and the status of non-court approved family law/mediation agreements (at least where mediation is contractually "open").

These matters are readily capable of reconsideration in a second edition because this important work on socio-legal relationships, law and procedures is intrinsically meritorious and includes research material and commentary of great importance tucked away in footnotes.

Areas of potential and actual liability of social workers, other "interveners" in the "process", and lawyers, for negligence both to clients and third parties, the rights and obligations of married, adopting, natural, fostering and unmarried parents/spouses, children, parents of foetuses/embryos (including surrogates) also rights of embryos/foetuses themselves are analysed by reference to United States, Canadian, Australian-British and European case law, though the treatment of maintenance and child support needs clarifying.

Disturbing examples are given from actual case-work material where harm and injustice occurs because of professionals' incompetence. Also because of poor communication between lawyers, social workers and courts, amongst themselves and in tandem. The adversary system in family disputes is critically considered throughout the book.

The best chapter (Ch.7) deals exhaustively with family law mediation as legal "content" and a social work "process" and gives a step by step description of the dynamics of an actual procedure. It is clear that that mediation, like litigation, needs close attention from the point of view of cost effectiveness and other micro-economic factors. The debt ridden Australian economy cannot afford wastage of legal/social welfare resources.

Although its condensed style and batches of footnotes make for some tediousness and misunderstanding in the reading, the book deserves close attention and examination. ❑

Patrick O'Sullivan

The Law Relating to Banker and Customer in Australia by G.A. Weaver and C.R. Craigie

The Law Book Company Limited; 2nd edition, 1990
Recommended Retail Price $475 and continuing subscription)

The publisher's decision to issue the second edition of this work in loose leaf form is to be commended. The initial cost of the work is substantial: by way of comparison, it will cost the Australian purchaser about twice as much as the current (10th) edition of *Paget*. One hopes that the publisher and the authors will avail themselves of the flexibility afforded by this mode of publication to extend the lifetime of the work and its value to purchasers.

It has to be said that the second edition of this work suffers from a number of defects. This may, to an extent, reflect a desire to cater for a wide audience: as the authors say in their preface to the second edition:

> "This service is designed for use by bank officers as well as by their legal advisors and other practising lawyers. For this reason an attempt has been made to include some general legal concepts, particularly in Chapter 4."

One feature which the second edition shares with the first, and which was, at least in this reviewer's opinion, a defect in the first, is its citation of cases from reports other than the authorised reports. The authors apparently recognise the problem: in the preface they say:

> "Whilst the cases written up in the text are not always taken from an authorised report, we have attempted to deal with this by giving a number of references in the table of cases..."

Two things may be said of this. Firstly, it is far from convenient for the reader, having found a reference in the body of the text, to have to go to the table of cases to find a reference to the authorised report. Second, the table of cases does not always fulfil the authors' apparent intention. In a work of this nature, one would expect that, where possible, a reference to, or quotation from, a case, would be supported by a citation of the authorised report of that case.

Another feature which the second edition shares with the first is in its style. On many topics the treatment of principle is discursive rather than concise. The authors do not always attempt to frame a statement of principle, and to support that

statement by reference to authority. Rather, they tend to proceed by extensive quotations from authority, with, sometimes but not always, an attempt to draw together in some coherent statement the point of those quotations. To give but one example: the authors' treatment of the circumstances in which guarantees may be avoided (paragraph 23.200 *et seq*) proceeds by way of an extensive compilation of authorities - some, it must be said, of varying relevance - and citation of extracts from some of those authorities. There is no real attempt to set out clearly and concisely the underlying principles or to show how they relate to each other and to the legal features of the relationship of principal and surety. There is no real attempt to reconcile apparent differences in the authorities to which reference is made. To say of a case that "there can be no certainty that (its) decision would be repeated in any future case..." (as the authors say in paragraph 23.220 of *Westminster Bank Ltd v Cond* (1940) 46 Com Cas 60) leads one to speculate on why, in the first case, it was necessary to make reference to that case. Unfortunately, the method by which the authors have developed the topic in relation to which that case was cited - non-disclosure by a creditor of unusual circumstances within its sole knowledge - does not easily allow even the diligent reader to answer such a question.

It is difficult to see what reason, other than historical, there can be for the method of exposition which the authors have adopted. A clue may be provided by the preface to the first edition where the authors trace the development of the predecessors to that edition. However, the limited and didactic purposes for which those predecessors were produced should not continue, beyond the grave, to rule the form of the second edition.

Although it is necessary to make some reference to defects in the work, it should not be thought that the authors have failed in their task. The work has many strengths - strengths which it shares with the first edition. Among those strengths are the enormous scope of the work, and its extensive and authoritative references to banking practice. A glance at the table of contents illustrates the former point: the work not only covers a wide range of topics which have relevance to the relationship between a bank and its customer, but also the constitutional and legal setting in which in Australia that relationship operates. The latter point can be appreciated only by reading the entire work: but to take one example only, refer to Chapter 24 - agreements for loans and bill line facilities. The authors' backgrounds and experience vouch the authenticity of their comments on banking practice.

It is not possible, within the scope of a review, to attempt to analyse and comment upon each of the major segments of the work. However, in very broad summary, it may be said that the comments which have been made about the virtues and vices of the work as a whole apply equally to those individual segments. The work is strong where the law is well established, but less strong where the law is undergoing development; strong where it deals with matters at the heart of banking law but less strong on matters more peripheral. See, for example, the treatment of the duties and protections of the paying bank and the collecting bank in Part 4. The treatment of "ratification, adoption and estoppel" (paragraphs 13.540 to 13.660) and the treatment of the bank's defence "based on the customer's duty of care" (paragraphs 13.690 to 13.740) are really no more than case digests.

Even allowing for the authors' methodology, there are some noteworthy omissions. In the treatment of s.95 of the *Cheques and Payment Orders Act 1986* (paragraph 15.490 *et seq*), no reference is made to the important decision of Giles J in *Hunter BNZ Finance Ltd v C.G. Maloney Pty Ltd* (1988) 18 NSWLR, in which his Honour dealt, inter alia, with the elements of s.88D of the *Bills of Exchange Act 1909*, (the statutory predecessor of s.95) and with the nature and extent of the enquiry required of a bank which sought to rely upon the protection offered by that section. Of particular interest in that case was the consideration given by his Honour to the position of a bank which did not make proper enquiry, in circumstances where it might reasonably be concluded that, had proper enquiries been made, the true position would not have been revealed. It is difficult to escape the conclusion that the authors' treatment of that question (paragraphs 15.1050 to 15.1090) would have been aided by a consideration of the views of Giles J. Again, the treatment of recovery of money paid under mistake (paragraphs 14.310 to 14.340), whilst recognising the central importance of *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662, and recognising apparently, the significance of *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, does not appear to take account of the significant divergence between the law on this topic as it has developed in England and in Australia. As a result, the text is littered with references to English authorities, many of which are out of date even in England and most of which have little relevance to the present position in Australia. The debate, which occupied judges in England in the early part of this century, over the views of Lord Mansfield in *Moses v MacFerlan* (1760) 2 Burr 1005, may have been interesting at the time and to its participants, but its present relevance must be open to question. Again, the authors' treatment of contracts subject to finance (paragraph 19.520) makes no reference to the decision of the High Court in *Meehan v Jones* (1982) 147 CLR 571 - surely the leading case on this subject.

Similar comments might be made about particular parts of some other sections of the work. However, the flaws thus indicated are, almost necessarily, products of the scope of the work and the breadth of the audience which it is intended to serve. To concentrate on such matters is to do the work, and its authors, less than justice. For it has to be said that the work is an indispensable part of the library of anyone professing serious interest in the areas of law which it covers. If it does not contain the answer, it will surely set the enquirer on the correct path to the answer and it will certainly not lead him to an incorrect answer. Lawyers' libraries are littered with books which aim higher, but fall lower. ❑ Robert McDougall QC

Law an Ass - Never!

***FISHERY** - Net placed in tidal waters - Whether "fixed engine"*

Gray v. Blamey [1991] 1 WLR 4

Shipping Law
by Davies and Dickey (1990)

The Law Book Company Ltd.; Hard Cover; $79.50

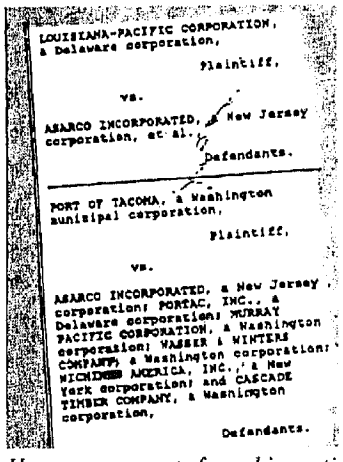
This work has the distinction of being the first comprehensive publication on Australian maritime law. For both the unfamiliar and the expert the work is a most useful source of reference and discussion of principle.

The authors have successfully condensed into seventeen well indexed chapters with clear and logical sub-headings the Australian legislation and case law that impacts on the world of shipping. Appropriate use has been made of relevant English precedent and it has the quality hallmarks necessary to become an essential tool for the maritime practitioner. It is fair to say that the book has achieved the useful object of permitting any reader to glean the necessary comprehension of things maritime to venture into and enjoy this stimulating area of practice.

It is tempting to highlight some of the many areas that have been so assiduously reduced to a meaningful and digestible form however it would not do justice to the depth of achievement that the authors have reached in this work on Australian shipping law: suffice to say that there is a lucid discussion of exciting topics including the nature, distinction and priorities of true maritime liens and the statutory liens, as well as the principles relating to ships' mortgages, voyage and time charter parties, bills of lading, collisions, limitation of liability, general average, salvage and wrecks. No doubt the continuing expansion of Australian case law and continuing legislative activity such as the *(Cmlth) Limitation of Liability for Maritime Claims Act 1989* and the *(Cmlth) Carriage of Goods by Sea Bill 1990* with the intended introduction of the amended Hague Rules and then the Hamburg Rules, will plainly call for further editions. ❑ A.W. Street

Get Me to the Church on Time, Your Honour

Jeffrey W. Leppo, a 35-year-old Seattle lawyer, was preparing to argue a civil case in May when he learned that the trial date had been postponed until Oct. 1 - the day after he was to return from his honeymoon.



LOUISIANA-PACIFIC CORPORATION, a Delaware corporation,

Plaintiff,

vs.

ASARCO INCORPORATED, a New Jersey corporation, et al.,

Defendants.

PORT OF TACOMA, a Washington municipal corporation,

Plaintiff,

vs.

ASARCO INCORPORATED, a New Jersey corporation; PORTAC, INC., a Delaware corporation; MURRAY PACIFIC CORPORATION, a Washington corporation; WANBER & WINTERS COMPANY, a Washington corporation; NICHIMEN AMERICA, INC., a New York corporation; and CASCADE TIMBER COMPANY, a Washington corporation,

Defendants.

Desperate to salvage his wedding plans, Mr. Leppo filed a motion with the trial judge in Federal District Court in Tacoma, Washington requesting that the trial be further postponed, until Oct. 8. Here are excerpts from his motion and the judge's order.

I. Introduction

Jeffrey W. Leppo ("Counsel") respectfully requests that this Court reconsider its decision to amend the trial date of this litigation to Oct. 1, 1990. Counsel requests that the trial begin one week later on Oct.8, 1990.

II. Marital Facts

Counsel bases this motion upon the following uncontroverted facts:

It has taken Counsel over 34 years to find someone whom he loves and who loves him.

Counsel became engaged on Jan. 31, 1990, at a time when this matter was set for trial beginning May 21, 1990.

Scheduling for a wedding, especially one involving the concurrence of two out-of-town families and the Roman Catholic Church, requires considerable advance planning.

Counsel's honeymoon was scheduled for Sept. 11 through Sept. 30, 1990. On very solid information and belief, Counsel believes his betrothed will feel very irritated, ignored [and] offended if the honeymoon must be cancelled, delayed or cut short. Counsel further believes such feelings would be justified.

Counsel is loath to begin what he very sincerely hopes and intends to be his one and only marriage by offending his bride-to-be, in-laws, associated friends and the Roman Catholic Church.

III. Prayer for Relief

The merits of this motion are founded upon common notions of respect, fairness and compassion. Accordingly, they speak for themselves. Nevertheless, one point bears further brief discussion.

After completing four months of marriage preparation classes approved by the parish priest of Counsel's betrothed, Counsel has been informed that his proposed marriage is now blessed and sacred to the Roman Catholic Church. Counsel is not exactly sure what this means, but is convinced after experiencing the prescribed preparation that the Roman Catholic Church has little sense of humour about such matters. Counsel seriously suspects that it would be a Mortal Sin (in secular terms, a "Big Mistake") to disappoint the Roman Catholic Church at this point in time.

Accordingly, Counsel respectfully offers the eternal gratitude of himself, his heirs, his assigns and his issue (if any there be), in return for the Court's compassion. Counsel warrants that this eternal gratitude will be far more valuable a gift should he be so fortunate as to spend his days on Earth in the state of Marital Bliss and the Everlasting in a state of heavenly repose.

DATED this 29th day of May, 1990
Jeffrey W. Leppo
Counsel of Record for Plaintiff
Port of Tacoma

ORDER

In this court's 20 years of judicial experience, counsel's motion for reconsideration is unprecedented in its creativity and urgency. In a spirit of cooperation with Mr. Leppo's efforts to avoid eternal damnation and to please (and appease) his intended, their families and friends, as well as the Roman Catholic Church, it is hereby

ORDERED that the Port of Tacoma's Motion for Reconsideration of Second-Amended Trial Date is GRANTED and the trial date of this case is hereby continued to October 9, 1990.

DATED this 31st day of May, 1990

By Robert J. Bryan, United States District Judge ❑

Letters to the Editor

Dear Editor

I am pleased to see that, in the spirit of post-dingo-fence camaraderie, your publication is showing a serious interest in Queensland news. In the most recent issue (Summer 1990) I have noticed three articles with an obvious Queensland bias: a very learned and interesting article by Robert Angyal in relation to the decision of the Supreme Court Queensland in *Allco Steel (Queensland) Pty Ltd v. Torres Strait Gold Pty Ltd* (which has disappointingly received little publicity in this State), a review by Garry McIlwaine of Bill Duncan's recent book on Commercial Leases (in which the reviewer quotes the author's admission that the book has a "distinctly Queensland flavour", but observes that "as the Brisbane Line slowly recedes into the past it will become an increasingly more valuable asset to the Chambers library"); and a note entitled "One Question Too Many" - which is rather curiously located on a page headed "Restaurant Reviews" - concerning an evidentiary point raised at a trial in the Federal Court in Brisbane, and in which the unidentified author is at pains to observe that the point was successfully argued by "Sydney counsel for the applicant" without mentioning the opposing counsel's geographical base.

In the same spirit, may I contribut a comment in relation to the item entitled "Resiling with (Some) Dignity" on p.20 of that issue.

Until the *Supreme Court Act of 1892* (Qld) disqualified a Judge of the Queensland Supreme Court from sitting on the hearing of an appeal from a judgment or order made by himself, it was quote common for Judges of that Court to sit on appeal against their own decisions. This practice no doubt contributed to the considerable rarity of successful appeals; but when, on occasion, a Judge was impelled to concur in the reversal of his decision, the result was a rather undignified process of judicial "squirming".

The most notorious of such cases involved Lilley C J., who showed no reluctance in permitting his son (a junior barrister named Edwin Lilley), not infrequently instructed by another son (a solicitor, H.B. Lilley), to appear as counsel before him. In his recent history of the Supreme Court of Queensland, Mr Justice McPherson observed (at p.193) that -

> "Of Edwin it was said that, instructed by his brother, his record of success before his father made it imperative for Supreme Court litigants to secure his and his brothers' services. ... By 1890 the activities, real or imagined, of the Queensland trio had earned them the title 'the Trinity', as in 'Father, Son and Holy Ghost', or pseudonymously, 'Smith & Sons'."

In the case of *Emmott v Queensland Mercantile Company Ltd* (1892) 4 QLJR. 166, Edwin Lilley appeared before his father in chambers and, notwithstanding the formidable opposition of Sir S.W. Griffith, QC, AG, managed to secure an interlocutory injunction which effectively gave his client final relief in the action.

There was inevitably an appeal, which was heard by Lilley C J. sitting with Harding and Real JJ. By this time, the opposing team led by Sir Samuel Griffith had been reinforced with the addition of Byrnes S G.; Edwin Lilley appeared alone for the respondent. Harding and Real JJ. delivered the first judgments, allowing the appeal. At pp.169-170 of the report, the concurring judgment of Lilley C J. is set out in these terms:

> "I agree with the judgment and the reasons. It is not necessary that I should enter into the matter at all. I think in making the order I went beyond what the parties meant I should do, but it is not unusual where the parties wish it, for the Judge below to determine on the evidence before him, in effect the whole matter. No doubt I made a larger order than I should have made. I agree with my brother Judges that the Plaintiff ought to be restrained from a present inspection; for, if he gets that, he gets all he would get on a hearing. ... Either the Plaintiff has the right he claims here, or he has not; and if I, under a misapprehension, have over-stepped in the slightest degree the line of my authority, why then, no doubt, I must be brought within it. I think, probably, the order was too large, and I think the modification that is proposed is a just one."

In the same year the legislature intervened, with the result that it became necessary to "import" a New South Wales Judge (Sir William Windeyer) as an "ad hoc" member of the Full Court to sit on a subsequent appeal from Lilley C J. A few days later, the Chief Justice resigned; and, having first seen to it that the Chief Justice's salary was increased by 50% from two thousand pounds to three thousand pounds per annum, Sir Samuel Griffith retired as Premier and Attorney-General to assume the then Colony's highest judicial office.

A.J.H. Morris
Level 13
MLC Centre
239 George Street
Brisbane Qld

Dear Editor

In the Summer 1990 edition of Bar News, an article was published about a barrister cross-examining on the witness's knowledge of a building depicted in a photograph. The article was entitled "One Question Too Many" and requested readers' comments on the judge's ruling.

My comment is that the article should have been entitled "Four Questions Too Many".

P.H. Greenwood
Wentworth Chambers
180 Phillip Street
Sydney NSW

Dear Editor,

Re: "One Question Too Many"

Hearsay is an out-of-court statement adduced as evidence of the truth of its contents.

In "One Question Too Many" (Bar News Summer 1990) the terms of the question under consideration ("that was just what someone had told you?") and the context in which it was put make it clear than an answer was not sought as evidence that the photograph was a photograph of the shop taken on 18 August; it was sought as evidence of the fact that the witness had no personal knowledge of the contents of the photograph. As evidence of that fact, it was not hearsay and was unobjectionable.

The issue raised, therefore, is whether admissible evidence which is also hearsay is admitted for all purposes. That is to say, once admitted, is it evidence of the truth of its contents as well as of the fact in respect of which it was adduced?

In *Ritz Hotel v Charles of the Ritz* (1988) 15 NSWLR 158, McLelland J. considered whether documents admitted without objection could be used as evidence of the truth of their contents. Starting with the proposition that "when a statement is admitted, not as evidence of its truth but simply as original evidence, the mere fact of its admission cannot enable it to be given an additional probative value which the law denies it" (per Gibbs J. in *Hughes v National Trustees Executors and Agency Co* (1979) 143 CLR 134 at p.153), his Honour proceeded to consider whether, by failing to object, the non-tendering party had waived the application of the rule against hearsay. He held, at p.170:

> "The tender of a statement may amount to a waiver by the tendering party of the application of the hearsay rule to that statement, and the absence of objection to the tender may amount to such a waiver by the party against whom the tender is made, but only in my view where such a waiver on each side can reasonably be inferred from the circumstances, and this will occur only where there is no other apparent explanation of the tender and the absence of objection."

In the case under consideration, another explanation of the question was readily apparent. No waiver of the rule against hearsay should have been inferred, and the answer to the question should not have been given the "additional probative value" which it was given to make the photograph admissible.

The photograph should have been rejected.

David Murr
Frederick Jordan Chambers
233 Macquarie Street
Sydney NSW

Modesty Blazes

McHugh J: Has Victoria got any equivalent to the statutory offences which were created in New South Wales in the last century and are still there today, I think, which were in terms that any person who by false pretences or fraudulent means, induces a woman to have carnal connection ---

Mr Black: Yes, it does, Your Honour. It is referred to briefly, indeed, by the Full Court in the end of Their Honours reasons ---

Toohey J: Page 247, Mr Black.

Mr Black: Yes. Your Honours, there is such a provision that the penalty is less; it is not, of course, rape, and there are some problems with it, as the Full Court points out in this case. There is the question of corroboration, but perhaps one can pass from that, but the sexual penetration, as defined, is otherwise than as part of some generally accepted medical treatment. Now, that raises an issue in this case. There is no doubt that at least with a special vaginal ultrasound probe, it is a generally accepted part of medical treatment. There may be a debate as to whether the general purpose probe is proper to be used for that purpose, as to which I think there was conflicting evidence below. So, it does not solve the problem. That question, in fact, was agitated in *Williams'* case in the 1920s - the choir master case, and it was argued then that the corresponding English provision really meant that it was not rape, and also more recently in New South Wales, in the case of *Gallienne*.

McHugh J: Yes, I was counsel in that.

Mr Black: Your Honour was, I think, successful.

McHugh J: No, unsuccessful. It is the story of my career at the Bar.

Mr Black: My duty, Your Honour, nevertheless, to mention the case. The point did not succeed in that case, Your Honour.

(R v Mobilio, High Court, special leave application 6 December 1990)

Sir Who ...!?

"Adelaide: J.N. Taylor Holdings Ltd had shown it had no serious intention to pursue the liquidation application against Bond Corp Finance, the Bond offshoot's counsel, Sir Alex Shand QC, told the South Australian Supreme Court yesterday ..."

(...Sydney Morning Herald 12 April 1991)

Motions & Mentions

Annual Conference, Australian Institute of Judicial Administration

The Annual Conference of the Australian Institute of Judicial Administration (AIJA) is to be held on 7-8 September 1991, at the Hindley International Hotel in Adelaide, immediately preceding the Law Council of Ausralia's Legal Convention.

Information about the Conference can be obtained from Mrs Margaret McHutchison at the AIJA Secretariat, 95 Barry Street, Carlton South. Telephone (03) 347 6815/18.

Conference programmes will be sent to AIJA members late in May and will also be available from the Secretariat to anyone who is interested.

Fourth Australian Business Lawyers' Conference

The Business Law Section of the Law Council of Australia is holding its Fourth Australian Business Lawyers' Conference at the Manly Pacific Hotel, Sydney from 22-24 March 1992. The theme of the Conference is "Opportunities - The Way Ahead". For additional information contact Carol O'Sullivan, Law Council of Australia. Telephone (06) 247 3788 Fax (06) 248 0639.

Julius Stone Memorial Appeal

The Julius Stone Memorial Committee and the Faculty of Law of the University of New South Wales propose to honour the memory of Professor Julius Stone and to promote the standards of teaching and scholarship exemplified by him, through the institution of Julius Stone Postgraduate Scholarships in Law tenable at the Faculty.

In order to raise funds for these scholarships the Memorial Committee is seeking financial support and invites readers of this journal to consider making a donation. Individuals who donate $1,000 or more and corporations and firms which donate $5,000 or more will have their names inscribed on a Wall of Recognition to be established in the Law Library of the University of New South Wales.

Donations are tax deductible and should be made payable to: The Julius Stone Memorial Scholarship Foundation,
c/- Faculty of Law,
University of New South Wales,
PO Box 1,
Kensington NSW 2033.

1991 Annual Congress, International Association of Young Lawyers

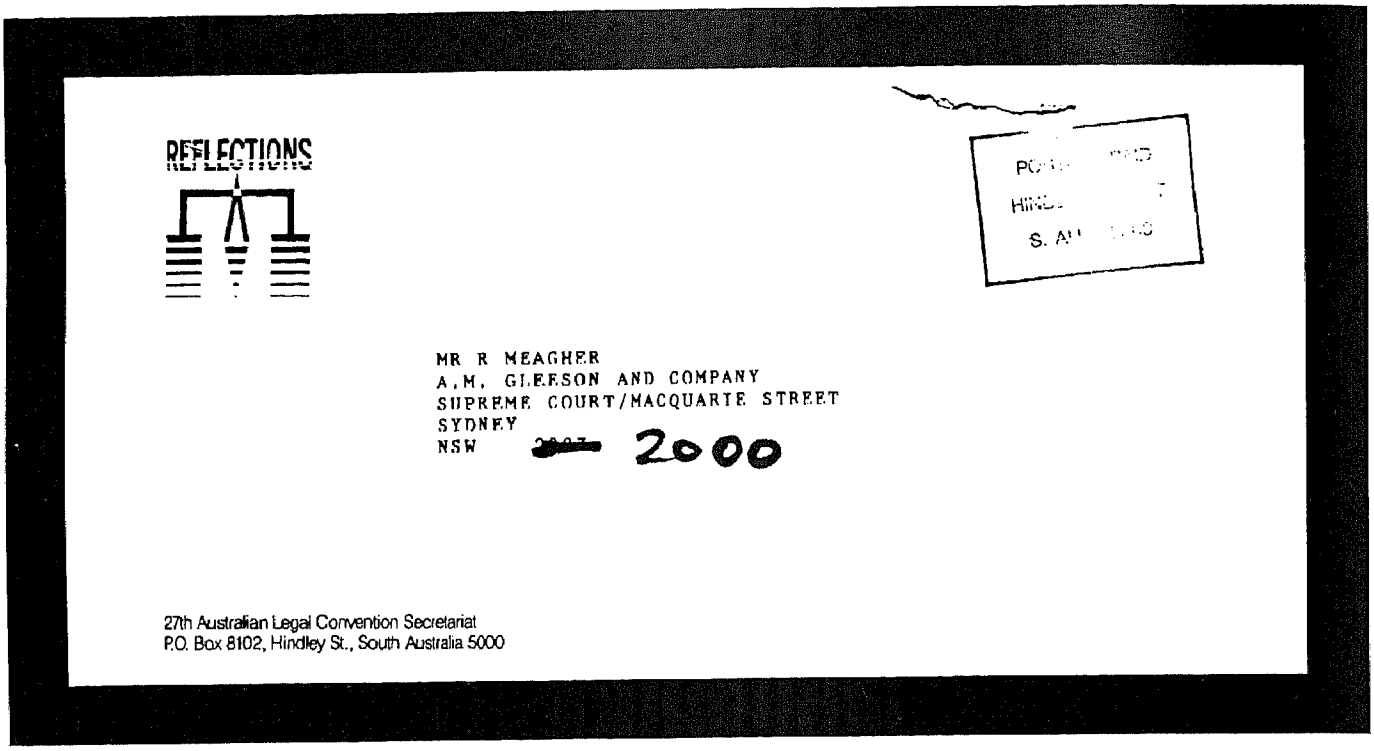
During September 1-6 1991 the International Association of Young Lawers will be holding its 1991 Annual Congress in London.

The Association has a number of Australian members and would, of course, like to attract a wider Australian participation from amongst our young lawyers. For further information, contact:

Michelle Sindler, Minter Ellison,
44 Martin Place, Sydney NSW.
Telephone (02) 210 4444 or Fax (02) 235 2711; or

Melissa Bailey, Clifford Chance, Royex House,
Aldermanbury Square, London EC2V7LD.
Telephone 44 71 600 0808 or Fax 44 71 726 8561.

Priorities (letter received in the Supreme Court)



This Sporting Life

Cricket

Bar v. Solicitors

The second of the revived annual cricket matches between the New South Wales Bar and the Law Society took place at North Sydney No. 2 Oval on 3rd March. The game was significant due to the debut for the Bar of a couple of second generation cricketers, Hughes Jnr. and Gyles Jnr.

After having the impertinence to win the same fixture last year, there was some apprehension in the Bar team that the solicitors may overreact by utilising their undoubted depth to field a team which would lead to an unequal contest. That turned out not to be the case, as the Bar eventually won reasonably comfortably by passing the solicitors' total of 184 with 3 overs to spare and 5 wickets in hand.

The solicitors batted first and commenced impressively with an opening stand of 77, although at a modest run rate due to steady bowling by Levick and Naughton. The Bar fielded enthusiastically and the solicitors' final score of 184 from 45 overs on a small ground was well within reach. Geoff Parker, also making his initial appearance for the Bar, bowled well and Hughes Jnr. opened the bowling with vigour but displayed a familiar trait by leaving the ground after 3 overs and returning later to conclude his bowling spell.

A superb innings of 76 by John Harris ensured that the Bar was always likely to reach the target set by the solicitors. With steady support from Burchett, Harris figured in an opening partnership of 83 and was finally out with the score at 106, of which he had contributed 76. Collins QC, with a fine 62 n.o. then steered the Bar to victory. After being heard to enquire of the captain whether, due to the alleged debilitating effects of nerve irritation at L3/4, he should hit out or occupy an end, he obviously chose the former by threatening motorists on the adjoining expressway with a series of huge sixes. Parker eventually hit consecutive fours to score the winning runs with 3 overs to spare.

New South Wales Bar v. Victorian Bar

The annual match against the Victorian Bar took place at Acron Oval, St. Ives, on 10 March 1991, with a depressingly close win to Victoria off the second last ball of the day.

With his usual flair, Maiden arranged the entertainment of the teams at Dimitris Five Doors the night before, causing some optimism amongst the home team that several of the visitors could well be jaded after a particularly late finish to the evening/morning. Unfortunately, that turned out to be only partly correct.

New South Wales batted first and, in conditions which were slow due to overnight rain, accumulated a score of 153 from 40 overs. Gyles (33) and Harris (22) were the principal contributors. Victoria then started briskly and were well ahead of the required run rate before Hamman and Naughtin gained control with some tight bowling. Wickets then commenced to fall and with a short, sharp spell from Parker (3-9 from 4 overs), suddenly Victoria were 8/99. Some critics suggest that the captain lapsed into error by thereupon relaxing the pressure in removing the successful bowlers from the attack. The captain suggests that 3 dropped catches were responsible, but whatever the cause, the fact was that the next Victorian wicket did not fall until the score reached 138. To add insult to injury, Maiden then came to the wicket in his role as a covert Victorian and proceeded to score the remaining runs required, including the final flourish of a four off the second last ball of the game to win the match for the Victorians. Readers can form their own views of this behaviour. The unhappy consequence was that the handsome trophy has now returned to Victoria for another year.

❑ Peter Hastings

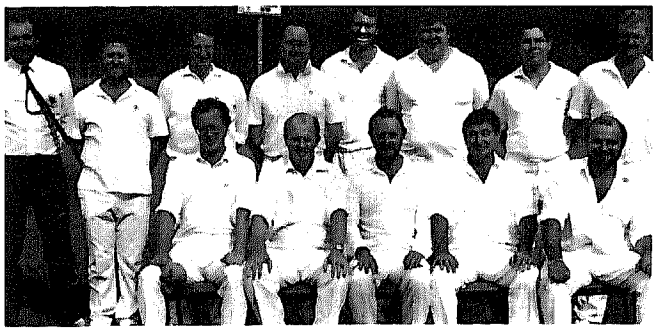
NSW Bar v. Queensland Bar

The Bar finished its 1991 cricket season with a comfortable win in its annual match against the Queensland Bar on 20 April 1991.

Following the successful format adopted by the NSW Bar last year with the game being played out of town (Bowral), the Queensland hosts this year arranged a magnificent weekend at Coolangatta for the annual clash. The game itself was played on the Bilambil sportsground in the nearby foothills. With an excellent wicket and fine amenities and pleasant weather, the setting was ideal. NSW batted first and with John Harris (55) and Rod Foord (72) in top form, the score was a useful 194 from 45 overs.

Notwithstanding the debilitating effects of a pleasant lunch, Queensland started its innings comfortably despite aggressive bowling from Naughtin and King, reaching 50 without losing a wicket. However, the arrival of Stirling Hamman at the bowling crease changed the situation rapidly and Queensland then lost 7 wickets for 16 runs. Hamman took 2 wickets for 4 runs from 5 overs, Foord assisted with 2 wickets for 2 runs from 4 overs and Naughtin then picked up 2 wickets giving him 2 for 25 off 8 overs. The fielding was top class with a great catch from wicket keeper Ireland QC and two smart runouts. Queensland eventually reached a total of 141 off 39 overs leaving NSW the victors by 53 runs. Kevin Connor and John Costigan finished off the innings with some tidy overs. The post-game celebrations took place at the Greenmount Resort, where both teams stayed and Poulos QC gave the Queenslanders a taste of his best "Fifteen Bobber" form after dinner.

❑ Peter Hastings



The victorious NSW Bar team which defeated Queensland.
Rear: H.Munroe (Umpire), Naughtin, Connor, Costigan, Harris, Ireland QC, Levick, Foord.
Front: Maiden, King, Hastings (C), Hamman, Poulos QC.

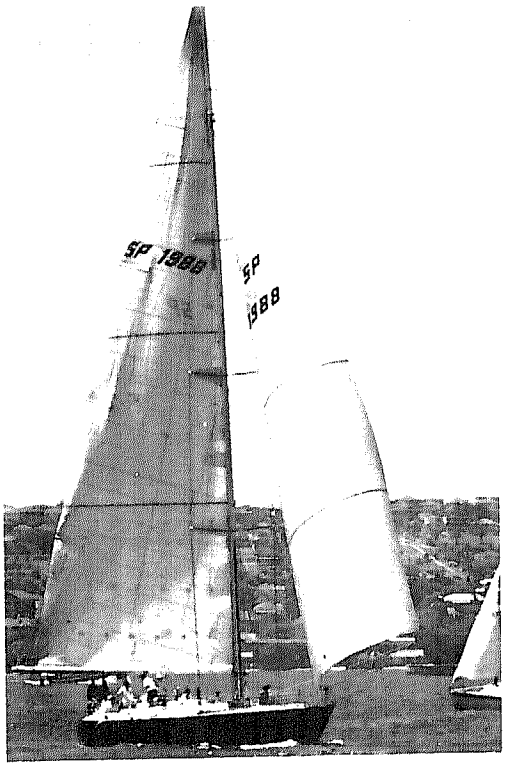
7th Great Bar Race - Memorable Day on the Harbour

The largest fleet yet to compete in the race did battle on Sydney Harbour on Monday, 17th December, 1990.

Forty four yachts competed in this year's race which was started by the firing of a cannon by O'Keefe QC, the "Officer of the Day", from the historic schooner rigged "Boomerang".

The race was sailed in a 10-15 knot south easter which conveniently came in about half an hour before the start of the race. It made for keen and enjoyable racing.

As a result of a breakdown in communication between the writer and his co-organiser, Kelly, O'Keefe QC was not made the "Commodore of the Fleet" but the "Officer of the Day" which function Wheelahan QC had discharged with distinction and panache in previous years. This apparent slight by the race organisers will not be repeated in future years as Wheelahan QC is not one to be trifled with. Next year the ruling President of the Bar Association (if willing) will be the "Commodore of the Fleet" and Wheelahan QC will resume his rightful position as "Officer of the Day".



A Barrister's Boat: On the one hand, if the wind blows from port; on the other hand ...

The race was won by Bodor QC in "Impulse" in a fast time of 1 hour 33 minutes. The "Law Book Sailing Trophy" was kindly presented to him by Mr. Crane, the National Marketing Manager of that company. Bodor QC also took the "Chalfont Cup" for competition between Judges and Silks. The Attorney General, John Dowd QC, was able to enjoy the festivities of the day and presented this trophy. Foster J., who came in third in the race, missed out by a whisker in repeating the feat of his brother Smythe J., who won both of these trophies in the Third Great Bar Race.

Kelly took a good second in "Blind Justice" and O'Keefe QC kindly presented the Bar Association pewters to the skippers.

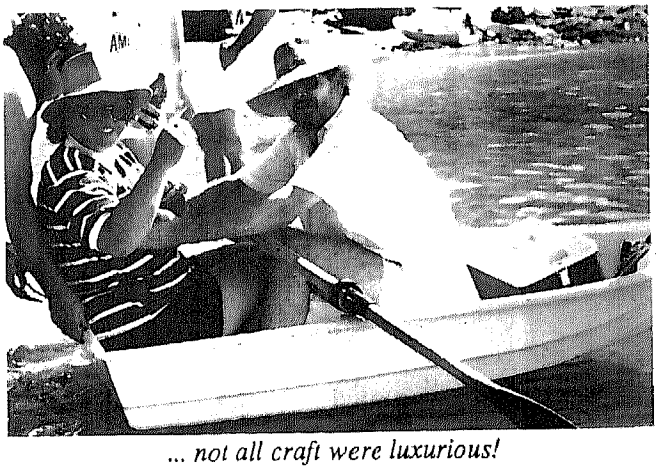
This year, for the first time, the skippers competed for the "Compo Cup", kindly donated by Coleman (previously Coleman J. of the Compensation Court Bench). This trophy was not donated to perpetuate the memory of that august Court but to provide a fitting prize for a member of the junior bar who competed in the race with distinction but did not take one of the major trophies and sailed a yacht which did not regularly compete in organised races. This year's winner was Morrison in "Gramayre". This feat was achieved by him without the able assistance of his usual crew and good wife, Sue, and his young family.

The obvious winner of the prized "Gruff Crawford Memorial Panache Trophy" was Cranitch who skippered "Sundancer", a 60ft. tub. It was a manful effort by Cranitch in seeking to complete the course with a yacht that had aboard a large crew of 60 odd persons in jovial mood and all wearing t-shirts with the words "Sir James Martin Chambers". There was a scurrilous rumour that some of these persons were in fact solicitors! It had the appearance of a modern day pirate ship.

The post race celebrations on Store Beach attracted several hundred skippers, crew and other members of the judiciary and the Bar who had come onto the harbour to enjoy the race and the social activities. Unfortunately, the tender service could not cope with the numbers that wished to be on Store Beach for the presentation of trophies and there were probably another couple of hundred who remained on their yachts. This problem will be remedied for this year's race.

There has been a considerable debate concerning the date upon which the "8th Great Bar Race" should be sailed as this year the law vacation commences on Monday 23rd December, which is very close to Christmas. The race has traditionally been sailed on this day and it is the tentative view of the race organisers that this tradition ought to be maintained. The views of skippers have already been canvassed in relation to this matter and any further comments or views would be welcome.

Many thanks to O'Connor for the provision of "MV Lennox" and to John Barrett and Alan Brown of the CYCA who assisted with the starting and supervision of the race and the handicapping.



... not all craft were luxurious!

Presentations ...

Finally, it is the present intention of the organisers to seek to include in the 10th Great Bar Race Day a race between representatives of the Interstate Bars and our ruling champion yacht. A suitable trophy will be arranged. ❑ Des Kennedy

Golf

Bench & Bar Unlucky to Lose to Solicitors

The Bench & Bar, gallant as always, were narrowly defeated by the solicitors 10 1/2 matches to 8 1/2 matches. The solicitors, who numerically exceed the Bench & Bar by factor of 4, seem to take enormous, indeed, disproportionate delight in defeating the Bar at anything. In this reporter's view their only hope is at golf and that is due largely to the fact that many of our senior and distinguished golfers were unable to attend.

Next year we propose to unleash our most powerful weapon - the David and Goliath of the Bar - own own scud missile - McInerney J and (the recently married) Norman Delaney.

Until then we will need to satisfy ourselves with some outstanding results which regrettably did not lead to the regaining of the trophy which, it is understood, has mysteriously disappeared from the Law Society custody and into which an inquiry will ultimately have to be conducted.

It's worth noting, particularly from the point of view of those members of Bar who may be fortunate enough to appear in front of Judge Sinclair QC, DCJ, in cases where the opposition is represented by a solicitor that, in the Law Society Journal report of the event, the solicitors recorded that the "Bench and Bar representative Judge Sinclair QC begrudgingly presented the trophy to the solicitors ...". Barristers ought note that his Honour was cordial and charming throughout the presentation of the trophy.

The results were as follows: Best ball score for the Bench and Bar J. Steele and I.D. McA. Roberts, 49 points; runners up, Judge Gallen and T. Christie, 47 points; best ball score for the Solicitors, E. Fritchley and P. Farrugia, 50 points; runners up, P. Caldwell and M. Hogan, 46 points; best front nine, R. Moss, J. Demester, 26 points; best back nine, J. Spencer and J. McDonald, 23 points; longest drive, J. Andrews; nearest to pin, D. Remedios. ❑

Golf Day - Bench and Senior Bar v Junior Bar

This annual game which was inaugurated in 1987 was played at Pymble Golf Club on Tuesday 4 April 1991. Forty eight golfers hit off in perfect weather (as opposed to the quagmire conditions of 1990), and all enjoyed (to varying degrees) a day of good fellowship and interesting golf.

The Bench and Senior Bar were successful by seven matches to five, their first triumph over the Junior Bar since 1987. Some players remarked upon their elevation (courtesy of Webb QC) to higher status for the day, but showed their appreciation with some stunning performances on the greens.

The best eighteen holes for the Senior Bar was won by Judge Kinchington and Mike Cummings, whilst the best for the Junior Bar were Rick Seton and Terry McGill. Col O'Connor and J Harris (elevated for the day) were runners up.

Judge Staunton accepted the trophy for the Bench and Senior Bar, with forebodings as to the future of the competition (ie Easter Tuesday may not continue to be a Court holiday much longer).

❑ N. F. Delaney

Tennis

Due to difficulties in finding a suitable venue on a day when the Courts did not sit in 1990, the Annual Tennis Day for the Judge Barbour QC Cup was not contested last year.

Arrangements have been put in train to arrange the Competition in 1991 and the final details will be published when they are to hand.

For the record the 1989 results, having not been previously published, were as follows: Greg Newport and Michael Sexton defeated Justice Giles and Brian Knox 6/2, 6/2.

❑ Tony Reynolds

Squash

The Judge McCredie Cup for the annual competition of the Bar Members was held on Wednesday 19 December, 1990 at the University and Schools Club.

The players who arrived for the Round Robin Competition had their squash abilities fully tested as they had to play five matches within the afternoon's programme. The Final was won by Andrew Fennell of the Gosford Bar who defeated Jim Young of Trust Chambers 7/9, 9/7, 9/7, 9/1.

The Bar Association Trophy for the Best Allrounders was won by the Team from 13th Wentworth Chambers.

❑ Tony Reynolds

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