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.

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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".

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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.

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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)