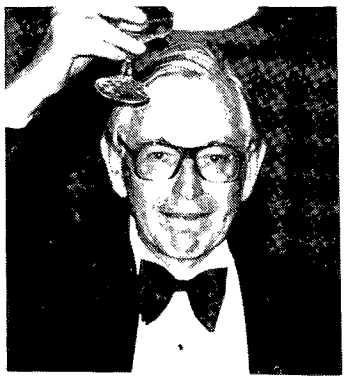
Intercontinental Extravaganza!

The 1987 Bench and Bar dinner was held at the Hotel Intercontinental and was a resounding success. The guest of honour was the Chief Justice of the High Court, the Honourable Sir Anthony Mason, K.B.E. His old floormate "Smiler" Gleeson Q.C. was appointed by the President to laud the Chief Justice, but, at the last moment, succumbed to a bout of stage fright (he said it was laryngitis) and passed the brief to Hughes Q.C. who — as always — rose to the occasion. Frosty's words were lamentably and inexplicably lost to posterity. Mr. Junior, Alan Sullivan, former associate to the Chief Justice, regaled the audience with several inglorious incidents of his term of office, best left unrecorded. The Chief Justice's response was, fortunately, preserved:

Tonight has taught me two lessons: (1) with a close friend of 53 years standing like Tom Hughes I don't need enemies; and (2) I must tighten up the procedures for the selection of future Associates. I am particularly distressed by Hughes' revelation of the dark secret that I am an old convent girl. What will Gaudron J. think of me?



I last spoke at this function more than 30 years ago — as Mr Junior. At that time the intellectual traditions of this Dinner could be traced back through the line of blood sports, the bull ring and the gladiatorial combat to the pagan sacrifices of the ancient world. Judges were seen as ritual victims or evil spirits to be exorcised. One speaker outdid another in reviewing an endless gallery of New South Wales judicial eccentrics. Their names linger on in the law reports, without yielding any clue to the sobriquets by which they were affectionately described by the Bar. "Funnel Web", "The Mad Dog" and "Lord Calvert", later to be joined by "The Tired Lion", were among those who effortlessly achieved immortality in this way.

Lord Calvert closely resembled an aristocratic-looking Englishman who appeared in advertisements constantly demanding a Scotch whisky of that name from a fawning and approving waiter. Unfortunately the Scotch whisky — which was quite a good one — was withdrawn from the market, through no fault of the judge, so that his Lordship was condemned by free market forces to eke out his judicial career bearing a name that had ceased to have any relevance.

My own career at the Bar was more closely connected with the first of the legendary figures I have mentioned. He was a great stickler for propriety, with an analytical mind mainly of a destructive bent, but not wholly so, and a deep-seated suspicion, probably well founded, that counsel was endeavouring to lead him astray. Only the most tightly drawn pleading would survive his searching scrutiny. Advocacy in his Honour's court called for extra dimensions of skill - close attention to punctilio, professions of anxious concern about questions of propriety and a profound knowledge of legal ethics so as to repel allegations of unethical conduct by one's opponent and to support a similar charge against him if the opportunity should offer. It was particularly important to make an immediate disclosure of any possible shortcoming in one's case. On the disclosure of such a difficulty, as if by way of reward for exemplary conduct, his Honour would deploy his constructive ability in circumnavigating the problem and sternly repel the later efforts of one's opponent to improperly exploit the difficulty. In this testing school of forensic skill I thought I did rather well. But I always acknowledged that my contemporary Michael Helsham did better. He had a vast reservoir of matchless cunning and he oozed propriety from every pore. He will need all these qualities and more as he probes that trackless wastes of the Lemonthyme Forest.

In the years of which I speak, the New South Wales Bar was pre-eminent in common law advocacy. The obscene notion that common law counsel might be imported from Melbourne to conduct a major trial in Sydney would not have occurred to anyone, least of all a solicitor conscious of res ipsa loquitur. How times have changed! The poor relations from the South have stolen our clothes. And in a master-stroke of publicity, recorded in "The Australian" last week, the Solicitor-General for Victoria has projected a formidable image that must be the envy of every Law Officer. What Solicitor-General hailing from New South Wales would have dealt with an attractive T.V. reporter in the precincts of the High Court in the manner reported?

Maurice Byers would certainly have put his all-embracing arm around the reporter, but his suggestion would have been much more subtle than that attributed to the Law Officer from Melbourne.

There have been other changes as well that have to do with the Law Officers. Before I was appointed Solicitor-General in 1964, the Commonwealth was almost invariably represented by Counsel from the Bar, even in major constitutional cases. And, although some of the States were represented by a Law Officer or Crown counsel, others were not. Today, in major cases at least, the Commonwealth and every State except Queensland is represented by its Solicitor-General. Of course junior counsel from the Bar are briefed, and sometimes senior counsel as well. But the result is that constitutional work has increasingly become the preserve of Law Officers. And this tendency is not confined to constitutional work as they appear for governments in non-constitutional cases and from time to time for statutory authorities and officials. The present Solicitor-General for the Commonwealth, Gavan Griffith, appears in a larger number of cases than his predecessors. The establishment of the office of Director of Public Prosecutions by the

Commonwealth and by some States is a further extention of this development. By drawing attention to this trend I do not suggest that it is an untoward development. Indeed, it is an inevitable response to the demand for specialization, in particular the requirement of government that it be represented by counsel who has a comprehensive understanding of the complexity of the entire range of problems, legal and non-legal with which it is confronted.

But it may give you some satisfaction to know that it was a Solicitor-General who was the target of the most devastating judicial comment I have heard. One of the State Solicitors-General was addressing the Court in a constitutional case. He ended his first submission with the words "That concludes the first branch of my argument." To which Menzies J. responded "Twig would be a more appropriate word Mr Solicitor, would it not?"

Shortly after I was appointed Solicitor-General, the Attorney-General Bill Snedden asked me to arrange lunch with some junior counsel in Sydney. I invited Rod Meagher among others. On being introduced, Rod proffered his silver snuff box to the Attorney who visibly recoiled before asking "What's in it?" "Snuff, of course" replied Rod dismissively. After the Attorney had indicated that he would forego the privilege, Rod proceeded to dose himself liberally with pinches of snuff, to the accompaniment of much sneezing. Bill Snedden seemed unnerved by this experience for he was not his ebullient self during lunch. I wondered what he might be thinking. The mystery was revealed after we left the Common Room when he asked me "Are many of the barristers in Sydney gay?" So much for the exploits of that other equally famous snuff-taking barrister - James Boswell.

To return to the present. Another respect in which we have seen a significant change is in the manner of presentation of appeals. In the High Court there has been a marked reduction in the time taken in the hearing of cases. If I may give one striking example. A fortnight ago we heard two cases involving a comprehensive re-examination of s.92. The Commonwealth and all the States were each separately represented as parties or interveners. The time taken in argument was a little more than 4½ days. Subject to one potential qualification, all possible arguments were thoroughly canvassed — and some others besides — including the novel contention that the eating in Tasmania of a crayfish caught in South Australian waters amounts to intercourse within the meaning of s.92. This submission reminded me of an episode in the film "The Adventures of Tom Jones".

All in all it was a fine exhibition of the art of advocacy by the counsel involved, concentrating on points of principle, expounding and criticising, and keeping the recitation of passages from judgments to a minimum. In other words, using authorities merely to document and illustrate propositions otherwise made and elaborated. It is interesting to compare the **Bank Nationalization Case** which took 39 days in the High Court and 37 days in the Privy Council, though it involved other important issues apart from s.92.

By way of contrast with counsel's performance in the two recent cases, there was the repetitious counsel appearing before the Supreme Court of Canada who was trespassing on the Court's time. "You have said that before" interrupted the judge. "Have I, my Lord? I am sorry, I forgot" was counsel's rejoinder. To which the judge responded "Don't apologize. It is quite understandable. It was so long ago."

Time taken in litigation and increasing costs, the burden of which is partly borne by government and, ultimately by the taxpayer in the form of legal aid, is a matter of growing public concern. It was one of the reasons assigned by the Senate Constitutional and Legal Affairs Committee for holding its inquiry into the High Court last year. And it is **one** of the factors that lie behind the criticisms recently levelled at the Courts by State and Federal Ministers in recent weeks. Concern on this score is not confined to Australia. At the recent International Appellate Judges' Conference and Commonwealth Chief Justices' Conference the length of court proceedings, especially criminal trials, and rising costs were identified as major problems in common law countries. There is now a general expectation that court procedures should be streamlined and that costs be kept within reasonable limits. Consequently there is a need for the lawyer, whether judge or practitioner, to concentrate on fundamental issues and deal with them expeditiously. Although the adversary system provides the most rigorous means of testing evidence and establishing facts, it is a high cost system of justice. That is why governments in many countries are beginning to examine the possibilities of less expensive systems, such as conciliation and arbitration, at least at the lower levels of dispute resolution.

Proposed alterations to the law as it relates to personal injuries and workers compensation may, if implemented, have a significant effect on the profession, especially on the Bar. I shall not discuss the merits or demerits of these changes except to say that experience shows us that departures from traditional procedures should be approached with caution. But the proposed changes remind us as lawyers that we are mistaken if we assume unquestioningly that the practices and procedures of the past will necessarily satisfy the demands of the future, or even of the present. Unless our performance persuades the community to value the services that we provide, governments and legislatures will feel that they are justified in imposing changes on us. We have to remember that the law is in many respects a service provided to the community by the courts and the profession. In the final analysis it is the community as the user, through its representatives, which makes its judgment on the efficiency and the value of that service.

Of course as one legal door closes another opens. This has happened in New Zealand. The law reports of that country show that personal injury litigation has been partly replaced by litigation involving other and more interesting issues. The result has been that in contract, tort and administrative law New Zealand courts have been exploring issues which have not surfaced to the same extent in Australian courts.

The public perception of the law as highly technical in many of its aspects is an obstacle to a better popular understanding of its role. Though some complexity is unavoidable in a society which is itself complex, there is scope for the elimination of technicality and artificial doctrine. Having listened to argument in two cases concerning the validity of the extraordinarily complicated

Fringe Benefits Tax legislation, I am inclined to support the suggestion that the Attorney-General should begin to recruit English speaking draftsmen. If the community is to understand and value what we are doing, we need to rid the law of its prolixity and unnecessary technicality.

Mind you, we have come a long way since the great days of Parke B. who, though the possessor of a brilliant legal mind, was known as Baron Surrebutter because of his love of technicality. He visited a colleague who was gravely ill, taking with him a special demurrer. "It was so exquisitely drawn", he said, "that it would cheer him to read it". He actually rejoiced when non-suiting a plaintiff in an undefended case, reflecting that those who drew loose declarations brought scandal on the law. The 16 volumes of Meeson & Welsby were his especial pride. However, another colleague remarked that "it was lucky that there was not a 17th volume for, if there had been, the common law world would have disappeared altogether amidst the jeers of mankind".

The stories told by tonight's speakers have improved with the passage of time. However, they have managed to convey an impression, as I have tried to do, of the Bar as it was, a world which to me was both fascinating and exciting, with its companionship and competition, its humour and rumour.

I thank the speakers for what they have said and I thank you all for your support of the toast. Although it is the Annual Dinner of the Association you will forgive me if I regard the large attendance as amounting to a personal gesture of goodwill and as an expression of confidence in, and support for, the High Court. For that my colleagues and I are extremely grateful. □

Letters to the Bar Association

From Judge Phelan:

"Dear Secretary,

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Would you please pass on to the office bearers of the Association my sincerest thanks for the hidden work which throughout my years at the Bar has been carried on by the various specialist committees. I am deeply indebted to all members of those various committees who have at no inconsiderable sacrifice to their own freedom and leisure worked on my behalf in so many divergent ways.

That work has so constantly been carried out so efficiently that it seldom if ever comes to notice.

May I, through you, thank all those involved.

Yours faithfully
Peter Phelan"