Book Reviews

Equity Practice and Procedure in New South Wales

(John Leslie, Registrar, Equity Division, Supreme Court of New South Wales, Legal Books Pty. Limited, $195.00 inclusive of first release)

Passing across the desk of John Leslie, Registrar of the Equity Division of the Supreme Court, are numerous unreported judgments, both interlocutory and final, of the Equity Judges and Masters, as well as unreported judgments of the Court of Appeal on general court practice and procedure and on equity appeals.

In the introduction to his work Registrar Leslie explains that the *Practice* is the result of his desire "to make available to the legal profession up to date material on equity practice and procedure on areas of equity law covered in recent judgments". Also, that the work "covers the practice and procedure in the Master's Court and the Registrar's Court as well covering areas of current equity law".

All who practise at the equity and commercial bar are well aware of the importance of reading the most recent in point judgments of the Judge or Judges before whom a case is to be conducted. The proliferation of unreported judgments has meant that not infrequently one learns for the first time at the bar table that the Judge before whom one is appearing, or his brother along the corridor, has recently considered the issue in an unreported judgment. Use of aids such as CLIRS, ESTOPL and the New South Wales Judgments Bulletin reduces this risk to a certain extent.

My view is that the principal use to the experienced barrister of Registrar Leslie's work is to further reduce the possibility of one's falling into the above predicament in areas particularly of procedure and to a considerably lesser extent of substantive law.

The problem with any attempt to cover the entirety of the field of equity practice and procedure are obvious. The field is so wide that no work can hope to cover it. Registrar Leslie, recognizing this problem, has sought to deal with it by producing a practice which is to be supplemented with periodic releases of additional material. The unfortunate consequence is that the *Practice* in its original form (June 1987) bore a first blush appearance of a scatter-gun attempt to set out extracts from judgments on a large number of seemingly unconnected areas.

Release No. 1 has since been issued (1 December, 1987) Release No. 2 was issued in March. The following comments are based upon all of this material —

1.
— especially the barrister of up to, say, four or five years' standing.

2. Accepting the limitation requiring the *Practice* to be consulted on areas of procedure in addition, say to Ritchie's *New South Wales Supreme Court Practice* and possibly to William's *Victorian Supreme Court Practice*, in my view the *Practice* is a valuable procedural aid to those who practise in New South Wales in the equity and commercial area.

3. By its title the *Practice* purports to deal only with equity practice and procedure. In fact, when one looks at the contents the work purports at times to deal with substantive law. The reader should bear firmly in mind that where the work touches upon such law its treatment can, save in a few specific areas, in no way be considered to be full or to be a substitute for references to standard works. In this respect, it is suggested, the work falls between two stools and one may perhaps be permitted to wonder why the author has gone beyond the scope suggested by the title. One trusts and no doubt the author intends that those isolated areas of substantive law sought to be dealt with will be substantially supplemented in further services. In any event, any references to recent and particularly unreported judgments on areas of substantive law are welcomed.

4. The principal contribution of the work is twofold —

   (i) as a "form guide" to the views of the particular judges whose judgments are extracted;

   (ii) to enable a practitioner unfamiliar with certain areas treated in the work to quickly find his or her way into the main recent relevant reported and unreported decisions.

5. Those consulting the work ought not assume that the extracts are necessarily always a correct or complete exposition of principle on the areas extracted. To a very substantial extent the work extracts the views, and often the recent views, of first instance judges. These views do sometimes conflict and one simply cannot assume that any particular extract will be reflective of the views of each of the judges. Naturally, however, there is some precedent value in being able to cite before any first instance judge a statement of the practice recently followed by another and one would imagine that where possible the judges will endeavour to follow the same line. Registrar Leslie's work does extract some judgments of the Court of Appeal and of course those judgments, particularly when unreported and recent, are of special value to the practitioner before either the Court of Appeal or a first instance judge.

A careful barrister will consult his colleagues before dealing with an area of practice or procedure with which he is unfamiliar. Having read Registrar Leslie's *Practice*

The *Practice* is particularly useful to the new practitioner I cannot say that one could compare it to Parker's *Practice in Equity,* but I can say that when one is able to master the manner in which the extracts are classified it appears to be of real assistance in furnishing one with references to unreported judgments which, outside of this *Practice,* are very difficult to learn of.

It is to be hoped that the equity judges will, from time to time, seek to draw Registrar Leslie's attention to particular portions of their judgments dealing with

procedural matters so that these extracts may be added to the work. Should this occur, the criticism which can presently be made of the *Practice*, namely that it concentrates on the judgments of some, giving lesser attention to the judgments of others, would not be warranted. □

C.R. Einstein

Law of Evidence in Australia

Dr P Gillies, Legal Books, $85 (HB), $60 (PB)

No longer scraping the bottom of the barrel . . .

In *Reg.* v *Morgan* Lord Hailsham of St Marylebone described the prosecution as having had to travel all the way "to New South Wales for direct authority in their favour": [1976] A.C. 182 at 210 — as though thereby counsel were so desperate that they were scraping the bottom of the barrel of judicial authority. One can even perhaps speculate on His Lordship's vocal intonation of those clipped English tones to emphasise the distant peregrinations of counsel viz. to the other side of the globe. Counsel had cited *R* v *Flaherty* (1968) 89 W.N. Pt.1 (N.S.W.) 141 and *R* v *Sperotto & Salvietti* (1970) 71 S.R. (N.S.W.) 334.

It may be that their Lordships were not accustomed to hearing the citations of N.S.W. cases in the hallowed surroundings of the House of Lords.

It is perhaps very appropriate that in this Bicentennial year Dr Gillies has given us the last word on the Law of Evidence with emphasis on "In Australia". Indeed at page 8, when discussing the sources of evidence he writes that:

"The Australian Legislatures have tended not to follow British Parliamentary initiatives in the area with as much alacrity as was evidenced in earlier generations. . . . Today it is appropriate to speak of an authentically Australian law of evidence, one differing in a number of more or less significant ways from the English which, for so long, fulfilled the role of the template."

In his 78 pages of Table of Cases, Dr Gillies cites a total of 2,407 cases, of which 1,540 are Australian. The total number includes a small number of United States and Canadian citations, but 64% of the total number are Australian, emerging from each of the States and Territories.

The Author's method of citation in the table is most welcome in that, at a glance, one sees a collection of all the reports in which a case has been included, e.g. "Rogers v Home Secretary [1973] A.C. 388; [1972] 3 W.L.R. 279; 116 S.J. 696; [1972] 2 All E.R. 1057; affirming R. v. Lewes Justices; Ex p. Secretary of State for Home Department [1972] 1 Q.B. 232; [1971] 2 W.L.R. 1466; 115 S.J. 306; [1971] 2 All E.R. 1126 . . . 431, 432, 434, 435".

The work, released in December of 1987 is a statement of the law as it stood at March 1987.

The student and practitioner are referred to the relevant statutes of all the Australian States and Territories — even those of the United Kingdom (if I may say that with tongue in cheek).

As we have come to expect from Dr Gillies, this work is the obvious result of meticulous research. He gives us a refreshingly different approach in the exposition of the fundamental principles, doctrines and rules in the law of evidence. His method of exposition is to take us on an historical overview of the general common law principles and trace their development to the present day. The journey is both comfortable and illuminating because of the logical sequential flow of its delivery. He takes us from point to point in such a way as to evoke from the reader "Well, yes, that makes sense when you put it that way".

Dr Gillies exhaustively deals with the various doctrines by dividing them into segments each under a short heading. At times he appears to adopt a Thomistic or Socratic system by posing a short question e.g., in discussing the scope of Res Gestae, after demonstrating that strict contemporaneity is not required, he asks, "Must the transaction in issue be inherently dramatic or surprising?", "Does the doctrine apply to purely verbal acts?" and "Whose statement can be part of the Res Gestae?"

The work comprises thirty-nine chapters. Under the heading "Applying the Law of Evidence" he devotes two short chapters (14 and 15) on "No Case to Answer" and "Taking Evidence on the Voir dire". In treating on the exclusionary rules, there is a chapter on Opinion Evidence another on Propensity Evidence as well as four chapters (24, 25, 26 & 27) on Privilege in General, Occupational Privilege, Privilege Against Self-Incrimination, and Public Interest Immunity, which is followed by a short chapter (28) on the Ireland Discretion. Under the heading Admissions and Confessions, chapter 33 represents a plenary study on the exclusion of confessional statements.

The author's style is laudably readable, often times obviating that all-too-familiar exercise of re-reading a passage in order to understand the particular doctrine.

The Law of Evidence in Australia is, indeed, a major and important work. I would go so far to say that it should be a compulsory acquisition for students and practitioners. Bearing in mind the author's other works viz., The Law of Criminal Complicity (1980), The Law of Criminal Conspiracy (1981), The Law of Criminal Investigation (1982), Criminal Law (1985) and numerous articles on Criminal Law and Evidence, it is no wonder that (at least in the District Court) we are hearing more and more citational references to Dr Gillies' works. □

L.J. Attard

Brysonalia

"In pursuing this opportunity to obtain rental revenue the S.R.A. took little notice of signals displayed by persons not on its staff and proceeded on iron rails to a timetable and destination known only to itself." (*National Australia Bank Limited v. Italo Australian Club Ltd,* Bryson J, 23 September 1986)