The Time of Cooper

by J.B. Thomas

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Pope Alexander Cooper was Queensland's longest serving Judge. He spent 39 years of his life as a Supreme Court Justice, and for the last nineteen of them he was Chief Justice of Queensland.

In legal history there occasionally emerges as Chief Justice an intellectual giant such as a Griffith, a Jordan or a Cussen, who dominates the legal thinking in his state or even his nation for succeeding generations. Cooper was not of that ilk, but in his own peculiar way he exerted considerable influence on the development of the law and on community attitudes in Queensland during an important period of its development.

Cooper possessed undisputed legal ability and a striking personality that seemed irresistibly drawn toward controversy. His well-developed faculty for making enemies was not balanced by any cultivation of those in the echelons of power. In fact he showed a decided propensity towards attacking the leading political figures of his day, irrespective of their political persuasion. He did so upon issues which he perceived to involve injury or insult to the judiciary. This is apparent from the beginning to the end of his long judicial career and it may be rated as one of his principal characteristics.

This was of course not only the time of Cooper but also of other Judges including Lilley, Harding, Pring, Mein, Real, Chubb, Power, Shand, Lukin and McCawley.[1] The contribution of all these men to our judicial system also deserves evaluation, but as the main events, especially after 1903, unfold largely around the person of Cooper, it seems reasonable to lend his name to the title.

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PERSPECTIVE 1883-1922

These forty years saw great changes in the development of Queensland. It was a period of material growth and expansion of ideas. The population trebled from one-quarter to three-quarters of a million.[2] The Commonwealth of Australia was created. A World War was fought. New ideas and aspirations emerged and radical political changes were wrought, especially after 1915.

A great influx to the legal profession occurred in the 1890s.[3] Curiously this professional growth occurred too late to take full advantage of the real boom period, namely the 1880s, and the level of litigation actually fell very significantly during the 1890s. Foreign investment had flowed easily to the fastest growing of all the Australian colonies and there had developed an artificial level of prosperity in the State. The economic collapse of 1893 hastened the moment of truth. Queensland's reputation in London quickly retreated from the eldorado of the South to "the most deeply indebted country or colony in the world".[4] Foreign capital and investment tended to dry up, and there was never again such an easy and superficial local prosperity until perhaps the 1970s and 1980s.

Although economic growth occurred during the time of Cooper, it should not be thought that it did so in an orderly or planned way. An economy hitherto dependent on pastoral and mining activity was diversifying into agriculture and dairying. But there was no secure industrial base. No objective analysis can fail to identify the sparseness of genuine local, commercial or financial control in Queensland over this period. Indeed these inherited disadvantages are visible to the present day.[5]

There is abundant evidence of litigation involving land booms, land "sharks" (so-called even then), mining booms, building booms and the sort of litigation that inevitably follows the greed and speculation that go hand in hand with these phenomena.[6] But no solid body of commercial litigation involving trading corporations and disputes between industrial and commercial competitors emerges as it does over the same period in England and to some extent in New South Wales and Victoria.

The influence of Sir Samuel Griffith was considerable and needs no emphasis, but his brother Judges did not entirely stand in his shadow. An eminent jurist, admittedly of Queensland origin, referring to the time of Griffith's appointment to the Queensland Bench, has observed that "after he had become Chief Justice of Queensland in 1893 the Bench over which he presided was as strong as any in Australia."[7]

When Cooper went to Bowen in 1883 as Northern Judge, the remainder of the Supreme Court consisted of three Judges based in Brisbane. By 1889 the Northern lobby persuaded the Government

to move the Court from Bowen to Townsville and to appoint Chubb as a second Northern Judge. For six years two Supreme Court Judges were maintained in Townsville out of the total complement of five for the whole in Queensland. When Cooper came to Brisbane in 1895 there was a change that has survived in substance to the present day. This was largely the work of the Central lobby that also had separatist aspirations. The state was accordingly divided into three Supreme Court districts — Southern, Central and Northern. So in 1895 we had three Judges in Brisbane (Griffith C.J., Cooper and Real JJ.) one in Townsville (Chubb J.) and one in Rockhampton (Power J.). The judicial power of the state was exercised by these five men, along with three District Court Judges, and a magistracy which depended heavily upon unqualified Justices of the Peace.

When Griffith left the Court in 1903 to become Chief Justice of the High Court of Australia, the Government made a conscious decision to economise, leaving only two Judges in Brisbane. Despite the public branding of this by Cooper as a "ghastly experiment"[8] no further appointment was made until 1908. Much later, in 1917, when the government appointed a sixth member (McCawley), the gesture was neither welcomed nor recognised by the Bench of five. It declared the appointment invalid and refused to swear him in.[9] McCawley's appointment was widely seen as political, and legal dispute as to its validity continued until 1920[10] when he finally took his position as an ordinary member of the Court.

Although an Act was passed in 1905 giving women the right to admission and practice as barristers, solicitors or conveyancers,[11] legal rights and social opportunities do not always march at the same pace, and no admission of a woman as a solicitor occurred until 1915, or as a barrister until 1926.[12]

The last seven years of this period, 1915 to 1922 were years of strong Labor Governments firstly under T.J. Ryan and subsequently E.G. Theodore. They were aggressively reformist Governments which saw their role as "taking active action to aid and alleviate the conditions of the working people of the State".[13] Ryan's Government attempted to regulate industry, expand State enterprise and control industrial relations. Its attempts to do so met with heated opposition, and led to a series of important cases, some of which were taken to the Privy Council. In most of them the Government was successful.

Among the more dramatic changes effected by this Government were the abolition of the death penalty[14] (a radical move in those days) and the abolition of the Legislative Council[15] (too radical a move for any other State to contemplate to this day). History seems to have judged these measures fairly kindly.

The last years of this period were marked by a growing bitterness between the Government and the members of the Supreme Court Bench. The final act was written by the Government in the form of

the *Judges' Retirement Act* which was part of a legislative scheme that not only reshaped the structure of the Judiciary, but also removed from office the three senior Judges of the Supreme Court in 1922. It is time then to look at Cooper's story in which this Government action may be seen as "the final solution".

SIR POPE ALEXANDER COOPER (1846-1922)

Cooper was born 12th May, 1846 at a station near Lake George, New South Wales. He was the fifth son of a wealthy squatter who eventually moved his family to Brisbane. He was first educated privately, then at Sydney Grammar School. At the University of Sydney he was a contemporary of Sir Edmond Barton and Sir Samuel Griffith. He was a talented scholar, winning several scholarships. Graduating as M.A. in 1868 he went to London, enrolled at the Middle Temple, passed the intermediate law examination of the University of London in 1871 and was called to the Bar on 6th June, 1872. He commenced practice in London and married in 1873. In the course of time he fathered a son and two daughters, but there is no space for family matters in this short review.

His career conveniently divides into segments, within the framework of which the events in his life are more readily understood.

1846-1872	26 years' education and preparation.
1872-1883	11 years' intermittent practice at the Bar.
1883-1895	12 years as Northern Judge.
1895-1903	8 years as a Judge in Brisbane.
1903-1922	19 years as Chief Justice.
1922-1923	1 year in retirement.

As a young man he underwent an idealistic experience that remained with him throughout his life. While studying in London, he regularly attended the Westminster Courts. He later candidly described his admiration for the English Judges as a form of hero worship.

> To my young and wondering eyes they seemed to be the incarnation of justice — imperturbable justice, of wisdom, knowledge of the world, and courtly manners, and of kindliness. I thought that if I should ever be able to inspire in the profession or among my friends the same sort of feeling that I had for them, I should have reached the highest point that any person could reach in the world.[16]

He was an ardent admirer of the British system and its traditions.[17] He never lost that vision of excellence. It contains the key not only to his straightforward technique as a Judge, but also to his angry responses against those whom he thought were attacking or even failing to respect his own hallowed vision of the Courts.

When Cooper was admitted to the Queensland Bar in 1874, much of his practice consisted of prosecutions in the District Court, and he left Brisbane to accept appointment as Northern Crown Prosecutor in 1878. A few years later he ventured into politics, with a short career of almost exactly two years. He started as Attorney-General, at the invitation of McIlwraith upon the death of Henry Rogers Beor. Seemingly uncomfortable in politics,[18] he held office only until 5th January, 1883 when he was appointed to the Northern Bench of the Supreme Court.

Thus did Cooper, at the age of 36, without the benefit of a long or heavy practice at the Bar, come to an isolated Bench at Bowen where there was no residential Bar. He undertook to do justice to the poor and the rich in the far flung areas of Northern Queensland.[19]

It was not long before his high expenses on circuit were questioned by the Executive. His Honour's chambers were at Bowen and he considered that he should not be expected to endure undue discomfort on circuit and that the entertainment of friends was not an unreasonable expense. Such expenses were accordingly charged to the circuit. A public controversy ensued between the Premier (Mr. Griffith Q.C. as he then was) and the Judge. It began in 1884, reached its climax in 1887, and had not entirely subsided by 1889. There was much public grandstanding by both men, including letters to the newspapers and the publication of their letters to each other. Griffith presented the issue as the right of Parliament to supervise the expenditure of public money whilst Cooper presented it as an attack on the independence of the judiciary.

On analysis the criticism of the level of his expenditure seems unjustified. His circuit travelling expenses for 1887 were approximately £800 whilst those of the three Southern Judges totalled only £400. Some thought this statistic counted against him, but on closer analysis, the three Southern Judges travelled for a total of 70 days whilst Cooper spent 104 days on the track. There seems little doubt that expenses were higher in the remote north than in the south.[20] Some detractors said in parliament that he threw too many picnic parties and that he was overgenerous with champagne and ice.[21] Such details were never well particularised, and no-one ever identified a claim that ought to have been disallowed. It is true that ice chests were carried with the retinue on some circuits; that on one occasion he hired a special train from Townsville to Charters Towers; and that on his second circuit in 1884 he took his wife with him. Good reasons were advanced for all these actions.[22] The northern press strongly supported Cooper throughout the dispute.[23]

The climax came when Cooper threatened to close a circuit court and discharge the prisoners unless the government gave a proper

assurance that his circuit expenses would be met. Conflicting attitudes between the Townsville and Brisbane papers over the threatened closure of the court in 1887 can be partially explained by the northern separation movement, by which administration from Brisbane was easy to identify as unreasonable. On this particular occasion Cooper was notified quite late in the piece that the government had restricted circuit expenses for the Northern Judge for the financial year to £400. He had already incurred circuit expenditure of £286 that year, and asked the Attorney to advise him "what the government expects me to do in the very probable — I should say almost certain event — of my travelling expenses reaching the amount of your estimate whilst I am engaged upon my next circuit". The belated response was "the government are not at present able to give an assurance that any sum beyond the amount voted by parliament for your Honour's travelling expenses will, in any event, be provided for that purpose". Cooper was already committed to an important circuit at Townsville which included eight capital cases and six others carrying a possible penalty of life imprisonment. He responded "As soon as the amount of my travelling expenses reaches a point at which the sum of £114.00 threatens to become exhausted, I will forthwith close the court and return to Bowen". The government's response to this was in the vague bureaucratic formula that "full consideration (will be given) to such representation as you may think fit to make in support of your claim to an increased allowance". Cooper rightly concluded that there was no assurance in this that the government would honour cheques over the voted amount. The circuit was by this stage well under way. Cooper sent a telegram[24] stating "unless I receive assurance from you before 11 o'clock tomorrow forenoon that my cheque for expenses on circuit shall be honoured as usual, I shall discharge all prisoners and return at noon to Bowen".

On the following day, having finished one trial and commenced another, Cooper read the correspondence in open court. He continued: "It is now nearly 12 o'clock, and I have received no answer to my telegram. I therefore intend to discharge the prisoners. Every prisoner is entitled to be put upon his trial or to be discharged." The prosecutor Virgil Power asked His Honour to reconsider, stating that he had given instructions to have all the prisoners re-arrested in the event that His Honour discharged them. Cooper said that he would try to arrange for the steamer to be kept back "for a couple of hours" so that there may be further time for a reply, and so that Mr. Power might make some representations. At 2.20 p.m. His Honour took his seat and on Mr. Power rising it was seen that he held a telegram in his hand. It contained a reply from the government spokesman (the Colonial Secretary) stating that the Judge "has no reason to doubt the assurance of the government that provision will be made for all reasonable expenses". Of course no such assurance had ever

been given to Cooper before this, but Cooper regarded it as sufficient evidence of a promise to meet his expenses and indicated that he would continue with the sittings, draw cheques upon the government as usual, and suffer the risk of loss himself rather than terminate the sittings prematurely.[25]

This controversial incident has been much misunderstood, and has often been used as a basis for discredit of Cooper. The editorial in the Brisbane *Courier*[26] suggested that the public should be indignant, and that he might be suffering from an insidious mental ailment. It was possible, wrote the editor, "that brooding over his supposed wrongs in what we believe is to him the uncongenial climate of the north — coupled of course with the strain of his arduous judicial work — may have begun to make encroachments on the luminous intellect which we have all admired in his honour". It was suggested that he should be given 12 months' leave of absence.

Heartened no doubt by the aggression of the Brisbane *Courier*, Griffith took advantage of the situation by moving to set up a "select committee" to review the whole matter. This was seen by many as the first step towards removal of Cooper. In doing this Griffith went too far. The press in both the north and the south saw an unwarranted interference with the independence of the judiciary.[27] More than a century was to go by before anything approaching this happened again.[28] It is the only pre-1988 example which can be found of the setting up of something resembling a commission of inquiry to examine matters touching the propriety of the conduct of a Supreme Court Judge. Fortunately Griffith took no further step to appoint the members of the committee. Ironically when he became a High Court Judge Griffith himself came into conflict with the Commonwealth Attorney over what he then saw as the parsimonious level of his own expenses and allowances.

Although some complaints continued to be made until 1889, the scales tilted Cooper's way. In Parliament it was said by Mr. Philp that "The Northern Judge had to travel four times the distance travelled by the Southern Judges. He knew that the Northern Judge worked very hard. He had known him to sit until 10 and 11 o'clock at night and to travel by special train on Sunday, in order to start work on Monday morning." The points made in the Northern Newspapers in Cooper's favour were really unanswerable.[29] There seems to have been a growing recognition on the part of the Government that circuit expenses in the North were greater than had been appreciated, for between 1886 and 1888 the expense vote was increased to £800. Thereafter the heat seemed to have disappeared from the issue.[30]

It is ironical that Griffith, who later showed himself to be an impeccable upholder of judicial independence, was seen by some (including Cooper) as its enemy during this dispute. In a sense they

were both upholding a right, and neither trusted the other to be reasonable. It became a personality clash between two proud men. Only a few years later they sat together in Banco with Griffith presiding and Cooper sitting on his right, observing due professional cordiality toward one another. There is no reason to believe that their feud survived Griffith's transference to the Bench. Indeed, there is reason to believe that Griffith recognised Cooper's judicial abilities, and approved his being brought to Brisbane as his Senior Puisne Judge in 1895.[31] It would also be difficult to believe that Griffith was not consulted on the question of the Chief Justiceship in 1903 when he was succeeded by Cooper, an appointment that was not taken well by Patrick Real who had his own aspirations for the position.[32]

Stories of occasional irascibility, harassment of jurors and of over-reactions in Court are common during this period, but time does not permit the giving of examples. He expected, and generally received, receptions in circuit towns befitting an important personage. A police officer who failed to provide an escort from the Gulf to the Normanton courthouse was publicly censured in Court for his "'disobedience, misconduct and insolence".[33] Cooper's problem was that he thought judges were important people and he still had his image of Westminster! The trouble was that he was in Normanton not London or even Exeter. The *Daily Standard* shrieked with laughter.[34] Predictably Cooper was in due course painted in parliament as an over-demanding autocrat, and the police justified as ordinary over-worked servants.

In 1888 Cooper J. dealt with Mr. G.W. Wilson, a correspondent who wrote a scurrilous letter published by the *Port Denison Times*, for contempt of Court. The letter was severely critical of the conduct of a matrimonial trial recently heard before Cooper J. with a jury, and still pending. When called upon to answer for contempt, Wilson made a guarded apology saying among other things that he respected judges, law and order. Cooper sentenced him to twelve months' imprisonment. There was considerable outcry in the press which, even in those days, was wary of possible abuse of the power of a Judge to punish for contempt of court. Much of Cooper's reputation as a harsh sentencer stems from this heavily publicised sentence. What is not so well known is that Cooper co-operated in the remission of the sentence. When contacted by the Chief Secretary upon enquiry as to possible executive remission of the sentence, Cooper recommended his release as a first offender. Wilson was in fact released within six weeks of the imposition of his sentence.[35] But to Cooper's detractors it was the original sentence that left the lasting impression.

There is little doubt that Cooper was an irascible man with a tendency to pedantry. There is also reason to believe that he did not always get on particularly well with his brother Judges. At least minor

friction may be inferred to have been present between him and his fellow Northern Judge Chubb J.[36]; he had been in personal dispute with Griffith during most of the 1880s; and Real's comments upon Cooper's swearing in as Chief Justice reveal more hostility than support.[37]

His appointment as Chief Justice was preceded by an Act of Parliament reducing the salary of the Chief Justice from £3,500 (the amount enjoyed by his predecessor Griffith C.J.) to £2,500. Just what effect this had upon his attitude to the government is difficult to gauge, but there can be no doubt that the financial dealings between Cooper and the various governments of the day show a degree of hostility on Cooper's part and of parsimony (or careful stewardship as the interpretation may be) on the part of those governments. Certainly he commenced office upon express notice that the government valued his service at only 70 per cent of that of his predecessor. But of course controversy with the government over financial matters was not by then a new experience for him.

Soon after his appointment as Chief Justice, Cooper C.J. attempted to achieve something which judged by modern standards seems ambitious in the extreme. He attempted to secure the exemption of Judges from income tax. He tested the Commissioner's resolve by failing to pay his own assessment for the year 1905. He was sued before the Police Magistrate for the sum of £77.19.4, together with a penalty of £7.15.11 for late payment. Cooper succeeded before the Magistrate. That was his only success. The Commissioner's appeal was upheld successively by the District Court, the Full Court (comprising Real, Chubb and Power JJ.),[38] and the High Court.[39]

Not long after his appointment as Chief Justice he was knighted (in 1904) and in 1908 the honour was upgraded to K.C.M.G.

There is no shortage of impressions of Cooper's demeanour and character, some of them gleaned from his contemporaries and passed on to others. He is described as "tall and handsome with the pointed beard and manner of a Renaissance noble". He was said to be one of the best judges of china in Australia.[40] Another researcher paints the following picture:

> Cooper was above all a man of culture. He dressed with distinction, belonged to the right clubs, knew his wines, smoked the most expensive imported cigars, had the right friends. He spoke with the best Sydney University accent, mixed with a polite proper Oxford accent; yet he spoke through his whiskers so that he often sounded garbled. His aim was to be a man of great taste and dignity in the colony; he regarded himself as the local Petronious, a patron of fine living. He relied upon sarcasm, and, possessed of a savage temper, he could be merciless with his sarcastic jibes when aroused.[41]

Most of this is clearly derived directly from the rather jaundiced

appraisal in the *Catholic Press* of 15 February 1915, written by an anonymous contributor who apparently resented Cooper, sneered at Chubb and idolised Patrick Real. The appraisal, and others based on it, therefore need to be read with some circumspection.

His judicial reputation has perhaps suffered to some extent from his propensity to bicker publicly with those who irritated him, and in particular the Governments of the day. This tendency, which had been sufficiently marked in times of conservative Governments, became particularly noticeable in the days of the Labor Ministries from 1915 to 1922. In particular it has been suggested that whilst Cooper was Chief Justice the Courts adopted a deliberately obstructive attitude to Labor's legislative programmes. Dr. D.J. Murphy[42] has commented: "Labor had no reason to feel satisfied that the decisions of the Supreme Court on vital Government legislation had been either fair or sound in law." That author suggested that Mr. Cope's thesis[43] supported that comment, but examination of it fails to substantiate such a view.

The issues litigated in the Queensland Courts at this time are little different from those that still confound lawyers and lead to divided Courts. They include s. 92 of the Constitution, good faith and statutory construction. On analysis the Government enjoyed as much success in the Queensland courts as elsewhere and the adverse decisions were not based on political reasoning or specious grounds.[44] It is impossible on analysis to justify the implication in Murphy's statement that there was any reason to distrust the honesty or soundness of the work of the Supreme Court in these contentious matters. It is however easy to see why those in power (including Ryan) distructed the motives of those who gave adverse decisions.[45]

There is however reason to believe that Cooper personally opposed the Labor Government and its policies, and unfortunately he made public utterances that left little doubt of this. He, and to a lesser extent some of his brothers, were on occasions prepared to make public statements critical of the Government, and to relax the traditional judicial restraint in this area. This was unwise, and has probably contributed to the fear in such commentators as Dr. Murphy that partisanship was carried through into his judicial work.

In November 1915 Cooper was reported as publicly criticising the Ryan Ministry on the grounds of its socialism.[46] He made no secret of his views on conscription — which were opposed to those of the Ryan government.[47] In 1918 he was quoted in the *Courier* as issuing a warning to the community against the prospect of the Labor Government interfering with judicial independence by making political appointments and that the McCawley appointment was merely preparatory to an attack on the Supreme Court.[48] This was taken up as an electoral issue but the Government was returned and very quickly foreshadowed its intention to introduce a "Supreme

Court Acts Amendment Bill''. Still later when he realised that the Government was intent upon abolishing the Legislative Council, Cooper described that course as ''Bolshevik''.[49]

In January, 1920 he endeavoured to forestall the appointment of William Lennon as Lieutenant-Governor, interpreting that appointment as a step towards the abolition of the Legislative Council, and sought the support of the Governor-General. He refused to recognise Lennon's commission which had been drafted on telegraphic instructions from London, and continued to act as Lieutenant-Governor until Lennon's original commission arrived. Subsequently, in Lennon's absence on sick leave, Cooper became Acting Lieutenant-Governor. In that capacity he refused to sign the Executive Council Minute appointing Lennon president of the Legislative Council. On his return Lennon appointed himself.

The Government was re-elected by the people later in 1920 in an election in which abolition of the Legislative Council was an important issue. Lennon, who had been a former Speaker of Parliament, proceeded to appoint 14 new members to the Legislative Council thereby giving the Labor Government a majority in that Chamber.[1] It approved the Government's Supreme Court legislative programme to remove the unwanted judges, and other measures as well, before voting itself out of existence. Cooper however saw the removal of the Legislative Council as a dangerous elimination of a constitutional safeguard and did everything in his power to frustrate it. He no doubt saw the whole campaign as something akin to the invasion of the Barbarians. There can be no doubt that he entered the political arena on numerous occasions, and it might be thought that he eventually suffered the fate of those who live by the political sword.

It should not be thought that the confrontation was initiated by Cooper or the Judges. Indeed it seems to have been a growing distrust, started by the release on political grounds of certain prisoners. This started soon after T.J. Ryan's Labor government took office in 1915. A unionist named Dennis McCarthy had been sentenced by Cooper in 1912 to 15 years' imprisonment for manslaughter. He had killed an elderly worker who had given no more provocation than refusing to join a union. Cooper thought it a bad case of manslaughter and the sentence reflected this notwithstanding the jury's recommendation for mercy. In those days there was no parole system. There was however the Royal Prerogative of Mercy which could be exercised by the Governor on the advice of the Executive Council. The normal practice involved the calling for a report from the trial Judge before deciding whether to exercise the power.[51] Not long after coming to power, T.J. Ryan advised the Governor to release McCarthy, to the great surprise of Cooper whose advice had not been sought. Cooper then published his correspondence with the former Attorney-General (T. O'Sullivan) to show the normal practice and, no doubt, to draw

attention to the release. Ryan responded by stating that the Executive had "new material" which was not before the Judge on sentence. He declined Cooper's request to see it on the somewhat smoky ground that it was "inadvisable in present circumstances to furnish the papers".[52] Cooper knew how to get press coverage and, in open court with the press present postponed some sentences pending receipt of the Premier's explanation.[53] Ryan responded by implying that Cooper was not properly performing his job.

Neither the Ryan nor the Theodore governments made any serious attempt to observe the usual practice, and the Executive remission of prison sentences became something of a running sore between the Executive and the Judiciary.[54] Some members of the government consciously mounted a popular front for shorter sentences, claiming that some of the Judges, in particular Cooper and Lukin, were unduly harsh.[55] From 1913 there was a right of appeal against sentence by which such matters could be ventilated before a Court of different judges, but such rights were not often used.

It may be true that he imposed penalties that would be thought by current standards to be severe. But he appears to have acted within the range of penalties regarded as appropriate by the judiciary of the day. His judgments were subject to appeal, and there is no evidence that he suffered any unusual degree of reversal; nor is there any perception that he acted otherwise than in the conventional discharge of his duties. The duty to deter offenders was perhaps taken more seriously and performed with more zest and less sensitivity to the effects upon the offender than is the case today.[56] It is difficult to detect in Cooper any different attitude to offences against the person or property than that taken throughout the common law world (including that of the English judges) of that era.

One more scene is worth presenting. If an observer could have an instant replay of the courtroom scene of 3rd April, 1918 he might find it easy to understand how it happened that the government had the resolve in 1921 to dismiss three of the five serving Supreme Court Judges. It was an episode in the McCawley saga. The whole Bench was present except for Chubb who was absent ill. The proceedings concerned the validity of McCawley's appointment. To support the unusual basis on which the Government had made the appointment (through the Industrial Court) it was necessary to prove Executive approval of his commission and Executive fixation of his salary.[57] The Executive minute and commission relied on were held invalid because they failed to prove prior fixation of any salary. T.J. Ryan, at that stage the Attorney-General and Premier, saw fit to appear as leading counsel for McCawley. On 15th March, 1918 he read an affidavit which seemed to prove that an earlier Executive minute dated 5 January had been located, and that these things had been done validly. It swore to the Governor in Council's approval of the

commission and of the salary, and that public notification "of such approval" had appeared in the Queensland Government *Gazette.* Some of the grounds upon which the proceedings were based were thereupon withdrawn, and the court adjourned. Cooper then examined the *Gazette.*

On 3rd April, 1918 the court reconvened in its own motion. Cooper remarked that he had happened to examine the *Gazette* and that "I found greatly to my astonishment that the notification therein relating to this Executive minute contains no reference whatever to the fixation of salary, and that the court has been misled in a very material particular . . . "[58] The other Judges were of the same view. An adjournment was granted so that the Attorney-General could appear in person. The copy of the Executive minute referred to in the affidavit showed that it had not been signed by the Governor personally, but it was claimed that it had been "approved by telegram". Cooper raised the question "whether the Executive minute which purports to have been approved by telegram was in fact so approved".[59] There followed what can best be described as a cat and mouse game between the court and Ryan as to whether the telegram could or should be produced. Ryan fulminated 'This is an attack by the Judiciary or some of the Judiciary upon the Executive.'

He said that he was personally in the position of being able to tell the court whether or not the minute was approved by telegram but regarded himself as "precluded from doing that" because it would be giving "information as to communications between ministers and His Excellency the Governor". Cooper then asked explicitly whether the telegram approved the minute or not. This produced the following exchange:

"The Attorney General: I am not going to allow you to ask me questions that I don't think you have any right to ask, and that you cannot compel me to answer; and that is the attitude I am taking in this matter.

The Chief Justice: Don't talk about allowing us to ask you questions, you know. You may refuse to answer them, of course; but don't talk in that way; because when you are here, you know, you are here as Attorney General appearing for a respondent.

The Attorney General: Quite so, yes.

The Chief Justice: You are not Premier here, you are an officer of the Court.

The Attorney General: Yes. Even though I am an officer of the Court, I am not going to permit anything that you choose to say to me, to be said without stating my position. It does not mean that I lose my manhood because I happen to be here as an officer of this Court I if I were Premier. Attorney General, or anything else. However,

> that is the attitude which I take with regard to the matter. If the Court consider that they have the power to do certain things, well then it is for the Court to do those things.
>
> The Chief Justice: You won't tell us?
>
> The Attorney General: I will tell you nothing, your Honour, that I consider you are not entitled to get from me.
>
> The Chief Justice: Very well."[60]

Ryan's bluff won the day and the telegram was never produced. However he produced other evidence that the Court regarded as sufficient.[61]

The stakes were high and the atmosphere was charged. Not only was the office of a Supreme Court Judge (McCawley) in question, so too was the face and status of the government. The drama was marked by enormous distrust on both sides. One can imagine the effect on the electorate if the leader of the government had been shown to be party to perjury or deliberate trickery of the court. Once again we find Ryan hiding behind the shield of governmental privilege on the very issue in question. The real events were sufficiently obscured to avoid any substantial electoral impact. Ryan's government was returned in 1918. One of the first measures foreshadowed was a bill to amend the Supreme Court Act.[62]

By this time there was little doubt that the Government of the day had made a conscious decision to rid itself of what it regarded as a reactionary element on the Supreme Court Bench. It was not suggested on behalf of the Government that grounds existed for the removal of any of the Judges, a course that could be justified only upon Parliamentary address for removal, which required proof of misconduct or incapacity.[63] The device was conceived of compulsory retirement through introduction of an age limit applicable to present as well as future appointees. Lukin J. was probably regarded as being part of the reactionary element but he was a mere fifty-three years old, whilst the three senior members of the Bench were in their mid-seventies.[64] The device of age disqualification could not reach him, but it would at least get rid of Cooper C.J., Real J. and Chubb J.

There was perhaps an arguable case, had the Government chosen to risk presenting it, that Cooper had publicly shown political partisanship to such a degree as to be unfit to hold judicial office. Such conduct had led to a former Queensland Judge, Lutwyche J., to the brink of dismissal in 1863. He survived only by publishing an undertaking not to participate in politics during the remainder of his judicial tenure.[65] The rationale behind this is that public confidence is undermined if a Judge gives cause for suspecting that his decisions may be determined by political reasons.[66] However these perceptions have become much clearer over the last 40 years

than they were then.[67] By the standards of his day it is arguable whether Cooper so clearly transgressed as to justify a case for removal. Some of the issues on which Cooper spoke out involved the administration of the Courts, and a Chief Justice may have the duty to speak out on such matters. But he obviously went well beyond these limits.

Irrespective of the politics of the Government of the day, he seems to have been an "against the Government" man. He did not appear to support any party in a positive way. His earlier public explosions had been against the actions of conservative Governments. However by his constant public outbursts against the legislative programme of the Labor Government of 1916-1922 he was seen by many as a partisan.

No-one in the Government was able or willing to articulate the real objection, and Cooper and the others were dismissed under the label of "retirement". It was a cheap legislative trick. There was nothing wrong with imposing an age limit upon the tenure of future Judges, but there was everything wrong with dismissing incumbents in this way without proof of misbehaviour or incapacity.[68] In short the Government shirked the true issue of judicial impropriety. It achieved the ulterior purpose of dismissal by pious statements of the desirability of all Judges retiring by age 70.

In 1921, amidst great controversy, Theodore's Government presented a package of Bills in an ambitious programme to reorganise the Courts system. It involved numerous aspects —

1. The removal from office of the three senior Supreme Court Judges.
2. Promotion of the three existing District Court Judges to the Supreme Court.
3. Abolition of the District Courts which had operated since 1865.
4. Creation of Magistrates Courts with civil jurisdiction in matters involving up to £200.
5. Abolition of Judges' Pensions and reduction of salary of the Chief Justice.

All stages were finally effected in the one session.[69] The debates raised questions as to the desirability of requiring Judges to retire at age 70, the impropriety of compulsorily retiring Judges who were originally appointed for life, and the issue of political interference with the judiciary generally. The arguments were lengthy and acrimonious. One searches in vain for any serious allegation of impropriety or unfitness on the part of the Judges to be retired. Hints were dropped but no case was made out.

> Hon. A.J. Jones: Under the present Act they can be retired in a more obnoxious way — by asking Parliament to do it. If they knew of a Judge who was physically or mentally incapable through no

> fault of his own, because of his age and infirmity, would they like to vote for a motion to put him out of his position? Is this not a more humane way?
> Hon. E.W.H. Fowles: Which Judge do you think is incapable?
> Hon. A.J. Jones: I am not going to cast any reflection on the present Judges nor on the high and honourable judicial position they occupy . . .[70]

Other comments made during the debate include:

> You know that one Judge at present can be attacked on various grounds.[71] (No particulars given.)
> They hang on like limpets to a rock.[72]
> (The Bill is brought in) to secure efficiency of the Supreme Court Bench.[73]
> That is repudiation of the present contracts.[74]
> Q — Has there been any public clamour for this Bill?
> A — You don't wait for the public to initiate legislation.[75]

The only member of the legal profession in Parliament to support the Bill was Frank Tenison Brennan, then a solicitor and Labor member for Toowoomba. He was himself appointed to the Supreme Court Bench four years later. He supported the measure, stating that the Judges had been "warned on numerous occasions".[76]

Suggestions were made that in a few instances particular Judges had been too severe or "savage" in imposing sentences,[77] but no-one made reference to particular cases. Indeed the remarks of Andrew Thynne, an elderly respected solicitor who seems to have had the respect of both sides of the House, suggested that the Judges generally enjoyed the respect of the profession and that they had disciplined themselves admirably.[78]

> HON. A.J. THYNNE: I would like to know how many of our judges belong even to a social club. They did so as barristers, but most of the withdrew from membership on being appointed judges in order to keep themselves absolutely clear of being brought into too friendly contact with others in a way which might, perhaps, affect their judgment later on when any of those people in those clubs or associations came before them. The care which I know has been shown by our judges in that respect is beyond all praise, and I know they have lived very largely retired lives, away from the associations under which they had been working in order to keep themselves clear and free of imputation of unfairness.

Late in the debate, Real J. appeared before the Bar of the Legislative Assembly and made a lengthy speech (without the use of notes) in an attempt to demonstrate that he was still fit and capable.[79] It did not persuade the House. One Member said it was sad to see an old, "maundering, infirm man" talking with such little logic[80] and "his address was that of an old man who is inclined to ramble into reminiscences of the past".[81] The following reflects the standard of the debate:

> Mr. Hartley: I have seen incapacity in Judges. I have seen them hoisted up by a crane into a steamer, because they were incapable of walking up the gangway. I have known of Judges going to sleep on the Bench. I have known Judges in the North to be very irritable through age, and with the overbearing demeanour which is accustomed to manifest itself in men who have such great power. I have known a Judge who is so anxious to catch his steamer to go South that he threatened the barrister that if he did not close his address quickly, he would give the prisoner another year's sentence, so as to cause the counsel to be quicker next time.
> Mr. King: Do you apply that to the three Judges here?
> Mr. Hartley: No. When men get to a certain age they are irritable and overbearing, and it is not right that they should then have the administration of justice in their hands.[82]

The legislation was carried along party lines. It is difficult to resist the conclusion that this was a serious Governmental intrusion upon judicial independence. Such an interference with the tenure of sitting Judges had been unknownin the common law world since the seventeenth century.[83] The measure also deprived future Judges of pensions, and Queensland Judges remained pensionless until their re-introduction in 1957.

Upon Cooper C.J.'s compulsory retirement, McCawley was appointed Chief Justice. The existing Judges of the District Court (Macnaughton, Jameson and O'Sullivan) became Judges of the Supreme Court.

Thus ended the time of Cooper. It was an able Bench whose members performed their work with integrity, and with the rigorous autocratic attitude typical of those times. Some of its members (Cooper in particular) were indiscreet in taking public stands which exposed their conservative views and which placed them at odds with the legislative programme of the Government of the day. In turn, there is no doubt that there was an unworthy over-reaction on the part of the Government.

Cooper did not long survive in retirement and died in Brisbane on 30th August, 1923.

CONCLUSIONS

Some of the conclusions that have emerged from this review may now be stated.

1. There was a surprising degree of open friction between the members of the Court which they made little effort to conceal. Although it was a robust age the English tradition had always avoided open confrontation on the Bench.
2. The period reveals a Bench of men who were the product of their age, and whose talents and respect for traditional legal values were adequate. They were the men appointed to serve a colony

with a small population and relatively immature institutions. They helped the State through a period of inevitable strife in its political, economic and social growth.

3. There was much public confrontation between members of the Bench and politicians of all political persuasions. Until 1915 the hostile comments related mainly to matters that directly or indirectly affected the administration of justice. After 1915 definite political hostility is discernible from both sides.
4. The extent to which some of the Judges (especially Cooper) were prepared to engage in public squabbling and political controversy would not be acceptable today, and probably was over the limits even then. However it is fair to remember that times have changed. Expectations that Judges should refrain from all forms of partisan political activity are better understood now than they were in the time of Cooper.
5. There was an unworthy over-reaction on the part of the Government to what it perceived as opposition by the Judges to its programme. The entire Supreme Court in Brisbane was in effect dismissed under the label of "retirement" and an aggressive legislative package altered the entire profile of the judiciary.
6. The story underlines the need for respect by all three arms of government for the separation of powers. It reveals a mutually damaging confrontation between executive and judiciary and ultimate use of the legislature to attack the judiciary. This fundamental democratic safeguard was breached by all three branches of government. The delicate balance was lost and "good government" was the loser.
7. The political confrontation was unfortunate and engendered a distrust between politicians and the legal profession which persisted well beyond the time of Cooper.

NOTES

1. Lilley — Chief Justice of Queensland 1878-1893; Harding J. — 1879-1895; Pring J. — 1880-1885; Mein J. — 1885-1890; Real J. — 1890-1922; Chubb J. — 1899-1922; Power J. — 1895-1910; Shand J. — 1908-1925; Lukin J. — 1910-1926; McCawley J. — 1917-1925 (Chief Justice from 1922 to 1925).
2. Figures derived from Queensland Parliamentary Papers.
3. The solicitors' roll reveals that until 1890 the average admission rate was eight per year, but during the 1890s 170 admissions are recorded, i.e. 17 per year. From 1900 onwards there was a setady average of nine per year.
4. D.B. Waterson — "Pastoral Capitalism and the Politician" 1986 RHSQ *Journal* XII, 411,
5. Fitzgerald, "From the Dreamtime to 1915; a History of Queensland", p. 272.
6. R. Lawson, "Brisbane in the 1890s" — U.Q.P.
7. "Some Aspects of the History of the Queensland Bar" — article by Gibbs J. in (1979) 53 A.L.J. 63, 65.
8. (1908) St.R.Qd. memoranda p. v.
9. *Re McCawley* (1918) St.R.Qd. 62.

10. (1918) 26 C.L.R. 9; (1920) 28 C.L.R. 106; (1920) A.C. 69.
11. *Legal Practitioners Act* 1905.
12. Agnes McWhinney was admitted as a solicitor on 7/12/1915, and Katharine McGregor as a barrister on 5/10/1926.
13. M. Cope "The Political Appointment of T.W. McCawley as President of the Court of Industrial Arbitration, Justice of the Supreme Court and Chief Justice of Queensland", U. of Q. L.J. Vol. 9, p.224.
14. *Criminal Code Amendment Act* 1922, s.2; see also R.N. Barber "The Labour Party and the Abolition of Capital Punishment in Queensland" — *Queensland Heritage* Vol. 1, No. 9, November, 1968, p.3.
15. *Constitution Act Amendment Act* 1922, 12 Geo. 5 No. 32, s. 2.
16. *Brisbane Courier* 28 October 1903 on the occasion of his swearing in as Chief Justice.
17. *Brisbane Courier* 16 November 1915. Cooper's remarks at this stage are distinctly Anglophiliac and anti-German. They were made during the war when conscription was a burning issue.
18. "Statesman and Jurist", Queensland Trustees Quarterly Review, March 1949 p. 20, 21.
19. His oath was the conventioal Judge's oath, but a strange decision by Lilley C.J. and Harding J. in 1880 had treated Cooper's predecessor (Edmund Sheppard) as lacking any general right to exercise jurisdiction outside the Northern district. See *"Mr. Justice Sheppard's Claim" 1880 B.C.R. Jnl. 13;* and R. Johnston "History of the Queensland Bar" p. 64.
20. Q.P.D. 798-800 per Messrs. Morton Glassey, Philp and Rutledge.
21. Q.P.D. 55, 798; Q.P.D. 58, 1666.
22. V. & P. 1887 (1) p. 523.
23. *Townsville Herald* 30th April, 1887, pp. 8-10, 1887 p. 8; 14th May, 1887, p. 20; 16th July, 1887, p. 3; 6th August, 1887, pp. 3, 7.
24. April 27, 1887; *Townsville Herald* 30 April 1887.
25. *Townsville Herald* 30 April 1887, p. 10.
26. *Brisbane Courier* 29th April 1887.
27. *Townsville Herald* July 16th, 1887; August 6th, 1887, pp. 3 and 7; *Brisbane Courier,* 3rd August, 1887.
28. *Parliamentary (Judges) Commission of Inquiry Act* 1988: First Report 12 May, 1989.
29. *Townsville Herald,* 7th May, 1887, p. 8.
30. W.R. Johnston's "A Study of the Relationship between the Law the State and the Community in Colonial Queensland" — M.A. Thesis U.Q. August 1965, pp. 114-123.
31. See the remarks of the Attorney-General T.J. Byrnes — *Brisbane Courier,* 9th December, 1895.
32. Real's remarks on Cooper C.J.'s swearing in. *Brisbane Courier,* 28th October, 1903, p. 2.
33. V. & P.1888, (1) 851.
34. *Daily Standard,* 22nd November, 1915.
35. V. & P. 1889, p. 1055.
36. This may be inferred from the episodes in the Northern Full Court.
37. *Brisbane Courier,* 28th October, 1903.
38. (1907) St.R.Q. 110.
39. *Sir Pope Cooper v. Commissioner of Income Tax for the State of Queensland* (1907) 4C.L.R. 1304.
40. *The Bulletin* 8 September, 1923; cf. J.C.H. Gill, *national Dictionary of Biography* p. 106.
41. Johnston ibid p. 66.
42. Queensland Political Portraits by Murphy and Joyce, at p.320.
43. Cope — A Study of Labor Government and the Law in Queensland — 1915-1922; cf. 9 U.Q.L.J. 224.

44. The analysis includes *Australian Alliance Assurance v. A-G of Queensland and Goodwyn* (1916) St.R.Qd. 135; *A.A.A. v. Goodwyn and the Insurance Commissioner* (1916) St.R.Qd. 225; *the Mooraberrie Station case* (1917) St.R.Qd. 250; *Taylor v. A-G* (1917) St.R.Qd. 208, 23 C.L.R. 457.
45. Ryan, in Parliament, alleged that Cooper's decisions in the *Goodwyn* and *Tylor cases had shown "want of integrity rather than an imperfect knowledge of the law" (Q.P.D. 127, p. 15).*
46. A.D.B., 8, 106; cf. *Daily Mail* 10 April 1916, 2 October 1917.
47. *Brisbane Courier,* 16 November, 1915.
48. *Brisbane Courier,* 15th March, 1918; Cope op. cit. (9 U.Q,L.J.) 238.
49. A.D.B. 8, 106.
50. Murphy and Joyce op cit., pp. 320-1; Cope op. cit. pp. 30-31.
51. V. & P. (1888) 1, 684; Q.P.D. 137, 1027.
52. *Brisbane Courier,* 16th November, 1915.
53. Ibid.; P.R.E./A.507, Q.S.A.
54. See PRE/A60 Q.S.A., and also Cope, op. cit., 102-5.
55. *Daily Standard,* 19 November, 1915; *Brisbane Courier,* 19 November, 1915.
56. See for example the sentences (and sentencing remarks) reported in the *Brisbane Courier,* 16 and 19 November, 1915.
57. Cope, op. cit., pp. 115-116.
58. 3 April, 1918, Q.S.A. CRS/202 p. 134.
59. Ibid., p. 137.
60. Ibid., pp. 195-196.
61. Ibid., p. 211.
62. Q.P.D. 129, 7; note aggressive remarks at p. 25.
63. *Act of Settlement* 1701 — 12 and 13 Will. III c. 2; *Supreme Court Act* 1867 (Qld.) ss. 9, 12.
64. In 1921 Cooper C.J. was 75, Chubb J. 76 and Real J. 74 years old.
65. "The Case of Mr. Justice Lutwyche" by McPherson J., Quadrant Sept. 1986 48-52.
66. Thomas, *Judicial Ethics in Australia* (1988) (Law Book Co.) 49-52, 28-30, 98.
67. Op. cit., 52, 70-71, 84.
68. *Act of Settlement* 1700 12 and 13 Will. III c. 2. *Supreme Court Act* 1867 (Qld.) ss. 9, 12.
69. The *Judges' Retirement Act* No. 14 of 1921) with effect from 31st March, 1922; *Supreme Court Act* (No. 15 of 1921) with effect from 31st March, 1922; *Magistrates Court Act* of 1921 (No. 22 of 1921) with effect from 3rd April, 1922.
70. Q.P.D. 138, 1366.
71. Q.P.D. 138, 1411.
72. Ibid., p. 1409 per Hon. W.H. Demaine.
73. Ibid., p. 1415 per Hon. R. Bedford.
74. Ibid., p. 1366 per Hon. E.W.H. Fowles.
75. Response by Hon. A.J. Jones to Hon. E.W.H. Fowles, ibid., at p. 1367.
76. Q.P.D. 137, 1081; *The Worker,* 6 October, 1921.
77. Q.P.D. 137, 1015, 1079. The issue of heavy sentences had been previously raised through frequent exectuive reduction of prison terms, especially since 1920. (See Mr Cope's article — U.Q.L.J. Vol. 9 224, 238-9.) But this did not particularly relate the Judges who were being forced out of office. Sentences of other Judges, including Lukin J. and Shand J., had been similarly remitted.
78. Q.P.D. 138, 1413.
79. Q.P.D. 137, 1002-1006.
80. Ibid p. 1016.
81. Ibid p. 1078 per Mr. Hartley.
82. Ibid, p. 1072.
83. This is also the conclusion of Gibbs J. (as he then was) in "Some Aspects of the History of the Queensland Bar" (1979) 53 A.L.J. 63, 68.