JUDGE MARTIN KRIEWALDT; NINE YEARS OF THE NORTHERN TERRITORY SUPREME COURT

By Geoffrey Sawer*

Introduction

Martin Chemnitz Kriewaldt, a leading practitioner at the South Australian bar and lecturer in the Adelaide University Law School, was appointed an Acting Judge of the Supreme Court of the Northern Territory in 1951 and the appointment was made permanent in 1952. His first recorded judgment is dated 13 March 1951, and his last 5 May 1960. Short holidays apart, he served in the Northern Territory until ordered to hospital on 22 May 1960; the Supreme Court was constituted at his bedside in Darwin Hospital on 27 and 28 May to enable him to dispose of a divorce suit and two chamber matters, he was flown to Adelaide for an emergency operation on 30 May, but it was already too late to operate and he died on 12 June 1960; he died in harness, and among his last acts was a letter to this writer asking that his judgments and some other legal papers should be preserved and used to the best advantage.

The judgments of the Supreme Court of the Northern Territory have not hitherto been reported in any regular printed reports.[1] But Kriewaldt J. himself carefully collected and preserved typed or stencilled copies of his opinions, partly for the convenience of the profession, and partly because he had a proper sense of the value of his own work. He assembled the opinions in two forms. Firstly, in annual volumes running from 1951 to 1959 inclusive, containing all the matters to which he devoted any degree of consideration; there are sets of these volumes at the Supreme Court libraries in Darwin and Alice Springs, and a microfilm copy is in the library of the Australian National University in Canberra. Secondly, selected decisions of particular importance for the profession bound in two volumes, the first covering 1951-53 and the second 1954-55; copies of these sets are in the Court libraries at Alice Springs and Darwin, in the Judge's Chambers in Darwin, in the Attorney-General's library in Canberra, and at the Institute of Advanced Legal Studies in London,[2] and a microfilm is in the library of the Australian National University. A

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1. Kriewaldt J. was keenly interested in plans to produce a comprehensive Australian "Federal Reporter".
2. The Institute also has loose copies of most of the judgments from 1955 to 1958 inclusive.

set of the opinions for 1960 is being assembled and copies will be preserved at least at Darwin and at the Australian National University. This survey is concerned with the nine complete volumes to the end of 1959, whose reports are in a form which the late Judge regarded as reasonably satisfactory.

This survey has three purposes. Firstly, it is not often that one can obtain a virtually complete conspectus of the nature of a judge's professional work during his entire judicial career; the Northern Territory is an unusual jurisdiction and accordingly so far as the material provides some basis for a sociology of judicial activity, it should be regarded mainly as part of the sociology of the Northern Territory, but the record is not without interest for the sociology of judicial action in general. Secondly, Kriewaldt had to deal with a small number of technical legal problems of general interest on which authority is sparse or conflicting. Thirdly, most of his decisions are of continuing importance for the administration of the law in the Northern Territory, being concerned with peculiar local problems and in most cases peculiar local legislation; many of these decisions are also of wider interest, particularly in Australian States whose legislation provided models for N.T. draftsmen. The present survey will provide a rough index to all this material.[3] All the references here used are to the annual volumes with the year preceding and the page following the letters N.T. However, a warning is necessary about pagination. Kriewaldt J. for the most part had the volume pagination inserted with a stamp, but often he subsequently inserted further material; sometimes he numbered these inserts with letters and did not disturb the original pagination, while at other times he re-numbered right through, in ink, not always accurately. The page references here are to the stamped numbers, where available and legible, otherwise to inked numbers, but in all cases must be regarded as approximate.

The Judgments: General Character

In the ten years under review, the reports contain 372 cases (treating as separate "cases" the successive stages of the one general matter, such as the decision on a trial and the remarks on sentencing the accused). Of these, 216 dealt mainly with questions of fact, or with questions of law where the legal rules in question were reasonably well-established; the latter decisions fall into the following groups.[4]

3. Kriewaldt J. himself drafted catchwords, headnotes and tables of statutes and ordinances and indices for the two volumes of "Decisions of Importance", and for all except the 1955 and 1957 annual volumes; the format of the tables in the annual volumes, however, is not uniform.
4. The figures given are approximate, partly because of the difficulty of classifying some of the cases. Some cases of possible special interest in the N.T. are noted.

Fifty-six were criminal causes other than murder. (About 20 related to assaults, nearly all with a drunken or a sexual element or both.) References to some cattle-theft cases are footnoted[5]; *R.* v. *Boon* contains a discussion of the evidentiary significance of cattle brands.

Twenty-nine cases concerned claims arising out of contracts. Those footnoted deal with pastoral transactions.[6]

Twenty-eight concerned matrimonial disputes, most of them petitions for divorce. *Mann* v. *M.*[7] has an interesting review of the different standards of proof required in the High Court as compared with English courts, as shown by the former's decision in *Briginshaw* v. *B.*[8]; on appeal, the H.C. approved Kriewaldt J.'s interpretation of *Briginshaw,* to which it adhered, but reversed his decision on the facts.[9]

Twenty-six concerned running down claims. Of these *Seery* v. *Lauder*[10] has some general interest, because it arose out of the management of a fork-lift truck on a wharf. Those footnoted may be of special interest in the N.T.[11] Eight concerned other types of claims in tort. Twelve were concerned with procedural points, two with bankruptcy matters. The remaining miscellany (55) includes the release of a bail surety where the accused committed suicide before answering to his recognisance,[12] and many observations when sentencing prisoners.

Under the general category of "mainly factual" cases come also most of the 39 murder trials at which Kriewaldt J. presided, of which 37 are reported in these volumes.[13] Twenty-four dealt with aborigines—a few half-blood but the majority substantially full blood. The latter cases provide a fascinating picture of the problem of applying the white man's law to the aborigine, and of the whole anthropological problem of culture contact. But Kriewaldt J. himself wrote at

5. *Byers,* 1953 N.T. 240; *Boon,* 1954 N.T. 38; *Wallis,* 1955 N.T. 106; *Bladwell,* 1959 N.T. 51; *Pearce,* 1959 N.T. 250.
6. *Wilson* v. *McDonald,* 1951 N.T. 134; *Fawcett* v. *Hall,* 1955 N.T. 231; *Tighe* v. *Leonard,* 1956 N.T. 299; *Smith* v. *Liddy,* 1959 N.T. 153; *Dowling* v. *N.A. Development Co. Pty. Ltd.,* 1960 N.T. 70.
7. 1956 N.T. 277. See also *Smith* v. *S.,* 1953 N.T. 147.
8. (1938) 60 C.L.R. 336.
9. (1957) 97 C.L.R. 433.
10. 1958 N.T. 246.
11. *Brunner* v. *Fitzgerald,* 1954 N.T. 108 (contributory negligence); *Christie* v. *Ford,* 1957 N.T. 474, *Turnbull* v. *McKay,* 1959 N.T. 213 (turning across traffic); *Sandor* v. *Bolla,* 1959 N.T. 71 (pillion passenger).
12. *R.* v. *Douglas,* 1953 N.T. 85.
13. The volumes do not contain the summing up at the abortive second trial of *Stapleton,* and at the third trial which resulted in a verdict of not guilty on the ground of insanity. But Kriewaldt J. bound up all three of his directions in this ill-starred case, the High Court opinion in which the conviction after the first trial was set aside—(1952) 86 C.L.R. 358—and a number of other relevant papers including his recommendations to the Executive Government as to the course to be taken in respect of the accused, in a separate volume.

length about the lessons to be learned, and his paper will be published in the *University of Western Australia Annual Law Review* for 1960. Of the cases concerning whites, only *R.* v. *Stapleton*[14] is of general interest. On a defence of insanity, the main question was whether the accused knew that he was doing "wrong" within the meaning of the M'Naughten rules. Kriewaldt J. summed up, in accordance with *R.* v. *Windle,*[15] to the effect that this meant "wrong in law"; the High Court on appeal held that the standard should be not legal but moral.[16] Of the aboriginal cases, *R.* v. *Wadderwarri*[17] involved the question whether a dying declaration by a person with no belief in the hereafter is admissible in evidence; Kriewaldt J. thought not.[18] *R.* v. *Nitjenburra*[19] concerned a drunken murder which was a part of the tragic story of Albert Namatjira's closing days. Admirers of Arthur Upfield's detective stories would enjoy the discussion of the probative value of "Kurdaitcha boots" in *R.* v. *Willie*[20] and *R.* v. *Activity.*[21] The murder cases gave his Honour great anxiety; he did not believe in capital punishment and was upset by the double execution which followed the conviction in *R.* v. *Novotny and Koci.*[22]

This leaves about 117 cases of substantial interest either because of the legal issues involved or because of difficulties in applying law to borderline facts; the cases sub-divide into 31 of general interest and 86 likely to be of interest mainly in the N.T.

It should be noted that during this period the N.T. Supreme Court sat with a jury only in murder trials, and in the rare cases where an offence under a Commonwealth Act (as distinct from a local Ordinance) was tried on indictment.

Cases of General Interest

In *Ballard* v. *Wright*[23] the question was raised whether having regard to the principles established by the High Court in *R.* v. *Davison,*[24] bankruptcy jurisdiction was validly conferred upon the Supreme Court of the Northern Territory, whose judges do not have the life tenure required under Chapter III of the Constitution for federal

14. 1952 N.T. 80.
15. [1952] 2 Q.B. 826. This was the most recent authority available to Kriewaldt J.
16. (1952) 86 C.L.R. 358. The H.C. opinion is plainly preferable to that in *Windle.* The High Court criticised some other features of the summing up, but would probably not have quashed the verdict on that account.
17. 1958 N.T. 53, 101.
18. This case is discussed by Mr. P. Brazil in a forthcoming number of the Australian Law Journal. Kriewaldt J.'s views on the bearing of aboriginal circumstances on the defence of provocation are discussed by Mr. Colin Howard in [1961] *Criminal Law Review* 41.
19. 1958 N.T. 382.
20. 1955 N.T. 67.
21. 1955 N.T. 82.
22. 1952 N.T. 68. It was a brutal murder for the sole purpose of robbery.
23. 1955 N.T. 127.

courts exercising the judicial power of the Commonwealth. Kriewaldt J. held that *R.* v. *Bernasconi*[25] is still good authority to the full extent of excluding the Courts of Federal Territories from the requirements of Chapter III of the Constitution, but that this does not involve the consequence that those Courts lie outside the Federal system; he thought it logically consistent with *Bernasconi's* case that a general statute such as the *Bankruptcy Act* should confer jurisdiction on Territory Courts, and further that there should be an appeal from such Courts to the High Court of Australia, and he criticised contrary views expressed by the present writer in *Essays on the Australian Constitution.* His Honour's careful reasoning makes sense of the cases, once the correctness of the dicta in *Bernasconi's* case is granted, and this writer now agrees that the difficulty is not so much one of logical inconsistency in the subsequent decisions, but of the patent incorrectness of the dicta in *Bernasconi's* case itself. Kriewaldt J. was not required to express an opinion on *Bernasconi* and indeed was bound to accept it as correct.[26]

In *Christie* v. *Ford*[27] the plaintiff in a running down case required the N.T. Police to produce at the hearing statements made by the defendants to a police constable at the time of the accident, and sketches and maps of the scene. The Superintendent attended with these documents, but the Crown Law Officer appeared for the Administrator of the N.T. and on his behalf objected to the production of the documents in the possession of the police as being contrary to the public interest. Kriewaldt J. examined at length the authorities on this question, in particular *Duncan* v. *Cammell, Laird & Co. Ltd.*[28], and *Robinson* v. *S.A.*[29] He came to the conclusion that the two latter decisions are irreconcilable, and that the view of the Privy Council in *Robinson* is preferable and is as a matter of form still binding on Australian Courts; hence he regarded himself as free to examine documents for himself if a claim for privilege made in proper form by the Executive did not on its face satisfy without such examination. However, he did not finally decide that question because, mainly on the basis of dicta in cases including *Duncan* v. *Cammell, Laird,* he held that the privilege in any event ceases if there has been "a prior publication of the documents *or information*[30] for which privilege is sought". In this case it was obvious that documents produced by counsel for the defendants were copies of the documents

24. (1954) 90 C.L.R. 353.
25. (1915) 19 C.L.R. 629.
26. Kriewaldt once expounded to me a thesis that s.122 of the Constitution has always been misconstrued; he thought it was not intended to give the Commonwealth Parliament a plenary legislative power with respect to the Territories, but only the power to set up a system of government in and for those Territories.
27. 1957 N.T. 337.
28. [1942] A.C. 624.
29. [1931] A.C. 704.
30. My italics.

for which privilege was sought; Kriewaldt J. inferred that there had been a "publication" for the purpose of the rule. However, he suggested shrewdly that probably in future the police would not be so obliging as to supply documents of this type to the parties, and in case that happened, he drew the attention of the Administrator to the strong dicta of Viscount Simon L.C. in *Duncan* v. *Cammell, Laird*[31] suggesting that the Executive should not readily take this objection, and he mentioned the practice now adopted in England of disclosing such statements.[32]

In *Dalgety & Co. Ltd.* v. *Aitchison*[33] a claim *in rem* was made in the N.T. Supreme Court against the foreign ship "Rose Pearl" on behalf of a "material man" for necessaries supplied to the ship at ports outside Australia. This claim necessitated a careful consideration of the *Colonial Courts of Admiralty Acts*: in particular, the question whether under those Acts as applicable in Australia there existed a maritime lien for necessaries supplied and if not, whether there was an enforceable claim *in rem.* His Honour first held that the N.T. Supreme Court was a Court invested with admiralty jurisdiction under the Imperial legislation.[34] He then pointed out that early decisions of the Privy Council had interpreted the Imperial Act of 1840 as conferring a maritime lien on material men, and that this might still be the law in jurisdictions subject to the Judicial Committee, although the House of Lords had held otherwise[35]. However, he did not find it necessary to decide the case on that basis because of the alternative possibility of a judgment *in rem* against the ship, even if no lien existed. On that point, he held, distinguishing the Privy Council's decision in *Foong Tai & Co.* v. *Buchheister & Co.*,[36] that it is essential to a claim *in rem* by a material man against a ship that he must be able to establish a claim *in personam* against the owner of the ship at the time of the arrest. There was some ground for thinking that the ship in question had at the date of arrest passed to the ownership of persons against whom no personal claim in respect of the necessaries supplied existed, but in the absence of legally admissible proof of this, his Honour applied the presumption of continuity and held that at the time of arrest the ship was still owned by the company against whom a right *in personam* had arisen: hence he gave judgment condemning the ship.

Another maritime case was *Haritos v. Commonwealth,*[37] in which the plaintiff claimed salvage for towing an Army vessel stranded on a beach near Darwin. Kriewaldt J. held that neither s.56 of the

31. At p. 638.
32. See 1957 *Public Law* at p. 36.
33. 1957 N.T. 277.
34. This question had not previously arisen for decision.
35. *The Henrich Bjorn* (1886) 11 A.C. 270.
36. [1908] A.C. 458.
37. 1955 N.T. 209.

Commonwealth Judiciary Act, nor s.21A of the N.T. *Supreme Court Ordinance* imposed any liability in salvage on the Crown.[38] However, the parties invited him to investigate the substantial merits of the claim, and this involved a careful consideration of the nature of "salvage", and in particular of the fine distinction between "voluntary" rescue undertaken on request, and a "contractual" rescue justifying only a claim to a *quantum meruit*. He held that in the circumstances of this case, a salvage claim (with a correspondingly higher award) would have been available but for the question of the Crown's immunity.[39]

In *Chisholm* v. *Rieff*,[40] a defendant in a Supreme Court action obtained ex parte injunctions from a Warden's Court prohibiting the plaintiff in the Supreme Court from working a mine, pending the determination of a dispute concerning a tribute agreement; the plaintiff won the principal case and claimed damages for cessation of work in obedience to the injunctions issued by the Warden's Court; no undertaking to pay damages had been required in that Court. Kriewaldt J. thus had to consider the disputed problem in equity as to whether in the absence of an undertaking damages could be claimed for loss suffered from obedience to an injunction. His Honour showed that statements as to the origin of undertakings on the giving of an injunction made in Ashburner's "Principles", on the basis of dicta of Jessel M.R.,[41] are wrong, and that such undertakings were known before the Vice-Chancellorship of Knight-Bruce. Apart from that, however, his Honour found a surprising dearth of authority on the question at issue, and had to rely on somewhat uncertain dicta and on the lack of contrary authority when holding that in the absence of an undertaking damages could not be claimed.

Another question on which there was a surpising dearth of authority related to the standard of care and the onus of proof applicable where a car left with a trader for sale on commission was stolen in circumstances not satisfactorily explained by the evidence.[42] Kriewaldt J. was inclined to think that the bailment should not be treated as gratuitous, but even if regarded as gratuitous he thought the onus of disproving negligence still lay on the defendant bailee.

In *Knowles & Co.* v. *Rose*,[43] a bookkeeper dismissed in breach of his employment contract claimed damages, and the question arose what was the reasonable notice to be implied in such a case. Authority is scanty as to the basis on which such implications should be made. Kriewaldt J. adopted the approach of Fergusson J. in *Harding* v. *H.*[44]; he tried to construct the likely view of the parties if they had thought of the question when making the agreement. This would let in evidence as to the circumstances of the particular agreement, contrary to dicta in some other cases; here, for example, the circumstance that the plaintiff was brought to the job from another State. His Honour also dissented from the view expressed in some Australian cases[45] that in a weekly employment, as this was, a week's notice should normally be implied as reasonable. This was on appeal from a magistrate in the Darwin Local Court; the latter had held that six months' notice and consequential damages was proper, and Kriewaldt J. affirmed the decision.

38. He also pointed out that in its then form s.56 of the Judiciary Act probably did not apply in Darwin. The section was suitably amended by No. 50 of 1959.
39. The Parliament does not appear to have acted on his Honour's intimation that the Crown should be liable in salvage.
40. 1953 N.T. 128.
41. *Smith* v. *Day* (1882) L.R. 21 Ch.D. 421.
42. *A. E. Jolly & Co. Ltd.* v. *Casey*, 1958 N.T. 1.
43. 1958 N.T. 8.

In a group of matrimonial cases, *Fullerton* v. *F.*[46] involved complex questions as to the retrospective operation of decrees in nullity on the ground of incapacity. The decision has been discussed elsewhere.[47] In *Pendergast* v. *P.*[48] there is an exhaustive examination of the nature of collusion in divorce; his Honour held that an agreement by a guilty husband to pay costs is not *prima facie* collusive. *Re Morrison*[49] and *R.* v. *Dodds, ex. p. Mitchell*[50] contain a comprehensive examination of the procedure for enforcement of maintenance orders made in other States, which involves a consideration both of the Commonwealth *Service and Execution of Process Acts* and of the N.T. *Maintenance Orders (Facilities for Enforcement)* Ordinances, the latter resembling parallel legislation in the States. In the latter case, his Honour dissented from the view of Smith J. in *Lindgran* v. *L.*[51] as to the construction of ss.5 and 15 of the *Service and Execution of Process Act* 1901-53. In *Eacott* v. *E.*[52] there is an interesting discussion of the situation in relation to maintenance after divorce where a child of 18 is attending a university on a Commonwealth Scholarship; his Honour held that a father on a small income might reasonably have insisted on the child earning its living, if there had been no divorce, and hence could not be required to pay maintenance in respect of that child. In *Re Bellden*,[53] his Honour held that a divorced mother can on re-marriage, together with the second husband, adopt a child of her first marriage, even though custody of the latter has been awarded to the father in another State and he objects. The decision also involved dispensing with the con-

44. 29 S.R. (N.S.W.) 96.
45. See Australian Digest Vol. 13, Coles, 1149-50.
46. (1958) N.T. 289.
47. [1959] 32 A.L.J. 394.
48. 1959 N.T. 53.
49. 1958 N.T. 197.
50. 1959 N.T. 202.
51. [1956] V.L.R. 215.
52. 1957 N.T. 309.
53. 1951 N.T. 180.

sent of the male parent where the latter had not been in fault in the divorce, following *H.* v. *H.*[54] and not following *R.* v. *M.*[55]

As a result of a strike over the size of wharf gangs and consequential picketing at Darwin, an application was made to Kriewaldt J. for an interlocutory injunction to restrain the picketing. He held[56] that in the exercise of its discretion, an Australian Court when employing equitable remedies should not readily intervene in industrial disputes, because an elaborate system of specialised industrial tribunals exists for that very purpose. He did not, however, exclude altogether the possibility of an injunction in such cases and pointed out that this self-denying ordinance did not apply at all to actions for damages.[57]

Next a group of criminal cases. *Re Bailey*[58] involved in its various stages many questions concerning the application of the Imperial *Fugitive Offenders Act* 1881; one stage of the case went to the High Court.[59] The High Court upheld Kriewaldt J.'s view that notwithstanding the abolition of older punishments by the English *Criminal Justice Act* 1948, it was still possible to say that the latter Act taken together with prison rules thereunder inflicted a punishment which could be regarded as "imprisonment with hard labour . . . or . . . any greater punishment". Kriewaldt J.'s decisions on other aspects of *Bailey* provide a valuable guide to the machinery of the *Fugitive Offenders Act* and the methods by which detention thereunder can be challenged. In *R.* v. *Anderson*,[60] his Honour applied the definition of attempt adopted by Archbold,[61] in relation to assault preparatory to a rape. Some evidential points. In *R.* v. *Hayes*[62] he held on analogy with the rules as to lineups that identification based on a single photograph (instead of photographs of a number of similar persons) was not satisfactory; in *R.* v. *Dungan*[63] he held that the unsworn evidence of a child could be corroborated by the unsworn evidence of another child; in *R.* v. *Kunoth*[64] he held that it was open to a judge in a rape case to lead the evidence of a girl witness from whom (owing to shyness, etc.) the prosecution had not been able to obtain unprompted evidence. In *R.* v. *Wesley*,[65] he rejected a confession where the accused had a "not unreasonable" belief that an inducement had been offered, though none had been in fact.

54. [1947] K.B. 463.
55. [1946] V.L.R. 106.
56. *Dartim Shipping Co. Ltd.* v. *McGuinness*, 1958 N.T. 24. See also *Carroll* v. *Ryall, Post*, which arose from the same episode.
57. Nor to keeping industrial tribunals within their jurisdiction: see *R.* v. *Dodds*, 1956 N.T. 326.
58. 1958 N.T. 341, 361, 411.
59. *Bailey* v. *Kelsey*, 23 A.L.J.R. 1.
60. 1954 N.T. 48.
61. 32nd ed. at 1462.
62. 1959 N.T. 181.
63. 1956 N.T. 254.
64. 1957 N.T. 116.
65. 1960 N.T. 12.

R. v. *Shurety* is an example of manslaughter constituted by excessive punishment of a child.[66] In some rape cases, Kriewaldt J. applied in a manner somewhat favourable to the accused, the strict Common Law view that it is not a rape if the woman ultimately consents, even though she does so from fear of violence to herself or her children.[67] In a perjury case, his Honour held, mainly on a basis of dicta in earlier cases, that the crime is not committed if the false statement is retracted in the course of the one hearing.[68]

In *R.* v. *Wauchope*[69] Kriewaldt J. had to consider old conundrums concerning the effect of mistaken delivery on larceny, and as bearing thereon the *rationes decidendi* of *Middleton*[70] and *Ashwell*.[71] The accused had resigned from government service, but owing to errors in the administration, pay cheques continued to be sent to him by post, and these he cashed, spending the proceeds, after he had ceased to have any reasonable belief that he was entitled to receive them. His Honour was inclined to side with the Turner-Russell view,[72] against Kenny,[73] that in *Middleton*, Piggott B. did not agree with the joint judgment; he thought that Goddard L.C.J. was certainly wrong in the estimate of *Middleton* expressed in *Moynes* v. *Coopper*.[74] But his Honour did not have finally to decide that question, because of the special statutory character of larceny of valuable securities under 24 and 25 Vic. C.96, s.27 and its Australian analogies. Even if the cheque was regarded as passing into possession of the accused the minute the envelope containing the cheque was delivered (which his Honour thought the more probable view), there was still no larceny. There was no larceny of the piece of paper constituting the cheque, because that piece of paper would in due course return to the drawer's bank. The money obtained by cashing the cheque was not in any sense the property of the Crown nor in any sense stolen from the bank which paid it. The cheque did not become a valuable security capable of being stolen as such until the very moment when the accused obtained it, so he could not possibly be regarded as then "taking" the valuable security from anyone else. It is indeed probable that his Honour had disclosed "a gap in the criminal law which should be cured by legislation". The Crown attempted to fill the gap by a fresh prosecution for obtaining by false pretences.[75] This was tried before a jury under the Commonwealth Crimes Act, but his Honour summed up strongly

66. 1957 N.T. 105.
67. *Dunne*, 1956 N.T. 96; *Regan*, 1953 N.T. 376; *Kunoth*, 1957 N.T. 116.
68. *Ching*, 1956 N.T. 65.
69. 1957 N.T. 244, noted in 1958 Crim. L.R. 525.
70. L.R. 2 C.C.R. 38.
71. 16 Q.B.D. 190.
72. 10th ed. p. 1151.
73. 15th ed. p. 239.
74. [1936] 1 All E.R. at 452.
75. 1957 N.T. 397.

against the Crown; it was impossible to treat any conduct of the accused as amounting to a false pretence. The accused was acquitted. In *R.* v. *Honer*,[76] it was held that drunkenness can negative the specific intent required by larceny. In *R.* v. *Copeland*,[77] there is a careful examination of forgery, showing that Kenny's rule about a document "telling a lie about itself" requires modification.

Motoring offences. In *McLean* v. *Sprigg*,[78] his Honour suggested that a licence should be endorsed on a first offence only if the offence is particularly reprehensible. In *Owens* v. *Colsen*[79] he had to consider whether the common provision entitling a motorist held on a drunken driving charge to request a doctor's attendance could be used to the advantage of an accused when the police are unable to obtain a doctor prepared to attend at the Police Station. This was on appeal from a Magistrate who had acquitted the accused and made derogatory remarks about the attitude of doctors employed in the Health Department; acting under official instructions, they had refused to make themselves available for such purposes. His Honour showed that the legislation did not make it obligatory for any doctor to attend in such circumstances, nor did it place on the police the impossible duty of securing such an attendance; the result might be unfortunate for the accused, but could not prevent his conviction if his drunkenness were otherwise proved.

R. v. *Edwards*[80] provides an interpretation of the offence of wilfully misleading a quarantine officer under s.83 of the Commonwealth *Quarantine Act* 1908-1950.

Cases of Special Interest in the Northern Territory

First some questions concerning Northern Territory government. In *Walters* v. *Fay*[81] his Honour had to decide at what date Ordinances come into operation under the provisions of the *Northern Territory (Administration) Act* 1910-1956, ss.4V and 4X. He held, with regret, since it was an inconvenient construction, that an ordinance operated on the publication of a Gazette notice that assent had been given, not on the date of the assent itself. *Richardson* v. *Darwin*[82] and *Kelly* v. *McDonald*[83] concerned electoral questions under the Local Government Ordinance 1954 as applied to Darwin. *Lee* v. *Commonwealth*[84] provides a history of powers of road construction and drainage on to private land in the N.T. *Tivendale* v. *Fitzgerald*[85]

76. 1958 N.T. 404.
77. 1960 N.T. 3.
78. 1959 N.T. 160.
79. 1959 N.T. 82.
80. 1952 N.T. 58.
81. 1957 N.T. 350.
82. 1959 N.T. 91.
83. 1958 N.T. 330.
84. 1955 N.T. 308.
85. 1958 N.T. 85.

examines the history of the Health Ordinance 1915-1957, and in particular the prohibition (s.7C) on keeping horses in the Darwin area. *Couper* v. *Public Trustee*[86] traces the steps by which lunacy administration in the N.T. developed out of the original South Australian legislation, and in particular the operation of s.72 of the *Mental Defectives Ordinance*, 1940 which seeks to protect dealings by a Public Trustee. In *R.* v. *Calma*[87] his Honour took judicial notice that the Fannie Bay Gaol had been duly established as a place of lawful custody. When settling jury lists at Darwin and Alice Springs in 1955,[88] his Honour traced the development of the *Jury Ordinances* from the South Australian *Jury Act* and pointed out the inappropriateness of many of their provisions to the circumstances of the N.T. In *R.* v. *Bagshaw*[89] he had occasion to observe that there is no such thing as a Clerk of Courts in Darwin, with consequential difficulties in registering and enforcing British Commonwealth maintenance orders. *Granites Gold* v. *King*,[90] *Leonard* v. *Dodds*,[91] *McDonald* v. *McPartland*,[92] and *Chrisholm* v. *Rieff*[93] deal with many questions arising under the *Mining Ordinance* 1939 and Regulations thereunder. In *In re Bardon and Sweetman's Arbitration*[94] it was held that the South Australian *Arbitration Act* 1891 (applicable in the N.T.) does not enable the Court to revoke a *submission* to arbitration — only the appointment of a particular arbitrator. A company debenture did not require registration as a Bill of Sale under the *Instruments Ordinance* 1935; the Ordinance allowed registration of instruments at any time and from the point of view of the policy of such legislation was found by his Honour to be almost worthless owing to its naive drafting.[95]

Some landlord and tenant questions. What constitutes justification for notice to quit under the *Landlord and Tenant (Control of Rents) Ordinance* 1945 is discussed in *Bardon* v. *Sweetman*.[96] The difficult distinction between tenancies and licence-management arrangements in relation to a pharmacy business was considered in *Darwin Pharmacy* v. *Wood*.[97] The conditions under which a Crown lease may be varied under the *Darwin Town Leases Ordinance* 1947 were explored in *Ex. p. Newell*.[98] In *Thomas* v. *Ethell*[99] his Honour held

86. 1958 N.T. 170.
87. 1956 N.T. 267.
88. 1955 N.T. 45, 141.
89. 1956 N.T. 169.
90. 1958 N.T. 259.
91. 1956 N.T. 209.
92. 1953 N.T. 60.
93. 1953 N.T. 4, 126.
94. 1957 N.T. 301.
95. *Mount* v. *Stubbs*, 1957 N.T. 1.
96. 1958 N.T. 124.
97. 1958 N.T. 131.
98. 1956 N.T. 270.
99. 1954 N.T. 1.

that the *Crown Lands Ordinance* 1931-52, s.118, empowers Justices to issue a warrant of eviction against a tenant holding over.

Some hotel cases under the *Licencing Ordinance* 1939-52. In *R.* v. *Odlum*[100] Kriewaldt J. felt obliged to follow a decision of his predecessor Wells J., to the effect that plans deposited in connection with licencing applications must be deposited at the centre where the Licencing Court sits prior to the hearing of the application — even though this may mean depositing plans in Darwin in relation to an application in Alice Springs. His Honour doubted whether this was the proper construction and encouraged an appeal to the High Court. The High Court confirmed Kriewaldt J.'s doubts and held that the plans should be deposited at the centre where the hearing is to be held.[101] *R.* v. *Nichols*[102] and *Hotel Alice Springs* v. *Coulter*[103] provide guidance as to the basis on which licencing fees are calculated, the former dealing in particular with the meaning of the expressions "grant" and "renewal" in this context. *Raabe* v. *Gee*[104] explores the vicarious liability of licencees for hotel offences, and vicarious liability in crime generally. *Rorke* v. *Mannion*[105] provides an interpretation of the requirements in s.116 of the Ordinance, making it an offence for an illegal bookmaker to re-enter premises after having been "arrested and removed" therefrom; the case also provides a general discussion of the meaning of the word "arrest" in such contexts.

In *Paspalis* v. *Dewey*[106] is found an interesting and amusing discussion of the control of privies under the *Health Ordinance* 1915-1957 and the *Night Soil Regulations* (No. 4 of 1949, No. 2 of 1954). Territorians will particularly relish the references to "Flaming Furies". *R.* v. *Lemaire*[107] provided a destructive analysis of the *Stock Routes and Travelling Stock Ordinance* 1954-6, as a result of which the Ordinance was amended.[108]

The requirements for conviction of a child as neglected under the S.A. *State Childrens Act* 1895 (applicable in the N.T.) are reviewed in *Re Thompson.*[109] That peculiar Territorian institution, the "General Search Warrant"[110] under the *Police Offences Ordinance* 1923-34, s.21, is considered in *Phillip* v. *Dillon.*[111] Some long-standing illusions as to the powers of Courts of Summary Jurisdiction to impose

100. 1951 N.T. 44.
101. *Sub nom. Minahan* v. *Baldock* (1951) 84 C.L.R. 1.
102. 1953 N.T. 180.
103. 1958 N.T. 118.
104. 1958 N.T. 226.
105. 1951 N.T. 104.
106. 1959 N.T. 223.
107. 1957 N.T. 313.
108. No. 13 of 1957.
109. 1952 N.T. 176.
110. Shades of Erskine.
111. 1955 N.T. 289.

conditions when releasing convicted persons on bonds, or suspending sentence, were dealt with in *Good v. Benyon*[112]; his Honour showed that the range of conditions which could be imposed was actually very restricted. The proper form for such orders and bonds is set out in *Ah Mat* v. *Hook.*[113]

In *Li Kim Gee* v. *Ryall*[114] his Honour examined the development of the *Lottery and Gaming Ordinance* 1940 from South Australian origins in order to decide a question of onus of proof. He held that ss.41 and 61 operate to place on the defence the onus of proving that a game being played with instruments (such as a pack of cards) which could be used for an *unlawful* game is in fact *lawful. R.* v. *Perry*[115] construes the conditions of liability for making a false declaration under s.11 of the *Gold Buyers Ordinance* 1935.

In *R.* v. *Nicholls,*[116] his Honour had to consider whether the S.A. *Childrens Protection Act* 1889 had operated to raise the age of consent in carnal knowledge cases from 16 as provided in the S.A. *Criminal Law Consolidation Amendment Act* 1885, s.4, to 17 — both Acts being in operation in the N.T. He held, following an unreported decision of Murray J. in the Supreme Court of S.A., that this was not the case, as had commonly been assumed in the N.T., so that the age of consent remained 16. In this case his Honour also intimated without deciding that probably a Court of Summary Jurisdiction in the N.T. has no power to convict under s.4 of the 1885 Act, but only a power to commit for trial above.

Two cases under the *Motor Car Ordinance* 1930-1946. The obligation to "give way to the right" is considered at length in *Read* v. *Bowie*[117] with particular reference to the South Australian decisions on former Regulation 6A of the South Australian *Road Traffic Act* from which the N.T. provision was taken. The case is particularly important for the A.C.T., where there is a similar emphasis on this rule. In *Ex. p. Brown*[118] his Honour held that the notice of action required by s.82 (5) applies only to the case of an unidentifiable defendant under s.82 (3), not to the case of a known but uninsured defendant under 82 (1).

In *Carroll* v. *Ryall*[119] his Honour heard a complaint under s.11 of the *Observance of Law Ordinance* 1921. This highly original law was enacted as a consequence of the minor civil war between 1918 and 1921, in the course of which an Administrator and a Director of the Territory were compelled by a rebellious populace to leave Darwin.

112. 1951 N.T. 32.
113. 1957 N.T. at 231 ff.
114. 1954 N.T. 24.
115. 1952 N.T. 99A.
116. 1958 N.T. 28.
117. 1951 N.T. 23.
118. 1958 N.T. 16.
119. 1958 N.T. 205.

The charge was one of interfering with the right of a person to "carry on his lawful occupation", under s.11 (a). During an industrial dispute, the accused and others had prevented a carrier from entering the Darwin wharves for the purpose of removing goods. Kriewaldt J. reviewed with learning and with relish the history of the Ordinance[120] and in the light of its history came to the conclusion that to interfere with a particular activity of a person carrying on his lawful occupation did not amount to an interference with the "right . . . to carry on his lawful occupation" under the Ordinance. The prosecution appealed to the High Court[121] which affirmed Kriewaldt J.'s decision, but purported to differ from his formulation of the offence, and there may be some difference between Dixon C.J. and Fullagar J. as to the correct view. But probably the differences are purely verbal and there was substantial identity of view between them and also between them and Kriewaldt J.; the section required a desire to prevent a man from carrying on business as a carrier at all.[122]

Some words and phrases from Ordinances. "Equip" (a fire extinguisher, equals keep equipped[123]); "owner", "occupier" (in the Darwin situation where there is no freehold land[124]); "purporting" (in the phrase "a certificate signed, or purporting to be signed, by the Director of Welfare"[125]); "shop" (*prima facie* does not include a cafe or coffee lounge[126]). The cases concerning aborigines, mentioned later, contain numerous verbal points, notably the various meanings to be attributed to "give", "sell", and "supply".

Appeals from Courts of Summary Jurisdiction were numerous and the following are only those which raise questions of substantial importance. His Honour occasionally complained that Magistrates and their Clerks did not supply an adequate note of the reasons for decisions,[127] or had not forwarded all relevant documents.[128] He also found that there were fairly frequent misunderstandings as to the circumstances under which numerous charges against one person could be heard together, or numerous persons could be joined in the one proceeding. Generally speaking, Courts of Summary Jurisdiction may not jointly hear several charges unless the accused consents; the position as to *joint defendants* is the same as in the superior Courts.[129] He also had to point out on several occasions that after a plea of guilty, the statement made by a police prosecutor with reference to penalty did not provide a proper basis upon which a Magistrate might record an acquittal; the accused should be invited to change his plea.[130] *Osborne* v. *Metcalfe*[131] discusses what is a "variance" which may be amended, and what amendments produce a substantially fresh complaint necessitating a fresh start. In *R.* v. *Lemaire*[132] he held that N.T. Courts of Summary Jurisdiction had no power to award costs if they had no jurisdiction. It was his Honour's own practice to grant adjournments readily, because of the paucity of practitioners in the N.T. and the difficulties under which they practised in distant centres, and he recommended this policy to all the Courts under his control.[133] *Willard* v. *Savage*[134] provides guidance on the forms of recognizance when the accused is released pending appeal. In *Jones* v. *Cooper*[135] the papers on an appeal left so much doubt as to the exact nature of a dispute concerning a motor car servicing contract that he directed a new trial; the case stands as a warning that even in Courts of Summary Jurisdiction the formal claims should, even if only with the aid of amendments, bear some relation to the story disclosed by the evidence. On two occasions, his Honour criticised Magistrates for making unnecessary moral or political speeches in the course of their judicial activities.[136] In *Ryall* v. *Chin*[137] he held that costs should usually not be awarded against an official informant acting bona fide and reasonably in the course of his duties.

Finally, the cases in which aborigines or special provisions of the law relating to aborigines are involved. The most celebrated of these was *Namatjira* v. *Raabe*,[138] in which the famous artist was charged with supplying liquor to a fellow aborigine, being a "ward" under the *Welfare Ordinance* 1953-55, contrary to s.141 of the Licensing Ordinance 1939-1957. Namatjira left the liquor in question in a taxi which was carrying himself and the "ward" to an aboriginal camp near Alice Springs. A Magistrate convicted, and on appeal

120. This was the first known prosecution under it.
121. *Ryall* v. *Carroll* (1959) 33 A.L.J.R. 350.
122. This was the only High Court decision on appeal from Kriewaldt which this writer ever heard the latter criticise. His Honour thought the High Court had substituted two different and obscure formulations for the single clear formulation on which he himself had acted. I respectfully agree with Kriewaldt J.'s opinion, but think that all the opinions raise difficulties. Would an accused escape who sought to prevent a carrier from carrying on business save with one customer? Two customers? Etc.
123. *Cutler* v. *Keetley*, 1959 N.T. 12.
124. *Richardson* v. *Darwin*, 1959 N.T. 91.
125. *Peters* v. *Metcalfe*, 1958 N.T. 222.
126. *Paspalis* v. *Dewey*, 1959 N.T. 223.
127. *Styles* v. *Hook*, 1955 N.T. 148; *Angelo* v. *Metcalfe*, 1958 N.T. 373; *Lewis* v. *Metcalfe*, 1959 N.T. 24.
128. *Willick* v. *Raabe*, 1957 N.T. 423.
129. *Mathews* v. *Stokes*, 1951 N.T. 242; *Laurie* v. *Stokes*, 1951 N.T. 256; *Bowie* v. *Williams*, 1952 N.T. 124.
130. *Kelly* v. *Beckett*, 1957 N.T. 144; *Davies* v. *Gillespie*, 1958 N.T. 93.
131. 1959 N.T. 253.
132. 1957 N.T. 313.
133. *R.* v. *Dodds*, 1957 N.T. 330.
134. 1953 N.T. 75.
135. 1956 N.T. 311.
136. *Willick* v. *Raabe*, 1957 N.T. 423; *Owens* v. *Colson*, 1959 N.T. 82. The Magistrate in question might reasonably have pointed out that Kriewaldt J. himself from time to time gave unsolicited advice to the Administration and even to private persons, though he always did this in a restrained fashion.
137. 1960 N.T. 38.
138. 1958 N.T. 437.

to Kriewaldt, Namatjira was represented by Ashkanasy Q.C. of Melbourne; almost every conceivable legal and factual issue was raised, beginning with the proposition that the Ordinance was invalid because the *Northern Territory (Administration) Acts* delegated the legislative power of the Commonwealth to the Northern Territory Legislative Council in a manner amounting to abdication. In deference to the seniority of counsel and the earnestness of his arguments Kriewaldt J. dealt carefully with this and some similar questions of constitutional and administrative law, but the only arguable issues were those considered on appeal in the High Court;[139] the question of mixed fact and law whether Namatjira had "supplied" liquor; the question of law whether the blanket declaration of fifteen thousand or so aborigines as "wards" had been valid, seeing that none had been individually notified or given a chance to object, and subsidiary questions as to whether the aborigine here in question was a ward; and the discretionary question as to the appropriate penalty. (His Honour imposed a sentence of imprisonment for three months, in place of the compulsory minimum sentence of six months imposed by the Magistrate). The High Court upheld Kriewaldt J.'s decision on all these points. The procedure for declaring aborigines as wards provided for an appeal to a tribunal, so it was clearly not a case for implying any necessity for a hearing of individual aborigines at the initial stage of declaration. The finding that there was a "supply" of liquor has been criticised, but in the opinion of this writer, it was the only possible finding on the facts proved. Namatjira had previously been warned about the danger he was running in supplying liquor to his relatives and friends, and liquor so supplied had played a part in several drunken brawls, including one which led to a murder, so that his Honour could hardly have done anything else but impose some sentence, and he did so in the knowledge that Namatjira would serve this sentence under conditions congenial to his tastes and mode of life. Namatjira's tragedy was a part of the tragedy of his race. Kriewaldt J. expressed in his judgment a deep understanding of and sympathy with the man, the race and the problem, and most of the people who criticised the late Judge because of this decision did so without taking the trouble to read his opinion.

The certification of wards and the status of aborigines were also considered in *Ross* v. *Chambers*[140] and *Peters* v. *Metcalfe*.[141] But indeed there are hardly any cases dealing with aborigines in which the construction of the *Welfare Ordinance* and its ancestors failed to be considered.

Kriewaldt J. had frequent occasion to consider the special problems which arose from the position of an aborigine as a witness,

139. 33 A.L.J.R. 24.
140. 1956 N.T. 43.
141. 1958 N.T. 222.

especially if the aborigine was only half-assimilated or less.[142] He held that s.9A of the *Evidence Ordinance* 1935, which enables the evidence of aborigines to be received though unsworn, does not put the aboriginal witness in the position of a child so as to require corroboration of his evidence. He also held that s.9A covers the whole question of oaths and affirmations by aborigines, so that the *Oaths Ordinance* 1939 does not apply in such cases.[143] In *R.* v. *Anderson*[144] his Honour held that statute apart, a confession by an aborigine accused not taken in the presence of a protecting officer would be admissible. In *Wilson* v. *Porter*[145] he considered the position created after s.82 of the *Welfare Ordinance* 1953 came into operation and the presence of a protective officer became a statutory necessity in such cases. As to the general problem of making sense out of the evidence of uncivilised and half-civilised aborigines, see especially *R.* v. *Chambers*,[146] *R.* v. *Dumaia*[147] and *Lewis* v. *Metcalf*,[148] His Honour often expressed the view that it is not possible to understand a literal transcript of aboriginal evidence.

But most of the cases before him involving aborigines, other than the murders, were concerned with the range of problems which arose in *Namatjira's* case—the meaning and application of the provisions of the *Welfare Ordinance* and the *Licencing Ordinance* designed to prevent the sale of alcoholic liquor to "wards". The most important recurring problems were: the meaning and application of the expressions "sell", "give", and "supply",[149] in relation to liquor; whether the person supplied was and was proved to be a "ward"; and whether under the circumstances the Supreme Court should exercise its power of mitigating the penalty imposed below. The whole policy relating to these matters is now under reconsideration, and it is possible that Kriewaldt's many decisions on the existing legislation will soon become merely a part of legal history. Many of them led to amendments in the relevant ordinances. They are noted below without further comment.[150] In the inter-

142. Many of these points are discussed in his paper in the Western Australian Annual Law Review.
143. *Pearce* v. *Fay*, 1958 N.T. 161.
144. 1954 N.T. 43.
145. 1959 N.T. 317.
146. 1955 N.T. 326.
147. 1959 N.T. 274.
148. 1959 N.T. 24.
149. In no case did Kriewaldt J. refuse to exercise his power of amendment when the act in question was wrongly described, though he kept threatening to do so and kept urging the legislature to amend the provision so that the charge could be stated in all three words.
150. *Mathews* v. *Stokes*, 1951 N.T. 242; *Stokes* v. *Pryce*, 1952 N.T. 3; *Dowling* v. *Bowie*, 1952 N.T. 132 (reversed on the facts by the High Court, 86 C.L.R. 136); *Styles* v. *Hook*, 1955 N.T. 139; *Holtze* v. *Browning*, 1956 N.T. 257; *Sinclair* v. *Kelly*, 1956 N.T. 101; *Rasmussen* v. *Hook*, 1956 N.T. 61; *Walters* v. *Fay*, 1957 N.T. 350; *Angelo* v. *Metcalfe*, 1958 N.T. 373; *Wilson* v. *Porter*, 1959 N.T. 317; *Osborne* v. *Metcalfe*, 1959 N.T. 253; *Tobey* v. *Porter*, 1960 N.T. 29; *Potts* v. *Porter*, 1960 N.T. 35.

pretation of this legislation, it is possible that his Honour was influenced by his own view as to its merits. He agreed wholeheartedly with the policy of trying to prevent the supply of alcoholic liquor to aborigines, and frequently expressed this agreement from the Bench.

Two cases arising out of the attempt to prevent white persons from taking sexual advantage of female aborigines are *Simmons* v. *Mannion*[151] and *Raabe* v. *Wellington*.[152] The latter also deals with proof that an aborigine is a ward.

In *R.* v. *Pudden*[153] his Honour suggested that generally speaking "wild" aborigines should not be let out on bail pending trial unless there was a real possibility of acquittal, because it was in the public interest that their period of imprisonment if sentenced should have begun at as early a stage as possible.[154] In *R.* v. *Anderson*[155] his Honour explains at length the principles he thinks should be applied when sentencing an aborigine.

Kriewaldt as Judge

Martin Kriewaldt possessed the virtues traditional in the Anglo-Australian judiciary—learning, wisdom, uprightness, fair-mindedness and a profound sense of public duty. He had however in addition a degree of scholarly and scientific interest in the administration of the law which few of our judges retain after the long and successful practice of the law which normally precedes their judicial appointment—as it did in the case of Kriewaldt. This is no criticism of the judiciary. The experienced practitioner acquires not only some distrust of theory, but also an instinctive quality of judgment which to some extent replaces theory and is to some extent better than it. Moreover, if all judges concerned like Kriewaldt mainly with trials or re-trials (on appeal from Summary Jurisdictions) spent as much time as he often did in order to run down obscure points not immediately necessary to his decision, then the court lists in the great centres of population would be even more jammed and hearings delayed than they are at present.

The Darwin jurisdiction was in many respects ideally suited to Kriewaldt's temperament. His desire was firstly to do justice between the parties and secondly to seize every opportunity of explaining and developing legal principles, and he was not happy if circumstances prevented him from performing the latter function. There was plenty of work in the N.T., and indeed too much for the desperately sick man that he was in his last year, but when his health was good there was not too much to prevent him from devoting to interesting cases the sort of attention which he thought they deserved. Indeed, it is probable that adequate attention to the scholarly as well as the practical aspect of his task would have come easier and taken less time but for the deplorably inadequate library facilities available to him, a lack of which he often complained.[156] Sometimes his opinions verged on the pedantic, pedantry being the vice of the born scholar who likes to explain and develop a theme beyond the necessities of a primarily practical occasion. But it was to some extent deliberate pedantry. He regarded his opinions as a method of educating the profession, both private and official, in a place where there was little other opportunity for reflection on basic legal problems.

It was a product of his scholarship that Kriewaldt was a little more self-conscious about his methods and approach than judges in the English tradition usually are. He admired the spirit in which Lord Denning, among modern judges, has approached his task, although by no means agreeing with all of Lord Denning's somewhat remarkable feats of rationalisation. Thus in *Re Harmer*[157] he said, "I prefer to be classed with the 'bold spirits' rather than with the 'timorous souls' of whom Denning L.J. speaks in *Candler* v. *Crane Christmas & Co.*", and in the same case he expressed his strong preference for reaching the substance of the matter rather than adhering to formal issues, though he liked the paper work to be in the end correct. He used history freely, and often consulted historical sources beyond those usually familiar to judges.[158]

His readings had made him something of a "fact sceptic", and he often expressed the uncertainty which he felt in coming to some particular conclusion of fact. He was also always conscious of the difficulty arising from living and working in a small community, where he could not help but have some acquaintance with many of the officials and the private citizens who figured as plaintiffs, defendants and witnesses before him.[159] His opinion in *Namatjira's* Case has a particularly poignant passage on this theme[160]:

> "The Northern Territory is but a small community. It has been impossible for me not to have acquired some information about many of the inhabitants of the Territory. Unless I had soon after my appointment abjured newspapers, silenced

151. 1951 N.T. 113.
152. 1957 N.T. 410.
153. 1959 N.T. 201.
154. In his paper in the W.A.A.L.R., his Honour explains the difficulty of making an aborigine understand why he should be, as he sees it, imprisoned twice for the same offence.
155. 1954 N.T. 63.

156. He made up for this lack to some extent by corresponding with friends both in the profession and at the University Law Schools all over Australia, from whom he borrowed as occasion required cases and periodicals not available to him in Darwin.
157. 1951 N.T. at 195.
158. See especially his use of Dr. Price's *Macrossan Lectures on the Northern Territory* in *Carroll* v. *Ryall*, 1958 N.T. 205.
159. See e.g. *R.* v. *Todd*, 1959 N.T. 295; *R.* v. *Wallis*, 1955 N.T. 106.
160. 1958 N.T. at 440.

> radio news bulletins, and avoided conversation on all topics other than banalities, or unless I had the facility to forget immediately and completely all that I hear or read, I could not come to a consideration of either the general or the particular problems debated on the present appeal without background of information and an attitude of mind which may despite my best endeavour affect my decision. For example, even before I came to the Territory I was an admirer of the art of the appellant. Two pictures by one of his sons have graced the walls of my living room for some years. All my life the duty of Christians towards heathens, and the duty of the more fortunate towards the less fortunate has been impressed upon me. The controversies aroused by the passage of the Welfare Ordinance and the activities of the Welfare Department have not been without interest to me. In the desire to fit myself better for my position I have from time to time read such books on the Australian aborigine as came under my notice, but I did not anticipate that thereby I would make it more difficult to decide some of the matters debated before me last week."

Faced with evidentiary problems, he did not mind admitting that judicial decision sometimes depended on a hunch.[161]

Kriewaldt's opinions are written in a clear, strong, but sober style; he had a gift for legal exposition, both verbally and in writing, and did not resort or need to resort to rhetoric, though he liked an occasional touch of learned humour.[162]

His Honour's premature death is mourned not only by the Northern Territorians whom he served so conscientiously and the aborigines whose interests he had so much at heart, but also by the Australian University faculties of law who had hoped that his Honour would spend his last years in one or other of them, developing his general theories about the nature of law and judicial function and making available to students his technical skill and experience. Negotiations to that end had begun in the last year of his life. Such opportunities for broadening the scope and increasing the depth of University teaching and research do not, alas, often occur.

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161. E.g. *Jones* v. *J.*, 1956 N.T. at 140; "I would still have preferred the evidence of the plaintiff but I would have found it hard to explain the reasons for my preference".
162. Note e.g. his reference to the principle of "fair wear and tear" as applying to matrimonial relations, *Barden* v. *B.*, 1957 N.T. 100.