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BAR COUNCIL REPORT

1. The Bar Council has met five times this year up to 31st March, 1978.
2. Since the commencement of this year eighteen persons (excluding interstate practitioners) have signed the Bar Roll.
3. Mr. B.M. Gillman, the Clerk of the Melbourne Magistrates' Court, has been instrumental in obtaining a conference room for barristers at that Court and in procuring the use by barristers of the Magistrates' Library.
4. **Accommodation**
   A report from Davies Q.C. on this matter in the form of a letter to the Editor appears at page 7.
5. The Bar Council resolved that at the next Bar Dinner (which is to be held on 13th May at Leonda) the seating arrangements will generally be in order of seniority rather than a mix which has been practiced during the last few years. Mr. Junior Silk will be W.M.R. Kelly Q.C.

TRIBUTE: JUDGE RAPKE

Trevor George Rapke was born on September 2, 1909, and educated at Wesley College and the University of Melbourne. He came to the Bar in 1935, and read with the late Clyne J. In the years prior to the outbreak of the second world war, he built up a strong and active practice. Competition at the Bar was fierce then. But he was able and did well.

He enlisted in the R.A.N. In 1941 he became a commissioned officer. He served with distinction. After the War he returned to the bar and quickly rebuilt his practice. He was an extraordinary literate man. He was a speaker of great skill. His two readers, Judge Stabey and Kaye J. will attest that as an advocate he had few, if any equal and was courageous and flamboyant. He took silk and was appointed a Judge in 1958. In 1965 he became an honorary professor of law at the U.S. Naval Justice School, R.I. In 1964 he was appointed Judge Advocate-General of the Royal Australian Navy.

As a boy he founded the 3rd St. Kilda Scout troop. It enabled Jewish boys to participate fully in the scouting movement while at the same time obeying the religious law, dietary and otherwise. For he was active in the affairs of his religion. He served as president of the Victorian Jewish Board of Deputies from 1956-1958. In 1957 he was the Australian Representative on the executive of the World Jewish Congress, and President of the World Israel Movement. He was proud to be the first Jew to be given permanent judicial appointment in Victoria.

On February 2, the Chief Judge his Honour Judge Whelan delivered a tribute in the County Court to his late brother.
". . . the characteristics that Trevor Rapke had exhibited at the Bar he took with him to the Bench. He may aptly be described as a colourful judge. He hated injustice wherever and in whatever guise he found it, and he spoke out fearlessly in favour of all he thought were disadvantaged before the law. He was a kindly man who frequently saw a hope of reformation in some person presented before him on a criminal charge, where such hope was not even recognised to be present by the person concerned . . ."

The Bar extends its sympathy to his widow and family. Trevor Rapke has a special place in the hearts of all of us.

ETHICS COMMITTEE REPORT

In November 1977 the Bar Council heard a complaint which was referred to it by the Ethics Committee against a member of the Bar in respect of the following matters:—

(a) that shortly prior to the hearing of a charge against his client in the Magistrates' Court Counsel intimidated or attempted to intimidate a policeman into withdrawing a charge against the client;

(b) that during an adjournment of the hearing of a (different) matter in which the same Counsel was engaged and whilst robed and in the vicinity of the County Court, that Counsel addressed in abusive language a witness whom he had cross-examined a short time earlier.

The Bar Council found that the first charge was not proved. As to the second charge, the Bar Council ruled that Counsel be cautioned and imposed a fine in the sum of $300 to be paid within six months.

A member of Counsel sought a ruling in the following circumstances.

He was approached by a client who offered him a substantial fee and in return sought Counsel's agreement not to act against that client for a period of twelve months and to give it special consideration in the event of any possible clash of hearings between a case in which it will be involved and any other case.

The Counsel sought a ruling as to whether or not he could properly enter into the above arrangements.

The Committee resolved that Counsel could not properly enter into any such arrangements.

The Ethics Committee is currently considering:—

(a) a County Court Practice Direction relating to Counsel holding one brief in the Reserve List and another brief at the same time;

(b) the propriety or otherwise of Counsel compiling unsworn statements for their lay clients and whether or not any abuses are practised when such statements are being compiled.

THE DUTY OF A PROSECUTOR TO REVEAL EVIDENCE

"It is very well established that Prosecuting Counsel are Ministers of Justice, who ought not to struggle for a conviction nor be betrayed by feelings of professional rivalry; and that it is their duty to assist the court in the attainment of the purpose of criminal prosecutions, namely to make certain that justice is done as between subject and the State . . . not to try to shut out any evidence which the jury could reasonably regard as credible and which could be of importance to the accused's case" (R. v. Lucas 1973 V.R. 693 at page 705 per Newton J., and Norris A.J.) If this principle is followed it is difficult to understand how a problem could ever arise in relation to the suppression of evidence peculiarly within the knowledge of the Crown. Perhaps Prosecutors and those responsible for briefing them take other apparently conflicting pronouncements too literally. Barwick C.J. has said "It should be borne in mind that the Crown, as representing the community has an interest in the result of the trial. It is not in the position of Counsel assisting a Royal Commission with no function than to assemble for consideration such facts as are available to it. Its role is that of Prosecutor, seeking

by all proper means to secure the conviction of the accused of the crime charged; that is part of the duty of the Crown." (at page 2 Demirock v. The Queen unreported 22nd April 1977 (minority judgment).)

These two judicial pronouncements appear to be quite contradictory. But in practice they can be reconciled. Any problems arise because of a failure by these representing the Crown to realise that both of these different views are part of the same function. For a Prosecutor can seek to secure the conviction of the accused "by all proper means" including applying the attitudes of a "Minister of Justice".

Where the Witness is not called

A clear form of the problem can arise in the following way.

Let us say that the Crown is in possession of the statement of an independent and credible witness. Its existence has never been disclosed. The witness could be expected to give a version of evidence favourable to the accused. But the Crown unable to divorce itself from a partisan stance, tells the defence nothing. The correct practice is quite plain. The authorities which say that a Prosecutor has a duty to prosecute, not to defend have never gone so far as to suggest that a Prosecutor is entitled to keep that sort of material secret. (Per Diplock L.J., Dallison v. Caffery (1964) 2 A.E.R. 610 at 622.). At very least he should make such a witness available to the defence. Indeed it has been stated "it would be highly reprehensible to conceal from the court, evidence which such a witness can give". Ibid per Denning M.R. at 618. See too Ziems v. Prothonotany Supreme Court of N.S.W. (1957) 97 C.L.R. 279 at 308.

More subtle forms of the problem are compounded by the Crown's conclusion that a witness is so unreliable and untruthful as to warrant the exclusion of his evidence from any proceedings. The conclusion may be based on a fear that it would pervert the course of justice, by so clouding the collective mind of the jury as to make it unable to discover "the truth". Reported examples of such a case are rare, possibly because the Crown has been successful in keeping the existence of such a person a secret. Alternatively the defence has become well aware of his existence and either procured his attendance for the defence, or prevailed on the presiding Judge to call the witness for cross-examination. As to a Judge's right to call a witness, see R. v. Evans 1964 V.R. 717; Richardson v. The Queen (1974) 131 C.L.R. 116.

One suspects that there may even have been cases where the problem has been caused by a simple failure of prosecution agencies to appreciate the significance of a piece of evidence and the possible value of that evidence to the defence.

It is trite and unhelpful to comment that the prosecution must always be alert and sensible to the real risk of doing the defence an injustice. But the examples point to one facet of the duty "to make certain that justice is done as between subject and the State". Of course the cases of intentional or inadvertant concealment of evidence are the most dangerous and the least likely to see the light of day in any court proceeding.

It is not surprising therefore to find that the reported cases are not much concerned to expand the obvious view that concealment of evidence would be highly reprehensible. They are more concerned with the means of ensuring that where the defence becomes aware or is suspicious of the possibility that such evidence may exist, it be permitted to ascertain whether or not that be the fact. That awareness or suspicion has usually arisen in the context of allegedly inconsistent statements.

Where the witness is called

The defence may have no more than a suspicion of a prior inconsistent statement

by a witness. In the event that there has been a previous statement by the witness, what right does the defence have of looking at the statement? And what duty does a prosecutor have in making the defence aware of a departure by a witness from a previous version of events? Or a minor departure? Does he have a duty to hand over a statement before evidence is given by a witness who the Prosecutor believes will not stick to an earlier version?

The difficulties

It is one thing to work out the principles which may apply to the various situations referred to. It is altogether another thing to define what ought to be the practice in different cases. For the decided cases range from situations where the defence suspicions of concealment of evidence are without foundation to cases where the defence has good grounds for suspicion and where clear prejudice has attended the accused's case.

We can suppose that the law can also be derived from those informal situations in court where a Judge simply directs the prosecutor to hand over the statement. The direction is based on the need for fairness and on the pragmatic assertion that if the statement had been called for at the lower court proceedings, the document would have been made available to the defence as part of the despositions. e.g. per Starke, J. R. v. Limneos 8/11/1972 unreported.

Mere suspicion of evidence helpful to defence is not enough to justify an order that the prosecution hand over the statements of the Crown witnesses. Nor is the assertion that there may be other evidence enough. We say this despite the decision in R.v. Hall (1959) 43 C.L.R. 29 and R. v. Xinaris (noted in the decision in Hall's Case).

The well-known case of Mahadeo v. R. (1936) 2 All E.R. 813 is an example of prior inconsistent statements having come into existence without the knowledge of the prosecutor at trial. The decision is also apparently an example of a blanket type of ruling. The Privy Council observed: ". . . it is obvious that Counsel defending the appellant was entitled to the benefit of whatever points he could make out of a comparison of the two documents in extension with the oral evidence given and an examination of the circumstances under which the statements of the witnesses changed their purport" p.817). The earlier case of Clark (1931) 22 C.A.R. 54 is another example of stubborn bad mannered prosecutorial unreasonableness. The circumstances were similar except that the defence's suspicion that the witness had made a prior inconsistent statement was unfounded. The decision is however worthy of close examination. It is an object lesson to any counsel (and Prosecutors in particular) who might be tempted to allow partisan stupidity to lead them to fabrication and half truth in an attempt to justify an improper stance taken at trial and later on appeal. In Clark the prosecution had effectively prevented defence counsel from gaining access to the statement in question. The grounds were a claim of privileged confidentiality and a threat made to defence counsel that he could call for the statement "at his peril". The peril being that if the statement were produced, it would go into evidence in toto including material relating to the accused's antecedents. The Court no doubt feeling that it had shown sufficient displeasure with the prosecutor's activities during argument, contented itself in judgment by describing the incident as "unfortunate". It asserted that if any inconsistency had in fact existed the conviction would have been set aside.

Such a case did in fact arise in Victoria in the unreported decision of Carlo Dolson (no. 60 of 1973) which followed an earlier decision of Baksh. The Full Court set aside the conviction, reciting the observations made in Baksh to the effect that where a prior statement of a prosecution witness

differed markedly from his evidence (in this case of identification) and the statement affords material for serious challenge as to the credibility or reliability of the witness on matters vital to the prosecution's case, the defence may be able to destroy the effect of the evidence by cross-examination or by proof of the statement if the witness denies making it. Unfortunately, in neither case did the court make any observations about the conduct of the Prosecutor in failing during the trial to reveal the discrepancy between the statement and the evidence to the defence.

The real question of whether the defence had a right to prosecution statements prior to trial did not receive direct attention until Charlton (1972) V.R. 758. It was a murder trial. Counsel for the defence made application (based on the ruling in Mahadeo) for production of all the statements of the Crown witnesses prior to the commencement of the trial. The trial judge refused. On appeal, the Full Court decided that an accused person has no legal right to the production of state ments made by witnesses to be called at his trial. But the Court also said that in special circumstances such as Mahadeo, Hall and Xinaris, the prior statement should as a matter of practice and in the interest of justice be produced; and in cases like these the court may well order the production of such a statement.

The present position therefore in Victoria should seem to be as follows:—

(a) It is wrong for the Crown to conceal evidence of any sort which may be used to advantage in the defence case.

(b) There is no general right in the defence to call for production and examination of all or any statement made by prosecution witnesses on the off chance that such an examination may disclose a discrepency, or other material which would benefit the defence case.

(c) If prior to trial the defence can show at very least a strong suspicion based on evidence that there is likely to be a discrepency between the version of events of a Crown witness to be given at trial and a previous version given by such witness then this will constitute sufficient special circumstances for the court to order production to the defence of that witness's previous statements.

(d) Where neither the defence nor the prosecution has any inkling that a Crown witness is likely to seriously depart from that witness's original version of events and such witness does in fact make such a substantial departure to the detriment of the defence case, and in circumstances in which the defence can still have no inkling that such a departure has been made; then the prosecution is bound to disclose to the defence the "statement" or other material which highlights the departure. This course can also be justified in the following way. Not revealing the conflicting material would amount to wrongful concealment of evidence and a failure to enquire into the circumstances of apparent "perjury" on the part of that witness. In such a case the Crown cannot withdraw its representation but it should not be entitled to avoid the effects of the ethical rule, by ostensibly lending support to the current version of the witness concerned.

P.A. Willee
J. Walker

LETTERS TO THE EDITORS

Letter from Davies Q.C.

Dear Sir,

re: Accommodation

I desire to report briefly on the accommodation problems of the Bar. The adhoc committee of which I am Chairman has examined and is continuing to examine a number of projects. However, it has not been possible to form any final view principally because a proposal which the Bar Council has forwarded to the National Bank respecting the possible letting of the low rise section of National Bank House has not yet been answered. When an answer has been received both my Committee and the Bar Council will be in a better position to formulate a view. To assist it in its consideration of the possible alternatives, the Bar Council has received advice, at a cost of approximately $10,000 to date, from Messrs. Phillips Fox & Masel, Solicitors, Gordon Allard & Co. Real Estate Consultants and Lumsden & Ashton Architects Pty. Ltd., Architects. In particular, the advice has been directed to possible layouts for the National Bank House and the Goldsborough Mort Building, the cost of fitting out each of those buildings and the economics of its use.

It being impracticable for the Bar to contract for the construction of a building to house the whole Bar, it seems that there is presently no ideal solution to the Bar's accommodation problems. Moreover, it is clear that any step taken, whether it involves the renting of the low rise of National Bank House or the purchase and development of another building, will substantially increase the rents payable by tenants of Barristers' Chambers Limited. However, all possibilities known to the Committee are being investigated and it should not be long before a further report can be made to the Bar.

Yours faithfully,

J. Daryl Davies.

Letter from Liddell Q.C.

Sir,

The accommodation crisis continues. Barristers are spread through Owen Dixon Chambers (318), Tait Chambers (36), Hooker Building (11), Equity Chambers (31), Hume House (28) and Four Courts Chambers (112). Some thirty-four barristers will be finishing reading in the near future but only two rooms are available (in Equity) both on the short term and long term basis. Accommodation Committees have reported on the problem to the Bar Council for many years. The 1976 Committee tried to provoke action by setting out what it considered to be the only viable alternatives for providing long term accommodation and, at the same time, easing the short term problems. The Current Bar Council has gone through the annual ritual of appointing a new committee to re-examine the matter. Of its own initiative it has continued to espouse the proposal of leasing from a bank, a project about which little has been heard of late.

I have served on many of these Accommodation Committees. I accepted an offer to be on the new one rather than give up what I consider to be the value of the previous work. I have continued to press for the adoption of what I think to be the most favourable of the three possible solutions proposed by the previous Committees after many years of work and investigation and consideration. This proposal is based on the retention of Owen Dixon Chambers for use by barristers. It is for the purchase of an additional building to be a complementary set of chambers at of at least equivalent prestige and standing to Owen Dixon Chambers with a good mix of counsel of all degrees of seniority and experience, and to be under the control of the Bar generally through the Bar Council.

Of all the buildings and sites examined, I consider the Goldsborough Mort building

to be most suitable for this purpose (depending of course on the purchase price that can be negotiated). Although it was a prime site, its classification by the National Trust has considerably reduced its market value, but it has the added advantage of the likely reduction of rates and taxes to the limited type of purchaser who could use it. In addition it could be developed into a prestigious building of which barristers with a pride in Australia's history and a penchant for fine historical buildings could be very proud.

It is important to emphasise this attraction because the success of the proposal depends upon the support of a good number of the established barristers now settled in Owen Dixon Chambers. But even this attraction may not be sufficient, to overcome the apathy of those reluctant to move from Owen Dixon Chambers. It seems to me that an added incentive would be to allow interested barristers to contribute to the purchase of being able, through a trust or company or personally, to acquire an entitlement to an area for chambers. This has obvious tax benefits. The Bar would thus be tapping its own sources of finance without any compulsion on its members. The only demand upon the Bar, as a whole, would be to take up any unpurchased share. This area could be leased to barristers on a temporary basis and sold to tenants when the demand arose.

There may be two major problems, depending on whether or not these proposed chambers become popular. I think both could be easily solved. One problem is that they may not be in popular demand.then a purchaser would bear the risk of not being able to sell. The other that, if the new chambers are popular, then they may be sold at an excessively high premium. These problems may be solved if the Bar were to underwrite all purchases of the basis of agreeing in specified circumstances to buy back the interest so purchased at a calculated figure. If such an option were exercised the chambers would then be available for leasing or purchase by other barristers.

I have circularized all members of the Bar to ascertain the level of enthusiasm for the project. To this date some 82 barristers indicated in writing that they were seriously interested in the proposal. At all times I made it clear that I was acting primarily for the Bar Council. But in order to sustain pressure on the Bar Council, I developed the alternative proposition that if the Council or Barristers Chambers Ltd. was not prepared to do anything, then the interested barristers themselves may undertake the project notwithstanding that this would produce a less satisfactory result for the Bar overall.

In February I accepted an opportunity to address a meeting of the Bar Council. Later I was advised by its Chairman that at a subsequent meeting on 23rd February, 1978, the Bar Council passed the following resolutions:

> "RESOLVED that being of the view that the proposal is not an economic one the Bar Council does not give its financial support to the Goldsborough Mort proposal.
> RESOLVED that having regard to the number of members said to be interested in the chambers and on the assumption that the chambers would be conducted in accordance with the Rules of the Bar, the Bar Council would have no objection to chambers in Woolstore House as chambers for members of the Bar if the project presented to the Bar by Liddell Q.C. can be implemented without any financial support from the Bar Council or Barristers' Chambers Ltd."

Neither in any personal capacity nor as a member of the current Accommodation Committee nor as a director of Barristers

Chambers Ltd. have I received any indication of what, if anything, it is now proposed should be done or what is considered to be an economic proposal. I think I should point out that there was more than one speaker at that meeting who said that the Bar Council should "do nothing".

I cannot accept that the Bar Council should do nothing. I cannot accept the conclusion of the Bar Council that the proposal is not economic.

The starting point for any financial assessment of the proposal is the purchase price and the building costs. I obtained a selling figure from the vendor to ensure that it was a genuine seller. If the Bar is genuinely interested and expects to raise the finance the next step is to negotiate with the vendor. Apparently the Bar Council is not even interested in this second step and ruled out the project without even knowing what it would have to pay for the existing building. Then there is the very difficult problem of the cost of making the historical wool store into barristers' chambers. This is estimated by the vendor's builder at $1.78M, but our accommodation committee's expert architect Ted Ashton puts it at $3M. Time had not permitted any attempt to explain the difference when the Bar Council made its decision. I have since sought explanations from the persons concerned. The builder and architect agree that the difference is mainly one of quality, and the prices represented the upper and lower limits. One other important aspect of feasibility is the "sale" of the ground floor at a substantial "price". This cannot have been considered by the Bar Council, because to my knowledge it made no approach to interested persons.

I express my disappointment not only at the rejection of the Bar Council of the proposal as being uneconomic, but particularly at its silence on any alternative.

What happens now? For my part I shall try and make the Woolstore Chambers proposal a success, and to this end I am calling on interested parties to contribute $500 to a fund so that we can start to negotiate an option to purchase. The procedure for raising money, if a realistic purchase price is available, was outlined by Mr. G. Samuels of Phillips Fox & Masel at the meeting of interested persons on the 7th February 1978. Personally, I think it is an enormous and unfair burden to put on individual barristers to take such steps on their own, and I still believe strongly that the Bar Council and Barristers Chambers Ltd. should underwrite the project.

Incidentially, Barristers Chambers Ltd. currently has $320,000 on short term investment and could well afford at least to try and negotiate a purchase price in a conditional contract. Currently it has no proposed use for this money.

This is a letter of explanation. I now call upon interested barristers to contribute to a trust account which we might usefully call the Barristers Historical Building Preservation account, to be held by Messrs. Phillips Fox & Masel for use in the obtaining of an option if an acceptable purchase price for the Goldsborough Mort building can be negotiated. If this is not possible, all contributions less pro rata expenses will be returned. The minimum amount should be $500 representing an entitlement to an occupation unit, and multiples of $500 will be accepted entitling the depositor to a negotiable interest in an additional unit. If there is an oversubscription such additional units will be available for re-sale for three times the original deposit. With limited resources and time available, I have to request that all replies short of a straight out payment to the fund be in writing. That I have to do this is I believe an indictment of those elected to look after the interests of the Victorian Bar.

Thank you for the opportunity of publishing this letter.

Yours faithfully,

P.A. LIDDELL

MISLEADING CASE NOTE

Tireless but unofficial Court Reporter, Gunst, has come across the following hitherto unreported judgment which he says is entitled Byrne v. Ross.

Wright J. read the following judgment: This is an appeal from a decision of Bloggs J. in the Family Court. The facts are agreed and may be stated briefly. Mrs. Ross, the respondent, is the owner of a house in Camberwell, where she lives with her two children. She has been living apart from Mr. Ross for some years, but owing to her religious convictions (she is Welsh) she has never sought divorce. In June 1974 she entered into a contract of sale of the house to the appellant Mr. Byrne. The terms of the contract were that he would pay a deposit of 10%, and 15% of the purchase price every six months thereafter. This he did, and in June 1977, having paid 85% of the purchase price, he was looking forward to completion. Mrs. Ross refused to complete, saying that she preferred to keep the house, but that unfortunately she had spent the instalments of the purchase price on a world trip for herself and her children. Mr. Byrne sued for specific performance of the contract in the Supreme Court. Mrs. Ross applied to the Family Court to have the contract set aside.Dust J. set the contract aside and awarded costs against Mr. Byrne. Mr. Byrne appeals to this Court.

It was conceded by Counsel for Mrs. Ross that she has no right, neither in law nor in equity, to remain as owner of the house. Her claim is based solely upon the provisions of the Family Law Act. It was submitted that the Family Court is not bound by the common law, or by equity, and that all who are fortunate enough to come within its jurisdiction are freed from the trammels which bind the rest of society and can have lawful contracts set aside at will. Accordingly, it was submitted, the decision of Bloggs J. must stand.

On the other hand it was ably submitted by Counsel for Mr. Byrne that the egalitarian principles of the common law are the heritage and the master of all in this country, and that, apart from certain recognized groups such as children, lunatics and foreign ambassadors, one's status in society does not determine the law to be applied to one's dealings with others.

I have considered these submissions and the authorities cited and have come to the conclusion that I must reject the appellant's arguments. We must, as far as possible, give effect to the will of Parliament. Parliament has seen fit to establish a court called the Family Court, and invest it with jurisdiction to determine all matters affecting married persons. If married persons had in that court no more rights than they have in the Supreme Court, the Family Court would be redundant. It is not for this court to say that there exists a body of judges who are paid a lot of money for being redundant, and therfore I find that the Family Court has some power more than the Supreme Court, and therefore was able to make the order it did.

It was argued that the finding of such a power would create a privileged class in society, or class with a benefit not enjoyed by the rest of society. I can only say, having been married myself for many years, that the benefits of matrimony have for too long been too much in theory and not enough in fact.

It was further argued that this benefit of matrimony is without precedent in the history of the law. That is not so. A study of the Middle Ages shows us that the Ecclesiastical Courts claimed a similar benefit, called the benefit of clergy, for all those, who fell within their jurisdiction. That benefit, which included in felony cases the right to be punished not by death in the King's Court, but by penance in the Church's, was obviously desirable

to many people. It was extended progressively from covering only those clerics actually in holy orders, until it covered all people. Its operation was however progressively reduced so that, by the time of its abolition in 1827, a large number of the more serious felonies were without benefit of clergy. It is my opinion therefore that Parliament intended the result of the Family Law Act, that is, to create a benefit of matrimony hitherto unknown. Some may say that this is unwarranted, and that in modern society the Family Court is not in the same position as the Church was in the Middle Ages. To that I say that the Medieval Church was a body that lived in plenty and splendour, while those it sought to help were wretched and starving. Others may ask why, if the Family Court is like the Medieval Church, it has no priests. Without expressing an opinion on that point, I would draw attention to the marriage counsellors, whose arcane proceedings are understood by none and believed in by all, and whose utterings are muttered fervently by supplicants, in ferocious belief.

Is the Family Law Act a step backwards into the Middle Ages? Is it the first step in the re-introduction of the feudal system? Will the benefit of matrimony be extended beyond married persons to companies in joint venture, or partnerships? Will the criminal law dissolve where persons claim the right to steal, on the ground of increasing their matrimonial property? Fortunately I do not have to decide these questions today. The appeal should be dismissed.

Slough and Rood JJ. delivered the following judgment:

We concur.

Appeal dismissed.

THE BUSINESS OF PRACTICE AT THE BAR

If Common room discussion is to be taken as typical, it is unfortunate that the most sophisticated response to the question posed by this article, is to increase one's fees.

Very shortly, the object of any business is to maximise the personal benefit to be obtained from personal effort. It is often said that such an aim is inconsistent with the ideal of a profession — service to the community. A moment's reflection, however, will indicate that these aims are not necessarily inconsistent. There is, of course, a point at which the attaining of the business objective leads to the "rip-off". On the other hand there are few of us who are in the happy position of being able to neglect entirely the requirement that practice at the Bar provides us with a living.

This article is primarily directed to the younger members of the Bar. It seeks to bring to their attention some matters which are all too real for their senior brethren. Very often this realisation is brought home at a time when it is too late to do anything about it.

This article is not concerned with the fact that inflation requires that fees be increased from time to time in order to maintain real income. If the object of this article is achieved, then these fee increases should be minimised.

In essence, the return of a business depends upon—

(a) the turnover.

(b) the profitability of turnover.

(c) the incidence of taxation.

Turn Over

The first item in any profit and loss account in the gross sales figure. This is, of course, the value in money terms of the output of the business. This is a figure which is not readily available for barristers. It would not be surprising if very few took the trouble to discover this most important statistic for themselves. It represents the total value of fees written into the fee book in any given year. It is this figure, and not the amount in the bank, which represents the prosperity or decline of one's practice. The manager of any trading company who neglects his turn over figure does so at his peril.

The maximising of the sales figure presents problems for a barrister. True, he can increase his fees within certain limits. Unlike the businessman he is forbidden to solicit custom by advertising. Nevertheless, within accepted ethical limits the prosperous practitioner must seek to maintain this figure and, if possible, to ensure that it increases at a rate not less than that of inflation in the community.

Profitability

Unlike most trading enterprises, there is no fixed relationship between turn over and profit for a barrister. Allowing for econo mies of scale, a manufacturer or trader usually allows a fixed percentage for production costs.

From an accounting point of view, this percentage falls as the barrister's income increases. Once a practice develops and the barrister is working at, more or less full capacity his turn over increases as he raises his fees rather than the volume of his output. There is a practical limit to the number of cases one can handle in a week and to the number of items of paperwork which can be produced by one person. Since the structure of the profession prohibits the delegating of professional tasks, a barrister does not enjoy the advantages of, say, a solicitor who has a large staff handling files under his general supervision.

Rent of Chambers is more or less constant. Increases in wages paid to his secretary depend upon general wage rates rather than volume of work. There are only a few barristers in very specialised jurisdictions who require more than one secretary and most are easily able to cope with a share. Other major items include depreciation, insurances and subscriptions – all of which accrue at a constant rate.

Perhaps the exception to this, are motor car expenses (that portion representing running expenses) paper and stationery, and telephone and postage.

Entertainment expenses are in a special category. It may be difficult to demonstrate a relationship between this item and turn over, but customarily this is assumed.

This relative increase in profitability compared with gross turn over has three important consequences. First it is a great incentive for barristers to raise their fees on the basis that an increasing proportion of each extra dollar will be profit. Second, as we shall see, any such increase has a relatively devastating income tax impact. Third, unlike a trading enterprise, there is little incentive to reduce overheads and operating expenses.

We have seen in recent years that this consequence has bedevilled the efforts that have been made from time to time to recognise aspects of the Bar. – the general reluctance to take effective steps to institute an efficient fee collection system. Delays in fee collection represent an overhead which is accepted with a totally uncommercial stoicism. – the refusal of the Bar to entertain any proposal for reform in the clerking system as a whole or any in my facet of clerking operations.

Taxation

Attention has already been drawn to the fact that the Barrister is concerned primarily with his income and not with the more important turn over figure. This is largely the result of the special taxation advantage that Barristers enjoy of paying tax on fees received rather than fees charged as is the case with most other businessmen.

Unlike the business expenses already referred to, taxation bears a direct, and in some cases a disproportionate, relationship to income received. When a business man prepares his accounts he must allow for tax. When a wage earner receives his pay, his employer does this for him. Not so the Barrister. Typically he exults at the big pay in and defers the problem of tax until 31st March when this falls due.

There are a number of lessons that the Barrister might profitably learn from the prudent business man —

Business Expenses:

If an expense is considered desirable or necessary it is in the taxpayer's interest to incur it as a business expense. Thus when an overseas trip is planned it is desirable to arrange it in such a way so as to ensure that a substantial part of the cost is deductable. The cost of the holiday is not less as a result of this arrangement — it may indeed be increased. It is the reduction in tax which is important. Likewise when a book is purchased for the library it is advantageous if it can be properly classed as a subscription rather than a capital. In the latter event the taxpayer is allowed 10% per annum as depreciation, with the prospect that when the library is ultimately sold the surplus over the then written down value is assessable as income. Doubtless this is one reason why many of the modern text books are now published in loose leaf and sold as annual subscriptions. The important aspect of this lesson is that the expense must be otherwise desirable. At the highest rate of tax the expenditure still costs the taxpayer 37 cents in the dollar. It is therefore generally not good business to purchase an unnecessary item even at such a discount.

Averaging:

One of the practical problems that bedevils the successful Barrister is the inevitable fluctuations in his gross and therefore his taxable income. At the highest marginal rate, an increase of $5000 means an increased tax (including provisional) of $6295. Other business are able to control their incomes to some extent to minimise fluctuations. Some Barristers have found themselves in trouble by having fees due to them withheld in special accounts. The taxation legislation enables primary producers to pay tax on the average of a number of years of income. These provisions recently enlarged are therefore of great benefit to the Barrister who is able to bring himself within the definition of primary producer. This is particularly the case as, in years of rising income, tax will thereby inevitably be assessed on an income lower than that in respect of which the return is submitted.

Income Diversion:

Having regard to the fact that the rate of tax increases with income, it may be worthwhile to divert income to a person on a lower rate, such as a wife or child. It is not open for Barristers to carry on business in partnership with their wives or children as many other business people. Nevertheless it may be possible to employ one's wife to perform secretarial or other tasks. The practicality of such an arrangement will depend upon a number of factors such as the loss to the taxpayer of the deduction for a

dependant spouse, the separate income of the wife and, of course the genuiness of the employment. If the Tax Department takes the view that the arrangement is not a genuine business expense the unfortunate taxpayer may find himself without a deduction, without a concessional deduction for a dependant spouse and his wife may still have to pay tax herself on the wages received.

Various other methods of diverting income have been devised. These are of varying complexity and opinions differ as to their respectability. Perhaps the most common is the arrangement whereby th the wife purchases business assets such as motor car, library, furniture and the like. These are then leased to the taxpayer at a proper rental. A more sophisticated system involving the factoring of fees to the barrister's wife or trustee company has been held by the Bar Council not to be unethical. Providing the factor has sufficient assets to establish such a system the sale on a weekly or monthly basis of fees charged to clients at their face value less a commission at current rates has the advantage of furnishing the barrister with a controllable income and at the same time divert to the factor a percentage of income ultimately received from clients.

Discretionary Trusts:

A convenient vehicle for the purpose of distributing income has been the discretionary trust. The taxpayer may use this instead of his wife to effect leasing or factoring arrangements already referred to. By a recent resolution of the Bar Council (23rd February 1978) it has been decided that there is no objection to the interposition of a trust or a company between Barristers Chambers Ltd. and the Barrister as a tenant of Chambers. Now that rents charged to Barristers are fixed at more or less the current rental available, this may have a limited benefit. It may, however, be that if a Trustee as tenant of Chambers, furnished them and provided them to the taxpayer with secretary and library in exchange for a proper fee, the whole would be deductable in his hands. The composite fee would include a leasing compenent plus a management component and the trusts profit on the whole transaction.

Home Office Expenses:

The Deputy Commissioner has been prepared to allow as a business deduction a proportionate part of a barrister's costs of domestic light and heating as may be fairly referable to time spent at home earning assessable incomes. Furthermore part of telephone expenses and depreciation on office equipment are deductable notwithstanding that they are expenses incurred at home. But by a series of decisions the Barrister has consistently been denied the right to deduct a proportionate part of interest and insurance payable on his house notwithstanding that he has set aside part of the home for business purposes. In a recent case one member of this Bar has successfully persuaded the Board of Review to allow a deduction for his home study in the following circumstances. His home was purchased by his wife and himself as trustees of a trust. The trust let the study to the Barrister for a fair rental. The trust permitted the family to occupy the balance of the house in consideration of their payment of all outgoings including interest under the mortgage loan obtained by the trust for the purchase of the property. The decision is subject to appeal to the Supreme Court.

In any of these schemes there is a very serious problem encountered at the time of establishment. This is that of transferring existing business assets into the hands of the wife or trust. It will be apparent that this transfer

becomes more and more difficult as the assets are more substantial. Moreover the whole arrangement becomes more unreal the longer the barrister has conducted his practice previously without them. It is therefore of considerable importance that the young barrister give very serious consideration to the commercial basis upon which he operates at the earliest opportunity, even though the immediate advantages to him may be small or even non-existent.

It is of great assistance that, even, or rather especially, in his first years at the Bar he obtain good advice from a competent and respectable accountant as to the courses which are properly available to him.

MOUTHPIECE

"Butterworths" remarked Bigwig, gravely "want to force us out of Owen Dixon Chambers!"

"Why do you say that?" queried Whitewig.

"It's an inference I draw from the circumstantial evidence", replied Bigwig smugly. "The recent increase in the numbers and weight of the Butterworths publications has placed a strain on the structure of this building never envisaged by the architects. One day, just one advance part of the Victorian Reports (and Heaven knows they're lightweight enough) will be sufficient to tip the balance. The edifice will crumble and hundreds will be crushed beneath cascading Halsbury's and Empire Digests."

"Horrible!" shuddered Whitewig. "I'm glad I'm in Hooker Chambers".

"Hooker Chambers", thundered Bigwig, "sounds more like the name of a massage parlour than Barristers accommodation. I wouldn't be surprised if there were women barristers there who do specials".

"Well there are actually", replied Whitewig, "but not . . . ".

"I don't know what the Junior Bar is coming to. It wouldn't surprise me if it was one of your colleagues who phoned in about that bomb scare in the County Court building".

"Well," replied Whitewig, "it is about the only way to get an adjournment out of the Chief Judge".

"Yes", reflected Bigwig. "I always said they needed a bomb under them before they'd work — how wrong I was".

"Quite correct. They all scuttled into the Common Room for coffee" Whitewig volunteered.

"No wonder the portable plants are dying", mused Bigwig irrelevantly "they can't stand the continual climate of hot air".

"I must say that I enjoy going there" commented Whitewig, "you meet new people and they do have wonderful hot suggestions".

Bigwig glowered: "That's what happens when you allow barristers to mingle with secretaries. I heard of two being dragged off into the artificial undergrowth!"

"Yes", replied Whitewig "some of those secretaries are pretty strong".

"What we need", thundered Bigwig, "is decentralization — a move to the country for the whole court complex".

"But could it be organized?" queried Whitewig.

"Well, Michael Dowling knows about some land at Pakenham that is not too dickie".

"Go on!"

"He reckons we could buy it cheap at high tide and you'd have a ready made jury pool."

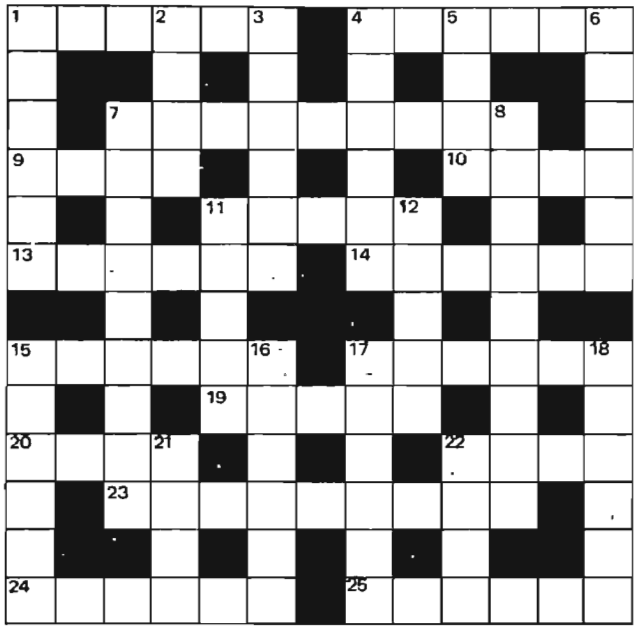
"But what if it proves unsuitable" asked Whitewig.

"No problems", replied Bigwig, "we just have another enquiry. That way we solve the accommodation and unemployment problems in one hit."

J.C.

CAPTAIN'S CRYPTIC

NO. 23



ACROSS:

1. Canine master (6)
4. Rounded up (6)
7. Rabbles for illegal execution (5,4)
9. My friend une bonne femme (4)
10. Small wallaby (4)
11. Change from beneath to more naked (5)
13. Fully satisfying (6)
14. List takes a letter from the cock (6)
15. Superficial traveller M.P. (6) *
17. Requesting from Gaskin (6)
19. Bird of prey which lands (5)
20. Expectorate on the promontory (4)
22. Lead to shuffle the deck (4)
23. Civilly no cased (9)
25. Deserved from render beloved (6)

DOWN:

1. Snaps some vacation (6)
2. This judge a cow for old Scots (4)
3. They're off! (6)
4. Strike an unlifted toe (6)
5. Outer formal court attire (4)
6. The negro trip by a roundabout way (6)
7. Reprepare for action (4,5)
8. Bore up against (9)
11. Untie becomes its antonym (5)
12. Or employ to awaken (5)
15. To slip for a change to a firearm (6)
16. Little south island (6)
17. Mountain peakine (6)
18. Ballsed out (6)
21. Solicitor of custom (4)
22. To read can be expensive (4)

*A thorough study of the works of Rudyard Kipling is recommended before attempting this clue.

FOR THE PERIPATETIC

Notice has been received of the following law conferences to be held in the near future. For further information members should make enquiry of the Bar Executive Officer, Miss Brennan.

April 1978
13th – 14th at San Francisco.
American Bar Association Institute upon the topic
Bankers Blanket Bond.

18th – 19th at Washington, D.C.
American Bar Association Institute upon the topic
Law of International Human Rights.

27th – 28th at Washington, D.C.
American Bar Association Institute upon the topic
Labor Law in the Construction Industry.

May 1978
11th – 12th at Denver, CO.
American Bar Association Institute upon the topic
Public Contracts.

18th – 19th at Houston, Texas.
American Bar Association Institute upon the topic
Energy and the Law.

18th – 19th at St. Louis, MO.
American Bar Association Institute upon the topic
Government Financed Housing.

June 1978
2nd – 4th at Washington, D.C.
American Bar Association Institute upon the topic
Regulation of Insurance.

10th at Chicago, IL.
American Bar Association Institute upon the topic
Debtor/Creditor Rights for the General Practitioner.

9th – 11th, or 10th – 12th at Scotland.
Law Society's Commerce and Industry Groups Annual Weekend.

22nd – 24th at Copenhagen, Denmark.
8th International Congress for European Law.

August 1978
3rd – 10th at New York.
American Bar Association – Annual Meeting and Joint Meeting with English Legal Profession.

27th August – 2nd September at Manila, Phillipines.
58th Conference of the International Law Association.

September 1978
10th – 14th at Paris, France.
International League Against Unfair Competition Congress.

10th – 16th at Sydney, Australia.
International Bar Association 17th Conference.

17th – 22nd at Sydney, Australia.
International Fiscal Association – International Tax Conference – 32nd International Congress.

October 1978
18th – 22nd, England.
The Law Society's National Congress.

September 1979
5th – 9th at Cannes, France.
International Union d'Adocats.

September at Colombo, Sri Lanka.
6th Lawasia Conference.

SPORTING NEWS

Bill Gillard's departure from the drug enquiry happened to coincide with a tour of the West Indies by a visiting cricket team comprised of members of the Law Institute. After spending a short time in Hawaii he played against the Jamaican Bar Association following a seminar and dinner given by that August body. It is believed Gillard gave a paper on legal aid. In the light of injuries suffered by our visiting Australian cricket team, a talk on first aid may have been more appropriate. From Jamacia he travelled to Barbados where following a dinner and reception given by the Barbados Bar Association, he played against their representatives and participated in subsequent matches against the Carlton Cricket Club, the Police Sporting Club and the Wanderers, an International team. Other matches on the itinerary included those against the Trinidad Bar Association and Tabago Bar Association. The players will see the fourth test match at Port of Spain and dine with the Australian test team. The tour will culminate with a cricket match against, of all teams, the "Miami eleven". All told, the trip is for five weeks.

* * *

The air was electric at the annual tennis match between Bar and Bench and the Law Institute at the Albert Courts on the 19th December 1977. After a gruelling contest the scores stood at 25 sets all, 222 games all, as Rattray poised to unlease his "Roscoe Tanner like" thunderbolts. A short time later we had won the annual event by one solitary game. Tony Graham was heard to remark "you only just beat the payment in that time, Rats". It is reliably reported that the number of bottles of intoxicating liquor consumed to celebrate the victory approximated the total number of games won by our side.

* * *

The expression "fun run" appeared most inappropriate when several members of the Bar were seen staggering over the finishing line at the Elwood Life Saving Club recently. The 13 kilometre horror stretch was successfully negotiated by Duggan, Dee, Pinner and Crossley, the latter finishing ahead of his ex-reader, Osborne. Included in the get fit campaign has been Philbrick who was recently mistaken for Oliver Hardy when running around the streets of Greensborough.

* * *

Roughneck was a slow horse. It couldn't run for toffee. When questioned after his chestnut gelding ran last at a Balnarring Picnic Meeting, Hore-Lacy vowed that the next time it went around a track it would be inside a greyhound. But Roughneck really wanted to jump. After promising wins over the brush at Caulfield and Sandown it was entered for the Onkaparinga Great Eastern Steeplechase with a purse of over $15,000. The punters got onto it and it started shorter than a Hare krishna haircut. At the finishing post you couldn't have shot the rest of the field. It was Roughy by a furlong.

* * *

Joe Beder has an interest in Prince Garuda a well-bred 3 year old colt by Latin Lover. It recently won at Flemington over a mile three days after its previous start when it ran 10th at Sandown. It returned to scale to a mixed reception. Kiwi Joe never batted an eyelid.

* * *

Talking about horse traders, I hear a tale from the Wright Stephenson Victorian thoroughbred yearling sales last March. A Well-bred chestnut colt by Master Guy out of Angel Fire was listed on account of a Mr. D. Blackburn. The following conversation was heard.
Auctioneer (before sale): You won't get more than 3 for this. The market's stale and the bidding's slow.

Mr. D.B.: Put it up.

Auctioneer: What's the reserve.

Mr. D.B. (undeterred that it was lot 13): Four.

Auctioneer: You'll never get past 3! It'll be passed in!

Mr. D.B.: Put it up.

Sometime later the hammer fell. "Sold for $4,500".

It just shows that a man can do well by fighting now and again.

Four Eyes

THOMAS MORE ORATION

A former Attorney General in the U.K. Government, The Rt. Hon. The Lord Rawlinson, P.C., Q.C., will visit Melbourne briefly in June to deliver the Thomas More Memorial Oration under the auspices of The University of Melbourne and Monash University.

The Oration will be delivered in the Wilson Hall, University of Melbourne, on Tuesday, 13th June, at 8.15 p.m. His Excellency The Hon. Sir Henry Winneke, K.C.M.G., K.C.V.O., O.B.E., K.St.J., Q.C. will preside in his capacity as Visitor to both Universities.

Lord Rawlinson has indicated that the theme of his Oration will be "that of the conflict between the public man and the man of faith together with the lesson this has for anyone in a modest way in modern times".

MOVEMENT AT THE BAR

Members who have signed the Roll (since November (1977)

A.J. Rogers (N.S.W., Q.C.)
D.D. Levine (N.S.W.)
J.K. Bowen (A.C.T.)
M.B. Kellam
A.C. Neal
T.R.H. Cole (N.S.W.)
R.E. Cooper (Qld)
C.D. Douglas (Miss)
P.A. Coghlan
B.J.D. Sutherland
C.R. Williams
J.G. Klestadt
S.M. Frederico (Miss)
H.M. Knott
R.G. McIndoe
W.E. Stuart
R.J. Spicer
C.T.H. Chessun (re-signed)
N.M. Jedwab
J.R. Dwyer (Mrs.)
H.T. Mason
D.H. Gude
C.O. Duncan
P.T. Maginn
P.N. Vickery

Member who has transferred from the Non-Practising List to the Practising List

J.R. Perry

Member whose name has been transferred to the Governor's List

HIS EXCELLENCY SIR ZELMAN COWEN, C.M.G.,Q.C.

Members who have transferred to the Non-Practising List

J.L. Sparks (Miss)
K.L. Chenery

Members whose names have been removed at their own request

A. Shelton (Mrs.)
M.A. McMullan
P.E. Bennett
M.J.N. Atwill (N.S.W.)

SOLUTION TO CAPTAIN'S CRYPTIC NO. 23

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"Sorry about that . . . I've only ever done prosecuting before."