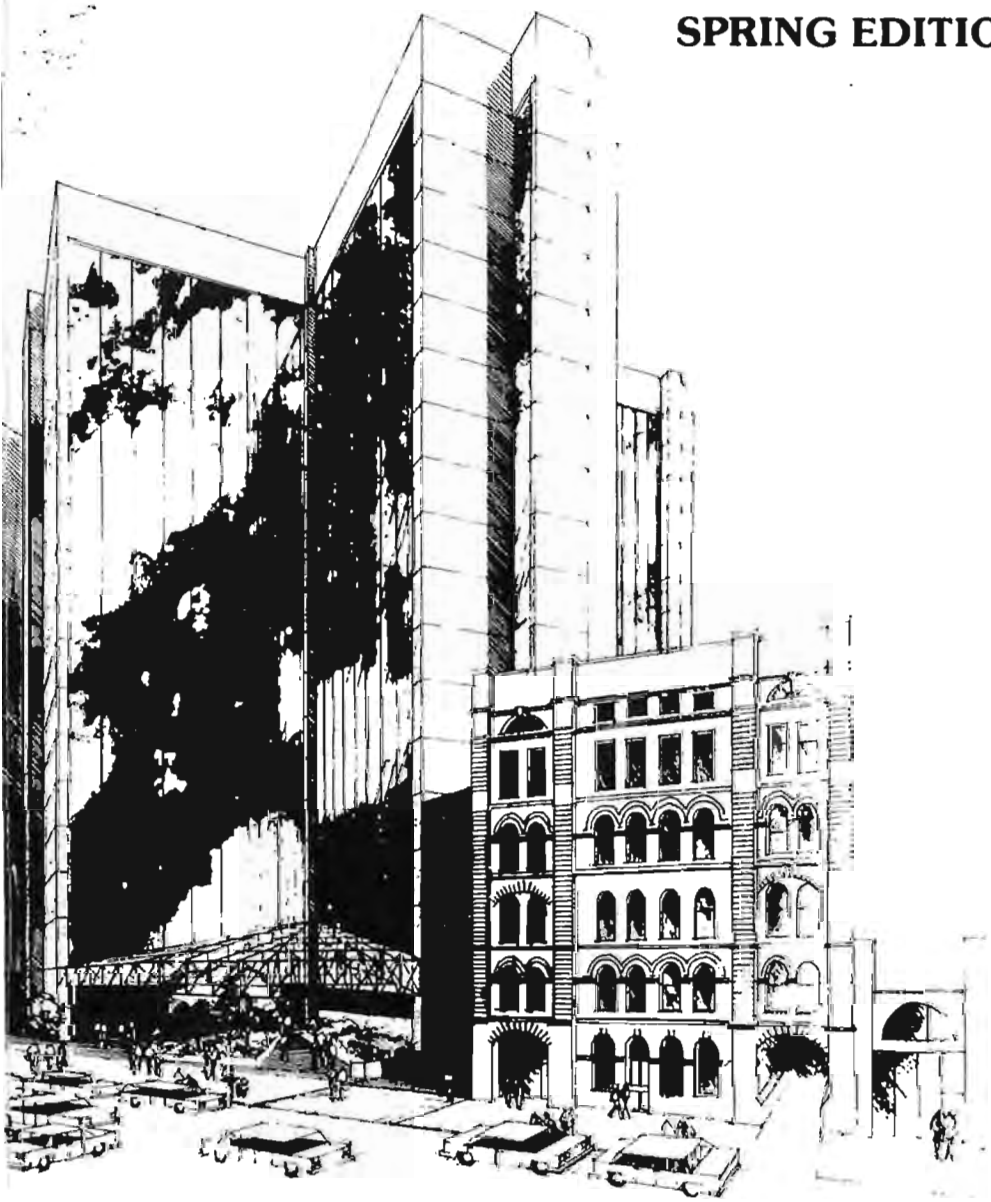
Victorian Bar News

SPRING EDITION 1979



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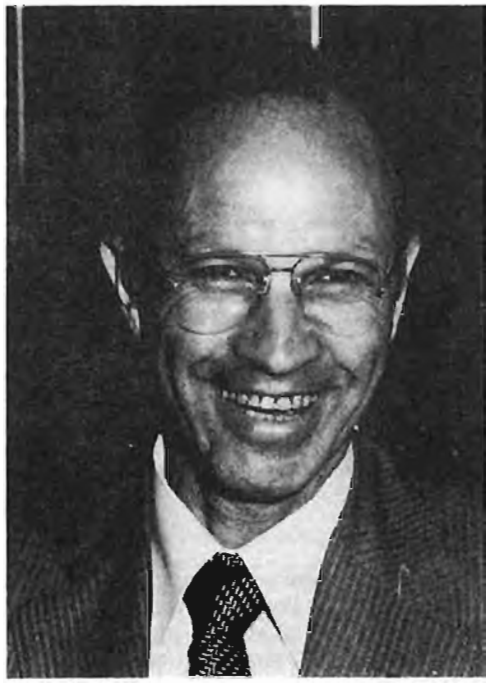
THE COVER:
Architects Lumsden and Ashton were asked to prepare a perspective of the proposed new building to supplement Owen Dixon Chambers as the home of the Victorian Bar. Readers are asked to visualise this concept in the light of the known dimensions of the County Court Building rather than those of the cars in the foreground which clearly antedate the petrol crisis.

BAR COUNCIL REPORT

Reading Reforms
Following the Bar Council Meeting of 23rd June (see p. 4) a subcommittee has been established to work out the details of the new reading procedures.

Fees
With regard to fees, the Bar Council since the last report continued its consideration of fee scales for counsel in the Supreme Court and the Family Court and have determined a new scale of recommended fees in both of these areas operative from 15th August, 1979. It has also determined a scale of recommended fees for non-legally aided criminal matters to be operative from the 21st day of August, 1979. (See p. 34).

ABC Building bought
The problem of accommodation is a continuing one for the Council. On this occasion the Bar Council is happy to be able to advise the Bar that Barristers Chambers Ltd., with the authorisation of the Bar Council has entered into a conditional contract with the owners of the property at the rear of Owen Dixon Chambers known as the ABC Building. The purchase price is $1.85 million with a deposit of 10 per cent of which $5,000 was paid on the signing of the contract and the balance of deposit being payable on the vendor being notified of the approval of the Bar in general meeting for the purchase. This meeting is to be held before the 14th December next. The balance of purchase money is payable at the expiration of 60 days thereafter. It is intended that a feasiblity study be conducted of the construction of the building upon the site which, in conjunction with Owen Dixon Chambers and the properties presently leased, will meet the accommodation requirements of the Bar for the forseeable future. It is proposed that the results of that feasibility study should be available to members of the Bar prior to the meeting for approval of the purchase in the hope that an informed decision be made. The advantages of the particular site should be obvious to members of the Bar with its proximity to County Court and Owen Dixon Chambers. In any development, the possibility of above ground interconnecting flyovers between Owen Dixon and the new building be pursued It is thought, at this stage, that a building to house some 550 barristers could be constructed upon the site at a cost which will be within the means of the Bar. (See p. 20).



Chairman Berkeley QC

BAR COUNCILLORS

Counsel of not less than 12 years' standing

H.C. Berkeley Q.C.	Room 1014
G.R.D Waldron Q.C.	1213
J.J Hedigan Q.C.	1203
J.E. Barnard Q.C.	1207
P.A. Liddell Q.C.	215
B. J. Shaw Q.C.	1205
J.H. Phillips Q.C.	133
G. Hampel Q.C.	103
C.L. Pannam Q.C.	111
F. Walsh Q.C	904
P.D. Cummins Q.C.	1214

Counsel of not less than 6 nor more than 15 years standing

E.W. Gillard	1208
A. Chernov	1204
B.A. Murphy	806
R.C. Webster	1018

Counsel of not more than 6 yeras' standing

T.A. Hinchliffe	F.C.
M.A. Adams	F.C.
J.L. Bannister	F.C.

THE BAR COUNCIL MEETING ON READING

Early this year there was brought to the attention of the Bar Council a number of complaints by magistrates and others of specific instances of alleged misconduct of the part of junior barristers appearing before them. In the course of discussing those matters, it was felt by the Bar Council that there may have been a decline in the standards of the very junior bar in both professional ethics and professional competence. Any such a decline might be allied with the very large rate of increase in the number of persons who had come to the Bar in the last 5 or 6 years. The Bar Council resolved to investigate current standards amongs the junior Bar and if necessary to consider whether any further, and if so what, restraints or qualifications should be imposed in respect of those seeking to sign the Bar Roll. It was realised that such an inquiry should not be kept secret and that persons hearing of it might seek to sign the Bar Roll before the matter was considered so as to escape the needs for any further qualifications though necessary by the Bar Council. For that reason, the Roll of Counsel was temporarily closed until after a meeting of the Bar Council which was arranged for Saturday, 23rd June, 1979.

Prior to the meeting, members of the Bar Council made themselves available to make inquiries into the way the junior Bar was operating in Magistrates' Courts and in the County Court. Almost every metropolitan Magistrate was interviewed by a senior member of the Bar Council. Interviews were also conducted with a number of County Court Judges. Submissions were invited from members of the Bar and from other interested parties. The inquiry resulted in a bundle of material of somewhere between 150 and 200 pages. Its nature may be indicated from the summary of contents as follows:–

1. Interviews with Magistrates
2. Interviews with County Court Judges.
3. Submissions from members of the Bar.
4. Letters from the Law Institute.
5. Submissions from Deans of Law Faculties at Melbourne and Monash.
6. Letters from the Leo Cussen Institute.
7. Readers' Workshop Draft Objectives.
8. Council of Legal Education (U.K.) Notes on How to Become a Barrister.
9. In Service Training for Practice as a Barrister.
10. Extracts from last 18 months of Bar Roll showing previous experience.
11. Barristers' Board (Queensland) Rules Relating to the Admission of Barristers.
12. Barristers' Directory (Proposal by Ad Hoc Committee).
13. Submission of Criminal Bar Association.

The meeting of the Bar Council occupied the whole of Saturday, 23rd June, 1979. It was attended by

every member of the Bar Council (somewhat unusual, indeed unknown event). Also in attendance by invitation were W.M.R. Kelly, Q.C. and David Ross.

In the first instance each person was asked to express his views on the matter. That procedure took the whole of the morning. In the afternoon, the Bar Council debated, considered and approved certain resolutions which will be referred to later. There was a surprising degree of unanimity at the meeting. In general, it was accepted that there had been no decline in the standards of the junior Bar. Indeed, that was the inevitable conclusion to be drawn from the material which was available to the Bar Council. A number of magistrates and judges interviewed were of the opinion that the standards of the very junior Bar had Improved, and if there were any complaint, it was to be directed at juniors of 10 years' standing and upwards. It was put by those Magistrates and Judges that the very junior barristers instead of coming to Court with 2 or 3 briefs were coming with one brief and that brief was correspondingly better prepared.

On the other hand, it was apparent to the Bar Council that the standards of the very junior Bar are capable of improvement. It is inevitable, when one considers the nature of the profession of advocacy, that the basic skills are acquired bit by bit in the first two or three years of professional life. The Bar Council thought that the time was ripe to make a serious attempt to help those coming to the Bar so as to enable those first two or three years to provide better training in the past.

Two main problem areas became apparent in the course of discussion. First, reading is a varied experience. Reading for only some counsel is satisfactory. It was proposed to make it more difficult for a reader to have an unsatisfactory pupillage by implementing certain proposals put forward in the Report of the Criminal Bar Association. Although a reader shall have only one master, it is proposed to attach each reader to a group of barristers in reasonable proximity to each other and practising in different jurisdictions. Each group is intended to have as its president or head, a Queen's Counsel who will be made responsible to the Bar Council for the administration of each reader's pupillage. In this way, it is hoped that a reader will have access to a wider experience than is possible under the present system. It is also hoped that no reader will finish his period of reading without getting from it what is at present given by a master with the time, the inclination and the ability to do his best for his pupil.

Secondly, it is intended to provide a course of training in the skills required by a practising advocate. This will be a course of training after signing the bar Roll. It will be a full time course of somewhere between six weeks and two months and it will probably be on a workshop basis. This means that practising members of the Bar may be asked to devote themselves full time to teaching small groups of new barristers. One thinks of such matters as pleading, evidence, cross examination and so on.

The formal views of the Bar Council were contained in the following resolutions:–

1. That applicants to sign the Roll of Council be permitted to sign on three occasions per annum, namely March, June and October (this was to enable a course of instruction to be properly ned so as to take place during the briefless period).
2. That the period of reading by 9 months.
3. That the non-brief period be three months.
4. That masters be required to have been at the Bar for a minimum of 10 years (this is something of the order of 200 juniors).
5. That an ad hoc committee be set up to advise the Bar Council:–

   (a) How to implement the proposals as to pupillage on pp. 5, 6 and 7 of the report of the Criminal Bar Association.
   (b) How to implement the proposals as to post call training contained in the report of the Criminal Bar Association.
   (c) Whether the cost of such training should be borne by those receiving it.
   (d) As to any further training which it considers should be undertaken by readers.

An ad hoc committee has been appointed consisting of J.H. Phillips Q.C., Kelly Q.C. and David Ross. Its report is awaited.

ETHICS COMMITTEE REPORT

The Ethics Committee has recently had to consider the conduct of a number of members of the Bar in matters which seem to arise regularly.

(a) **Failure to return briefs**

There have been several complaints regarding the failure of counsel to return briefs when requested to do so by the instructing solicitor. These have all arisen in circumstances where counsel has been dilatory in performing the work required. It has not been the dilatoriness which is the subject of complaint but rather the somewhat surprising refusal to return the brief despite, in some cases, numerous requests to do so by the instructing solicitor, in order that he may engage other counsel. It should be remembered that counsel's retainer is with the solicitor and upon its termination he has no further right (or indeed duty) to perform the work for which he is briefed despite what he may believe to be the client's desires regarding his continuing to act. It is thus imperative that counsel, upon request to return a brief in such circumstances should do so immediately.

(b) **Failure to pay Bar Subscription**

The annual list of those who have failed to pay their Bar subscriptions has arrived. The necessity to pay subscription is obvious. What is not so obvious, is that failure to pay can by virtue of Rule 41 of Counsel Rules as amended constitute an ethical offence. Sometimes payment may be simply overlooked for quite understandable reasons. However the administrative work in pursuing defaulters is time consuming and irksome. Many counsel find the giving of a continuing authority to their clerk to deduct the subscription from their fees a useful means of effecting payment which avoids the possibility of oversight From the point of view of the Bar administration and the Ethics Committee, it is a procedure to be recommended.

(c) **Failure to reply to the Ethics Committee**

Whenever the Ethics Committee receives a complaint for the unethical conduct of a member of counsel, and it appears that an ethical offence may have been committed, that counsel will be written to regarding the matter and his comments requested. Most counsel oblige with a prompt reply. Some, however, ignore it. By thus doing, the particular counsel creates unnecessary problems for himself. By a specific Ruling of the Bar Council of 22nd July, 1976, the failure to answer correspondence from the Ethics Committee is itself a breach of ethics – a matter which is always pointed out in the initial letter from the Committee!

(d) **Recent Rulings**

The following recent rulings are of special importance.

1. It was resolved that it is not a breach of ethics for counsel to attend the Listing Office of the Criminal Branch of the Law Department.

2. A member of counsel who was upset at a jury's decision to convict his client, happened to walk past some members of it in the corridor and was recognised by them. Spontaneously he expressed his feeling to them as to their decision as well as his opinion of the accused. The Committee found that the counsel committed a disciplinary offence and was fined $150.00. It was the express view of the Committee that had the action not been spontaneous and unpremeditated, the fine would have been much higher. It is fundamental, in the Committee's view, that members of a jury should not be queried or criticised about their decision, because they may in time return to Court to become againt part of a fact finding tribunal and may be inhibited from performing such function fully by reason of such query or criticism.

Of more general interest is the coming into operation of August 1st, 1979, of the Legal Profession Practice (Discipline) Act 1978 and the Legal Profession Practice (Solicitors' Disciplinary Tribunal) 1978. These Acts, create a Barristers' Disciplinary Tribunal. They have the effect of investing the Ethics Committee with statutory powers henceforth rather than simply those conferred by the Rules of the Bar. In practice the Committee will act substantially as before and apply the same body of rules. It is hoped that by the end of the year, a book compiled by Sir Gregory Gowans on Conduct and Etiquette embodying relevant rulings of the Bar on such matters will be published. The book will no doubt be of considerable assistance to members of counsel as a guide to proper conduct.

Webster

We remember in days passed, reading (surname first) the names of Little John and Black Michael in the directory of Barristers. In those times it gave us a sly chuckle. Now a new crop has emerged better than the last —

Brown Sally
Strong Michael
Grey Peter
Young Russell

but the ones we still like the best are Slim George and Wild Rex.

AUSTRALIAN LAW NEWS

Counsel have recently received gratis the September 1979 edition of this magazine. On page 2 is set out a list of constituent bodies and beside the name of each is the appropriate executive member/President. Of interest to Victorian Practitioners is the following:

"The Victorian Bar — Brian McCarthy, Rowland Ball. Law Institute of Victoria — Frank Costigan Q.C." It is with pleasure that we salute this new spirit of co-operation between the two branches of the profession.

KELLY ON ROSETTES

For those who did not read or do not remember Bar News (Christmas Edition 1977, p.12), a propos the Victorian fashion of Queen's Counsel wearing a rosette I have the following monograph to contribute. There are rumours abroad that it is part of Irish tradition. This is untrue. There are rumours abroad that it has some connection with the Middle Temple. This is equally untrue. I have conducted research (gossip with Poms) and say as follows:–

The traditional dress of Queen's Counsel is the same as that of a Judge sitting in a jurisdiction other than the criminal jurisdiction, save only that the Judge wears a judicial "Bench" wig, being one without curls. Equally, the dress of Queen's Counsel attending a levee or formal occasion of the like social kind is the same as that of a Judge insofar as it consists of Windsor Court dress, being the tail coat familiar to those at the Victorian Bar, knee breeches and silk stockings with buckled shoes, full bottom wig and silk gown. With that uniform is worn a rosette attached by a short strap to the inside of the collar of the coat. It has been suggeste that the original purpose of the rosette was to prevent powder from the wig as worn in the 18th Century, from staining the back of the coat. The rosette served something the purpose of an antimacassar.

It is still worn on such formal occasions by Queen's Counsel in England. I am unaware of the Irish practice. I should think it is similar. However, it is not there ordinarily worn as part of the dress used by Counsel when appearing before Courts of Law. It has no traditional function when wearing a short wig.

Queen's Counsel in England ordinarily wear a Windsor coat when appearing in Court.

For some reason unknown, and no doubt buried in the history of this State, Queen's Counsel at the Victorian Bar have traditionally worn a rosette upon their Windsor Coats rather as though they had just attended a levee and had forgotten to take it off.

Kelly, Q.C.

Welcome: JUDGE MURDOCH

On the 6th September, 1979 a large number of barristers and solicitors gathered in the 5th Court to welcome Noel Stewart Tye Murdoch on his appointment as a Judge of the County Court.

His Honour was born on the 28th June 1932 and was educated at Scotch College and Melbourne University prior to being admitted to practice on the 1st March 1955. His Honour was articled at Hedderwick, Fookes and Alston. He signed the Roll of Counsel on 30th April 1959 and read in Eagle Star Chambers with Newton, whose other readers included J.D. Phillips, Liddell and Merralls.

At the Bar, His Honour was in demand from his earliest days. His initial equity practice changed to general common law and in recent years he specialised in industrial accident and medical negligence cases. Of late, he attracted press notoriety for his appearance for "careless or vague members of the medical profession who performed gratuitious hysterectomies or who reshaped ladies' navels in the likeness of squashed eggs". His Honour's appointment follows the pattern of other County Court Judges who as barristers were similarly retained by the medical profession.

His Honour was highly respected and developed a reputation as an efficient and hard worker. He was regarded by his fellow practitioners as a "scrupulously fair barrister but not a man who lightly or happily paid $1 too much in any case."

He is also known for his passion for motor vehicles and racing and is more than envied for his handsome collection of cars which include six Lancias, a Ferrari, a 1926 and 1928 Bugatti and a Delage – the only 1914 Grand Prix Model in the world. It was noted at his welcome that His Honour recently sold a cast-off Lancia to the Prime Minister. Mr. Fraser spent a small fortune restoring the car, demonstrating His Honour as a man "able to negotiate with the most powerful and influential person in the land and, as it were, come out in from — small comfort to the wheelers and dealers who may appear in front of his Honour "

No doubt His Honour will look forward with relish to revisiting some circuit towns where he is already known to the local police. On one occasion he attended an inquest at Sale and arrived at high speed in a very sporting Ferrari. The car bore what can only be described as a miniature non-regulation number plate. There was a great to do with the local constables They could see the plate but hardly read it. The inquest lasted a week and His Honour's departure was blessed by the Force.

Any account of His Honour would be incomplete if it did not include the fact that he is a family man. He has four children and his wife is currently involved with the Australian Children's Television Action Committee. Other than racing, His Honour spends as much time as he can with his family and is often seen at Point Lonsdale hiding from the sun.

His Honour had three readers, Mary Baczynski, Lindsay R. Paine and Chris Jessup, to whom he was readily accessible. He would always assist them with much patience and humour.

The Chairman of the Bar Council aptly described His Honour as a man possessing in abundance, qualities of courtesy, humanity, good judgement and a fine sense of justice.

The Bar congratulates him and wishes him satisfaction and success in his new office.

FOR THE NOTER UP

County Court
Add
Judge Murdoch 47 28.6.32 1979 2004

THOUGHTS ON ADVERTISING

As Chief Justice of the Twelfth Floor, Star Camber, it has been our duty to consider what changes ought to be effected in the practices of the Bar consequent upon the passing of Act 9202 (Tighe Corson's Act).

At the same time, there has been brought to our attention, an attempt made by that other profession to overcome the apparently natural disinclination of its members to expose themselves. They have published from their headquarters in a disused insurance office in Bourke Street, a register, setting out in taxonomic and, one suspects, botanical order, the names of those amongst them who are both not gainfully employed and plying for hire.

We have thus the opportunity of killing two birds with one stone, or as one of our distinguished and learned predcecessors would have said —"Jettez le briqbat aux deux oiseaux".

It may well be that the rule inherited from our forefathers ought no longer to be enforced in its pristine severity.

> "There was an imperative rule before railways were generally established that no member of the Bar could enter a circuit town by any public conveyance and men used to club together and divide the expense of a post chaise amongst them. Many have been the times when after going by one of the 'Diamond' steam boats to Graves-End, I have walked on to Maidstone with a troop of companions, some of whom in after life would not care perhaps to be reminded of their then impecuniosity.
> No doubt the rule, as originally fixed, was a salutory one. Attorneys and solicitors would necessarily travel by ordinary conveyances and it was intended to prevent the Bar from unfairly currying favour with the former.
> I may say that in those days, deference to authority was much more strictly and generally manifested than it is now, when every man presumes to a law to himself and thinks he is not bound to obey an ordinance of the legislature until he has satisfied his own mind that it is both reasonable and expedient. The unwritten law and etiquette of the Bar were cheerfully obeyed and the tribunal of the Bar-mess was treated as supreme.
> The principle of the rule which prescribes exclusive travelling extended to lodging at circuit towns and we were precluded from taking up our quarters at any hotel. We must needs betake ourselves elsewhere and most of the tradesmen in the locality or rather their wives, offered us the accommodation we required (for we understood that what we paid was treated universally as appropriated to their separate use.)" Robinson "Bench & Bar" (1891) 20, 28.

Our learned predecessor goes onto record "It is true the same risks would be run by journeying by rail but the regularity and certainty of this mode of transit were too overpowering to be resisted." In Ireland, we are pleased to note (as Mr. Maurice Healy tells us) that the advent of railways was more satisfactorily dealt with . On the old Munster, Circuit judges and associates travelled first class, attorneys and witnesses second class and barristers and pigs, third class (unless of course, the pigs were also witnesses in which case they travelled second class). Non omne quod licet honestum est.

Today we owe it ot the Bar to retain for those under 7 years' call the primacy with which nature has endowed them.

Let there be published forthwith from the Twelfth Floor a Bar Register (in Salic order).

Let there be set opposite the name of each barrister seriatim and mutatis mutandis information by appropriate symbol in columns entitled:—

(a) Year of call
(b) Specialises in.
(c) Old fashioned rates.
(d) No circuit fees.
(e) Bankcard welcome.
(f) Has friends on the Supreme Court.
(g) Belongs to Melbourne Club.

The junior Bar being thus adequately and properly (if we may say so) advanced per pro, one may well ask what is to happen to the more senior and patented division of the Bar. Our distinguished and learned predecessors might have said — perspicua vera non sunt probanda — but speaking for ourselves we propose to publish the motto of our distinguished and learned ancestors — Retenent Walldronum ad colligenda bona.

LORD DEVLIN ON THE PRACTICE OF JUDGING

The following is a further article appearing in "The Listener" of 28th March 1979 published by the B.B.C. It is an abridged text of an interview broadcast on B.B.C. 2.

Ludovic Kennedy: *Lord Devlin was called to the basr in 1929, became a KC just after the war, was a high court judge for 12 years, and later served as a lord justice of appeal and lord of appeal in ordinary. Since his retirement he has lectured extensively on many aspects of the law and arbitrated in a number of important commercial cases.*
You have had a long and distinguished career in the law, first as an advocate and then as a judge. Is the transition from the bar to the bench an easy one?

Lord Devlin: Yes, I think it is, because owing to our practice of promoting from the bar to the bench, you are really doing the same thing. It is almost like an actor being given a larger part in the performance.

Are the qualities that make a good advocate the same qualities that are needed in a judge?

No, not entirely. I would say that the good advocate is not really concerned to know whether his client is right or wrong or not — it is not his business to decide the case. It is his business to take what is there, and present it as forcefully as he can, and to know that, if he does that and the other fellow does the same thing, we can take it that we reach justice. The judge is much more concerned with formulating the issues in a completely impartial way, to present them to the jury.

How does a judge prepare for a criminal trial? Does he see a lot of papers?

Oh, no. He is there simply as the referee, and he goes in knowing nothing about the case, in all probability. In a criminal case, it is true, there are the depositions of the prosecution witnesses which he may or may not have; he does not need to read them if it is a fought case.

When an appeal court reverses the decision of an earlier court, what is the view of a judge in the earlier court? Does he feel slighted?

No, I don't think so. I don't know if you remember Mr Justice Cassells. He was a wit who said that, during his 15 years on the bench, he spent the first five years in terror of being reversed by the court of appeal, the next five years he spent saying that, whatever the court of appeal did, it was always absolutely wrong, and the third five years he spent not caring a damn whether the court of appeal reversed him or not. I think that is a reasonably fair summary.

Is there a temptation for a judge, knowing, perhaps, rather more about the case than some people do, to influence the jury, either in his conduct of the trial or in his summing up to the jury?

The old school of judges used to regard it as their business. They would make up their minds what the verdict ought to be and would sum up accordingly. Of course, they were far too skilful merely to tell a jury what to do, but it was the test of their skill whether they could get the verdict they wanted. I do not think you get that now. I think you get more judges who see that this is the jury's business and their job is to give the jury a fair summing up.

There has been a tendency for some judges, when passing sentence, to moralise, to give their own views about affairs which the public may or may not agree with. Do you think that is a good thing?

My instinct is to say no, why not just pass sentence? But, to some extent, the public wants more, and you must bear in mind that it is very often an alternative to giving a more severe sentence. That is to say that the judge feels that the public may think he has sentenced too low, and not taken into account all the iniquities, and he feels that it is his job to express what he thinks is the public feeling. It may not be, that is the trouble. All the same, I would not rule it out entirely; carefully used, it can do good.

Victorian Bar News

Let me turn to one or two aspects of a judge's job. There is the question of what is called plea bargaining, where a man can be told by his counsel, who has seen the judge, that if he is found guilty he may not be sent to prison. The judge does not have it in mind to send him to prison and, as a result, he may plead guilty. Do you think that this is a wise thing?

No. It is sometimes rather a temptation. After all, in this country, a man is not guilty until either he has pleaded guilty or he is convicted, so he has got a card to play. His card is that he can save the court time and very often save some of the witnesses, particularly in a sexual case, what is very often a severe deal.

There isn't any bargaining, in the sense that you have a talk and say 'Well, look, what do you say to three months off?' 'Oh, come, judge, that is rather little when you think you are saving a week.' It is much more on the lines of counsel saying 'Could your lordship tell me if you have formed any view of what is likely to be the appropriate sentence for this case, so that I could advise my client?' and then, gradually, it comes out that the client is terrified of going to prison and that, if it weren't that he might be sent to prison, he would plead guilty.

Sentences in criminal trials in recent years seem to have been getting longer, which causes problems in overcrowded prisons. What is your view of these long sentences?

I think they have largely come as the result of the abolition of the death penalty. It was generally a sort of unspoken bargain that, if the death penalty went, the Home Office would not interfere with long sentences.

Do you think it is a wise thing that they have come?

I really don't know. If you are looking at the thing simply from the point of view of humanity, what is the difference between spending 20 years in prison and being hanged? I dislike the long sentence altogether, but it may be, we cannot do without it.

What about life imprisonment which, in fact, rarely is life imprisonment? Should we go on with this?

I think perhaps it might be better just to say, 'Now you are imprisoned...' The old phrase used to be 'at Her Majesty's pleasure.' Now I think it would be 'until the Home Secretary thinks fit to release you.'

Would you be in favour, as they have in some courts in America, of maximum and minumum sentences?

I like the idea of a range of sentence. After all,d what you have got to try to do is to give the proportionate sentence for the crime, and that can never be absolutely accurate.

If you say two to five years, that means that you are saying that you do not think that the sentence would fulfil its purpose, which is to deter the criminal and to deter others, if it were less than two years, and that if it were more than five years, it would be exessive. In between the two extremes, it depends on his behaviour. I think that it is a very reasonable way of dealing with it.

It has been said that some judges go on serving when they are past it and ought to retire. Do you subscribe to that view? You retired early.

Yes, nobody could accuse me of going on till I was past it, anyway. Of course, some did and, as a result, we got a retiring age of 75, which is not unreasonable in the present circumstances.

Do you think, because of the speed of change in social progress, that some rather elderly judges are out of touch with present-day society?

I suppose that is inevitable. I think all people of my age tend to get, to some extent, out of touch and out of sympathy with the younger generation, and judges are no exception, and some may say, indeed, they are shining examples. That is the importance of the jury, especially in crime, that the jury may appear to listen respectfully to the views of the old buffer, but when they are in the jury room, they are going to follow their own inclinations.

Could we talk about some of the issues where reform is felt to be needed in criminal justice? I would like to start off with the question of committal proceedings, about which there has been quite a lot of talk recently. Now, if there are a number of defendants at committal proceedings and one of them wants the reporting restrictions lifted, and the others don't, then the reporting restrictions are lifted. Is that fair?

I think it is wrong. I am told they had a considerable debate at the time the act was passed as to what they should do and, eventually, decided that they should give any man this right. I would say that, if the defendants are not all agreed, then it should be decided by a judge.

It has been suggested that, in some fraud cases which are so complicated that the jury cannot follow the proceedings, it might be better to get a panel of, say, three judges to decide the issue. Would that meet your approval?

I would not like to do anything that edges out the jury, because what is begun in trifles will end in something more important.. I would rather see an alternative explored, that I think might be feasible, whereby the more complicated and technical issues would be decided in some way outside, and a report would be prepared for the jury. I have not worked it out at all, but I would rather explore that before anything more radical.

What do you think about the prosecuting authority in this country? In Scotland, they have a procurator fiscal; in most other countries, they have a prosecuting authority. Do you think that the English system could benefit from something like that?

It really depends on what you want. I think, whether we like it or not, we are going to have it because our present system just takes up too much time. But it has got its disadvantages; it means that very important decisions, a decision as to whether you are going to be prosecuted or not, may mean the end of the case, in effect, if not in law, and such decisions are being taken in secret.

I think we should follow the Scottish or the foreign system of having a procurator fiscal or a *juge d'instruction*, who is an entirely independent legal authority, not responsible in any way to the executive.

There have been many instances, in recent years, of the police bending the rules to secure a conviction against a man whom they really believe is guilty when they feel that, otherwise, he would not be convicted because of the safeguards there are for the accused. Do you think there is any substance in this belief about the police?

I think that, when the police do bend the rules, which is not all that often, it is because they believe that a man is guilty and that, if the rules are unbent, he will be acquitted when he ought not to be.

And what do you think could be done to remedy that situation?

First of all, we want to take a good look at the police view of the matter: that we are far too tender to the defence, and that a lot of criminals escape because of this. A lot of it has grown up in the times when penalties were absurd and savage and the prosecutors were relentless, and I think we should no examine whether we allow more advantages to the defence than is necessary in the interests of justice.

From time to time it has been suggested that a man's record should be made known to the court, especially in cases, where, say, he is charged with molesting little girls, and he has a string of previous convictions for the same offence.

Victorian Bar News

I think we are much more tender than any other country in the way in which we keep back a man's previous bad character, and while one does not want to introduce it simply as mere prejudice, I think we may have gone too far in keeping it out in cases where it is really relevant.

What I am in favour of is examining the now extremely complicated rules about when you may bring in a previous conviction and when you may not. And let us examine it from the point of view that a previous conviction is generally relevant, and that it is only if it would cause excessive prejudice that you might allow it to be kept out.

I would not allow a man simply to be blackguarded in the witness-box, in the dock, but I would want to pinpoint each conviction.

But if there was a man up for molesting little girls, say, and the police knew that his record would be introduced at the trial, would it not be a great temptation for them to get hold of a man who had this kind of record?

This is a most important point. The danger is that the police will not look around; they will just say, here is a fellow who does these sorts of crimes, and all we have got to do is charge him and put his record in. That is why I am not prepared to go farther than say I am ready to examine it.

You have recently spoken on what is believed by many people to be an alleged miscarriage of justice, the Luton murder case, and, in a lecture, you criticised the appeal court for rejecting the new evidence instead of saying that this is something the jury should have considered. Is that right?

I criticised the process, yes. I went farther back, beyond the appeal court, in that case. I traced it back to a decision in the House of Lords which I think had gone on the wrong lines and which I hope may, some day, be altered.

If you had been on that appeal court, your argument would have been, it is not for us to decide, it is for us to imagine what the jury would have decided if they had heard this new evidence. Is that right?

Well, you get a piece of new evidence and you ask would a reasonable jury, properly directed, inevitably have convicted, notwithstanding the new evidence, and if the answer to that was no, then you acquit.

If you had been there yourself, you would have said that conviction is not safe?

I think that, in this case, they were following the decision of the House of Lords and working it out. But, in my view, it was the wrong process that applied, and that faulted the conclusion.

You said at the end of your lecture on the case we have been talking about, that, in order to be sure of obtaining all the evidence before a trial, we ought to consider some modification of the adversary system. Is that not a very radical departure from English criminal practice?

More radical sounding than it would be in effect.

What happens now is that the inquisitorial procedure is conducted, but by the police, and the collection of facts is done by the police; however rich you may be as a defendant, however powerful, you could not begin to have the resources of the police to collect your evidence for the defence. So we rely upon the police to do the job that the procurator fiscal or the *juge d'instruction* does abroad. And, to that extend, we have made the police inquisitors, and I sometimes wonder whether the police are the right people to be inquisitors.

Judges seem traditionally not to have been in the vanguard of reform as far as the law is concerned. Is this so, and if so, why?

I think that there are certain professions which attract the conservative — the army, the services generally, the police, the law — and the consequence is that the people who get to the top tend to belong to nature's conservatives rather than otherwise.

Every now and again, you get somebody with ideas of radical reform, but I think that the men at the top of the law, at the top of the judiciary, or the top of the professions — the bar and the solicitors — are, by nature, people who tend to think that what they have served all their lives ought to be good enough for the young fellows who come along after them.

NOTES ON THE UNSAFE GROUND

When is it unsafe to allow the jury an opportunity to convict? When it is unsafe, a jury having convicted, to allow a conviction to stand?

Obviously, the first of those questions has to be decided by the trial judge and the latter by the Court of Appeal. But is the standard in each case the same?

This article is directed to the above issues. It is **not** concerned with those cases where the Judge has misdirected the jury, or to cases where evidence has been wrongly admitted or wrongly excluded. It is concerned only with the situation where there is evidence upon which a jury **could** convict, for example, a rape case where it seems impossible to give any credence at all to the evidence of the prosecutrix but where, if her evidence is believed, a jury could convict. If the trial Judge has made such an assessment of the prosecutrix, should he take the case away from the jury, and if he doesn't and the jury convict, should the Court of Criminal Appeal quash the conviction? In **McGibbony's Case**, discussed below, the Judge formed that view, refused to take the case away, the jury convicted and the Court of Criminal Appeal dismissed an appeal though it said "We can understand the surprise that the learned trial Judge experienced at the verdict."

Section 568 of the Crimes Act provides that the Full Court shall allow the appeal "if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence ... or that on any ground there was a miscarriage of justice."

This section is in the same terms, for present purposes, as Section 4 of the Criminal Appeal Act 1907 of the United Kingdom – see per Barwick C.J. in **Ratten** (1974) 48 A.L.J.R. 380 at 381. However, in 1966, the provisions relating to Criminal Appeals were changed in England, and the new provision is now contained in Section 2 of the Criminal Appeal Act, 1968. The new section provides that the Court shall allow an appeal "if they think – (a) that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory."

This question of making "unsafe" submission was specifically dealt with by the Court of Appeal in **R. v Mansfield** (1977) 1 W.L.R. 1102 at 1105; (1977) 65 Cr. App. R. 276 at 281. (Similar facts, arson at hotels, hotel employee). The Court pointed out that, up to the sixties, it had been the practice to alow counsel to make a no case submission "on the basis that there was no evidence upon which, if uncontradicted, a reasonable jury could convict" and that it was understandable why the submission "took that form because under the Criminal Appeal Act 1907, if there was evidence upon which a reasonable jury could convict, the Court of Criminal Appeal would not interfere to quash the confiction." However in 1966 the basis of allowing an appeal was changed (see now Criminal Appeal Act 1968 s.2) and that since then –

> "The Court was no longer to be concerned with the problem whether there was evidence upon which a reasonable jury could convict but with the question whether the verdict was unsafe or unsatisfactory."

The Court noted that: –

> "about the time when the change came into existence, namely 1966, the practice began at the Bar of inviting the Judge at the end of the prosecution's case, to say that on the prosecution's evidence it would be unsafe for the jury to convict and accordingly the Judge ought to withdraw the case from the jury."

The Court of Appeal's conclusion was expressed as follows –

> "Unfortunately since this practice started in the criminal courts there has, it seems, been a tendency for some Judges to take the view that if they think that the main witnesses for prosecution are not telling the truth then that by itself justifies them in withdrawing the case from the jury. The Lord Chief Justice in his judgement in **Barker**, 65 Cr.App.R.287, pointed out that this was wrong and he did so in the following passage (p.288): 'It cannot be too clearly stated that the Judge's obligation to stop the case is an obligation which is concerned primarily with those cases where the necessary minimum evidence to establish the facts of the crime has not been called. It is not the Judge's job to weigh the evidence, to decide who is telling the truth, and to stop the case merely because he thinks the witness is lying. To do so is to usurp the function of the jury and would have been quite wrong in the present case.'
>
> Mr. Cockburn tells us, and of course we accept it, that he was not going to suggest to the learned Judge that some of the witnesses were lying and therefore their evidence was unreliable. That would have been a matter solely for the jury. Mr. Cockburn intended to submit to the Judge that some of the evidence was so conflicting as to be unreliable and therefore, if the jury did rely upon it, the verdict would be unsafe. In our judgement, he was entitled to make that submission to the Judge."

In **R. v. McGibbony** (1956) V.L.R. 424 the Full Court (Herring C.J., Hudson and Monahan J.J.) dealt with an appeal against conviction on the ground, principally, that the verdict was unreasonable. The appellant had been convicted of incest with his stepdaughter. The evidence of the prosecutrix was in many ways unsatisfactory. The Judge refused to withdraw the case from the jury or to advise the jury against convicting. In his report the Judge said that "he was surprised at the verdict; that in his opinion it was impossible to give any credence at all to the evidence of the prosecutrix" (p426). The Court in the course of its joint judgement said (p426):

> "In our opinion the test to be applied in determining this ground of attack on the verdict is whether the applicant has satisfied the Court that no reasonable jury, properly directed, could have found him guilty on the evidence before it, had it applied itself to its task in a proper manner making in his favour the presumption of innocence to which he is entitled and bearing in mind that it is necessary that the charge be proved beyond reasonable doubt."

Although that formulation appears to amount almost to a "no case" test, it obviously was not intended to be so construed, since it was preceded by the statement that "It was not and could not be contended that there was no evidence to support the verdict."

At p. 428 the Court said –

> "If an appeal were open in every case in which a jury has convicted on evidence which, though undoubtedly sufficient in law, apears to a Court of Appeal to be unsatisfactory because of its improbability or because of matters affecting the credibility of the witnesses who have given it, this would amount to un unwarranted usurping of the functions of the jury by the Court of Appeal. In this connection it is well established that though the dissatisfaction of the trial Judge with the verdict is an important factor to be taken into consideration when determining whether the verdict is one that could reasonably have arrived at, this in itself is insufficient to justify interference by the Court of Appeal."

On the same page the Court went on to say –

> "Though on a reading of the evidence of the prosecutrix we can understand the surprise that the learned trial Judge experienced at the verdict, we are unable to say that it is one that no reasonable jury could have arrived at."

The appeal was dismissed.

McGibbony's Case was applied by Barwick C.J. in **Driscoll** (1977) 51 A.L.J.R. 731 at 735. **McGibbony's Case** was considered by the High Court in **Raspor** (1958) 99 C.L.R. 346 and the High Court cautioned against

a narrow reading of the judgment in **McGibbony** and pointed out that the Full Court had power to set aside a conviction not only where the conviction was against the evidence, but also when it was against the weight of the evidence.

In **Raspor's Case** the trial Judge advised the jury to acquit because of aspects of the identification evidence upon which the Crown case depended. The jury rejected that advice and convicted the accused. Appeals to the Full Court and the High Court both failed.

The Full Court (Young C.J., Gillard and McGarvie JJ.) delivered a joint judgment in **Fenner** (29/6/77). The Court said (transcript p16) –

> "It is established that in considering whether to direct an acquittal it is not enough that there is evidence to support a tenuous case against an accused person. If the Judge considers it unsafe or unsatisfactory to allow the case to go to the jury he should direct an acquittal. **R. v. Falconer-Atlee** (1973) 58 Cr. App.R. 348 at 357; **R. v. Parker** (1912 V.L.R. 152 at 160. If a Court of Criminal Appeal considers that upon the evidence a conviction is unsafe or unsatisfactory it may set it aside: **Ratten v. The Queen** (1974) 131 C.L.R. 510 at 516; **Ive v. The Queen** (Court of Criminal Appeal, 19/5/76).
> It will be noted that in dealing with the functions of both the trial Judge and the Court of Appeal, the Court used the words "unsafe or unsatisfactory." Those words do not appear in Section 568 of the Crimes Act, but since 1966, they have appeared in the English provision. The effect of the alteration to the English provision is dealt with in **Mansfield** (above) and also by Barwick C.J. in **Hayes** (1973) 47 A.L.J.R. 603 and in **Ratten** (1974) 48 A.L.J.R. 380 at 381-2. In the former case, the Chief Justice used the expression (in relation to the Australian Legislation) of "dangerous in the administration of justice" and in the latter case "dangerous or unsafe in the administration of the criminal law."

In **R. v. Falconer-Atlee** (1973) 58 Cr. App. R. 348 the Court of Criminal Appeal said at p.357:

> "If the Judge thinks that the case is tenuous, then, even though there is some evidence against the accused person, the judge, if he thinks it would be unsafe or unsatisfactory to allow the case to go to the jury even with a proper direction, should take upon himself the responsibility of stopping it then and there. If the Judge is not prepared to stop the case on his own responsibility it is wrong for him to try and cast the responsibility of stopping it on the jury."

The case of **Ive** (19/5/76, unreported) was concerned with an appeal against conviction of a sergeant of police on a charge of storebreaking. He had been found in the store which had been broken into and his defence was that he was investigated a suspected offence. He asserted that he went to the store after hearing the alarm sound. Other witnesses asserted that the alarm had not sounded. It was a common ground that he had rung the police to report the breaking. The Crown's contention was that he had phoned the police in an effort to cover himself when he was discovered in the premises by a watchman. In his dissenting judgement, Starke J. said –

> "There can I think be no doubt that there was sufficient evidence to support a conviction. Once the jury excluded the applicant's evidence beyond reasonable doubt it was common ground that the applicant was inside a store which had been broken into without an explanation which might be reasonably true. The jury heard the applicant's evidence and observed his demeanour. They disbelieved him. It has often been said that this Court cannot usurp the function of a jury. The Court has not the advantage of seeing and hearing the witness."

Early in his judgment, he had spoken of "the breadth of the approach which the Court makes to a question of a miscarriage" after citing passages from the judgments of the High Court in **Davies & Cody v. R.** (1937) 57 C.L.R. 170 at 180 and 182 and **Ratten v. R.** 48 A.L.J.R. 380 at 382 (set out below) and after referring to **Raspor, Plomp, Mawson, McGill** and the two Victorian decisions in **Ratten** in 1971 and 1974.

Newton J. was of the view that the appeal in **Ive** should be allowed. He said, at p.15, that "in my opinion it is a nice question of whether upon the evidence at the trial it was open to the jury to be satisfied beyond reasonable doubt as to the guilt of the applicant." However he said it was unnecessary to decide that point because on the assumption that there was evidence on which it was open to the jury to be so satisfied –

> "I consider that this is a case where the verdict of guilty was unsafe and unsatisfying. In my opinion there is a substantial possibility that the jury was mistaken in its conclusions. I believe that there is such a doubt as to the applicant's guilt that the verdict should not be allowed to stand. If these views be right, then there is no doubt that the powers given to this Court by Section 568 of the Crimes Act 1958 enable it to quash the applicant's conviction: see, for example **Davies & Cody v. R.**, 57 C.L.R. 170 esp. at p.180; **Plomp v. R** (1963) 110 C.L.R. 234 at p.244 per Dixon C.J. and **Ratten v. R**, 48 A.L.J.R. 380 at p.382 per Barwick C.J."

It will be noted that, although they disagreed as to the disposition of the instant appeal, both Starke J. and Newton J. referred to **Plomp** and to the very same passages in **Davies & Cody** and **Ratten**. Fullager J. found himself "completely in agreement with the reasons and conclusions of Newton J."

A conviction of attempted buggery with violence and without consent gave rise to the judgment of the Court of Criminal Appeal in **R. V. Gurel** (28/7/78 unreported). The prosecutrix was the step-daughter of the appellant and had failed on several occasions to avail herself of an opportunity to complain, and in other ways had acted in a manner consistent with consent. The main judgment was delivered by Starke, J., and Murphy and Fullagar J.J. concurred in that judgment. At p.8 of his judgment Starke J. said that Counsel for the applicant had contended that "the evidence was of such a nature that the verdict was unsafe and unsatisfactory and that it should be set aside" and had based his submission on various factual matters.

His Honour said (at p.10) –

> "I must say for my part I find all the matters that Mr. McDermott relies on as being odd, to say the least, but one must pause at this point to observe what the functions of this Court are. This Court does not go into the evidence and return a verdict for itself, and it will only act on the basis that a verdict is unsafe and unsatisfactory where the circumstances are very strong. We have not had, as the jury had, the inestimable advantage of hearing the prosecutrix give her evidence and watching her demeanour. They heard her give her explanation for these things, which would otherwise be odd. In these circumstances, for us to supplant the verdict of the jury and without their advantages to say in the circumstances of the case there should have been a reasonable dout, is I think not open to this Court, and despite the earnest argument of Mr. McDermott I am of the opinion that these ground cannot succeed."

No reference was made to any authorities and, in particular, the judgment in **Ive** was not referred to, nor was **Watson** (below).

In **Ratten v. R.** (1974) 48 A.L.J.R. 380 at 382 Barwick C.J. said –

> "Miscarriage is not defined in the legislation but its significance is fairly marked out in the decided cases. There is miscarriage if... the Court is of opinion there exists such a doubt as to his guilt that the verdict of guilty should not be allowed to stand. It is the reasonable doubt in the mind of the Court which is the operative factor. It is of no practical consequence whether this is expressed as a doubt entertained by the Court itself or as a doubt which the Court decides any reasonable jury ought to entertain. If the Court has a doubt a reasonable jury should be of a like mind. But I see no need for any circumlocution; as I have said it is the doubt in the Court's mind upon its review and assessment of the evidence which is the operative consideration."

In **Ratten's Case** McTiernan, Stephen and Jacobs JJ. concurred with the reasoning and conclusion of Barwick C.J.

Although Starke J. was of opinion that the conviction should not be set aside in either **Ive** or **Gurel** he decided that in the circumstances of **Watson** (Full Court 3/3/1978) unreported) the conviction in that case should be set aside. The case of **Watson** was one in which an allegation of pack rape was made against the applicant and three

other men. All the accused were acquitted of rape and of indecent assault except the applicant who was convicted of indecent assault. The conviction related to an act of fellatio which the applicant had admitted in his unsworn statement and had asserted by be with consent.

In his judgement Starke J. referred to the same authorities as those to which he had referred to in **Ive**. His Honour also quoted the passage from the judgement of Newton J., in **Ive** (above) and said "I turn then to applying those principles, which I think are beyond dispute, to the facts of this case."

As indicated above, Starke J. decided that the conviction be set aside. Anderson J. was with him and Harris J., although expressing some doubt, dissented.

A joint judgment of the Court (Winneke C.J. and Adam and Crockett JJ.) was delivered in **R. v. Pixton, Richardson, Rowlands & Hill** (unreported 10/4/1973). The accused were charged with abduction and of other counts of rape. The Court said –

> "We have reached the conclusion... that it would be unsafe and unsatisfactory to allow these verdicts to stand. In our view it is a case which calls for the exercise by the Court of its general supervisory jurisdiction on principles which were stated in the decision of this Court in **R. v. Wilkes and Briant** (1965) V.R. 475 and particularly at p.477." (p.2)

(The decision in **Wilkes and Briant** is not relevant to these notes since, in that case, the conviction was set aside because of errors on the part of the trial Judge and not because the Court took a different view of the evidence to that taken by the jury).

After setting out the facts of the case, the Court went on to say (at p.10) –

> "This was not a case, we think, in which it can be said that there was no evidence by which the verdicts returned by the jury could be supported. An application was made to the learned Judge at the trial to take the case away from the jury on that ground, but he decided, and we think rightly, that it was proper to allow it to go to the jury. Of course the function of the trial Judge in that regard is very different from the function that falls to the responsibility of the Court of Appeal when it is considering, once verdicts have been returned, whether it would be safe and unsatisfactory to allow them to stand."

What, then are the answers to the questions posed at the beginning of these notes?

It would seem that the trial Judge should uphold an "unsafe" submission if he "considers it unsafe or unsatisfactory" and that the evidence supports a "tenuous case" – **Fenner** and **Falconer-Atlee**. It seems to be implicit in **Mansfield** that the criterion to be applied by the trial Judge is the same as that to be applied by a Court of Appeal, but in **Pixton & Ors.**, the two functions were said to be "very different". If the functions are the same, should the judge apply the test stated in **Ratten** – "It is the reasonable doubt in the mind of the Court which is the operative factor... If the court has a doubt, a reasonable jury should be of a like mind." To go that far would seem to amount to a gross trespass into the jury's "paddock".

In relation to a Court of Appeal, it would seem that, although the words "unsafe or unsatisfactory" appear in English legislation but not in ours, the Court should allow the appeal if it considers that the conviction is "unsafe or unsatisying" (**Ive** and **Watson**) or that it is "dangerous in the administration of justice" (**Hayes**) or "dangerous or unsafe in the administration of the criminal law" (**Ratten**) or if there is a "reasonable doubt in the mind of the Court" (**Ratten**).

Hassett

"Psst. Ya want a purple gutser?"

Flossie was uncertain whether Whitewig was making some improper proposal, or doing a bit of drug trafficking on the side. In either event the prospect was interesting.

"Maybe", she ventured archly, "how much for?"

"I'll swap you a Perceval & Gordon for an Ive and a Watson."

The Waistcoat snorted his approval "Back in the sixties we didn't have to worry about this sort of thing. When a chap wanted to discover the law he could expect to find it in the official reports. Don't stoop to it m'dear."

"But, I have to" she insisted. "Yesterday the prosecutor ran his whole case on unreported decisions. He told me that they have drawers full of them over at Nubrick House."

"It's a great idea" ventured Whitewig, "they're putting together a set in the library. I'll bet there aren't any at the Law Institute. It's not a bad way of keeping the bounders out."

"I think it's all Archie's fault. A civil chap like him doesn't want to muddy up the nice green volumes with murders and rapes. And they're getting skinnier and skinnier so that he can get more reports in his room without buying more shelves."

"Not so", pronounced the Waistcoat, "it's all part of a deal he's got going with Butterworths. They keep the price the same but publish fewer pages on thicker paper. It's all a conspiracy."

"Maybe", wondered Flossie "all the law has been decided." Perhaps the judges can't think of any more."

BYRNE & ROSS D.D.

IN XANADU . . .

The mediaeval architect adopted a cruciform plan for his cathedrals. The plan prepared for the Victorian Bar by Lumsden and Ashton Pty. Ltd. is in the form of a plus. Or is it a multiplier?

The sketch on the front cover shows the architectural concept of the building which the Bar may erect on the ABC site facing Lonsdale Street immediately behind the County Court. Technical details are discussed in the Architect's comments (see opposite).

A Bar Council committee chaired by O'Callaghan Q.C. has been working on the economic aspects of the project. Present thinking is that building costs have now become relatively stable, enabling a realistic projection of costing to be undertaken. The Committee will present detailed figures to the General Meeting of the Bar which is to be convened to consider the project. It is hoped that the project can be financed by letting rooms in the new building at a rate per square metre comparable to that charged to tenants in Owen Dixon Chambers.

The new proposal is an exciting one for the Bar. It comes at a time when the profession as a whole is looking to its role in society. The Bar in particular is emerging from a period when it saw itself as under threat. The new building therefore represents a tangible expression of the Bar's confidence in its future.

Existing facilities in Owen Dixon Chambers are extended to their uttermost. The common room, particularly the coffee lounge, is scarcely adequate to meet present demands. The library is unable to cope with its present collection. There is no space available for any extension for the present clerks. The lifts are a disgrace. They move from floor to floor in convoy, like trams in Bourke Street. The only improvement in these facilities brought about by the recent works is the provision of a reading lamp and an electric shaver power socket for those who are presumably expected to spend the weekend jammed between the tenth and eleventh floors. Can anyone remember the last time the corridors were painted?

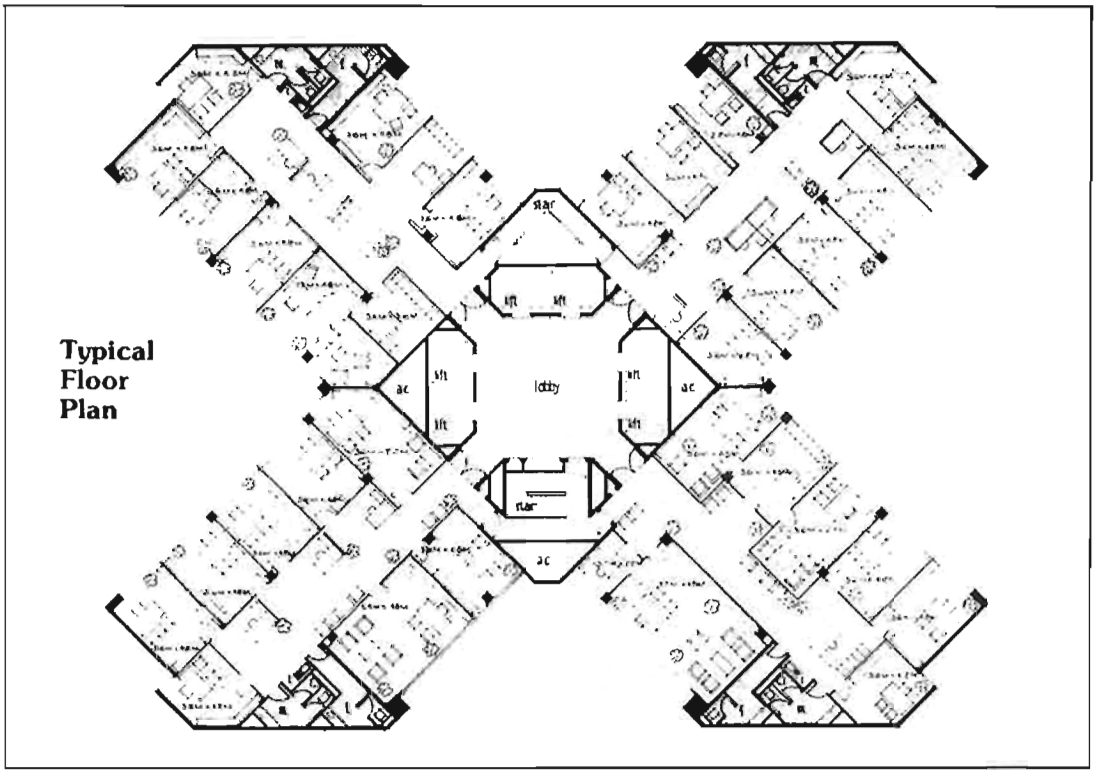
The new building can remedy these defects. Not only will it provide better facilities for tenants, but it will enable Barristers Chambers Ltd. to clear parts of Owen Dixon Chambers so as to permit the performance of major maintenance works. The provision of pedestrian walkways between it and Owen Dixon Chambers on the one hand and with the County Court on the other will avoid the sense of isolation that attends the establishment of a new building remote from the centre of the Bar.

It may be that, with some careful planning, the Bar will be able to provide entirely new facilities for its members. The prospect is an arcade of shops on the lower floors, even a tavern for those who have settled by 11.30. And why not a swimming pool, gymnasium and squash courts? The opportunity presents itself to look again at the unique position of the Bar as a community of interest more closely knit than any other profession.

Doubtless at the coming General Meeting there will be heard the voices of those opposing the new venture. Almost exactly twenty years ago the Bar was agonising over the decision to move to Owen Dixon Chambers. The majority of the tenants of Selborne Chambers were then opposed the proposal. Bradshaw in his "Selborne Chambers Memories" offers this as the reason for opposition:

> "Barristers being what they are, the reasons for oppostion extended from a desire to stay where one was for the rest of one's life, on the one hand, to strong support for the new building but object to the price offered (for the shares in Selborne Chambers Ltd.), the way the matter was being handled or the lack of security should the new building fail to be completed on time, on the other" (pp. 94-5).

The present proposal does not involve the abandonment of our present home; it offers perhaps our last opportunity to extend it.



THE ARCHITECTS REPORT

"The site behind Owen Dixon Chambers is particularly well suited to the construction of Barristers Chambers both in its location and the floor area it is allowed to carry under the Council's plot ratio system.

"The form we have chosen for the new building is the cruciform plan, similar to that which was developed for the original Northrock submission for the site across Lonsdale Street, and is a plan form which we believe is particularly well suited to barristers' accommodation. It allows each room to have window space over a variety of internal plan arrangements with the need for long distribution corridors.

"Each wing can be partitioned to produce from six to nine barristers' rooms with secretarial and client waiting facilities being either centrally or privately located. The site allows for a total accommodation of approximately 420 rooms over 15 typical floors.

"A high level soundproofing will be obtained between each room through the selection of suitable finishing materials and the design of partition and air conditioning will also be zoned to allow out-of-hours use on each floor and in each wing to minimize the operating costs associated with the type of facility.

"All floors will, however, be designed to accommodate normal office functions so that space not immediately required for chambers will be suitable for rented premises.

"The centre core from which each wing is serviced has its focus in a large symmetrical lobby with six lifts for fast efficient access both to the ground and between floors. Included in the internal access arrangements is an elevated link to Owen Dixon Chambers with a similar arrangement being investigated to the County Court Building.

"Externally this building will reflect its unusual plan form in the strong angular inter-relationship of solid and window walls and will have an identity seldom achieved in the business district."

SOLICITORS TO CONSIDER BARRISTERS' FEES

The following letter has been sent to all members of the Law Institute.

Law
Institute
of Victoria

Your ref.

Telephone enquiries:

When replying please quote:

191 Queen Street, Melbourne 3000, Victoria A D E DX 350 Telephone: (03) 602 3922

20 September 1979

Dear Member,

Extraordinary General Meeting
to Consider Barristers' Fees

Pursuant to the resolution passed at the Annual General Meeting of the Law Institute of Victoria on 30 April 1979 an EXTRAORDINARY GENERAL MEETING of members will be held on the 18TH FLOOR, 191 QUEEN STREET, MELBOURNE on 24 OCTOBER 1979 AT 8.00 P.M. to consider the following business:-

A request by the Council pursuant to By-law 48(a) for the following recommendations:-

. That the members of the Institute recommend to Council that the Council adopt as the Institute's policy the proposition that comprehensive scales of barristers' fees in all jurisdictions should be fixed by the same bodies as are now responsible for fixing solicitors' scales of costs. (25/0/0)

. That the members of the Institute recommend to Council that the Council adopt as the Institute's policy the proposition that the authorities that are now responsible for fixing lawyers' costs should be replaced by a single authority. (25/0/0)

. That the members of the Institute recommend to Council that the Council adopt as the Institute's policy the proposition that unless there is an agreement in writing to the contrary barristers should not be entitled to recover fees in excess of the amount allowed on taxation. (25/0/0)

. That the members of the Institute recommend to Council that the Council adopt as the Institute's policy the proposition that any personal liability of a solicitor to pay barristers' fees should be abolished. (18/7/0)

. That the members of the Institute recommend to Council that the Council adopt as the Institute's policy the proposition that solicitors will continue to collect barristers' fees. (19/4/2)

. That this meeting recommends to the Council that the Council should take such action as is necessary to advance the policies as adopted. (25/0/0)

(The numbers in brackets indicate the votes of Council members on the above recommendations: For, Against, Abstained).

BACKGROUND

The above matters are submitted by the Council of the Law Institute of Victoria for the consideration of members having regard to the resolution passed at the Annual General Meeting of the Law Institute of Victoria on the 30th day of April 1979 which was as follows:-

> "That within six months the Council submit to a general meeting of the Institute a proposal for the decision of members covering:-
>
> (a) the appropriate method for the collection of barristers' fees;
>
> (b) the responsibility for payment of barristers' fees;
>
> (c) the method for fixing barristers' fees and whether there should be any statutory control and adjudication of barristers' fees;
>
> (d) any amendment felt necessary to the Legal Profession Practice Act 1958 and the Supreme Court Act 1978."

As a result of the resolution an Ad Hoc Committee of the Institute, formed for the specific purpose of informing the Council in relation to the matters raised in that resolution, has taken the following steps:-

1. Members were invited to forward submissions to the Institute in relation to the terms of the motion in an insertion in the August issue of the Law Institute Journal.

2. Letters were written to all suburban and country associations requesting them to obtain the views of their members.

3. A questionnaire was circulated to 200 city, suburban and country practitioners on a random sample basis requesting their views as to a number of specific questions. The results (approximately 60% returned the questionnaire) were published in the September issue of the Law Institute Journal.

4. Members of the Institute attended meetings arranged by law associations to discuss this matter and the views of members at those meetings were canvassed.

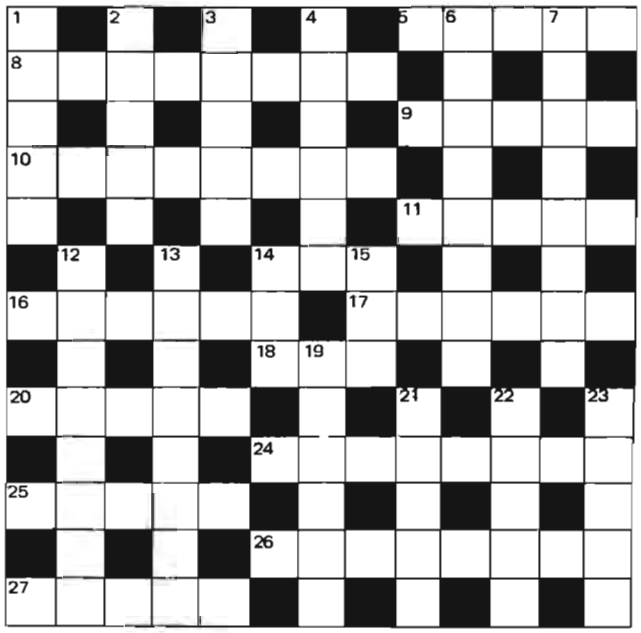
5. The views of members in relation to the matters raised in the resolution were canvassed generally.

Yours faithfully,

(Gordon Lewis)
EXECUTIVE DIRECTOR

"This time I had a good common lawyer sitting with me . . .and a chancery lawyer who was endowed with unusual common sense."
Denning: Discipline of Law, p.27.

CAPTAIN'S CRYPTIC No. 29



ACROSS:

5. Helps to commit a battery (5)
8. Do this and be caught by Garrotters Act 1863. (7)
9. Step edge (5)
10 Cricket items not needing special attention (8)
11. A shellfish becomes peaceable (5)
14. Possesses burnt remains (3)
16. Chapter heading (6)
17. Downright (6)
18. Bit of a small bird (3)
20. Ancient British and Irish alphabet (6)
24. Perpetual right of presentation to 26 across (8)
25. Reasonable standard of proof in crimes (5)
26. Ecclesiastical living (8)
27. Property available for payment of debts (5)

DOWN:

1. Charge with a public burden (5)
2. Lost modern (5)
3. Woo at the Judges' place (5)
4. Emphasise the pressure (6)
6. Misdemeanour of habitually quarrelling (8)
7. The subject of tenure (8)
12. Underground prison cells (8)
13. Opening words to 14 down (8)
14. Parliament's intention (3)
15. Homberg and pork pie have common genus (3)
19. In fact, in truth and in reality (6)
21. You may not, say Commandments 9 & 10 (5)
22. Savoury meat jelly (5)
23. Go in (5)

Spring 1979

MISLEADING CASE NOTE No. 7

The County Court Judges v. State of Victoria (High Court)

Even J. read the following judgement:

This is an appeal from a decision of His Honour Mr. Justice Unstable in the Conciliation and Perpetration Commission. Before considering the substance of that appeal, it is convenient to set out the history of this matter.

Earlier this year, the Parliament of the Respondent passed an Act entitled the **Judicial Officers (County Court) Redeployment and Retirement Act**, 1979 which received from that former Judge of another court, the Royal Assent with what seems to me to be unusual haste. That Act provided the Government of the day with the power to appoint Judges of the County Court to other positions, including Royal Commissions and various boards, and to compel their retirement at the age of 72. For reasons best known to themselves, their Honours took that Act as an affront to their independence and dignity, and threatened retaliation in the form of a Work-to-Rules campaign. They promised that the public would not suffer. Indeed, their spokesman, Judge Freewheeling was heard to say "if we bring them in in the morning, we'll put them down again in the afternoon". Despite these and other bland assertions from the bench, there began what could, on one view, only be described as a deliberate campaign of industrial disruption.

Criminal trials were delayed and adjourned and delayed again. Civil actions suffered a curious process called "listing", designed to ensure that all witnesses came to court at least once, not to be heard, but to have their case adjourned for two or three months; with no guarantee that it would even then be reached. It is best not to dwell too long upon the system called "Causes Reserve", or to consider the demise of the summons for final judgement under the onslaught of such pronouncements as "We all know these Defendants lie, but if they are prepared to perjure themselves on affidavit who am I to refuse to give them leave to defend?" I find it difficult to accept that this melange occurred otherwise than through the malevolence of the appellants.

This new-found spirit of militancy spread to the Amalgamated Barristers Metal Workers and Shipwrights Union, which was formed shortly after the transfer of Mr. Ken Stone from the Trades Hall Council to the Barristers Disciplinary Tribunal, and a series of boycotts of particular judges began. It was suggested before me that certain cliques of counsel were conspiring to refuse briefs in particular civil cases, except at their new and unilaterally declared higher fees. I cannot accept that any Counsel would ever do such a thing.

The State Government announced the introduction of stand-down procedures, and the Judges stepped up their disruption by the introduction of a multiple-listing system, whereby each counsel could select the Judge of his choice. The West Australian Government promised to introduce an Act making illegal all court hearings without prior police approval, with extra-territorial effect. And then the Judges ceased their Work-to-Rules campaign, which had in fact increased the number of cases they were hearing.

The solution found was the submission of the dispute to the Commission, and it was heard as a work-value case by Mr. Justice Unstable. Unfortunately for the administration of the law in Victoria, His Honour found that the work-value of the Appellants was such that most of the Judges were redundant. It was put to me that the number of County Court cases had decreased in the civil jurisdiction, this being caused by the increased jurisdiction of the Magistrate's Court; and in crime by the "don't go for trial or you'll only get a heavier sentence" camaraderie of police officers and the increasing tendency of robbers and rapists to murder their victims. Hence the County Court Judge has no or no sufficient work to occupy himself. His Honour therefore ordered that the pay of each of the Appellants be reduced accordingly. He fixed a figure at one-third of their previous annual income. It is from that decision that the Appellants appeal to this Court.

It was put to me by the Respondent that the Appellants work in unwarranted splendour, and that their incomes far exceed their responsibilities. However, I am not persuaded by that argument. Indeed, I cannot see anything wrong with judges working in a large white building resembling the Taj Mahal, and being paid

for work that is now largely performed by other courts. The faults in the County Court clearly lie at the door of the Respondent, not the Appellants, for it is the Respondent that has by its parsimony and short-sightedness reduced the criminal and civil jurisdictions of that court to a mere shade of its former glory.

In my view, the only way in which the Respondent can be made to understand the waste of talent and resources which it now indulges, is to treble the original incomes of the Appellants, to recompense them for the archaic system with which they battle daily to administer justice in Victoria.

This appeal should be allowed accordingly.

Furphy J: This case has very little to do with the United Nations Declarations of Human Rights, and so I will express no view of it.

Pubwick C.J.: I agree
Appeal allowed.

Gunst

SHAW Q.C.'s SHEEP

"Should Shaw sell shorn Sheep?" said Sharp shrewdly scanning share scrip. "Stock seems such sound security".
"Shorn sheep should surely secure splendid sums sending September salary skyhigh," said Shaw slyly sipping schnapps. "Shorthorn shoppers springtime spending surges sharply" suggested Spry solicitously. "Seems sound solution."
So saying Shaw strode showards, shoes shining.

SPORTING NEWS

Stevenson's efforts in walking from the City to various suburban Magistrate's Courts has become legendary. His historic walk to Ringwood Court, however, paled into insignificance when compared with his recent trek to Dandenong Magistrate's Court during one of our transport strikes. He set off about 4.00 a.m. and six hours and two pairs of "Hush Puppies" later he wandered up to the Clerk. He wishes to quash one rumour that he arrived on a "dies non juridicus" although he may be forced to concede that he requested his case be stood down for some time whilst he regained his breath.

● ● ●

Numerous members of the Bar are in training for the forthcoming Big M Marathon. Berkeley has been seen running every day and supplementing his running by climbing 5,000 ft. Mt. Torbreck near his 600 acre farm at Thornton. It should also be a mere formality for Castan and Faris to complete the 26 mile run, although there are doubts about Crossley who failed to complete the course at his last attempt. There are also some doubts about Vincent being able to participate in this year's event due to a bad case of sunburn occasioned when he was in Alice Springs for a recent criminal trial. He apparently set out from Alice Springs and headed towards Stanley Chasm upon the clear understanding that Dee would drive out at an arranged time to pick him up at the end of Vincent's 26 mile training run. Dee, however, had apparently become side-tracked by some alternative source of amusement. Although he maintains that he eventually picked up Vincent beside a large rock, there are suggestions taht the Flying Doctor had been summoned to render emergency first aid.

● ● ●

Merralls and Lennon have been difficult to pin down to reveal any information about their hope for the Spring Carnival. Their three year old colt, Watney, showed good form earlier in the year before being injured. This horse, appropriately named in view of the fact that it is by Beer Street, is one to watch and appears a likely prospect to take out a race in the city.

● ● ●

Rattray was recently selected as a member of the crew of one of five boats which participated in the World Championship Etchells 22 Class at Toronto. The boat is a three man fibreglass racing boat of approximately 30 feet in length. Following a warm up series in New Port Beach in California, he then moved on to Las Vegas where he battled with the poker machines instead of the elements. He commenced his first encounter with the gambling tables at about 6.00 p.m. and left at 9.00 a.m. and proceeded to wander the street with a "Rusty Nail" and an extra $500.00. The fact that drinks were free certainly assisted his endeavours to break the bank. His attempts at the World Championships were not as successful although he asserts that the wind conditions were not in his favour.

● ● ●

Some thought is being given to the Bar staging a revue with the accent on music. Brustman is apparently a very good pianist and in bygone days used to supplement his income by tickling the ivories around local night spots as part of a small group. We have it on good authority that Perkins is a good trumpet player and would make an ideal match for Walsh, whose playing of the saxophone has attracted world interest. Dowling could assist Brustman on the piano with the melody being supplied by Sundberg on the bagpipes. To round off the night it is thought that Chris Larkins and his group could be featured, although it has been suggested that they would make the "Sex Pistols" look like the Vienna Boys Choir.

● ● ●

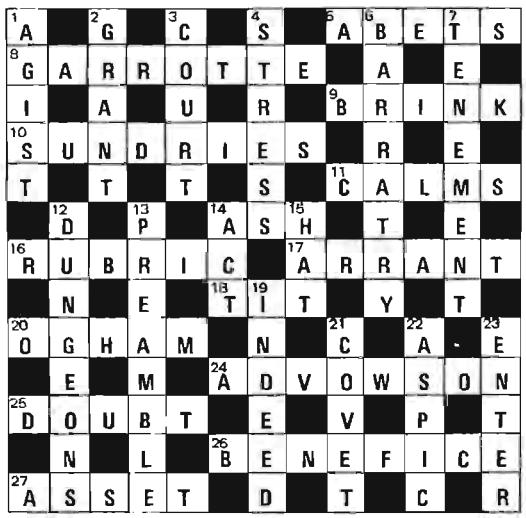
Dean Ross (no relation to Bruce, David, Les, or Noel) has played several games this year for St. Kilda and has made use of his six feet six inches height. Although not a household word at this stage he tells me that one of his clients approached him at Court and could remember his playing on the previous Saturday. He hopes to bring to an end an unnerving trend in his football career. He has been a member of seven different clubs in seven years ranging from amateur to Victorian Football Association teams and is most anxious to be able to play in the red, black and white colours again next year subject, of course, to the imprimatur of new president Fox.

● ● ●

Several members of the Bar have recently been seen with tennis racquets preparing in earnest for the annual match against the Law Institute. Kingsley Davis, due to his succinctness in Court, has had plenty of time to practice and is rivalled in enthusiasm only by Flatman and Fookes. We have it on good authority that Flatman has been forced to give away winter pennant due to his involvement in a French Cordon Bleu cooking course. Fookes' attempt to combine both tennis and skiing in the winter time did not meet with success and it is reported that his sole attempt at skiing resulted in his being horizontal more often than vertical. Blackburn, however, has been showing his customary speed down the slopes and his quick movements from court to court have, no doubt, stood him in good stead in his sporting pursuits which are less risky than those encountered during work hours. Michael Monester, although a member of the Mt. Buller Search and Rescue Team, has had a fairly quiet year in view of the undoubted class of such skiers as Hampel, Bingeman and Redlich.

FOUR EYES

SOLUTION TO CAPTAIN'S CRYPTIC No. 29



VERBATIM

I like to read "The Age". That's how I find out what the Bar Council is doing.

Strahan, 18 July 1979

● ● ●

Dickson (prosecuting coram Brooking J.):

"Your Honour, I would like to ask Mr. Healey some questions. He's just taken off from the box like a monk about to break his vow.

R. v Caruana & Buttigieg
15 August 1979

● ● ●

Anxious father, supporting his son's application for leave to apply for his licence following an 0.05 conviction:

"I think he's had a very statutory lesson from being convicted of 0.05."

Heidelberg Magistrates Court
17th August 1979

● ● ●

Brown S.M. (to another applicant for a licence):

"Are you married?"

Applicant: "No, that's why my social life is so dull . . ."

ibid.

● ● ●

Counsel (at divorce trial of beautiful socialite on the ground of adultery with rather plain man):

"Did you commit adultery with the Respondent and has your association with her now ceased?"

Plain Man:

"Yes".

Counsel:

"Do you consent to pay the Petitioner's costs in the sum of $300?"

Plain Man:

"Yes, I do. And can I say this, Your Honour. It was worth every penny."

Coram Newton J., 1972.

● ● ●

"One of these days an accused will make an unsworn statement and the Court will rise as one man with cries of 'Author! Author!' "

Vincent, at lunch,
June 1979

● ● ●

Meldrum (examining a psychiatrist in the course of trial for attempted murder):

"The accused has successfully attempted suicide on two previous occasions, has he not?"

McInerney J.:

"Mr. Meldrum, you have just propelled yourself into legal immortality".

R. v Doutch, Dec. 1969

● ● ●

First Submission:

"Having regard to the evidence and the reasons for judgment, the award made by the Board is of such a character that no reasonable man could have made it".

Judge Corson:

". . . As regards the first submission, it is sufficient to say that the members of the Board are reasonable men . . ."

Karambinas v. Sentex Pty. Ltd.,
27 July 1979

● ● ●

Rape Trial cor Judge Mullaly

Wraith:

The doctor describes the external genitalia; he describes the hymen and I won't go into that. I've been through it once before.

R. v. Wilson & Ors.
Sept. 13, 1979

● ● ●

The Frankston Riot Committal cor Duggan S.M.

A policeman having given evidence that he covered a distance of some 50 yards in 30 seconds chasing youths, and in the process batonning some 6 of them to the ground:

C. Larkins:

"Are you sure it took only 30 seconds?"

Policeman:

"It was only a short time".

C. Larkins:

(in a loud aside) "Amazing how time flies when you're having fun."

SUPREME COURT OF VICTORIA
R. v. BRANAGH
FULL COURT
STARKE, CROCKETT and O'BRYAN, JJ.
20 July 1979

Counsel appearing for two accused — conflict of interest — apt to cause disparity in sentencing — Counsel's duty when appearing for more than once accused.

The Applicant aged 20 pleaded guilty to one account of armed robbery. Charged on the same count was one McPhail aged 18. McPhail also pleaded guilty. Both accused were represented by the same counsel.

The Applicant admitted eighteen prior convictions. The Applicant was the instigator of and main participant in the offence. The Applicant was called and asked questions by Counsel tending to show the Applicant's and McPhail's part in the offence.

The Applicant was sentenced to imprisonment for 5 years with a minimum of 4 years before becoming eligible for parole. McPhail was sentenced to 12 months Youth Training Centre.

Held The result of Counsel appearing for both accused may have misled the Judge, resulting in too great a disparity of sentence.

(per Crockett J.) The possibility of injustice arose from Counsel's seeking to represent two accused when there was a conflict of interest. It behoves Counsel to exercise great care.

Appeal The Applicant appeared in person.
Peter Martin for the Crown.

STARKE, J.: This is an application for leave to appeal against sentence. The applicant, who is aged twenty years, was presented in the Supreme Court at Geelong presided over by Gray, J. on 4th June, 1979, charged with one count of armed robbery. Charged on the same count with him was a young man by the name of McPhail, who at the time was aged eighteen years. Both pleaded guilty and both were represented by the same counsel. McPhail had no prior convictions from seven court appearances between 30th January, 1975, and 26th January, 1977. Most of these priors, but not all, were convictions of dishonesty. In the result, the learned Judge sentenced the applicant to five years and directed that four years be served before he became eligible for parole, and in McPhail's case he directed that he serve twelve months in a youth training centre...

When the applicant addressed us it appeared that the ground he relied on was the disparity between the sentence imposed upon McPhail and that imposed upon himself. This is very much a matter of one's sense of proportion and fairness, and very little can be said one way or the other except by way of assertion. It is true, as undoubtedly the learned Judge decided, that the applicant was the ringleader. He was the one who wanted the money. He was the one who thought of the crime. He was the one who sought out McPhail. It is clear enough, I think, that no robbery would have occurred at all if it had not been for his suggestion. However, that does not mean that a court can differentiate to too great an extent between two persons who have committed the same offence and are principals in the commission of that offence. In my judgement in this case the disparity between a sentence of twelve months in a youth training centre and five years with a minimum of four is greater than that which could be imposed while maintaining a level of justice.

I think I should add this. The learned Judge, I have a feeling, was placed in a very awkward position. This was not of his own doing at all. I said at the outset that one counsel appeared for both applicants, and it was clearly that counsel's duty, when wearing the hat of counsel for McPhail, to place as much of the blame on the applicant as he could. Then, of course, having done that his hands were really tied when it came to making a plea on behalf of the applicant. To give an example of this, counsel called the applicant in the course of the plea and asked these two questions: "And in fact did you indicate to me that you accept almost full responsibility for what took place?"

Answer, "Yes". "Particularly young McPhail's involvement in it?" Answer, "Yes".

I say this not for the purpose of criticising counsel, because that would be unfair as we have not heard from him in these proceedings, but the embarrassment, however it occurred, is clear on the face of it. The applicant himself has complained to this Court that he felt for various reasons, which I need not enumerate, that because of this approach by counsel justice was not done to him. In saying that, I am again not criticising counsel, because counsel owed a duty to McPhail as well as to the applicant. However, I mention this only for this purpose, to indicate that it may have been that His Honour, when placed in this situation, was to some extent misled, and this may have resulted in what I consider to be too great a disparity between the sentence imposed on McPhail and that imposed on the applicant.

In my view, the proper sentence in this case would be a sentence of four years' imprisonment, with three years to serve before eligibility for parole.

CROCKETT, J.: : I agree with the order proposed by the learned presiding Judge, and I do so for the reasons expressed by him. I would just add one or two observations myself. I think that this case affords a striking illustration of the need for counsel to be scrupulously careful, when accepting a brief to appear for more than one client in joint proceedings, to ensure that there is no risk of a conflict of interest's arising from such contemplated joint representation.

In the present case the material placed before the Court, and, in addition, the submissions that have been made by the applicant himself, and have left me in no doubt that there was such a conflict of interest created by counsel's joint representation, even if he himself may not have been aware of it. The applicant had conceded at the time of the plea's being made on his behalf that it was he who conceived the robbery. It may also be said that he did not contest that he was the one who played the principal part in its preparation and execution. He made a like concession to us in the course of the presentation of his application. But he did complain that what was told to the learned sentencing Judge in support of the plea for leniency being made on behalf of McPhail, to the effect that the applicant "pressured" McPhail into participating in the offence, was not correct. It may be assumed that some such instructions had been given to counsel by McPhail. Accordingly, it was clearly counsel's duty on behalf of McPhail to press that issue before the Judge. It was a point which, if accepted, would operate in minimisation of the sentence to be passed upon McPhail; but equally, if accepted, the correlative of the contention is that the same consideration must act to a degree in increasing the penalty to be imposed upon the co-accused, the present applicant.

The applicant complained before us that that particular consideration had no validity, and that, as it was in fact pressed on McPhail's behalf, it may, therefore be assumed that it played a part in producing the degree of disparity which, in fact, is to be seen in the two sentences. It is not possible to say with certainty that it did, but beyond any question in my mind, the fact is that it may very well have done so. It is quite wrong that the possibility of injustice of that nature should be allowed to take place by reason of what, on analysis, I think arises from what I have indicated I thought was the problem consisting of counsel's seeking to represent two co-accused when a conflict of interest exists. It may be that the existence of such a conflict gives some weight to the applicant's contention that he lacked confidence in his counsel, some indication of which is to be found in the transcript material before us.

In the result I think this case does indicate how much it behoves counsel to exercise great care in seeing that an embarrassment of this nature does not occur, before attempting to appear for more than one accused jointly presented with another or others.

I think that the considerations to which I have adverted, as well as those referred to by the learned presiding Judge, may well have been responsible for the disparity which I agree exists to a degree which is unacceptable and which, accordingly, requires this Court to re-sentence the applicant. As I have indicated, I agree with the proposed order upon such re-sentencing as has been suggested by the learned presiding Judge.

O'BRYAN, J.: I agree that the appeal should be allowed and with the orders proposed by the learned presiding Judge. There is nothing I wish to add.

STARKE, J.: The application is granted. The appeal is heard instanter and allowed. The sentence is quashed and a sentence of four years with a minimum of three years before being eligible for parole is imposed.

LETTERS TO THE EDITORS

Dear Sirs,

Continuing Legal Education

As chairman of, and a Bar representative on, the Leo Cussen Institute for Continuing Legal Education I have noticed that (and wondered why) the attendance of members of the Bar at C.L.E. functions has been abysmally lacking.

As an example, the Institute recently held a 6.30 p.m. seminar on "Expert Witnesses" at the Windsor Hotel, chaired by Sir Richard Eggleston. The speakers included Sir Esler Barber, E.D. Lloyd, Q.C., Geoff Masel and Ian McVey (surgeon).

About 75 persons attended of which 9 were members of the Bar.

They were outnumbered 3 to 1 by both solicitors and medical practitioners, yet the topic was not one thought to be of no interest to members of the Bar. True we were unable to obtain the services of Horace Rumpole as a speaker, but at least the seminar was not held on a Wednesday night!

Several possible explanations occur to one for the dismal attendance of members of the Bar Any who bothers to read this letter might ask himself which (if any) of the following explanations applies to him:

- ☐ Can't afford the registration fee of $30 (or whatever).
- ☐ So continually keeping up to date with all facets of my practice that I don't need further education.
- ☐ So busy that I can't spare the time to attend.
- ☐ Don't wish to appear to be "attorney-hugging" by attending programmes at which solicitors will be present.
- ☐ My attendance might be construed as an admission (which I decline to make – especially to solicitors) that I am in need of further education.
- ☐ Insufficient Income Tax advantage
- ☐ Too lazy
- ☐ Too shy.

None of those possible explanations is likely to be probable. The laws of probability are imponderable, e.g. Paul Dickson in his book "The Official Rules" reports as follows:

> "One day a teacher named Murphy wanted to demonstrate the laws of probability to his maths class. He had thirty of his students spread peanut-butter on slices of bread, then tossed the bread into the air to see if half would fall on the dry side and half on the butter-side. As it turned out, 29 of the slices landed peanut-butter side on the floor, while the 30th stuck to the ceiling."

Whatever explanation is probable for the poor attendance of members of the Bar in the past, might I urge members to at least consider making a more fulsome contribution in the future.

Yours truly,
H.G. Ogden
(Leo Cussen Institute for Legal Education)

P.S. One judge attended the seminar in question

(Similar comments have been made in respect of the Adelaide Law Conference. Eds.)

Dear Sirs,
Are the Editors afraid of tits? There is no such thing as a "Tidbit". (see Pocket O.E.D. and p.19 of Winter Edition).

Pedant

(Yes, and see Shorter O.E.D. p.2199. Eds.)

TIDBITS

LAW MYSTERY TO MOST, SAYS JUDGE

The law continues to be a mystery to most Australians because lawyers are prevented from talking about it to the community, the chairman of the Australian Law Reform Commission, Mr. Justice Kirby has said.

Mr. Justice Kirby said that this was because members of the legal profession were restrained by professional rules from publicising their work.

Addressing a conference of economics teachers in Canberra, Mr Justice Kirby called for an increase in the teaching of law in schools.

He said that although it had become popular in some States, the teaching of law in the community was "piecemeal".

It was therefore necessary to teach law to school children so that they could understand their legal rights, the function of law in a changing society and develop "responsibility for the state of the law."

The teaching of law had been generally ignored until recently, he said. "I confess that it is hard to justify in logic or morality the rule of law that every man is taken to know the law and is not excused by ignorance of the law, when we do little to bring its most important rule to attention in the classrooms."

Part of the problem was the failure of the legal profession to communicate with the public, he said. "The myths and mysteries of the law tend to be re-inforced by the lawyer's reticence.

"Judges and administrators are unable because of their office to explain their daily tasks.

"Courtrooms are rarely filmed or photographed. Barristers and solicitors are restrained by ethical rules against advertising and self-promotion.

"There is also a tendency to disparage the few media lawyers' who seek to communicate the problems, rules and opportunities of the law.

"The net result of this is that lawyers, whose craft is words, communicate very little about this vital, living social science, to the community as a whole."

The Australian Council of Professions is conducting a Seminar on 19 and 20 October 1979 at the Wentworth Hotel, Sydney. The general topic is "Accountability and Control of the Professions".

Registration forms and details are available from Law Council of Australia 155 Queen Street Melbourne, Telephone 60 1367.

International Bar Association

International Bar Association has arranged a seminar for the latter part of 1979:

Comparative Immigration Law Seminar —
Cafe Royal,
London 29 November – 1 December.

Note too the International Bar Association Biennial Conference to be held in Berlin 24-30 August 1980. The objectives of the International Bar Association are —

(1) to ensure better co-operation between the improvement in the services of all Bar Associations and Law Societies;

(2) to provide opportunities for individual lawyers to make personal contacts and by sharing their expertise to contribute towards the solution of common international legal problems; and

(3) to enable the voice of the legal profession to be heard on the international scene and so to contribute towards the establishment and maintenance of the Rule of Law throughout the world.

Any lawyer in good standing with his or her Bar Association may join the International Bar Association. Further details may be obtained from the office of the Executive-Director, Byron House, 7/9 James's Street, London SWIA IEE.

MILESTONES

Sir James Tait has been at the Bar since September 11, 1919. He was admitted to practise on August 1, 1919 on the motion of R.G. Menzies.

CRIME DOESN'T ALWAYS PAY

Recommending (please do not read "fixing") fees for counsel in criminal cases has recently become necessary in order: –

(a) to secure a market for the foreboding, but seemingly reluctant, spectre of the Legal Aid Commission;

(b) to bring criminal fees into parity with those in the civil jurisdiction;

(c) to provide some guidelines to counsel in a wide variety of cases where the little assistance other than that the clerks or the "generosity" of the Law Department previously existed.

The circular of August 21, 1979, emphasizes that the fees are **recommended** fees for a **standard** case, merely for the guidance of counsel. It is to be hoped that the disparity between these recommended fees and the fees on briefs from the Public Solicitor set out in Costigan's circular of July 3, 1979, will promptly be brought to the attention of the Law Department. However, it must be emphasized that the Public Solicitor fees have traditionally been regarded as 80% of the non-legally aided fee.

Meanwhile, commonsense dictates that counsel abide by the current scale of Public Solicitor fees. It is interesting to note that the officers of the Public Solicitors take the sensible precaution of **marking** briefs.

Some observations on the Bar Council's recommended fees:

(a) Fees in Magistrate's Court cases are expressed in ranges for counsel under two years at the Bar, two to five years and over five years;

The fees for "junior" juniors have been dictated by the sensible approach that it is better to be briefed several times a week at a moderate price than once or not at all for a sizeable amount;

(b) Inquest and committal fees finally recognize the importance and usefulness of a searching, thoroughly-conducted preliminary hearing;

(c) Full Court appeal fees have at last been brought into the twentieth century;

(d) The brief fee for a Supreme Court non-murder trial is $450, exactly the same as for a Supreme Court case;

(e) The Bar Council, in both County Court trials and committals, has wisely opted for a range of fees based on the **seriousness of the charge** in most cases. This is preferable to:
   (i) **seniority of counsel** – likely to discourage the briefing of appropriate representation in order to save funds; and
   (ii) **complexity of the case** -- too nebulous and creating too much uncertainty about fees at all stages of the case among solicitors and barristers alike;

(f) It is questionable whether the **full** trial brief ought to be payable for a plea – but it seems that, at last, the importance and complexity of addressing the Court on penalty has been accepted, at least by barristers. Hopefully, the clutch of pleas for paltry remuneration (and no time to prepare any of them) will disappear completely;

(g) Criminal trial barristers, however, still wait in vain for:

(i) fees when the Crown arbitrarily lists a trial with little hope of it being reached (they are very hard to settle, you know);

(ii) fees when the Crown summarily pulls a case out of the list at 4.00 p.m. on the day prior to listing (This applies to the prosecutor's fee also, believe it or not!);

(iii) more certainty in the areas of **preparation,** particularly **reading** compendious depositions and trial transcripts; and

(iv) adequate fees for **prosecuting** trials – currently these are well below fees payable to defence counsel. They have not been altered for at least five years. They ought to be radically revised at once.

Lovitt
Secretary,
Criminal Bar Association

Spring 1979

A LAWYER'S BOOKSHELF

FREEDOM OF INFORMATION IN CANADA: Two volumes including "Will the Doors Stay Shut?" by T. Murray Rankin 155 pages (1977) and "A Model Bill" prepared by the Special Committee on Freedom of Information in a dual language presentation (English and French) 110 pages. (1979). Both published by the Canadian Bar Association Suite 1700, 130 Albert Street, Ottawa and available from them for C$3.00 each or C$5.00 a set.

In recent years the question of "freedom of information" both in Australia and overseas has become ever more topical. In Australia a bill was introduced in 1977. Much criticized both by those in favour and those opposed, the bill has been much amended and presently remains bogged down in committee. In Victoria both major parties prior to the recent election made a committment to introduce it. To date however no bill has been forthcoming.

These two books are of interest to members of our Bar. Not only because of the light they might throw on the Canadian situation (or for that matter on the Australian which seems prima facie very similar), but also as an indication of how and to what extent the Canadian Bar Association, an essentially professional body has become involved and expressed its views.

The C.B.A.'s participation in the debate has extended over a number of years. Strongly worded resolutions in favour were passed at its conventions of 1976 and 1978. In 1977 what is described as a major press conference was held by its then President to express its concern about delay. In the same year it sponsored and published Professor Rankin's book and created the special committee to prepare "A Model Bill".

Rankin discusses the principal obstacles to "freedom of information" in Canada which are very much the same in Australia. He is, of course, clearly in favour of such legislation. He asserts that much of the opposition to it has been based on a misapprehension of what is involved and suggests that the opponents of the legislation have set up straw men in an endeavour to avoid the real issues. No one, he suggests, is advocating that policy deliberations, Cabinet confidences, or the advice of senior advisors to Cabinet be opened to public scrutiny.

The two chapters dealing with the United States experience may be of only passing interest. But his final two chapters which return to the Canadian position undoubtedly contain much of relevance. Particularly chapter 4, which deals with the Courts and "Ministerial Responsibility". After examining the arguments, his view is unequivocal that it is the Courts which must ultimately play the essential role in any "freedom of information" legislation.

On this aspect, Rankin notes the argument that he United States situation, which involves a substantial role for the judiciary, is not comparable in Canada due to the tradition of parliamentary sovereignty. He reviews this argument and refers to what he feels is a neglected Privy Council decision of **Liyanage-v-The Queen** (1967) I A.C. 259; (1966) I All.E.R. 650 as support for the view that the British North America Act vests the judicial power in the judiciary as a matter of law. The result is that there exists in Canada a separation of powers similar to but more limited than that in the United States.

Rankin's arguments have similar application to Australia and not only of course to "freedom of information". Would the recent retrospective legislation declaring invalid the notorious "Curren Scheme" for example be an invalid exercise of judicial power? **Liyanage's case** has been considered however by our High Court on at least 2 occasions somewhat inconclusively so that, at least in an Australian context, Rankin's view of its importance might be misplaced.

Victorian Bar News

The main interest in "A Model Bill" would be to those interested in the details of the Bill itself although there is a valuable expression of reasons for a number of sections. Both books, but particularly Rankin's, are recommended.

Sharp

VICTORIAN CRIMINAL PROCEDURE by Richard G. Fox. Published by the Monash Law Book Co-operative Ltd. 1978 84 pages — $4.00.

Subsequent to the review in the Winter Edition of **Bar News** of Antalfy's "Crown Pleas in Victoria", the present book was drawn to this reviewer's attention. Essentially it is a set of lecture notes, printed on foolscap and bound in soft cover, prefaced by a clearly itemized list of contents but with no general index.

Those practitioners in the criminal jurisdiction whose university days are well behind them could do worse than settling down on a rainy evening to read through Mr. Fox's book. In brief note form it will take them over virtually the complete field of criminal procedure including many areas which have been considerably altered in the last few years. Thus the chapter on bail is particularly good, canvassing step by step the procedures applicable under the recent Bail Act. Similar are the paragraphs on plea bargaining. Throughout the text there are numerous references to relevant cases, texts and legislation.

If there is a criticism of the book it is inherent in the nature of such a lecture note approach. Bald statements can be intriguingly brief - and unless accompanied by a reference (and many are not) can leave the reader wondering on the complete accuracy of the statement. Thus for example the author on p.53 under the heading "Direction to acquit" states "At the conclusion of the Crown case the defence may submit that there is no case to answer . . . If the judge agrees he directs the jury to bring in a verdict of not guilty. The jury may refuse to accept the judge's direction to acquit and if so the trial must proceed". On this aspect there is no reference given.

If this is the sort of thing that sends you off looking for a reference, then your passage through the book will indeed be slow. In this particular instance corroboration can be found in Lord Devlin's work "Trial by Jury" (revised edition) at pp.78-81 where it is suggested that the appropriate answer since the existence of the Court of Criminal Appeal, given an ultimately adverse verdict, would be for the judge to postpone sentence, grant bail to the prisoner, and certify it as a matter fit for appeal. Prior to the existence of such Court of Criminal Appeal it is suggested in any event that the judge could have dealt with the matter either by stating a case or possibly granting a motion in arrest of judgement. As Fox at p.61 of his book indicates, this last procedure is what the time honoured question "Do you know or have you anything to say why this court should not pass sentence upon you according to law?" is really inquiring after. As Fox there states "The question itself is known as the "allocutus" and technically only allows the accused or his counsel to move in arrest of judgement." (Given that on the previous page the author has also stated that "Upon conviction an accused is thereafter referred to as "the prisoner" it is rather a moot point if Fox is correct in referring to an "accused" as moving in arrest of judgement.)

Contrariwise such staccato brevity as criticised above is also the book's virtue. If the reader desires to obtain as many points of information as he can about the subject and retain them in his memory then this book should certainly assist. After having completed it he should well be able to survive any quick quiz for example, on sentencing, where Fox in one brief well referenced section makes clear that the death sentence has not been altogether abolished in Victoria and that arguably a judge may still be required in theory to pronounce such a sentence for piracy or for certain offences under the Dock Yards Protection Act and the Incitement to Mutiny Act.

At the beginning of his book Fox provides a book list of relevant works. Given that his book was published a year after Antalfy's it is interesting to see that he states "There is no basic criminal procedure text in Victoria", indicative of the fact that he was either not aware of its existence or did not consider it worthy of mention as such. Probably it was the former. His own work is highly recommended and as an adjunct to Antalfy's work should fill the gap which had previously existed.

Sharp

MOVEMENT AT THE BAR

Members who have signed the Roll (since 7/6/79)

Member	Master
P.G Hely (N.S.W.)	
R.W R Parker (N.S.W.)	
L.A. Marks (Mrs.)	Kay/C
N.D. Reeves	Hansen/B
K.I. Brandt (Miss)	Joseph Kaufman/W
P.E. Bennett (re-signed)	F
P.A. Scanlon	Stanley/B
R.H. Macready (N.S.W.)	--
J.C.A. Tippett	Dove/C
J.J. Hockley	Campbell/C
B. Scarfo	R J. Johnston/C
B.L. Devenish	Nicholson/C
E.M. Selig (Mrs.)	F.M Daly/C
P.R. Capelin (N.S.W.)	—
M.L. Rutherford (N.S.W.)	—
R.M. Downing	Harris/F
D.J. Brown	J.C. Walker/F
M.T. Bevan-John	D.M. Byrne/H
J.E. Middleton	Black/F
J. Ruskin	Richter/D
G.V. Laxon	R.G. Williams/D
C.W. Gilligan	Lopez/D
D.G. Russell (Qld)	
P.J. Brenner	Buchanan/H
J. Cyngler	Moorhead/S

Members who have transferred to the Non-Practising List:

K.L. Chenery
S.N. Allston

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

N.E. Roberts

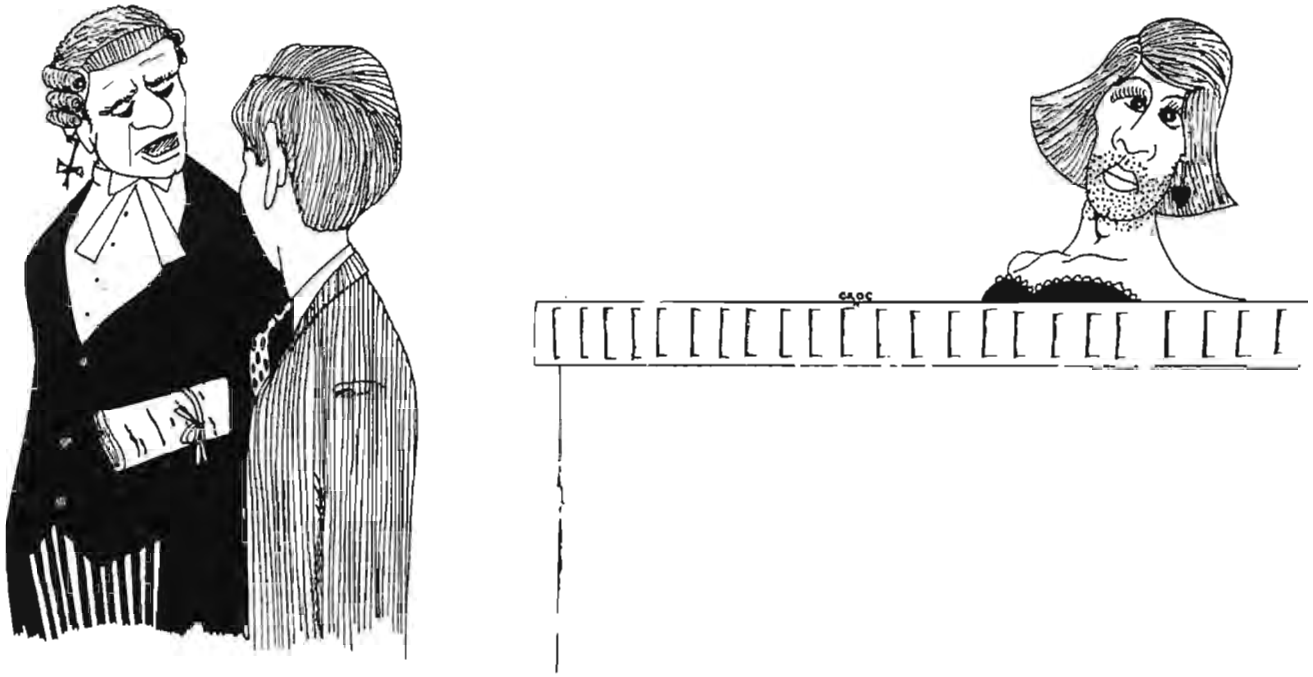
Members who have had their names removed from the Roll at their own request:

E.B. Wajsbrem
W. Morgan-Payler
M.F. Macnamara
P.G. McGuinness

Deaths:

H.M. Mighell (7th August 1979)
A. Fraser, formerly County Court Judge (30th August 1979)

Members in Active Practice: 670



It might not be Queensberry v Wilde to you, son, but it's two weeks at Noosa for me!!