VICTORIAN BAR NEWS

SUMMER EDITION 1979

CONTENTS

THE COVER:

The Editors' delusions of grandeur have reached new heights with this month's offering, or maybe they are a bit light headed at the approach of the festive season. The actual title of the eighteenth century tome from which these sumptuous graphics have been lifted is "Corpus Juris Civilis". Many of the symbols with which the design is loaded are referred to by McLennan in his comments on the derivation of Justice at p.25.

BAR COUNCIL REPORT

Clerking

The continuing numbers of new and prospective new members of the Bar have again placed strains on the existing clerking situation with the result that the Bar council has had to consider what measures should be adopted to cope with the anticipated demand for the coming year when it is expected that there will be few places available on existing lists. After considering the various alternatives which have from time to time been put forward, the Bar Council resolved on the 11th day of October, 1979 that it approve in principle the appointment of an additional clerk on the existing basis. The necessary arrangements are being made to advertise the position and interview applicants with a view to establishing a new list early in the New Year.

Readers' Practice Course

The Bar Council has received regular reports from the special ad hoc committee set up to plan the establishment of this course. It is expected that a curriculum will be prepared in time for the course to be operating so that it will be available to those signing the Bar Roll in March which is the next occasion for new members to sign under the recently revised Bar Rules.

Solicitors and Fee Collection

On the 12th day of October, 1979 the Chairman of the Bar Council wrote a letter which was sent to all solicitors in Victoria (copies of which were circulated to the Bar) advancing arguments as to why solicitors should continue to collect barristers' fees and remain liable for the same. This unusual step appears to have been worthwhile for at the General Meeting of the Law Institute held on the 24th October, 1979 the motion to the effect that the personal liability of a solicitor to pay barristers' fees should be abolished was lost by 53 votes to 121.

Accommodation

Following its receipt of a detailed report from the special Accommodation Committee the Bar Council on the 26th day of November, 1979 resolved that it recommend to the Bar that it approve and confirm the conditional contract entered into between Barristers Chambers Ltd. and the Mutual Life Assurance Society Ltd. This resolution was carried unanimously and as members of the Bar will be aware, in the subsequent General Meeting of the Bar held on the 28th November some 200 members of the Bar voted to ratify the contract. The motion was passed by an overwhelming majority there being only some 7 opposed to it. In the New Year the Bar Council will, through an appropriate sub-committee investigate in detail the future development of the site.

Professional Indemnity Insurance

Through the Australian Bar Association, arrangements have been made for professional indemnity insurance to be offered to barristers on an Australia wide basis on attractive terms. A policy giving $1 million cover for a premium of $150 on satisfactory terms has been negotiated and it is hoped that the master policy will be ready early next year. In the interim, the Bar Council has made arrangements with the insurer, Steeves Agnew (Australia) Pty. Ltd. for temporary cover to be given to barristers who intend to take up this insurance by giving notice of their intention to the Executive Officer of the Bar in writing.

General Retainers

At a meeting of the Bar Council held on the 11th October 1979 it was resolved that the General Retainer fee shall be as follows:–

Queen's Counsel	$600
Juniors	$400

R. C. Webster

WELCOME: HASE, J.

Peter Bernard Maxwell Hase Q.C. has been appointed a Judge of the Family Court. He was sworn in on December 10, 1979.

Peter Hase commenced a Law Arts course at the University of Melbourne in 1950. With his course not yet completed he went to London in 1955 and gained employment as a managing clerk in a solicitor's office. He completed his degree courses by correspondence and then he did his articles. He was not able to be admitted to practice in London due to a technical rule.

He returned to Melbourne and was admitted to practice on April 2, 1959. The following day he came to the Bar and read with Peter Murphy.

Peter Hase came to the bar with well formed social and political views. He was a member of the A.L.P. of long standing. He acted in all manner of matters relating to working people — arbitrations, hearings before the Industrial Court, long service leave cases. But it was in acting for injured Plaintiffs that he seemed to derive his greatest satisfaction, and considerable success.

He had two readers, Eames and Byard. He was granted letters' patent in 1978.

Peter Hase is looking forward to his new job with enormous enthusiasm. It is in line with his view of life that he direct his energies to where he believes he can benefit ordinary folk.

The Bar has lost from its ranks a fine practitioner of undoubted integrity. It is with no little pride that we welcome His Honour to the bench.

TRIBUTE: MENHENNITT J.

Fitting tributes were paid to the Honourable Mr. Justice Clifford Inch Menhennitt by His Honour the Chief Justice in the Twelfth Court on Tuesday 30th October 1979, and by the Moderator of the General Assembly of the Presbyterian Church at the funeral service the next day. Rather than to attempt a repetition of what has already been so well expressed, may we instead give some personal recollections.

It was more than fifty years ago that we first met the late Judge when he came as a new boy to Scotch College. It was only two or three months ago that he mentioned for the first time the tremendous significance to him of this change of school. Under the impact of the strong personality of Dr. W.S. Littlejohn, the Principal, the college gave him, he said, a new conception of life, the conviction that one should have ideals to aim at, a sense of purpose, and a realisation of duty to render service to the community. It was there also that he met Howard Norman, and through their friendship was introduced to Howard's sister Elizabeth who was to become his wife.

At the University he did not confine himself to those academic pursuits in which he was so successful. The intellectual ferment of a university attracted him. He became a seeker with a determination to become a finder, and pursued with enthusiasm the avenues of thought open to him. Thus he explored all the political theories that flourished there until, having weighed one position against another, he emerged with principles that were his for the rest of his life.

At that stage one of C.I. Menhennitt's great interests was the Law Students' Society of Victoria. During the presidencies of Harold Holt, D.I. Menzies, and Ivan Lewis he was one of its most active members, finally becoming President for two years, during which period the society;'s magazine Res Judicatae was first produced. In giving decisions on the cases argued before him as President we all saw in him a future Judge of great ability. In those days young men entering the profession usually lacked a plentiful supply of cash. One therefore remembers his alarm when, following a rather costly social function, the society's treasurer was challenged to a fight, stripped for the purpose, overlooking the fact that the takings were in his discarded coat pocket, and afterwards discovered that the money from which the expenses were to be paid had disappeared. The treasurer had fallen victim of a plot to rob him. On another occasion during his presidency the society had a smoke night at a cafe in Elizabeth Street at which large quantities of a well known coloured liquid were available. One remembers the future Judge, with a view to easing the position, trundling barrels to a doorway, pouring the contents down the back stairs, and then trying to control members who sought to leave by the windows on to the verandah roof, insisting all the time that they were on the ground floor!

After fifty years of friendship the quality of character most vividly implanted upon the mind was that stressed by His Honour the Chief Justice, namely loyalty. He was the most loyal and constant of friends. He was loyal to causes he espoused. He was loyal to clients,

The late Judge did not suffer fools gladly even if he did not show it. He felt greatly frustrated when unprepared or careless counsel appeared before him. Probably these men never realised the amount of time the Judge himself was prepared to devote to the case before him. But it was equally a cause of satisfaction to him to see men who were previously unknown to him conduct a case with ability.

For most of the thirty-five years of their marriage the Menhennitt household consisted of husband and wife and a housekeeper who had been Elizabeth Menhennitt's childhood nursemaid, and who had moved from the Norman household on Elizabeth's marriage. The consideration the late Judge showed for this faithful servant when her health failed some years ago gave great insight into his character. The same might be said of the constant care and attention he bestowed on his mother, who has survived him.

The last four years of his life were years of great tragedy, following the unexpected death of Elizabeth Menhennitt, a loss that time did little to heal. He tried to envelop himself in his judicial duties, but a tremendous burden of sorrow was always upon him.

Further, he was harrassed by almost constant physical pain. In recent months there were signs that it was necessary for him to reduce the demands of work, and at the same time he seemed to face additional stresses. Also, on medical advice, he had to cut down the long walks that meant so much to him. Whatever one's loss of a true friend, one has to face the reality that there was a considerable element of release in what has happened.

Bradshaw

FAREWELL: JUDGE BELSON

Victor Belson's career at the Bar is sufficiently well known probably to even the younger generation of Counsel to need little elaboration. Suffice if it be said that both as a Junior and Leader he built up an extensive practice in the criminal and common law fields, and he was renowned not only for his ability but also for is integrity and kindness to all those with whom he came into contact.

What perhaps is not so well appreciated is his career as a Judge of the County Court. Almost from his commencement he was beset by illness and disease which eventually forced his retirement. However, during the short time that he was on the Bench he fought heart trouble, loss of sight and a crippling family bereavement, with courage and resolution, which was both a credit to himself and an inspiration to his colleagues.

To those few who witnessed each day his fight, aided by a magnifying glass and a loyal associate, to fulfil the duties of the "Chamber" Chamber Judge, is something that will not easily be forgotten. Through all his appalling adversity, never once was he heard to complain, nor did he ever lose his tremendous sense of humour.

All at the Bar wish him a happy retirement and hope that his recent successful foray into real estate marks the turning of the tide.

J. Forrest

RECENT AMENDMENT TO THE COUNTY COURT RULES

On the 1st September 1979 the new County Court Rules came into force, embodying some substantial amendments. These Rules apply to all actions whether commenced before or after the 1st September. For details of the minor amendments, reference should be made to the circular distributed to members of the Bar by the Acting Honorary Secretary on the 10th August. The more substantial amendments are as follows:

Interrogatories

By Order 16 rule 1 of the old Rules, any party was entitled to deliver Interrogatories for the examination of the opposite party once without leave. Presumably the Committee formulating the new Rules considered that where a Summons for Final Judgment had been issued and heard, each party had supplied to the other an affidavit setting forth the facts upon which he would rely at the trial of the action and so the delivery and answering of Interrogatories would normally be unnecessary.

Rule 1 has been amended to remove the automatic right of a party to deliver Interrogatories " . . . in actions in which proceedings for final judgment have been taken pursuant to Order 5 rule 1." Order 5 rule 1 deals with entry of final judgment where no Notice of Intention to Defend has been filed. Since such an exercise disposes of the action at once, I believe that the reference in this amendment should be to Order 5 rule 4 which deals with Summonses for Final Judgment. The same error occurs in sub-rule (b) of rule 1 which states that no party may without leave of a Judge deliver Interrogatories in actions in which proceedings for final judgment have been taken ". . . pursuant to Order 5 rule 1 . . .". A plaintiff would not wish to apply to deliver Interrogatories after he had entered final judgment under Order 5 rule 1 and the defendant would not be entitled to make any such application without first applying to have the judgment set aside under Order 5 rule 15.

Sub-rule (c) of rule 1 permits an application for leave to deliver Interrogatories ". . . pursuant to sub-rule (b) . . ." to be made ex parte and sets forth the circumstances upon which the Judge may grant such leave, which are:

(i) delivery of Interrogatories is necessary to enable the applicant to obtain evidence essential to establish the applicant's claim or defence; or

(ii) delivery of Interrogatories is necessary to obtain evidence of facts of substantial importance which might not otherwise be proved, without undue expense; or

(iii) special circumstances exist which make it proper to grant leave."

Sub-rule (d) provides that where Interrogatories have already been delivered, further Interrogatories may be delivered by leave of a Judge on such terms as to costs or otherwise as he may order. The text of this sub-rule forms part of the text of the old rule 1 and is not new.

Sub-rule (e) overcomes much of the difficulty caused by the earlier reference to Order 5 rule 1 in sub-rules (a) and (b) by providing that, in the case of proceedings commenced by Special Summons, no Interrogatories may be delivered under sub-rule (a) unless the time for issuing a Summons for Final Judgment has elapsed and no such Summons has issued. This overcomes the difficulty of a party to a proceeding commenced by Special Summons delivering Interrogatories without leave after a Summons for Final Judgment has been issued on the basis that no proceedings for final judgment ". . . pursuant to Order 5 rule 1 . . ." have been taken. The question remains, however, how such a party obtains leave to administer Interrogatories if sub-rules (b) and (c) apply only to actions in which proceedings for final judgment have been taken pursuant to Order 5 rule 1. Whatever the basis for granting such leave may be on the Rules as they now stand, as a matter of practice it has been granted on many occasions since the new Rules came into force. Even where the application is not made ex parte it is unlikely to be opposed. Nevertheless the mistake in sub-rules (a) and (b) should be corrected to remove any doubt on the matter.

Application for Leave to Interrogate

Although it is contemplated that an application for leave to interrogate shall be made ex parte, the costs of a separate application may be avoided if the application for leave is made upon the hearing of the Summons for Final Judgment. There will then normally be sufficient affidavit material before the Judge to enable him to determine whether it is a proper case in which to grant leave. In cases where an order by consent is sought on a Summons for

Final Judgment it has become a common practice to add an extra clause to the written form of consent order that is handed to the Judge's Associate, granting leave to administer Interrogatories. However, since the Rules contemplate an ex parte application for leave and a determination by the Judge in each instance as to whether it is appropriate to grant leave, the correctness of this practice is doubtful.

Answering Interrogatories

The time for answering Interrogatories has been expanded by a new rule 6 from 7 days to a more realistic 28 days. By the new rule 8, if a party fails to answer within time the other party may serve upon him a notice in the prescribed form requiring the party in default to answer within 14 days. The costs of this notice are borne by the party in default unless the Judge otherwise orders. If the defaulting party requires more time he may apply ex parte to a Judge for an extension of time. He will have to bear the expense of such an application himself unless the Judge considers that special circumstances exist which justify the reservation of costs for the trial Judge. If his application for more time is successful, he must notify the other party forthwith in writing of the terms of the Order granting the extension and if the interrogating party feels aggrieved by the Order he may apply by Summons to the Judge in Chambers for an order that the Order extending time be set aside or varied.

Default in Answering Interrogatories

By the new rule 9(a), if a plaintiff fails to answer ". . . within the time limited by these Rules or any extension of time . . ." he shall be liable to have his action or claim dismissed by a Court or Judge. However, the new rule 9(b), dealing with the defaulting defendant, is in the following terms:

> "If the Defendant or any other party against whom relief is claimed has been served with a notice pursuant to rule 8(a) (i) and has not made answers or obtained an extension of time under rule 8(a) (ii), or when directed to do so has failed to answer interrogatories further or to attend for oral examination, the Court or a Judge may at or before the trial give judgment against the Defendant or such other party for the amount claimed or such lesser sum as may appear to be appropriate . . ."

On the strict wording of this rule it is strongly arguable that it does not apply to a defendant who has obtained an extension under rule 1(a) and then failed to comply with that extension. In such a case it may be doubted whether judgment could be given against the defaulting defendant because he has ". . . obtained an extension of time under rule 8(a) (ii) . . ." and so the rule does not appear to apply to him. This apparent omission should be cured by a further amendment.

An application pursuant to rule 9 should ask for judgment, not that the defaulting party supply answers.

Insufficient Answers

The former provision in regard to insufficient answers remains unchanged and is now found in rule 8(b).

These amendments provide a cheaper and easier alternative to the former practice whereby the interrogating party would take out a Chamber Summons seeking an order that the defaulting party supply answers within so many days, followed by a further Summons (if the defaulting party failed to comply with the order) seeking a self-executing order under the old rule 9 if answers were not supplied within so many further days. Instead, only one application need be made by the interrogating party which, if successful, will give him judgment in the action. Any other applications will be made and paid for by the party in default.

Discovery

In actions to recover damages for loss caused by or arising out of a motor vehicle, a Notice for Discovery cannot now be served without the leave of a Judge (Order 16 rule 10(a) and (b)).

The circumstances under which such leave will be given are set forth in rule 10(c).

The time for compliance with a Notice for Discovery has been enlarged to 28 days. Where a party fails to comply with a Notice for Discovery the new procedure is the same for interrogatories, except that the provision in the case of the defaulting defendant does not suffer from the apparent omission that occurs in rule 9(b) already referred to.

Payment into Court

A defendant with a counterclaim is now permitted to take part or all of his counterclaim into account in determining the amount of money that he pays into Court on the plaintiff's claim. For example, if the plaintiff's claim is $1,000 and the defendant has a counterclaim of $400, the latter may if he wishes make a payment into Court of $600 stating in his Notice of Payment into Court that he has deducted the sum of $400 in respect of his counterclaim.

Where a defendant who makes a payment into Court and wishes to deduct from the payment in an amount in respect of one or more of the causes of action raised by his counterclaim, his Notice of Payment into Court must specify the amount so deducted and the cause or causes of action in respect of which the deduction is made (Order 19 rule 1(8).

If the plaintiff accepts the sum paid into Court all further proceedings in respect of the cause or causes of action specified by the defendant in his notice shall be stayed (Order 19 rule 2(iii)).

The plaintiff is then entitled to his costs on his claim in the normal way and the defendant is entitled to the costs of his counterclaim up until the acceptance by the plaintiff of the payment into Court.

This is a very welcome amendment and, in effect, allows the defendant to set-off his counterclaim for the purposes of calculating the amount of his payment into Court. Similar provisions are to be found in both the Supreme Court and Magistrates Court Rules.

Judgment Reduced for Workers' Compensation Payments

Order 19 rule 7(3)(b) provides that in calculating the amount which the plaintiff recovers for the purpose of deciding the sufficiency or otherwise of a payment into Court, where the amount of the plaintiff's judgment or order has been reduced pursuant to Section 79(3) of the Workers' Compensation Act 1958, the amount the plaintiff is considered to have recovered is the amount of the judgment or order, plus the amount by which it has been so reduced.

Setting Down for Trial in Injuries Cases

By Order 24 rule 7(6), in actions where damages are claimed in respect of personal injuries, a defendant shall not be required to sign a Certificate of Readiness unless and until the plaintiff has, at the time of or after requesting him to sign the Certificate, served upon him up-to-date list of special damages giving all the particulars required by Order 12 rule 1, or a notice stating that the particulars last notified to the defendant on a specified date stand as the plaintiff's Particulars of Special Damages.

Order 12 rule 1 has also been amended and requires the following particulars to be included in the Particulars of Demand annexed to the Summons:

"(i) the date of the plaintiff's birth;

(ii) particulars of any loss of earning capacity resulting from the injuries;

(iii) particulars with dates and amounts of all earnings lost in consequence of the injuries; and;

(iv) the name and address of each of the employers of the injured person during the period commencing 12 months before he sustained the injuries complained of and ending on the day the Summons is issued, at the time of commencement and the duration of each such employment and the total nett amount after deduction of tax that was earned in each such employment."

Summary

In many instances the new amendments will reduce costs and streamline procedure and so they should be welcomed by the Bar.

An amendment that would be even more welcome however, would be an increase in the scale of fees which was last reviewed in August 1976. An outdated scale of costs penalises the successful party in litigation by widening the gulf between party and party costs and solicitor and client costs. Counsel cannot be expected to be charging the same fees now as they were charging 3 years ago.

Rohan Walker.

NEW PRESIDENT

Mr. John Richards has been appointed President of the Law Council of Australia.

Mr. Richards succeeds Mr. Cedric Thomson of Adelaide.

In 1975-76 Mr. Richards was the President of the Law Institute of Victoria. He has occupied the positions of Vice-President and of Treasurer of the Law Council and is a Deputy Member of the Commonwealth Legal Aid Commission.

Mr. Richards said he welcomed the increasing community awareness of the law and the role of lawyers. As this development continues it will be necessary for lawyers and legal professional bodies to improve communications with one another and with the community in order to ensure that legal services are provided in the most effective and efficient way throughout Australia.

The new President is married with four children. He is a graduate in law from the University of Melbourne.

ETHICS COMMITTEE REPORT

1. The members of the Ethic Committee appointed by the new Bar Council now are Waldron Q.C. (Chairman), Hedigan Q.C., Barnard Q.C., Chernov, Mandie (Secretary), Webster, B.A. Murphy.

2. The Lay Observer appointed under the Legal Profession Practice Act is Brigadier J.D. Purcell. Brigadier Purcell has by invitation attended a number of regular meetings of the Committee and has also (by leave of the Committee) attended some recent summary hearings.

3. One member of Counsel, after a summary hearing, was fined $325 for failing to promptly return a brief despite requests by his Instructing Solicitor after a long period of delay and broken promises. He was also fined $75 for failing to respond to communications from the Secretary.

4. Another member of Counsel, after a summary hearing, was reprimanded for his failure to return a brief within a reasonable time before the hearing of the action when it was apparent that he would be most unlikely to be able to appear. There was no evidence in all the circumstances that the client was prejudiced and the Committee decided not to impose a heavier penalty. The Committee reaffirmed that it is Counsel's reponsibility to return a brief when he is unable to do it and to so return it at a reasonable time. The Committee was satisfied that the decision to return the brief at 9.15 a.m. on the morning of the trial of the action was not a reasonable decision.

Mandie

CRIMINAL BAR ASSOCIATION

The Criminal Bar Association has celebrated its first birthday and held its first annual general meeting on 21/11/79. By the end of its inaugural year the Association had 130 financial members and a number of "promising" members.

At the meeting of 21/11/79 Kelly Q.C., Hassett and Lovitt were re-elected as respectively the Chairman, Vice-Chairman and Secretary and Vincent was elected Treasurer. A Committee has been elected consisting of Dixon, Kirkham, Murphy, Lopes, Richter, Faris, Vander Wiel and Thomas.

Although the Association has been actively involved in various activities its major achievements to date have been in having the Bar Council promulgate, for the first time, a Scale of recommended fees for the Criminal Jurisdiction and in proposing a new system of readership which was substantially accepted by the Bar Council.

The members directed the Committee at the Annual General meeting to take steps to have the Public Solicitor and the other Legal Aid bodies pay fees in accordance with the Bar Council recommended Scale, subject to the reduction customarily appropriate to Legal Aid work.

The other major goal of the Association in the immediate future is to bring to fruition the work already executed by an energetic sub-committee chaired by Lopes in relation to County Court listings. It is hoped that notification by the Crown of a date on which a trial will be listed may come to mean that the trial will commence on that day, thereby obviating the trauma currently occasioned to accused, victims, lay witnesses, Police and lawyers by the existing system.

FOR THE NOTER UP

Family Court:

Add:

Hase J.	48	20.11.31	1979	2001

Supreme Court:

Delete:
Menhennitt J.

County Court:

Delete:
Judge Belson

MUSINGS IN RETIREMENT

I can report that the pain of loss of power is considerably relieved by the pleasures of once more earning a living.

The editors have invited me to record some memories whilst they remain relatively fresh. I have selected only a few topics for such recollection and comment. Might I say immediately that such comment is entirely personal.

It will not have escaped the notice of those accustomed to reading the daily press and professional journals, that there has been unusual friction over the last few years between the Law Institute and the Bar Council. This has happened in the presence of good personal relationships between individual members of both bodies, and despite the acknowledged and genuine desire of the current President Rowland Ball to heal the breach.

It is essential to the proper working of the legal profession that its two branches operate together with a proper respect one for the other. Each performs an essential but different task. The reasons for the recent rift are complicated and in some ways not easy to understand. What is clear at all events is that there have been a number of significant members of the Law Institute Council who have adopted as a long term plan the reduction of the role of the Bar to a place subservient to the interests of the solicitors' branch. Despite the views expressed by the brother associations in other states as to the wisdom, in the interests of the public, of retaining a strong independent and separate bar, the activists at the Law Institute have created an atmosphere of antagonism.

What does not appear to be understood, is that the Bar can continue in existence only if it provides a service to the public through solicitors throughout this State. If it fails to provide that service it will wither away. I believe that the experience in Western Australia, South Australia and Canberra demonstrates that the more sophisticated a community becomes, the more important it is to have a separate bar of specialist practitioners.

In my own personal opinion, a good deal of the trouble springs from a desire (perhaps subliminal) to appear to be radical, equating radicalism with public interest and believing that the measure of radicalism

F X Costigan, QC

is the amount of activity engendered. It is fashionable to describe the Bar as conservative and unwilling to change. I believe that that description has no more than a superficial accuracy. I have been a member of the Bar Council for eleven years and have watched its workings under many different chairmen. It has in my experience been prepared to take a most "radical" view of many questions, but only after deep consideration, taking into account the long term implications of its actions. It does not believe, nor do I, that activity as such is a virtue, unless it is preceded by the kind of clear consideration of issues to be expected in a profession such as ours.

I have sometimes wondered whether part of the problem arises from the sheer size of the Law Institute and its major intrusions into services to members (costs, travel etc.). I do not doubt the value to members of some of these services, but they do have a number of problems associated with them. Parkinson correctly described the dangers of large organisations generating work to fill the hours. The

mass of paper produced by a large staff can make very difficult the task of devoting sufficient time to important matters on the agenda.

Perhaps the separation, with a quite separate organisation, of the service industry component would reduce the burdens and provide more time. It is my personal view that the control of the Solicitor's Guarantee Fund should be given to a completely independent statutory body on which the public is represented: after all it is the public's money. This would relieve the Law Institute Council of a very great administrative burden.

A much smaller body would enable many practitioners from the smaller firms, suburbs and country to contemplate more active involvement in the affairs of the Institute. One of the strengths of the Bar is that it has resisted a very large growth in its bureaucracy and therefore has been able to control its own affairs in a much more disciplined way.

The above comments, intruding as they do into the internal workings of the Law Institute Council may be thought by some to be impertinent. But the fact is that the events of the last few years have made it imperative that the Bar consider whether the attacks on it have come solely from some hostile minority or procede from the structure of the Law Institute of Victoria. I believe both factors are relevant.

Let me pass to another topic. One of the most important developments in recent years has been the re-activation of the Australian Bar Association. The greatly increased movement of barristers across State borders has made even more important than hitherto that bars in all States and Territories should understand the practices and ethics of each other. The A.B.A. now meets three or four times a year in various capital cities and the exchange of ideas and discussions of common problems has resulted, I believe, in big steps towards a truly Australian Bar. The Victorian Bar has made a big contribution to this development and has gained much from it.

I can see the Bar in ten years time providing a service not only to Victorians but to Australians throughout the Commonwealth and to other countries such as Singapore, Hong Kong and Malaysia who share our common law traditions. It will do so only if it maintains the standards of integrity and competence which have traditionally been its outstanding characteristics.

A great deal of work has been done this year in Victoria, in relation to reading. Sir Gregory Gowans will be producing shortly his work on Ethics. Continuing consideration is being given to rules such as the Two Counsel Rule. Major disciplinary changes have been made. That these tasks are being done not in isolation but in collaboration and discussion with other Bars is significant progress indeed.

Costigan

For those who have always wondered why a given number equals itself plus one, Blumsztein has provided the answer.

$(n + 1)^2 = n^2 + 2n + 1$

Subtract $(2n + 1)$ from both sides.

$(n + 1)^2 - (2n + 1) = n^2$

Subtract $n(2n + 1)$ from each side.

$(n + 1)^2 - n(2n + 1) - (2n + 1) = n^2 - n(2n + 1)$

Factorize.

$(n + 1)^2 - (n + 1)(2n + 1) = n^2 - n(2n + 1)$

Add $\frac{1}{4}(2n + 1)^2$ *to each side.*

$\therefore (n + 1)^2 - (n + 1)(2n + 1) + \frac{1}{4}(2n + 1)^2 = n^2 - n(2n + 1) + \frac{1}{4}(2n + 1)^2$

This may be rewritten.

$[(n + 1) - \frac{1}{2}(2n + 1)]^2 = [n - \frac{1}{2}(2n + 1)^2$

$(n + 1) - \frac{1}{2}(2n + 1) = n - \frac{1}{2}(2n + 1)$

Add $\frac{1}{2}(2n + 1)$ to each side

$\therefore n + 1 = n.$

Q.E.D.

SOLICITORS CONSIDERING BARRISTERS' FEES

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

LAW INSTITUTE OF VICTORIA

191 Queen Street,
Telephone 602 3922 MELBOURNE 3000.

POSTAL REFERENDUM - NOVEMBER 1979

INFORMATION PURSUANT TO BY-LAW 74

At an Extraordinary General Meeting of members held on 24 October at 191 Queen Street, Melbourne the following motion was put to the Meeting:

> "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."

This motion was amended by the addition of the following words:

> "provided that the barrister whose fees are in question is given the opportunity to be heard at such taxation."

after the word "taxation".

The motion as amended is set out on the ballot paper.

The amended motion was carried 96/74.

A postal referendum was demanded by the required 20 per cent pursuant to By-law 65(a).

RELEVANT FACTS PERTAINING TO THE MOTION

The original, unamended motion arose out of a resolution passed at the Annual General Meeting of the Law Institute of Victoria on 30 April 1979 which was as follows:

> "That within six months the Council submit to a general meeting of the Institute a proposal for a 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."

The Council appointed a Committee to prepare a report and recommendations to be put to members at the Extraordinary General Meeting. That Committee conducted a random survey of members on the matters raised by the motion and also visited a number of suburban and country law associations. The Council considered the Committee's report and recommendations and approved the motion which was moved at the meeting.

SUMMARY OF ARGUMENTS FOR AND AGAINST THE MOTION DERIVED FROM DISCUSSIONS ON THE MOTION AT THE MEETING

ARGUMENTS FOR THE MOTION

Prudent solicitors mark briefs to barristers before delivery and after negotiating a fee for the service to be performed, whenever it is possible to do so. However, it is not always possible to anticipate the range of services that will actually be performed before the brief is returned and, for this and other reasons, it has become a common practice of the majority of solicitors to deliver briefs with no fees marked. Increasingly, the fees marked by barristers on the return of briefs go beyond the usual fees for matters such as appearance at the hearing, refreshers, and conference before the hearing.

In recent years the notion of hourly rates of charging has seen the introduction of reading fees, preparation fees, special conference fees and other fees which must often be treated as "unusual expenses" under the Rules of the Supreme Court. Because of the rule in Blyth's case, such a fee must be borne by the solicitor personally unless the solicitor has given the appropriate warning to his client and obtained the appropriate instructions thereafter. Yet often the solicitor may not be aware that the barrister proposes to mark such a fee. What are the solicitor's options when a dispute arises as to whether such a fee should be paid?

- The solicitor can opt to pay the fee personally and hope that the client will reimburse him.

- The solicitor can opt to allow the barrister to sue him to establish that the fee is payable.

- The solicitor cannot opt to argue that the fee payable should be that recovered upon taxation, even though in very many cases this would be clearly the most equitable solution. Not only do the Bar Rules forbid a barrister agreeing to such a solution but the Rules of Court require the solicitor to pay all barristers' fees before they are submitted to taxation.

  There is no way that a solicitor can opt to let the Taxing Master resolve a dispute as to the fees payable to the barrister he has engaged. There ought to be such a way!

The principle underlying the proposition before the members is that the Taxing Master should be granted the jurisdiction to resolve disputes between solicitors and barristers concerning barristers' fees.

The proposition contains only the major ingredients of a procedure, the terms of which must be carefully drafted to ensure that the result is fair to the barrister and to the solicitor where there is a dispute. So long as the new procedure is fair to both, as the present situation is not, more harmonious relations between barristers and solicitors should be an additional desirable result.

ARGUMENTS AGAINST THE MOTION

If a solicitor retains counsel to undertake work, and either a fee is fixed for such work (as of course it should be) or the solicitor is content to let the fee be fixed by counsel or his clerk, it would be most unjust if counsel is to be deprived of his fee, or part thereof, if at a later date the Taxing Master decides that such work was unnecessary or the fee excessive. Thus if the recommendation is accepted there will inevitably be many situations where counsel carries out work in good faith at the request, or with the knowledge and consent of the instructing solicitor, but where because of a decision of the Taxing Master he is either unable to recover any of such fees, or only part thereof. Thus the Taxing Master may decide to disallow all senior counsel's fees on the basis that one counsel is sufficient, to disallow conferences although requested by the solicitor, or to reduce the fees, although agreed (such an agreement not being "an agreement in writing to the contrary").

Acceptance of the recommendation will only result in a plethora of "agreements in writing", nullifying the intent of the recommendation.

The motion does not set out in enough detail what is proposed by the motion and how it would work in practice.

SUMMARY OF THE VIEWS OF THE COUNCIL IN RELATION TO THE MOTION

The Council voted 25/0 in favour of the motion.

The Council supported the arguments advanced in favour of the motion which were put before the Council when it resolved to put the motion to the members at the Extraordinary General Meeting.

VOTING

Members should complete the ballot form by placing a tick (/) in the appropriate box and placing it in the envelope provided and returning it to the Institute by no later that 5.00 p.m., Monday 10 December 1979.

WHATEVER HAPPENED TO GERTIE?

Like poor old Maggie May they have taken her away.
She'll never look on our street any more.

She never walked down our street but look down on it she did for some 79 years. Then one Saturday (22nd June, 1963 to be precise) she was taken away on the back of a truck owned by Messrs. Whelans, a sad fate for an old lady of ancient lineage. What became of her then is something of a mystery. But let us begin at the beginning.

Gertie was the work of one Emanuel Semper. Robust of form and serene of countenance, three times life size, grasping a huge sword but seated as if listening and without blindfold, she was presumably in place by the time the Law Courts opened in 1884. Some years after being so unceremoniously carted off, she was replaced by a more Twentieth Century type, much slighter in figure, and with a rather careworn expression, but in the same seated position and, in the same tradition, without blindfold.

The search for Gertie has shown how kind people can be to someone on a slightly eccentric quest. But it is not over yet. No part of Gertie has so far been located. Tantalizingly the trail stops, in the case of the main part of the statue, at the Salmon Street, Port Melbourne depot of the P.W.D., and in the case of the sword, in the offices of the Law Department which were then located on the first floor of Owen Dixon Chambers.

The writer's interest in the saga of Gertie was sparked off by a cutting from "The Age" newspaper dated Monday, June 24, 1963 which was found among material in the Supreme Court Library. Beneath the

picture appeared the information that she had been taken away the previous Saturday, that she weighed 140 stone and was 9 feet high, and sat on a 26 ton pedestal. The article continued:

> "A director of the wrecking firm (Mr. Owen J. Whelan) said . . . that although the statue and pedestal were very weathered, both were brought down and loaded into trucks intact. The statue will be replaced with a bronze replica, mounted on a new pedestal. It is planned to have 'Gertie's' head and upper part of her body preserved in the new Cultural Centre Her 7 foot long sword is expected to be included in the replacement statue."

This cutting produced a number of leads. A call to "The Age" library produced a sympathetic response, but little information.

But Mr. Owen Whelan remembered that the statue was "hooked down one Saturday afternoon". The sword, he said, was handed to "some jovial chap about to retire who was the head of the Law Department." "Handed" hardly seems the word to describe a sword cast in bronze and 7 feet long, and it is not the sort of item one would think could easily be mislaid. Plainly it was necessary to find the "jovial chap". Mr. Whelan confirmed that the statue was taken to the P.W.D. store in Port Melbourne

At the P.W.D. depot at Salmon Street Port Melbourne they were helpful too. Mr. Pat Toohy remembered her "There's not many here as would. She was in the depot for six to eight months. She was completely wrecked, there were bits all over the place. I think they took her to the tip." Presumably a three times life size figure falling apart in your depot is something of an inconvenience. Pressed for details: — was there a file (surely to goodness in the public service there must be a file) he suggested a Mr. Eric Middleton. "He's at the Treasury now". The Treasury it turned out is not THE Treasury, but P.W.D. argot for P.W.D. Stores Control.

Mr. Middleton could not remember her, but said there would have had to be a "Board of Survey" before she could be thrown away. Two out of three persons appointed must sit on her like the Crowner in Hamlet. Where is their report? Where is the file? Mr. Middleton is still looking, and will let us know. If there is a death certificate he assured me it would be produced.

The National Gallery knew nothing of the suggested donation to them, nor of the statue.

A lady from the La Trobe Library, who apparently shares the writer's taste for trivia, dug around in the files and produced a photostat cutting from "The Herald" dated 11th April, 1966. Among other information, Columb Brennan recorded:

> "Justice will be returning as soon as the Law Department gets approval for an extra $6,000 for new pedestal. This will cost $28,000. Only $22,000 was allocated for it.
>
> After Mr. Justice was taken down, Mr. Ray Ewers sculpted a replica which was cast in rough bronze at F.J. Lemons Foundry at Moorabbin. This cost $18,000. A stone one would have cost $60,000.
>
> The new statue is at the Public Works Department's store at Port Melbourne."

Thus by this stage, although the old Gertie had gone, a new Gertie was resting at the depot in her place.

Mr. Ray Ewers, sculptor of Frankston, stated that the old sword was not incorported in the new statue. He thought it was not entirely of bronze, but certainly there was some technical reason why it was not suitable. The last he had seen of the old Gertie was in the South Melbourne store. Mr Ewers was given pretty much carte blanche, being told only that the new statue was not to be blindfolded and must fit upon a base having the same area as the old one. In fact the new pedestal is not as tall as the old one, but the area of the base is the same. Apparently the big problem with an over-life size sculpture is to get your proportions right. First a "sketch model" was made, and then from that a working model which was one-third the size of the final casting. Then using a pointing machine (which is something like a pantograph but works in three dimensions) a full-size clay model was "pointed up". Once the basic proportions of the clay model were determined, the sculptor worked freehand. The clay model being completed an impression was taken from which a plaster caste was made. That then went to the foundry where the final bronze was cast. Following casting the bronze,

was returned to Mr. Ewers for finishing work. The writer, having learned all these interesting facts from the informative Mr. Ewers, whose time he wasted one afternoon, thought them worth passing on. But as Zelman Cowan (as he then was) was wont to say during Private International Law lectures:

"Fascinating information, but nothing to the point!"

at least nothing to the point of finding Gertie.

Next then to the Works and Planning Section of the Law Department, there to speak by telephone with Mr. Jack Foley. Like everyone else, Mr. Foley was interested and most anxious to be helpful. But like a witness where a case has been slow to get to Trial, remarked that it was such a long time ago he forgot the details. The sword, he thought, was in the office at Owen Dixon Chambers at one time "for years and years". Certainly the new statue was erected in his time. Certainly the sword and the top portion of the statue were offered to the National Gallery. Certainly the last he remembered of the statue was at the P.W.D. Depot. He would have to look up his files.

Mr. Foley's predecessor was Mr. J.D. Cameron. He was tracked down and suggested the writer contact a Mr. Roy Glenister, formerly Permanent Secretary of the Law Department. Mr. Glenister's term of office however began after Gertie was removed. He could remember the sword being in the Law Department's offices at Owen Dixon:

"in the corner of a room. It was finally put away somewhere. There should be a file relating to it."

"Try Bob Burns," said Mr. Glenister, and Mr. R.A.W. Burns proved a mine of information.

Having retired in 1963 Mr. Burns is presumably no longer a spring chicken. But he has certainly not rusted away in retirement. His mind is clear, his recollection excellent, and one gets the impression that he must have been a very formidable permanent Head indeed.

He confirmed the sculptor, Emanuel Semper, the same man he said who had sculpted the group upon the old Colonial Mutual Life Building. Gertie, like the facing of the rest of the Supreme Court building, was made of Tasmanian freestone. Over the years she had deteriorated, and been patched with cement. Due to difference in the rate of expansion between the cement and the freestone, the patches fell out and the damage was made worse. Sir Edmond Herring, then the Chief Justice, thought that she should come down. P.W.D. estimated that the cost would be £5,000 to bring her down by day labour. Mr. Burns thought of Whelans, and Mr. Owen Whelan quoted £500 to bring her down over a weekend. Lodge Brothers provided a crane, and on one rainy Saturday afternoon down came Gertie. In fact she was down by the time Mr. Burns arrived at the scene.

He,it turns out, was the "jovial chap about to retire" referred to by Mr. Owen Whelan. He thought the statue should not be destroyed, and someone at the Public Works Department, Mr. Burns could not recall who, promised that the head and shoulders would be preserved, perhaps by being offered to the National Gallery. But the crown of the head was badly fretted. In fact it was almost flat. The sword was solid bronze, and on the Monday morning:

> "Two men came staggering into my office with it. It was about 6 feet long and weighed about 1 cwt. The gap where the hand went round the hilt was the size of three normal hands. It was not the sort of thing you could hang over your mantelpiece. They stood it up in my office in Owen Dixon. It was there for a while. I asked Ray Ewers to incorporate it in the new statue. He couldn't use it. Possibly it was still in the office when I left. When the statue itself was put under cover and became dry, it started to flake."

So there we have it. The sword is gone, disappeared from the office of the Law Department. Perhaps when Mr. Foley rises from his bed of pain his files may provide some more detail. As for Gertie herself, it seems (unless the Crowners report should ultimately show to the contrary) that when she was taken down from her proud position she just crumbled away.

FOSSICKER.

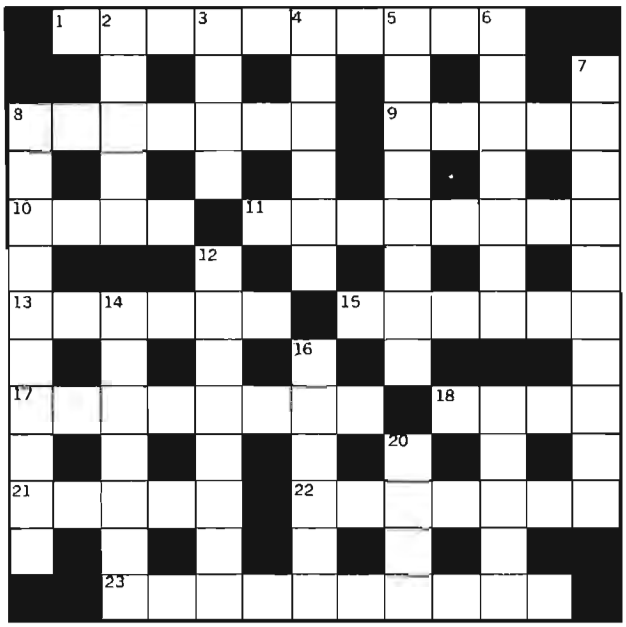
CAPTAIN'S CRYPTIC No. 30

ACROSS:

1. Bar's primus inter pares (8,1,1)
8. Putting up arms for robbery (7)
9. Briny tang (5)
10. Pathological lump (4)
11. Furnish with battlements (8)
13. Postcode 2571 (6)
15. Dullest (6)
17. Prickly plant known to the Greeks (8)
18. Operatic air (4)
21. Join together (5)
22. Shake as in fear (7)
23. Late Judge (10)

DOWN

2. Sets for publication (5)
3. Kind of knat on knumbskull? (4)
4. Vegetarian fare (6)
5. Cavalry force raised from farmers (8)
6. Loudly chuckly and snort (7)
7. Put in windows (10)
8. Alexander's charger (10)
12. Meridional (8)
14. Bonehead (7)
16. Bestir oneself (6)
19. Automaton (5)
20. Miserly Average (4)



TIDBITS

Outhwaite Scholarship

Applications are invited from students who intend to pursue or who are pursuing the course for the Degree of master of Laws in the University of Melbourne.

The value of the Scholarship for 1980 is $400 approximately. Applications to Law School by 29th February 1980.

• • •

Pinkerton Scholarship

Graduates of not more than ten years' standing are eligible for the Frank Pinkerton Scholarship at the University of Melbourne.

Each candidate must submit a subject pertaining to the law of Real and Personal Property on which it is proposed to undertake research. In making the award the nature of the subject as well as the ability of the candidate.

The value of the scholarship for 1980 is $400 approximately. Applications to Law School.

• • •

CONTROVERSIAL AMENDMENTS TO CONCILIATION AND ARBITRATION ACT

On 25th October, 1979, Royal Assent was given to the Consiliation and Arbitration Amendment Act 1979 (Act No. 110 of 1979). The amendments have attracted widely publicised criticism from Staples J, a Deputy President of the Commission and from the whole body of twenty five Commissioners whose proceedings are regulated by the principal Act.

The first amendment and that which has most incensed the Commissioners is the insertion of S.22A. That section requires a Commissioner who proposes to make an award or certify an agreement affecting wages or working conditions in a particular industry to first "consult with" the Presidential Member who is a member of the panel to which that industry has been assigned. (Under S.23, industries or groups of industries are assignable to a panel consisting of a Presidential Member and at least one Commissioner. Section 23(3) provides: "It is the duty of the Presidential Member who is a member of a panel under this section to organize and allocate the work of the members of the panel in respect of the industry or industries allocated to the panel and the other members of the panel shall comply with the directions given by the Presidential Member in the performance of the duty.")

It is clear from S.23(3) that the obligation to comply with the directions of a Presidential Member arises only when those directions are given in discharging a duty to organize and allocate the work of the members of the panel. How far, if at all, then is a Commissioner bound to comply with directions given by his Presidential Member in the course of the "consultation" enjoyed by S.22A?

A further question which is posed by the insertion of S.22A is what is necessary for a Commissioner to perform the requirement to "consult" with his panel reader. Is it enough merely to inform him of the industrial prescription which the Commissioner proposes, or must the Presidential Member have an opportunity to influence the Commissioner's decision? If it be the latter, it could be argued that the amendment represents a very grave encroachment on the principle that an administrative discretion should not be exercised under dictation from some other person who did not hear the evidence or argument for and against the application. A recent indication of the recalcitrant attitude of Commissioners to the new legislation is provided by a decision of Commissioner Brack in respect of a claim for travelling time by employees of the Tasmanian Forestry Commission. In the course of that decision given on 5th October, the Commissioner reported (21 A.I.L.R. 385) as saying:

> "The proposed law is, and the requirement is, for a Commissioner to consult and nothing more. So I inform the parties in this matter that the decision expresses what will go into the future order, unless they happen to agree otherwise, and no process of consultation, which in any event will be formal, will alter that.
>
> In this case I have seen the area in question with all its problems and I have no intention of my own volition, of letting anyone who has not squelched in the mud themselves, have any say, in what the result should be. It is not my intention to imply that anyone would want to do so. Any order made would, of course, be subject to appeal, should any any party so wish, but resolution of such a matter cannot properly be attempted without first-hand experience of the conditions."

A more fundamental attack on the validity of the section could well be based on the proposition that a law which embodies such a radical interferance with the conciliatory and arbitral functions of Commissioners as traditionally understood is not a law "with respect to conciliation and arbitration for the prevention and settlement of industrial disputes" within S.51 (xxxv) of the Constitution.

A similar criticism has been made of S.25A also inserted by Act No. 110 of 1979 which recites that the Conciliation and Arbitration Commission as a whole (Presidential Members as well as Commissioners) is not empowered to make an award, certify an agreement, make a recommendation or take any other action in respect of a claim for the making of a payment to employees in respect of a period during

which those employees were engaged in industrial action. That prohibition means that even if the Commission found the industrial action to have been justified because, e.g., it was unsafe for work to continue, it cannot sanction any settlement which involves a payment of any wages lost during the stoppage.

Other amendments introduced by the same Act include the insertion of S.34A empowering the President of his own motion "if he is of the opinion that there are special reasons that justify his so doing", to himself take over the hearing and determination of an industrial dispute.

Section 143A requires a Full Bench of the Commission if satisfied on the application of the Minister to declare that industrial action engaged in by two or more members of an organization is having or is likely to have a substantial adverse effect on the safety, health or welfare of the community or of a part of the community. Once such a declaration has been made the Governor-General has wide powers to direct that the organization be de-registered or to withdraw or suspend its rights and privileges. That amendment raises further nice questions of construction, and of whether it confers a judicial power on the Commission.

The insertion of S.143A and the provision for more expeditions applications for the right to stand down employees which is to be found in the new S.33A will certainly excite widespread resentment in the trade union movement. However, the procedural checks and balances introduced by the new SS.25A, 33A and 34A, are direct in their impact on legal practitioners and others concerned in the day to day presentation of cases before the Commission. It may well be asked whether isolated aberrations of one or two members of a tribunal can justify legislation which puts at risk the continued effectiveness of all the other members of the same tribunal.
the other members of the same tribunal.

REPRESENTATION IN TOWN PLANNING APPEALS

The value of legal representation is clearly demonstrated by a survey of decisions issued by the Town Planning Appeals Tribunal. The survey was of 150 consecutive decisions issued by that Tribunal they bear no relationship to whether the discussions would subsequently be reported in Victorian Planning Appeal Decisions. The results of the survey are as follows:

Appellant's representation	Cases in which appellant won	Cases in which appellant lost	Percentage of wins by appellants
unrepresented	18	42	30%
town planning consultant	14	16	46.8%
lawyer	43	17	71.7%

An appellant represented by a lawyer has more than double the chance of success of the unrepresented appellant and a far greater chance of success than one represented by a consultant without legal training.

K.H.G.

CONCERNING SPECIAL REFEREES:

Difficulties have arisen from time to time with the form of order of reference to a Special Referee under section 14 Arbitration Act. The following form of order has been prepared by the Building Dispute Practitioners' Society in the light of recommendations from its members and after consultation with the Judge in charge of the Building Cases List in the Supreme Court.

Needless to say, the precedent will have to be adapted to suit the requirements of each individual case.

IN THE SUPREME COURT)
OF VICTORIA)
BUILDING CASES LIST)
)
) 1979 No.

BETWEEN:

Plaintiff

— and —

Defendant

BEFORE THE HONOURABLE Mr. JUSTICE IN CHAMBERS
DAY THE DAY OF 1979

THIS SUMMONS FOR DIRECTIONS having been adjourned to and coming on for hearing before me this day AND UPON HEARING Mr. of Counsel for the Plaintiff and Mr. of Counsel for the Defendant AND UPON READING the Statement of Claim endorsed on the Writ herein and the copies of the defence and Counterclaim and the Reply thereto AND UPON READING the consent of Mr. of to be appointed as a Special Referee in this matter AND the parties by their Counsel jointly and severally undertaking to be responsible for the remuneration of the said Special Referee AND the parties consenting to the making of this Order I DO REFER to the said Mr. as a Special Referee pursuant to section 14 of the Arbitration Act 1958 the undermentioned Questions arising in the abovenamed cause for enquiry and report to the Court that is to say:

1. Whether any and which of the items set out under the heading "Particulars" in paragraph of the Counterclaim herein, which items are identified by the letters (a) (b) and (c), were erected, performed or completed otherwise than in a good and workmanlike manner, stating the respect or respects in which each was erected, performed or completed otherwise than in a good and workmanlike manner and the allowance if any which should be made to compensate for the same, unless the Court shall hereafter determine otherwise.

2. Whether any and which of the said items constitute work erected, performed completed or omitted contrary to the drawings or specification referred to in condition of the agreement dated the day of 1975 and mentioned in paragraph 1 of the Statement of Claim herein, stating the respect or respects in which each was erected, performed completed or omitted contrary to the said drawings or specification and the allowance if any which should be made to compensate for the same, unless the Court shall hereafter determine otherwise.

AND I DIRECT that the Special Referee is hereby authorised for the purpose of making the aforesaid report to have and use the following documents:

(a) Copy of this Order;
(b) Copy of the Pleadings herein, being the Statement of Claim endorsed on the Writ, the Defence and Counterclaim and the Reply thereto;
(c) The said agreement dated the day of 1975;
(d) Copy of the said drawings;
(e) Copy of the said specifications.

AND I FURTHER DIRECT that the said Special Referee shall inspect the premises situate at and known as the subject matter of the said agreement, and make such observations and take such measurements and do such other like acts and things, as may be necessary to make the said Report, and for the purpose of making the said Report shall hear the submissions if any of the Plaintiffs and the Defendants or of their respective solicitors and the submissions if any of an architect, builder or other expert appointed on behalf of the Plaintiffs and an architect, builder or other expert appointed on behalf of the Defendants and for the purpose of making such submissions or of instructing the said experts, whether on the inspection of the said premises or otherwise, there may attend on behalf of the Plaintiffs the Plaintiffs and their solicitor and on behalf of the Defendants the Defendants and their solicitor AND I FURTHER DIRECT that the Plaintiffs and the Defendants respectively be at liberty to place in the hands of the said Special Referee copies of any invoices, statements of account, receipts and other documents relevant to the said questions provided that copies of such documents are supplied to the opposite parties AND I FURTHER DIRECT that the said Special Referee shall not examine any witness and save as hereinbefore provided shall not receive from the Plaintiffs or the Defendants any document relevant to the said questions [or "AND I FURTHER DIRECT that the said Special Referee may if he thinks fit examine the parties to this action and their respective witnesses upon oath or affirmation and that he be authorised to administer an oath for such purpose" as the case may be] AND I FURTHER DIRECT that the said Special Referee shall make his report within months of the date hereof or such further time as may be allowed by the Court by delivering the same to the Associate to the Judge making this Order AND I FURTHER DIRECT that when a report is made by the Special Referee he shall on the same day cause Notice thereof together with a copy of such report and an itemised memorandum of his fees and disbursements signed by him to be given to the parties by pre-paid post letter directed to the address for service of each party AND I DO ORDER that within seven days of the date of this Order the Plaintiffs, on the one hand, and the Defendants on the other, shall pay into court the sum of $ as security for the remuneration of the said Special Referee and to abide any Order the Court may make in relation thereto AND I DO FURTHER ORDER that the parties be at liberty to pay into Court from time to time such further sums as they shall by agreement determine as further security AND I DETERMINE that the remuneration of the Special Referee shall be at the rate of $ per hour together with any amounts reasonably paid by the said Special Referee for the use of a room for the purposes of the reference [further disbursements as may be specified should be inserted] AND I RESERVE general liberty to all parties to apply further as they may be advised AND I RESERVE the costs of and incidental to this application and the said reference AND I CERTIFY that this was a matter proper for the attendance of Counsel.

THE NEW SILKS

Graham Lewis Fricke Q.C.
Signed: 1.2.62
Read with: McGarvie
Readers: R.W. Davis, Bell, S. Morris

Michael Joseph Dowling Q.C.
Louis:
Signed: 24.10.63
Read with: Lazarus
Readers: Strathmore, Stockdale, Shipton

David Anthony Kendall Q.C.
Signed: 17.12.59
Read with: W.O. Harris
Readers: Ramsay, Rose, P. Barton

Alistair Borthwick Nicholson Q.C.
Signed: 4.2.63
Read with: Coldham
Readers: Slim, T. Lusink, G. Crisp, Southall, McMullen, Devenish.

Ian Charles Fowell Spry Q.C.
Signed: 28.5.64
Read with: R.L. Gilbert

John Leonard Dwyer Q.C.
Signed: 12.12.63
Read with: J. Kearney and Lazarus
Readers: Salek, S. Alston, Zayler, Krejus.

Eugene William Gillard Q.C.
Signed: 24.6.65
Read with: Stephen
Readers: T. Schwartz, Hicks, Garde, R. R. Kendall, M. Lusink, Austin, Magee, Brookes, P. Misso, Campton.

and from N.S.W.

Peter Wolsenholme Young, Q.C.;

Roderick Pitt Meagher, Q.C.

THE SUPREME COURT STATUE

It is heartening to reflect that Justice, as personified above the main entrance to the Supreme Court, has managed to do so well after a singularly inauspicious start. Her proper name is Themis.

According to early Greek legend, in the beginning was Chaos. Into the sphere of Chaos came Gaea — Earth — and of that union came Uranus. Gaea made Uranus her equal and had twelve children by him — six males and six females. Themis was one of the daughters. Her brothers, the Titans, were defeated and killed in battle by the Olympians.

She did not participate in their downfall, however. After Zeus devoured his first wife, Matis, and unborn child, Themis became his second wife, to be later supplanted by Hera. Her children by Zeus were:

The Horae, or seasons
Eunomia (Wise Legislation)
Dike (Justice)
Eirene (Peace)
The Fates or Moerae.

Her main function lay in the regulation of the law of physical and moral order. Her functions on Olympus included the maintain of order and the regulation of ceremonial. She invited the gods to foregather and prepared their feasts.

On earth her functions were extensive. Above all she was the goddess of justice. One wonders where Dike fitted in. She maintained and protected the just and in so doing earned the title of protectress (Soteira). She also pursued the guilty. Judges gave their decisions according to her direction and in her name. Of importance to lawyers, she was also known as Euboulos or the good counsellor, and was respected for her wisdom.

This of course is only one version of the story. Some authorities propose that there were two goddesses by the name of Themis. With the notorious capacity of the bar to quibble over the slightest irrelevant detail a lively correspondence on the subject may ensue. The editor would be delighted.

The traditional attribute of Themis is a pair of scales. She has acquired other attributes such as the blindfold to indicate impartiality and the sword for the punishment of the guilty. She may be also shown with the Roman fasces, (the symbol of the King's authority — the bundle of twelve rods and the axe enclosed by a red strap) and a shackle, together with the cornucopia, either above or behind her. These are to indicate the punishment of the wicked and the rewards of the just. Sometimes she holds an orb symbolizing universality. Even more rarely she may be shown with the attributes of Hermes, or Mercury, (the winged sandals, broad brimmed hat, or winged helmet, and a staff on which are twined serpents) and an anchor, all at her feet, to show that justice is swift and sure.

She seems to have come to us through Roman mythology. According to the Oxford English Dictionary her later name is Justitia — though this name does not appear in any Latin dictionary perused. She represents, says the O.E.D., the exercise of authority or power in the maintenance of right.

It is a wonder, with her family background of incest and murder (seven counts), that she sits above a court, rather than having appeared before one as a juvenile delinquent.

D. H. McL.

WATTS[1] WITH[2] A NAME

Reading one of the jury lists recently I noticed a case of PRIEST v BIGOT. This caused me to wonder whether the various parties to litigation came together by accident or whether there was not some inevitability about it all.

For instance, consider how appropriate the adversaries were in STERN v GLARE[3], HYDE v SCYSSOR[4], TROUTBECK v FISHER[5], CUSHION v M.&M.T.B.[6], GUIDER v WALKER[7], CAVE v MOUNTAIN[8], MOLE v FOREST COMMISSION OF VICTORIA[9], HUNTING v BEAR[10], FISHER v MARSH[11], WATERMAN v FRYER[12]. TWIST v TYE[13], FLEETWOOD v HULL[14], HORN v LORDS COMMISSIONERS OF THE ADMIRALTY[15], and HUNTER V CHASEMORE[16].

Sometimes the battles have appeared unequal as in MARTEN v WHALE[17], CONQUER v BOOT[18], CORN v WEIRS GLASS[19], and CAVALIER v POPE[20].

Elsewhere the clash has been principally one of colours as in WHITE v BLACKMORE[21], BLACK v GOLDMAN[22], WHITE v BLUETT[23], and GRAY v BLACKMORE[24].

On other occasions even the nature of the action can be perceived by the discerning. Thus, it will come of no surprise that KEEN v PRICE[25] concerned gaming transactions, SPATT v SPATT[26] was a matrimonial dispute, and in FERET v HILL[27] the Plaintiff falsely represented that he intended to set up business as a perfumier in order to obtain possession of premises which he actually intended to use for immoral purposes.

For those with culinary interests there is PARTRIDGE v CHICK[28], VEAL v VEAL[28A], TOPPING v RHIND[29], SWEET v PARSLEY[30], and LEMON v LARDEUR[31]. BACON[32] was followed by LAMB[33], but what about the quality of goods sold in HARRODS v LEMON[34]?

The romanticists will find MAY v BLOOM[35] and HUNT v BLISS[36] which came eighteen years after HUNT v LUCK[37]. Movie buffs will doubtless recall KELLY v GRACE[38] and others may appreciate the juxtaposition of GLASSCOCK v BALLS[38A].

Perhaps of even greater coincidence is the number of times in which the party's name seems related to the individuals' predicament. Accordingly, JUDGE[39] had a stomach ulcer, RUDDY[40] refused to have his septic teeth extracted, HAMBURGER[41] interrupted a journey home from work, PUFFER[44] found himself sued in a passing off action, BAREFOOT[43] was suspected of self-injury and PORT[44] was a taxi driver who had a PEACH[44] of an employer.

Further, LAWLESS[45] was accused of murder, a horse belonging to CHEATER[46] ate the neighbour's yew tree and was poisoned, HACKWOOD ESTATES[47] was found liable when a branch fell from a tree on its land killing a tenant's employee, GILLETTE[48] sought to achieve a fine edge with cannabis but put too fine a point on it before the Magistrate and faced a re-hearing, and LIMPUS[49] was a man of straw.

HARMER[50] was a tortfeasor who took away the sexual capacity of a woman's husband. GODBOLT[51] was a cattle thief who was injured when the getaway truck met with an accident, BALLS[52] was the vendor of a glandered horse, ISITT[53] was faces with a question of remoteness of damage, GRIZZLE[54] was a girl who lost an arm in a rope factory, TRUELOVE[55] was charged in connection with obscene publications and YARN SPINNER'S AGREEMENT[56] was declared contrary to the public interest.

TICKLE v TICKLE[57] concerned a statement by a Doctor to his patient, CORNFOOT[58] considered SLOGGETT[59] and in TRIM JOINT DISTRICT SCHOOL[60] a master died following an assault by the boys.

In the parade of Plaintiffs there has been an ANGEL[61], a CHILD[62], a SOFTLAW[63] and a GOODY[64] (in a defamation action) as well as a BOAST[65], a BAPTIST[66], and A BASTARD[67]. Amongst the Defendants has been DEATH[68], BOOTY[69], DARE[70] and HILT[71].

HALFPENNY[72] was so influenced by the Defendant BALLET[72] that he walked backwards and forwards in the Court bidding the Master of the Rolls to observe the Statute of Fruads. MOSES[73] was found to be against LOVEGROVE[73] on one occasion and enmeshed with WOODS[74] a year later.

Finally, as was to be expected, DOHNT[75] didn't, STIFF[76] was and WAN[77] lost.

Stott

1. (1975) 2 All E.R. 528
2. 1936 CH. 575
3. (1953) VLR 276
4. (1619) Cro. Jac. 538
5. 1975 VR 471
6. Supreme Court Jury List. October 1979
7. (1933) VLR 413
8. (1840) 1 Mon. & G. 257
9. (1957) VR 383
10. (1939) QWN 19
11. (1865) 6 B & S 411
12. (1922) 1 KB 699
13. (1902) P.92
14. (1889) 23 QBD 35
15. (1911) 1 KB 24
16. 1959 VR 433
17. (1917) 2 KB 480
18. (1928) 2 KB 336
19. (1960) 1 WLR 577
20. 1906 AC 428
21. (1972) 2 QB 651
22. 1919 VLR 689
23. (1853) 23 LJ Ex 36
24. (1934) 1 KB 95
25. (1914) 2 CH 98
26. 1970 VR 104
27. 1854 15 CB 207
28. (1951) 84 CLR 611

28A (1859) 54 ER 118

29. (1904) 6 F (Ct. of Sess.) 666
30. 1970 AC 132
31. (1946) KB 613
32. (1965) 112 CLR 85
33. 1969 VR 343
34. (1931) 2 KB 157
35. (1949) 66 WN (NSW) 209
36. (1919) 36 TLR 74
37. (1901) 1 CH 45
38. (1931) VLR 147

38A. (1889) 24 QBD 13

39. 1939 WCR 205
40. (1929) 22 BWCC 138
41. 1943 WCR 50
42. (1930) 47 PRC 95
43. 1938 WCR 176
44. 1967 VR 558
45. 1974 VR 398
46. 1918

46. 1918 1 KB 147

47. (1938) 2 KB 577
48. 1976 VR 392
49. (1862) 1 H & C 526
50. 1955 S.A.S.R. 250
51 (1963) 63 SR (NSW) 67
52. (1852) 2 H & N 299
53. (1889) 22 QBD 504
54. (1863) 3 F & F 622
55. 1880 SQBD 336
56. (1959) 1 All ER 299
57. (1968) 2 All ER 154
58. 1973 VR 21
59. (1953) 70 WN (NSW) 206
60. 1914 AC 667
61. (1911) KB 667
62. (1731) 2 Str. 875
63. (1899) 2 QB 422
64. (1967) 1QB 333
65. (1868) LR 4 CP 1
66. (1954) VLR 431
67. (1924) VLR 9
68. (1881) 8 QBD 319
69. (1924) 27 WALR 3
70. (1978) 21 ALR 210
71. (1918) 2 KB 808
72. (1699) 2 Vernon 373
73. (1952) 1 All ER 1279
74. (1953) ALR (CN) 1165
75. 1967 VR 693
76. (1859) 5 Jur 947
77. (1970) VR 683

DRUGS AND INTENT — TIME FOR RE-DEFINITION?

> "Intention is the result of deliberation upon motives and it is the object aimed at by the action caused or accompanied by the act of volition."

Sir James Stephen. History of the Criminal Law Vol. II p.10.

> "Before an accused can be convicted of murder, the jury must be satisfied that the death was the voluntary act of the accused in the sense that it was the product of his will to act."

R. v. Tait (1973) V.R. 151 per Winneke C.J. at 154

The proliferation of psychotropic substances in Victoria has brought about the enactment of legislation as to the use and control of such substances, and the imposition of appropriate sanctions for their abuse. More complex is the problem which increasingly confronts counsel and the courts, in the prevalence of drug-related offences (such as chemist shop burglaries and robberies) and the categorization of offenders into drug-dependent persons.

Admittedly, alcohol and nicotine are the most commonly abused "drugs" [Senate Select Committee Report on Drug-Trafficking and Drug Abuse 1971 at p.3 and passim] but these notes are primarily concerned with substances proscribed by the Poisons Act 1962 of Victoria and the Commonwealth Customs Act 1961-1974. In dealing with offenders who abuse drugs it is submitted that the problem of intent, or the requisite mental element to found criminal liability, requires analysis and scrutiny, especially in determining guilt in drug and drug-related offences.

MENS REA

The maxim "actus non facit reum nisi mens sit rea" has undergone considerable academic and case-law review. But the "Woolmington principle" (Woolmington v. D.P.P. 1935 A.C. 462), namely that the law requires the crown to prove every element in the crime charged, including, where relevant, the necessary intent, is the starting point for any analysis of offences. The concept of "intend", however, presents considerable difficulty, in the area of drug, and drug-related offences. In many cases the person whose involvement with the law, either arises from, is connected with, or is precipitated by abuse of drugs, does not fit into the accepted categories being exculpatory or inculpatory in terms of criminal responsibility.

At present, (pending decision by the High Court) the law in Victoria on intoxication (whether through drugs or alcohol) and criminal responsibility is set out in R. v O'Connor (unreported 30.4.1979 Supreme Court F.C.). There is was held that evidence of intoxication, whether self-induced or not should be considered by the jury as part of their task in deciding whether the Crown had in fact proved that the accused's act was both voluntary and intentional [see P.A. Farrall, "Majewski in Retreat" (1979) 3 Criminal Law Journal, 211-219]. Certainly, (at least for the moment) it may be a relief to the practitioner to know that he is no longer required to wrestle with the problems of "basic" and "specific" intent when handling matters involving self-induced intoxication as had been required in R. v. Majewski (1977) A.C. 443. But, it is submitted, he is not relieved of the necessity of examining whether or not the actus reus of his client, was, in fact, "voluntary".

AVOIDING CRIMINAL RESPONSIBILITY

Criminal responsibility may, very broadly speaking, be avoided, if the offender;

(a) is insane within the meaning of the law in Victoria;

(b) is acting as an automaton as in R. v. Keogh (1964) V.R. 400; R. v. Haywood (1971) V.R. 755; R. v. Tait (1973) V.R. 151; R. v. Flight (Supreme Court F.C. unreported 11/11/1977); R. v. Bugg (1978) V.R. 251;

(c) has not formed the requisite intent: R. v. O'Connor op.cit. — see also cases in (b) (supra);

(d) comes into categories of defences such as honest and reasonable mistake, accident, self-defence or duress etc.

It was summed up by Barwick C.J. in Ryan v. The Queen (1962) 121 C.L.R. 205 at 215

> "In my opinion the authorities establish and it is consonant with principle that an accused is not guilty of a crime if the deed which would constitute it was not done in exercise of his will to act. The lack of that exercise which precludes culpability is not . . . limited to occasions when the will is overborne by that of another, or by physical force or the capacity to exercise it is withdrawn by some condition of the body or mind of the accused."

(followed in O'Connor's case op.cit. per Young C.J.)

Further, at page 217

> ". . . [The] necessity of deciding beyond all reasonable doubt that the deed charged was the voluntary or willed act of the accused. If it was not then for that reason, there being no defence of insanity, the accused must be acquitted."

In drug offences, the question of what is really meant by "voluntary" or "willed" becomes highly relevant. Can it truly be said that the actions of a drug-addicted or drug-dependant person are either "voluntary" or "willed", leaving aside any question of whether at the requisite time, he was insane (the burden of raising which, lies on him) or, due to his state of stupefaction, had not formed the requisite intent, as in O'Connor's case?

INTENT

The next question then becomes; how far should the Courts go in inquiring into the true state of mind of the accused? O.V. Briscoe (1970) 44ALJ23 entitles an article ". . . for the Devil does not know man's intention" and goes on to propound the theory that there may well be cases where no intent at all exists, in the sense of conscious purpose and says (dealing with the psychiatric exploration of motive)

> "what if only the unconscious motive is operating so that the actor feels compelled to act, without knowing or having the capacity, leisure or detachment to search his mind about it?"
> (op.cit. at 28 Col.2)

Thus, in such a case, there has been no rational or conscious purpose called into existence, even though, judged by external circumstances, the act may look purposive, "willed" or "voluntary".

The question of defining whether an act was voluntary or intentional (often described as being an "awareness" of action) is in practice determined by the presentation of a set of facts or external circumstances, from which the jury is invited to draw inferences as to the mental element involved. However, although most people (including jurors) are at least partially aware of the more lurid aspects of the consequences of drug abuse, few are able to appreciate fully the totality of life-style, environment, and social moves which governs the words of the drug-user. These are usually presented to the courts by experts only in the context of a plea in mitigation of penalty. It is submitted, however, that the role of the expert may go beyond this. He may, and should play a part in the determination of the realities of the very basis for criminal responsibility — i.e. the existence of the mental element required; the consciousness or voluntariness of the offender's action, irrespective of how purposive they seem. This may also be relevant, not solely in cases such as examined in O'Connor's case (op.cit) where the degree of intoxication was such as to preclude the existence of an intent, (or indeed, awareness of the actions),

but in those multifarious cases where drug-use has been the precipitating or causative factor in commission of the offence. This phenomenon has usually been accepted by the courts e.g. in R. v. Herzfeld (unreported 8.9.1976 Supreme Court F.C.) at p.6 where the learned trial judge said:

> "I accept that you were dependent on heroin prior to and at the time of these offences and but for your dependency you would probably not have committed these offences."

However, this factor, as already indicated, usually arises at plea stage. The question of how, if at all, such dependency affects the voluntariness of the actus reus itself and/or the conscious intent of the act, the question of actual criminal responsibility, is never tackled unless and until it involves a case where the state of stupefaction or intoxication, affects awareness to the degree where the offender falls within the time honoured exculpatory categories. Yet a statement such as cited above appears to indicate that despite the purposive and objectively conscious nature of the acts done, the courts recognise that the crime would "probably not" have been committed, were it not for a drug-dependency. But, one might be forgiven for thinking that this is tantamount to a recognition that the will and capacity for rational law-abiding behaviour are overborne by the factor of drug-use.

ANALOGY WITH DURESS

An analogy might be drawn, with the defence of duress. There, although the acts constituting the offence, are done purposively, and seemingly consciously and in a state of awareness, the fact that they are performed under coercion, may be highly relevant to the inference to be drawn on intent or mens rea. In such cases, it is said, the will has been overborne (see R. v. Dorrington & McGauley (Supreme Court F.C. 27.11.1979 unreported); R. v. Harding V.R. 1976 at 120; R. v. Hurley and Murrey 1967 V.R. 521 — see also "Compulsion, Coercion and Criminal Responsibility", H. Edwards 14 Modern Law Review at 296) to the extent that the pressure exerted (being, in cases of duress, threats of death or serious injury, of an immediate nature) has quashed the person's ordinary power of resistance.

In such cases, it is submitted, the law has been prepared to look byond the external circumstances, purposive though they seem, and is prepared to absolve an accused of criminal responsibility, though all his acts are "voluntary" in the sense of being done consciously and in a state of awareness, because "his will is overborne" (see dictum Barwick C.J. Ryan v. The Queen supra). Looked at objectively, the acts are "intentional", as defined by the working party of the Law Commission of the United Kingdom. [Working Paper No. 31 at p.44]

> "A person intends an event not only
> (a) when his purpose is to cause that event but
> (b) when he has no substantial doubt that that event will result from his conduct."

In cases involving duress, then, "intent" has to some extent become a legal fiction, since a rather artificial distinction is drawn between what Glanville Williams has called "external elements" in actus reus, [Glanville Williams, "Texbook of Criminal Law" London 1978 at pp.30-33] and mens rea itself. Yet as Williams rightly points out;

> "When a crime requires mens rea, an actus cannot be legally reus (in the sense of involving criminal responsibility) unless there is mens rea." (p.33)

It is submitted that the law recognises occasions when the external acts, be they never so "voluntary" in the sense of being purposive and conscious, are not accompanied by that requisite mental involvement to attract criminal responsibility. They are, in fact, voluntary acts done under compulsion. Clearly, the analogy between compulsion under duress and potential "compulsion" arising from drug-usage, cannot be drawn too far in the present state of the law. Duress involves immediate threats to life, or limb. Moreover, it will not serve to exculpate him who has voluntarily exposed himself to such compulsion. As far as drug-usage is concerned, even given that some sort of "compulsion" exists in the drug dependent person, that usage is commenced, at least, on a voluntary basis. However, in the light of O'Connor's Case, it would seem open to the courts to examine the state of being of the offender at the time of his actus reus, irrespective of his mode of entry into that state. Moreover, to speak of free will of entry into drug-abuse is, at best, an oversimplification.

AETIOLOGY OF DRUG USE

The aetiology of drug use has been canvassed thoroughly in many publications (e.g. Senate Select Committee Report op.cit. Chapter 5; "Drugs, Society and the Law" Harvey Jeff 1974 (Saxon House); Chapter 3; I. Chein "Narcotics Delinquency and Social Policy" — Taurstock Publications 1974; A. Lindesmith "The British System of Narcotics Control" — Law and Contemporary Problems Vol. 22 1957 — "The Ledain Report" (Canada) Chapter 4 — "Some causes of non-medical drug use)

Broadly speaking, several basic principles emerge:

(a) Drug-usage ought to be characterized into type of drug abused and route of administration, since not all drug-usage is drug-dependence e.g. the discussions as to Cannabis, use mostly not resulting in dependency or addiction — see the critique of Hardin Jones "Broadband" A.B.C. Radio September 1977 the LeDain report op.cit. the La Guardia Report — (Jacques Cattell Press, Lancaster, Penn. 1944)

(b) Commencement of drug use leading to dependence is influenced by a variety of sociological and psychological factors which deserve close scrutiny;

(c) Drug-dependence involves a large degree of psychological dependence, not only on the drug itself, but on the associated life-style and environment of drug-use;

(d) An inter-disciplinary approach is vital in sanction, control and elimination of such dependence.

Much of what is said here, is, of course true of many other sociological factors said to be causative of crime, such as poverty, poor education, migrant alienation etc. However, unlike these, drug-usage has per se been the subject of legislative sanction. Drug-dependent persons are by reason of their status, offenders. But it also appears that legislation has not yet grappled with the meaning of "intent" as it applies to such offenders.

LEGISLATION

Moreover, the courts have recognised that drug-dependence can be so significant a factor, both in the commission of the offence, and as to its influence upon the offender, that it may serve to transform the most serious of all sanctions, imprisonment, into a 'suspended' sentence for purposes of treatment. The Alcoholics and Drug Dependent Persons Act 1968 (no. 7772) S.13(i) provides for release conditional upon treatment, "where a person

(a) is convicted by a court and sentenced to a term of imprisonment for any offence in respect of which drunkeness or drug-addiction is a necessary part or condition or contributed to the commission of an offence and;

(b) the court is satisfied . . that the person habitually uses intoxicating liquor or drugs of addiction to excess . . ."

There is, it is submitted, an inherent dichotomy present. On the one hand, the Act says, a person must first be convicted, and thereafter, if satisfied —

(a) that drugs or alcohol were a necessary part of, or contributed to the offence; and

(b) that person is a habitual user "to excess"; then treatment is to be given him.

On the other hand, if indeed the offender does come into these two categories (for the two parts are cumulative, not alternative) then surely there must have arisen, during his trial the question of whether such a person was at all capable of having, or had the requisite intent necessary to found criminal responsibility. The Act itself seems to be a recognition by the legislature of the important influence drug-usage has on the very commission of the offence in those terms, since one of the requirements is that abuse of drugs or alcohol must have played a part or contributed to the commission of the offence. It is another way of saying, perhaps, that the law recognises that certain persons commit crimes which they would otherwise probably not have committed because of their dependence on drugs; moreover, given this, the law is prepared to allow a court to exercise its discretion, and remit such persons for treatment.

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It is submitted that this is tantamount to stating that the law is prepared to recognise the existence of a compulsion operating over such persons. The wording of the Act seems to suggest this very proposition, as does the treatment programme set out in it. However, if this is so, then surely it would be appropriate to examine those matters before conviction, as is done in other cases when the "will is overborne".

SENTENCING

It is not to be wondered at if the wording of the Act appears to have become somewhat eroded, or that courts have felt themselves constrained to impose sentences of imprisonment in cases where drug abuse was a contributing factor to the commission of the offence.

In R. v. Robinson (1975) V.R. 816 the Full Court in considering the applicability of s.13 (Gillard, Lush, Crockett JJ.) said

> "There is therefore involved a finding that a succession of events constituting a course of conduct extending possibly from a time substantially before the commission of the offence, contributed to the offence. In most cases, evidence relevant to a decision whether the accused is guilty or not guilty will probably not extend so far." (p.827)

The Court then went on to say (at p.829) —

> "If the nature of the offence calls for severe punishment then the public interest suggests that the *discretion* (my italics) under S.13 should not be exercised to relieve the offender of the punishment which it is thought community opinion would demand."

In recent years, the increase in drug-related offences especially armed robberies, has meant a hardening of community opinion, in turn reflected in sentencing policy.

In (R. v. Krone & Ors. (Supreme Court F.C. unreported 6.6.79) Young CJ., in considering a case where probation was granted at first instance to a drug-related armed robber said (at p.14)

> "The learned trial judge fell into error and allowed the considerations which are personal to the Respondent too much weight and gave insufficient weight to general deterrence . . .
> Robberies of chemist-ships for drugs are all too common; it is no defence or mitigating circumstance in such a robbery for the accused to say he was desperate for drugs."

In truth, as a mitigating circumstance, it has worn thin due to the prevalence of such pleas and the hardening of community opinion. In practice desperation for drugs is rarely raised as a defence. It is submitted, however, that such a defence is open, bearing in mind the matters already raised as to the meaning of intent and the courts duty to determine both that intent and the accused's capacity to perform voluntary acts not under compulsion.

The discussions as to mens rea and intent have largely dealt with the defences available to one whose actions were non-purposive or reckless (see two articles by Gerald Orchard Cr. L.R. Vol. 1 No.2 and 3. April and June 1977). Still remaining is the issue of law to classify the mental involvement of the person who by reason of drug and/or alcohol involvement adopts a course of action because of his status which is conscious, voluntary in the sense of being fully deliberate, and purposive, but whose sense of reality and of conforming to the social norm is so altered by his status as to allow him to adopt no other. In such a case the will of the offender is overborne; he is acting under a very real compulsion to such a degree that the "intent" or mens rea as currently defined is lacking.

OTHER STATES

A comparison with various sections in other states, shows that, for example, s.23A of the New South Wales Crimes Act (1974), served to reduce murder to manslaughter were a person

> "[is] suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind, or any inherent causes or induced by disease or injury) as substantially impairs his mental responsibility".

Clearly, despite the limitations of this section it is:

> "an attempt to mitigate the harshness of the law and it may be a step towards recognising other mitigating facts. For example given time, the law may recognise the significance of being raised in an environment of extreme social deprivation and adversity."

(Diminished Responsibility — Its Rationale and Application" — Goodman & O'Connor 1977 Cr. L. Journal p.204 at 212).

In Queensland, Western Australia and Tasmania there is the defence of some automatism and the defence of "disordered mind". In Queensland S.23 of the Criminal Code exculpates from criminal responsibility where a person:

> ". . . [is] in such a state of mental disease or mental infirmity as to deprive him of capacity . . . to control his actions".

However s.28 makes it clear that althoug stupefaction by drugs or alcohol is included, "intentional causing" of intoxication or stupefaction, is excluded. cf. s.17 of the Tasmanian Criminal Code, which makes no such exclusionary statement (see: O'Regan R.S. "Automatism and Insanity under the Australian State Criminal Codes (1978), 52 A.L.J. p.208)

INTERPRETATION OF THE STATUTES

Lastly, the interpretation of the legislation against drug offences has given rise to a draconic system making it perhaps all the more vital that the integral "intent" problems be cleared up.

The notion of "trafficable quantity" e.g. Poisons (Drugs of Addiction) Act No. 8961 of 1976 s.32(5) — Commonwealth Customs Act 1901-1974 s.4(1)) has reversed the onus of proof. Any person found in possession of a trafficable quantity, as defined, is deemed, prima facie, to be trafficking; the onus is on him to prove otherwise R.v. King (1979) V.R. 399. King's case also decided that the determination of non-involvement is a matter for the judge, not the jury.

Further, under the Customs Act, S.233B the prosecution need prove only possession — knowledge is not required. Possession or the fact of importation is sufficient. Even here, however, the principle of intent is not lacking [R. v. Router (1977) 14 A.L.R. 365; R. v. Van Swol (1974) 4 A.L.R. 386].

The legislation has stated the existence of "actus reus" and made it an offence of strict liability. Leaving aside the question of whether it is repugnant, in cases where such heavy penalties are attached to have a notion of strict liability this does not of itself obviate the need for determination of intent e.g. [R.v. Williams (1978) 22 A.L.R. 195]; in an analysis of whether possession of a minute quantity of cannabis was sufficient to found a charge of possession, the High Court maintained that it was still necessary to analyse the mental element involved in possession, to show whether there was sufficient knowledge on the part of the accused.

SOCIAL POLICY

Obviously, the harsh legislative provisions and the heavy penalty attached are an attempt to comply with social demands that drug trafficking (and hopefully, drug-use) be stamped out. That this is having little effect so far, is due to the nature of the offence, rather than any undue laxity on the part of the legislature and the courts. The problems of drug usage, whether contributory to drug offences simpliciter or drug related offences is so complex, and so symptomatic of social ills and pressures, as to depend for its solution, but on the interdisciplinary approach, involving experts in the field, not necessarily of the legal profession.

It is submitted that unless our system of criminal law suffers a radical upheaval, the proof of the mental element in these sorts of charges will cease to be an integral vital matter, irrespective of where the onus of proof is deemed to lie. Further, in light of the increased recognition accorded by the Courts to the concepts of the personality of the offender playing a determining role in the offence, it is surely a valid question whether such determinations are not themselves part of the fabric of assigning criminal responsibility.

As long as such matters are used primarily by Counsel in the form of mitigatory matters, the courts will have no option but to exercise their discretion in leniency, more and more sparingly, as the offences increase in number.

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PROPOSALS

It is submitted that such matters ought to be left to the jury for determination: whether this can, or ought to be achieved, will be a matter of an interdisciplinary approach where experts in the field can and should play their part. If it is true, that the drug-user, like the man acting as an automaton, or the man under duress, may be under compulsion to act, then such issue ought properly to be raised in his defence.

As to social policy, fears may exist that recognition of such a principle, would outrage community opinion, which calls for deterrent sentences for the good of society. This, of course, will be a matter to be taken into account, but it is submitted, given our system of law, such considerations ought to play a major part in governing what is legally and morally just.

> "Punishment must in all cases be imposed only because the individual on whom it is inflicted has committed a crime . . he must first be found guilty and punishable before there can be any thought of drawing from his punishment any benefit for himself or his fellow-citizens."

[I. Kant; "Rechtslehre" (1974) 1868 ed. of Collected works Vol. VIII].

LIEDER

MISLEADING CASE NOTE No. 8
SHORE and BEARD v. BOOTS
Supreme Court. Slough J.

This is the return of orders nisi to review convictions imposed by Mr. Gleeman SM at the Melbourne Magistrates Court. The first-named applicant was there convicted of obstructing a police officer in the execution of his duties and using insulting words, and the second-named applicant was convicted of obtaining a financial advantage by deception.

From the affidavits before me, it is clear that the following occurred at the lower court.

The defendants pleaded not guilty, and the Prosecutor commenced his case. The informant Senior Detective Constabvle Boots was called, and said, "Your Worship my name is Jack Boots I am a Senior Detective Constable Boots was called, and said, Squad. On Wednesday 5th August I was on corroboration duty in the Supreme Court at Melbourne in relation to other offences committed by one Ali Faker. I gave evidence that the accused had, after being intercepted falling down some stairs at the rear of the Moonee Ponds Police Station, confessed to numerous forgeries in the area. The Defendant Shore then used expression one. I produce that expression. I found that expression to be highly insulting, and as a result of it the accused Faker escaped from custody and is presently at large. I said to the Defendant Shore "What is your reason for using insulting words and obstructing a police Officer?" The Defendant then used expression two. I produce expression two. I said "This matter will be reported". I have been a member of the Police Force for 4 years, and in my opinion this is the worst example of obstruction and insulting words I have seen. The weather at the time of these offences was fine, the traffic was light, there was no interference".

The second-named applicant Mr. Ross Beard, who is a Barrister and who appeared on a fee declined basis for the Defendant Shore, called his client, who gave evidence as follows:

"My name is Sir Redmond Shore, and I am a Justice of the Supreme Court of Victoria. I was conducting the trial of Ali Faker, and at the conclusion of the

prosecution case, it was apparent that there was no case to answer, the Police evidence being a tissue of lies. I directed the injury to that effect and that they should acquit Mr. Faker, as they did and so he was released. The informant then asked me my reason for obstructing him, and I told him he was lucky not to be dealt with for contempt".

The Stipendiary Magistrate then made his findings in the matter as follows: "I have regard to the evidence given by the informant on the one hand; on the other hand I have regard to the evidence given by the Defendant. I certainly have regard to the fact that the Defendant does not deny using expressions one and two, which are highly offensive. I find the charges proved. Is there anything known"?

The prosecuting Sergeant then said: "Yes Your Worship the Defendant is the author of an alleged 'Inquiry into the Victoria Police Force', and is well known to members of the Police Force as a person who encourages perjury and unfounded allegations against such members".

"Defendant" the Magistrate then said, "I take a dim view of this matter. I certainly have regard to all those matters which I ought to have regard to, and I most certainly disregard all those matters which I ought to disregard. I sentence you to one month's imprisonment on each charge, sentences to be cumulative".

"There is the matter of defence Counsel also," said the Sergeant.

"Yes" said the Magistrate. "I find the charge against him of obtaining a financial advantage by deception proved. One month's imprisonment".

Perhaps unsurprisingly the two applicants are aggrieved by the decisions of the Stipendiary Magistrate, and have obtained from the Master orders nisi to review those decisions.

It is quite clear that the convictions cannot be sustained against my brother Shore. They arise from an understandable (although not excusable) desire on the part of some police officers to see defendants convicted whenever an information is laid, and from the common belief that such officers' opinions of guilt are (or should be) the alpha and omega of the trial process. In that belief, such officers are unfortunately all too often supported and confirmed by benches in the lower courts. It is high time that this court made public, with the support of the Bar, its condemnation of the connivance and conspiracy of such police officers, and its disgust with the venom with which they attacked the first-named applicant, who exposed them, before and after his appointment to this bench. Those orders will be made absolute.

The matter of the second-named applicant is quite different, however. He was convicted of obtaining a financial advantage by deception, in that he did act for and represent the first-named applicant, at the Magistrates' Court. He attacks that convictions on two grounds, that of financial advantage and that of dishonesty, contending that neither of those two essential elements existed or were proved.

The first ground is put this way: because the applicant acted fee declined for his client, he received no financial advantage from so acting. That ground, superficially of merit, has only to be explained to be shown to be false. Counsel's fees are rarely paid within 90 days, and often even then only after letters, telephone calls, and the issue of proceedings. Upon receipt, there is deducted from them the clerk's fee, telephone charges and other pro-rata disbursements, and from what remains there must be paid income tax, both current and provisional; secretaries wages, insurance and holiday pay, and rent and leasing payments on chambers and their contents. It is clear therefore that in many cases a brief fee would constitute a financial disadvantage, and that therefore to act fee declined would be a comparative advantage.

The second ground of attack upon the conviction can be disposed of as readily. It was put to me that Mr. Beard only acted to the best of his abilities in endeavouring to secure the dismissal of the information against his client, and did not act dishonestly in so doing. To that I can only say this: before most Magistrates or Justices of the Peace, any Counsel who even thinks that he can do anything other than obtain a finding of guilty is being grossly dishonest, both in his appraisal of his own abilities and in his assessment of the Bench. For those reasons, the order will be discharged.

Orders accordingly.

Gunst.

VERBATIM

An old local farmer, with a prior conviction for selling lice-infested sheep, is convicted again for an identical offence. He explains that his dipping facilities were destroyed by fire 6 months before, and decided to "take the chance".

S.M.: "You are fined $150 with $100 costs."
Farmer: "Could you break it down because of the fire, sir?"
S.M.: "No, you are an old offender."
Farmer: "Aw, come on."
S.M.: "I don't give discounts."
Farmer: Couldn't you make it $200?"
S.M.: "Look, you are not in the saleyards today."
Farmer: "Cut it back to $225 and I'll pay you cash today."
S.M.: "You will pay $250. Good day, sir."

Coram Mayberry S.M.
Korumburra Magistrates Court.

• • •

Tim Morris, cross examining a Health Inspector as to the number of bacterial organisms found in contaminated meat:

"I suggest a count of 670,000 orgasms would be quite normal . . ."

"I suppose it might depend on whether they were all sterile . . ."

Coram Miller S.M.
South Melbourne Magistrates Court
13th November, 1979.

• • •

Upon a bail application — Bank teller is charged with theft of $4700 from his employer.

Sgt.: "None of the money has been recovered."
Gerkens S.M. "Do you believe any remains or has it all been expended."
Sgt.: "It was all spent on the Melbourne Cup Carnival . . . on Dulcify!"

Oakleigh Magistrates Court.
14th November, 1979.

• • •

O'Bryan, J. charging a jury in a murder trial —

"If she is guilty so be it. If not, she is entitled to go home to her children, free, and without a stain on her character."

R. v. Lazarus
Sept. 20, 1979.
(accused acquitted).

• • •

On the shortage of accommodation in Owen Dixon Chambers:

"The other day I was in the lift and the phone rang and when I picked it up a voice said "Is that Mrs. Hooper's Chambers?"

Berkeley Q.C.
General Meeting of the Bar
Nov. 28, 1979.

• • •

Noel Ross —

"Would Your Honour enter an award for $5,000 plus costs?"

Judge Spence —

"Is this 'under the Table'?"

Ross — "No Your Honour it's all fair and above board."

Workers Compensation Board
1975.

• • •

One Supreme Court Judge was thinking to summarise, in his reserved judgement part of the evidence on an accused's belief.

He proposed to quote from Tennyson's Lancelot and Elaine, line 870.

But when the draft typescript was returned to him some unwanted capitals changed the sense of it somewhat —

". . His Honour rooted in dishonour stood
And faith unfaithful kept him falsely true . ."

November 1979

Tait had been convicted of murder and sentenced to death. Appeals and applications were made.
On one of the applications:

> "This series of proceedings is eloquent of the persistent attempts by Tait and his advisers to delay the carrying out of the sentence imposed on him on his trial and the terms of the notice of motion indicate further delaying action is contemplated."
>
> Per Lowe & Pape J.J.
> Tait v. R. (1963) V.R. 547 at 549.

• • •

An elderly lag admitted to the following conviction (inter alia):

> Police Dept., West Palm Beach, Fla. U.S.A. — 8.8.38 — Con Man — Ordered out of Town.
>
> 1979

• • •

Dee, in the course of his final address:

> ". . Mr. Barker (the prosecutor) gave you an example yesterday of how you can draw an inference from established facts and he said, if you saw me walking along Todd Street, you could draw an inference that I had come from the Stuart Arms (Hotel).
>
> "That may be right, members of the jury, but it is not the only inference which is open is it. I may have been on my way to the Stuart Arms, and that represents what I suggest is a defect in the Crown case here.
>
> "On the other hand it could be said that if you saw Mr. Barker walking unaided in Todd Street you could draw the inference that the one place he had not been to was the Stuart Arms."
>
> R. v. Collin & Ors.
> Murder Trial Coram Gallop J. & jury of twelve
> Alice Springs Aug. 16, 1979

• • •

Brian (Cohen) to other prisoner in dungeon:
"What do you think I'll get?"
Other prisoner:
"First offender? Oh . . . crucifixion, no worries."

"Life of Brian"
Python (Monty) Pictures Pty. Ltd.

LETTER TO THE EDITORS

Dear Sirs,

Having read his Honour Judge Ogden's letter in your Spring Edition 1979 and particularly his Honour's use of the word 'fulsome' may I suggest that the next C.L.E. seminar be entitled 'How to Use a Dictionary'.

Yours faithfully,
Lex. Logos

SOLUTION TO CAPTAIN'S CRYPTIC No. 30

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LAWYER'S BOOKSHELF

PROFESSIONAL CONDUCT PRACTICE AND ETIQUETTE

by Sir Gregory Gowans : Price gratis

Following the incredible public reaction to 'A Multitude of Counsellors' (Morocco Leather Edition) the Victorian Bar Council has produced a sequel in its famous Humourless Series, the eagerly awaited 'Professional Conduct, Practice and Etiquette' by the urbane Sir Gregory Gowans. Already it is rumoured that the Bar Council is negotiating with Kerry Packer for the television rights for a series based on the book starring Johnny Farnham as Hartog Berkeley and Frank Vincent as himself.

Although this new oeuvre is in the Very Greatest Traditions of Bourke's Annotations it does contain some disappointments.

The learned author has studiously eschewed the use of photographs and diagrams which would have added realism and interest to such chapters as Relations with Solicitors and the subjects of Conduct Unbecoming and Discipline.

Whilst dealing with relationships between Counsel, clients and solicitors the book totally fails to cover the vitally important area of relations with Bank Managers.

It also fails to grapple with that perennial question: "If a lady barrister drops her briefs does she become a solicitor?"

Despite these shortcomings this work will undoubtedly be welcomed by all those who believe in the importance of integrity and that it should not be sold cheaply.

Chapter Two is a Restatement of the Basic Rulings on Professional Conduct and Practice. Some rules are indeed worth noting. Rule 29 forbids the removal of books from barrister's libraries without the leaving of a note. So would the bastard who pinched my 1977 Victorian Reports return it immediately.

Rule 31 states:– A barrister shall not publish either orally or in writing or OTHERWISE (presumably by way of T.V. commercial) his opinion of the professional characteristics of his fellow barristers, or any of them, in such a way as to impugn the dignity and high standing of this profession.

This extremely wise directive is otherwise known as The Rule Against Shattering Public Illusion.

On the topic of Advocacy Training for Readers, the learned author recommends Harris' Hints on Advocacy 1943. That manual (p.133ff) contains such excellent advice as ". . . as far as possible leave the evidence of policemen alone. They are dangerous persons. The Police Constable is not below human nature generally. Today moreover the policeman is at least as well educated as the ordinary citizen . . . you must keep him with the sun in his eyes if you desire to make anything of him." The trend since 1943 to internal courtrooms with artificial lighting may well have made the novice's job more difficult.

As to Relations with Solicitors we learn: "It is not improper for a barrister to attend a Solicitor's Christmas Party at premises not at the solicitor's office."

This forcible fettering of festive fun can apparently only be overcome by pursuading your host to hire a hall or better still send up a couple of cartons to your own chambers.

Again we learn: "It is a breach of etiquette for counsel to criticize his instructing solicitor in open Court."

This is otherwise known as The Rule Against Financial Suicide.

Chapter Seven deals with Relations between Counsel and includes for the benefit of Crown Prosecutors the admonition that unreported judgements in the U.L.R. (Underground Law Reports) should, if relevant to legal argument, be disclosed to opposing Counsel.

Chapter Nine describes the phenomenon of Partial Ascension which occurs when a stuff gownsman (no 'ed' please) "takes silk". Unfortunately, this section completely ignores the new practice in the Criminal Jurisdiction known as "taking denim".

Referring to statements from the Dock, it is decreed that Counsel are not entitled to draft them. This must indeed be a relief for those who have found the Criminal Trial a voracious devourer of material.

Victorian Bar News

Advertising and Publicity receive a special chapter. In anticipation of the movement towards the liberalisation of touting procedures I have composed a commercial ditty to the tune of the popular Shirley Bassey hit "Free Again"

Free Again
Johnny Coldrey saved me again
Look at me I'm laughing
Look at me I'm laughing
etc.

This will be complemented by the snappy slogan "you commit, I acquit" which I have had printed on one foot square calling cards.

Under the present rules a barrister requires the permission of the Ethics Committee before publishing particulars of his life, practice or earnings at the Bar. This has saved us, (though not entirely), from the reminiscences of those fast approaching their annecdotage.

Photographs may be supplied at the request of the Press but are limited to head and shoulders — (eat your heart out Cleo) — taken against a plain featureless background. (No doubt merging with the plain featureless faces).

Counsel may supply general information to "Who's Who in Australia" and although not specifically spelt out it is felt on the balance of probabilities this would also apply to the Melbourne Telephone Directory.

It is suggested that lest this worthwhile publication becomes like "A Multitude of Counsellors", a recurring asset of the Victorian Bar (see Annual Reports 1968 et seq.), the Bar Council make its purchase and study a prerequisite to signing the Roll of Counsel (i.e. by the insertion of item (iv) to Rule II subsection (b) of the Reading Rules).

And anyway if the little buggers want to take the bread out of our mouths why shouldn't they suffer?

Coldrey

DIVORCE IN AUSTRALIA

by PAUL M. GUEST and MAURICE GURVICH

With Foreword by Sir Esler Barber — Sun Books 188pp. $5.95

"May I stress the responsibilities of legal practitioners in acting for clients in this important jurisdiction — a jurisdiction designed inter alia to 'protect the rights of children and to promote their welfare' and protect fundamental relationships of children and parents before and after dissolution. The philosophies of the Act are clear and should be borne in mind, not only by Judges but by Counsel and Solicitors. It is true the adversary system remains in the processes of determining contested issues. But the legal profession act as advisers, they are more than mouthpieces, more than puppets reacting to instructions. In this jurisdiction the functions of this Court are not often understood by parties in dispute. A bit of sound common sense and dispassionate legal advice will often go a long way in solving the issues confronted by people who have temporarily lost their sense of proportion, especially those who cannot disassociate children from their squabbles, who tend to regard them as possession, albeit as very precious possessions." per. Muirhead J. in the Marriage of Pastrikos (1978) 31 F.L.R. 524 at 526.

Divorce in Australia goes a long way towards explaining and emphasising the motivating influences behind the approach urged by Muirhead J. The book is misdescribed on its back cover as being ". . . a comprehensive guide . . . (covering) . . . aspects such as choosing a lawyer, costs, counselling, custody of children, maintenance and property agreements."

Whilst the book superficially deals with broad aspects of Family Law its main focus is on custodial disputes providing a sensitive and perceptive insight into the factors which the Court considers relevant in custody disputes and the manner in which parties should prepare for them. In addition, it explains the qualities which clients should look for in choosing suitable solicitors and barristers to represent their cause, although for the vast majority of consumers of legal services their need to call on a practitioner will be so infrequent that they themselves will never be in an adequate position to judge whether they are being adequately or inadequately represented or advised.

The book will provide useful reading to students about to undergo a course in Family Law or for graduates who have not studied the subject at University. It will also provide useful reading for social scientists and other allied professions as well as for the more literate members of the community to whom it is obviously aimed.

The treatment of custody and access occupies over half the text, whilst the other areas are broken down into some 25 chapters, mainly of 2 or 3 pages duration each. In dealing with property the authors have chosen (no doubt hampered by the restrictions of S.121 Family Law Act) to pose "hypothetical examples" rather than espouse the broad principles which the Court has recently attempted to lay down in decisions such as Wardman v. Hudson (1978) F.L.C. 90-465, Pothoff v. Pothoff (1978) F.L.C. 90-475, and Crawford v. Crawford (1979) F.L.C. 90-647. There is an inherent danger in encapsulating facts then demonstrating conclusions by way of example for members of the lay public. The area of property law remains a difficult one as it is dependent upon the discretion of the trial judge and the best an advocate can do is to explain to his client the broad principles and the likely range of result when such principles are applied to his client's case.

At page 68 whilst discussing the reason behind the Court's reluctance to impose restrictions on the introduction of children to their parent's de-factos I suspect the authors have directly quoted the sensitive judgment of Harris J. in Keenan v. Keenan (Supreme Court 15/11/1974 unreported) without giving credit to the original author of the remark.

Many practitioners find the footnotes more useful at the bottom of each page rather than compiled in a separate chapter at the end of the text, but as the book is designed primarily for the layman and the authors point out that the notes and sources are intended primarily for the use of members of the legal profession, perhaps the criticism is one of undue professional sensitivity.

Divorce in Australia is especially recommended to the younger members of the Bar and to those who foray into the field has been limited mainly to cases involving determinations made under the Matrimonial Causes Act. To those with a day to day practice in the Family Court the book provides some useful passages for placating clients who can only see the wisdom of their own cause without appreciating that there may well be another side to the story, especially in custody cases.

JOSEPH V. KAY

TASTY SUMMER DISH

BARBECUED GREEN PRAWNS

1. Buy fresh green prawns with shells. These are available inter alia at Prahran Markets and at J.J. and J. Canals of 703 Nicholson St., North Melbourne, Preston and Carlton (or should it be Cannals, JJ., & J.?)
2. Slice through shells along backs of prawns and remove the black line. It is important to keep shells on.
3. Marinade for as long as possible — preferably 4-5 hours — in a mixture made up as follows:
   Crushed Garlic
   Grated Fresh Ginger
   Lemon Juice
   Olive Oil
   Soy Sauce
   Salt
   Pepper

   The relative quantities of these ingredients should be decided by impulse and availability. That way no two dishes are ever the same and each can be properly regarded as an original creation. Other ingredients such as chopped chillies can certainly be added, and would indeed be advisable if, for example, Wikrama were coming to lunch.
4. The prawns still in their shells are sauteed on the hot plate of a barbacue or in a frying pan. For a few minutes only — they cook very quickly!
5. Serve with crystal finger bowls and a dry white flinty wine or copious quantities of beer.

Coke

SPORTING NEWS

All members of the Bar can be envious of the exploits of Paul O'Dwyer who assisted a friend of his in a sailing venture between May and August of this year. He set sail from St. John Cap Ferrat in the South of France and proceed along the west coast of Italy stopping at various islands which included Elba, Capri, Ischia, Stromboli, Lapari and Volcano. The ultimate destination was Corfu. Notwithstanding a vigilant lookout, he was unable to locate a law conference. Any conference dealing with the laws of admiralty would have been welcomed in the light of a number of near mishaps, including one episode when he nearly ran into an island off the coast of Sicily.

• • •

Large headlines were featured in a recent edition of the Sunraysia Daily, when a horse by the name of "Our Frankie" greeted the Judge in the Pooncarie Cup. One of its owners, Bowman, asserts that he was at the Grand Final of the Football and did not invest any of his hard earned collateral on his steed which started at six to four favourite. At its previous start it had run seventh at Tatura after drifting from 7/2 to 20/1. Bowman, who is a staunch Collingwood supporter, owns the horse in partnership with a Richmond supporting Solicitor, and the horse races in the colours of black, yellow sash, black and white hooped sleeves.

• • •

One of the highlights of the "Big M" Marathon held on the 21st of October of this year was the performance of our recently elected chairman, Berkeley. Despite adverse conditions which resulted in many competitors tossing in the towel, he manfully completed the marathon in three hours, 46 minutes, which is considered good by any standards. We believe that Leckie failed to complete the course; the "Angel of Mercy" helicopter has been dispatched in an attempt to locate Stanley and although Vincent completed the course in three hours thirty minutes, he blew up rather badly after the event. He maintains that Mattei, who joined him in Brighton Road not far from the Junction, "hit the wall" after travelling about two hundred yards. Danos was the star performer as he breasted the tape under three hours but he complained at having to wait for a further two hours for Castan and Fajenbaum.

• • •

Klestadt recently won the McCutcheon Cup sailed at the Royal Yacht Club of Victoria with the assistance of his crewman who happens to be a Solicitor. Despite having one of the oldest boats of the 250 entries he won his division and also captured the overall prize. Uren, is also a devotee of the classic older school of sailing and it is rumoured that he is talking about building a rowboat based on a 1920 design. There is no truth in the rumour that he has been consulting the Bible in an endeavour to locate the blueprint for the Ark. There is some foundation for believing that McPhee may be purchasing a new yacht which is currently located in Sydney.

• • •

With the summer months approaching and with the growing number of aspirants for the Bar Cricket and Tennis sides, it is not surprising to see many of the members of the Bar involved in frantic physical exercise. For example, Kelly Q.C. has been playing a regular game of tennis in the light of advice given to him by his doctor that he manifested "a total and complete lack of muscle tone". Philbrick, who used to have more chins than a Chinese telephone directory, is now as fine as a summer's day and is a chance for opening bat in the Bar Cricket side.

• • •

Hart will not be embarking upon his usual marathon across the Little Desert. He has not lost his spirit of adventure, however, and hopes to pursue a rubber raft trip down the Franklin River into the Gordon River in Tasmania. He will be accompanied by Peter Galbally whose fitness is without question.

Hart's enthusiasm can be seen from the fact that he is experimenting with various rubber rafts and drums in his swimming pool and even going to bed in his wet suit. The author notes, however, the following extract from a book entitled "Canoeing in Australia": "The Gordon River flows through some of the most rugged and inaccessible country in Tasmania . . . This trip should not be attempted by any but the most competent canoeists." The article then goes on to state that "Once canoes are launched there is little chance of turning back."

Four Eyes

THE PROSECUTORS FOR THE QUEEN

The Office of Crown Prosecutor in Australia originated in a statute well known to legal historians — 9 Geo. IV Ch. 83 (1828), which by Section 5 provided that all offences were to be "prosecuted by information in the name of His Majesty's Attorney-General or other officer appointed by the Governor". The signature of the Attorney-General or "other officer" authenticated the indictment without the necessity of a verdict from a grand jury; and it is said, that this provision was necessary because it was not easy to assemble a grand jury of 23 free men in Sydney at that time, or at least not without crippling the commercial life of the community.

Whether anybody other than the Attorney-General actually appeared in criminal prosecutions in the colony between 1828 and 1840 is not absolutely clear. At all events, in 1839 a gentleman from the Irish Bar was sent by the Imperial Government to the District of Port Phillip to be the "Crown Prosecutor" in that part of the colony of New South Wales. His name was James Croke and he was paid a salary of £400 a year. The early gossip, Garryowen, said that Croke was "the veriest muff in court, tedious, irritable and quarrelsome". (It will be immediately apparent that today's Prosecutors for the Queen are cast in a different mould). Victoria has continued to have Crown Prosecutors since 1840.

The office of Crown Prosecutor has no exact counterpart in England. In that country "Treasury Counsel" are appointed from the Bar and are in fact fully engaged in prosecuting for the Crown. However, unlike Australian Crown Prosecutors, they do not become permanent officers of the Crown and are not salaried.

It is interesting to note that in September of this year members of the United Kingdom Royal Commission on Criminal Procedure, including Sir Edward Everleigh, a Lord Justice of Appeal, were in Melbourne looking (inter alia) at our prosecution system in order to consider the possibility of its introduction in the United Kingdom.

Victoria maintains the strong common law tradition that the person holding the prosecution brief is a minister of justice in the sense that his first duty is to Justice itself and not merely to the Crown as a client. The ramifications of this proposition are well known to the Criminal Bar, and some of them are discussed in *Richardson* 131 C.L.R. 116. Nevertheless, the prosecutor is involved in adversary proceedings, and in Victoria prosecutions nowadays are conducted forcefully as well as fairly. One colourful Silk is prone to overstating the prosecutor's approach to litigation as "going for the jugular" while a more impartial observer would note that the prosecutor is stoutly endeavouring to keep the ratio of acquittals of the guilty to convictions of the innocent to not much more than "10 to 1".

Although a volume of the Crown work is briefed out to barristers in private practice, most of the court work in the area of prosecution is conducted by Crown Prosecutors. One of the distinguishing features of the Crown Prosecutor in comparison to "outside Counsel" is the power of the former to "make presentment".

This power, analysed in *Parker* (1977) V.R. 22, involves Crown Prosecutors in a general supervisory role over criminal trials. They may sign presentments or refuse to do so irrespective of the result of committal proceedings, and, of course, they may prefer different charges to those upon which a person is committed for trial. The period as to whether or not to sign a particular presentment is one which is personal to each individual Crown Prosecutor. He would not sign a presentment unless satisfied that the evidence available to the Crown would properly justify a conviction.

The work of a Crown Prosecutor comprises a number of areas — Supreme Court trials, County Court trials, Appeals to the Full Court, murder inquests and "Chamber work". The last mentioned category involves perusal of briefs in order to decide what counts should be included in a presentment (or whether a presentment should be signed at all), the provision of advice on matters of law and practice to "outside" prosecutors in relation to current trials and the provision of advice as to the entry of a "Nolle". Such last mentioned advice is forwarded to the Solicitor-General who then provides his advice to the Attorney-General who alone can direct the entry of a nolle. It is unusual for the Solicitor-General and the Attorney-General to reject the advice of a Crown Prosecutor in that regard. Another aspect of Chamber work is the consideration and, where appropriate, the approval of a "plea bargaining" proposal made to a prosecutor in private practice.

The Prosecutors for the Queen in Victoria are salaried and are entitled to quite substantial superannuation benefits. Their present salary is $35,430

and, for practical purposes, that salary is indexed. They enjoy the usual Bar vacations and are entitled to long service leave at the same rate as the Public Service. They welcome the regular fortnightly salary cheque, sadly miss the occasional big "pay-in" of their colleagues in private practice, are relieved of the April panic to pay the taxman and bemoan the large tax slice taken from each fortnight's salary. They continue to be members of the Bar but have no rights of private practice. They occupy a separate set of attractive Chambers located in a building which is known as "Nubrick House". As appropriate as that name is, in relation to the owner of the building, it is singularly inappropriate in relation to Crown Prosecutors.

At present there are fifteen Crown Prosecutors, and it is understood that a number of additional Crown Prosecutors will be appointed in the near future.

Appointment of Crown Prosecutors is made by the Governor-in-Council upon the recommendation of the Attorney-General and Solicitor-General. Those recommendations arise from a number of sources, although it is no secret that experienced members of the Bar interested in appointment are free to communicate in confidence with the Solicitor-General.

Criminal trials are becoming more complex and of longer duration, and it seems clear that for a variety of reasons the Criminal Justice System will have to meet unprecedented stresses in the next decade.

The ability of the system to survive in its present form will depend upon the Criminal Bar practising at each end of the Bar table and a continuing growth of expertise for both groups is essential.

OUTSTANDING FEES AGAIN

Early this year the committee of "C" list asked the Bar Council to reduce the time for payment of counsels' fees in respect of Magistrates Court matters from 90 days to 30 days. The Bar Council decided that it should not approach the Law Institute to reduce the time for payment of counsels' fees until counsel themselves had done what was reasonable to obtain prompt payment of their accounts.

There are at least two clerks that use computer accounting for the purpose of rendering accounts to solicitors, Foley and Stone. The experience of counsel on Foley's list and Stone's list is that their accounts are paid much more promptly than that of counsel on other lists.

One member of the Bar Council informed the Bar Council that on transferring from another list on to Stone's list, his outstanding fees had been reduced from the equivalent of one year's income to the equivalent of 3 months' income and that he attributed the difference entirely to the more efficient rendering of accounts to solicitors.

In addition the computer accounting enables the clerk to get to the barrister each week not only a statement of all fees received but also in respect of which matters and the total amount received for the year to date. At intervals of two months or so, each counsel receives a computer print-out informing him of the solicitor, the name of the matter and the amount of each outstanding fee and the total is divided into periods outstanding of three months, six months, nine months, twelve months and longer.

The Bar Council asked the clerking committee to take steps to ensure that each clerk adopted computer accounting before the commencement of 1980. After considerable discussion, the clerking committee reported to the Bar Council on the 8th November, 1979 that apart from Messrs. Foley and Stone and possibly Mr. Bloomfield, there is no interest in going onto computers. The reasons given by the clerks for not wishing to transfer to computers were that their present systems were adequate and that such a transfer would involve unnecessary expense.

FOR THE PERIPATETIC

Counsel will have received leaflets from Montpelier Travel International, managers of Law Institute Travel Service, and official travel agent for the Law Council of Australia's major conventions. These leaflets show forthcoming overseas conferences to the end of July, 1980.

For those planning further ahead, the following list may be of interest.

JUNE 1980		
19-21	Sydney, Australia	Australian Mining & Petroleum Law Association 4th National Conference
JULY 1980		
3-6	York, England	Society for Computers & The Law Annual Conference
12-17	Honolulu, Hawaii	Commercial Law League of America Annual Convention
19-27	Montreal, Canada	Association of Trial Lawyers of America Annual Convention
30-2/8	San Francisco, Calif.	Federation of Insurance Counsel Convention
AUGUST 1980		
30/7-6	Honolulu, Hawaii	American Bar Association Annual Meeting
11-15	Sydney, Australia	Continuation of American Bar Association Annual Meeting
17-23	Lagos, Nigeria	6th Commonwealth Law Conference
23-28	Montreal, Canada	Canadian Bar Association Annual Meeting
23-30	Berlin, Germany	International Bar Association 18th Biennial Conference
SEPTEMBER 1980		
19-21	Oxford, England	Planning Law Conference
OCTOBER 1980		
8-12	Eastbourne, England	Law Society National Conference
13-16	Worcestershire, England	Advocacy Training Course
15-18	French Lick, Indiana	Indiana State Bar Annual Convention
NOVEMBER 1980		
6-8	St. Thomas, Virgin Islands	Trial Evidence in Federal & State Courts
16-21	Buenos Aires, S.A.	International Assoc. for Protection of Industrial Property

For further information contact Paula at Montpelier Travel, telephone 26-1358.

BIG CHESS TORNEY

Frequenters of the 13th floor coffee lounge will have noticed a chess set in regular use. It is now proposed to conduct an inaugural Bar News Chess Torney. The cryptic Captain himself has consented to donate an appropriate trophy. Organization is to be handled by Fookes. Wagers will not be part of his function. Interested members should contact Fookes Clerk Q.D.C. Room 201 P.A.X. 122.

"Don't worry about it. One day you're feeling down and you dish out twenty years to some poor devil. The next day you feel great and everybody gets a bond. It all evens out in the end."

Summer 1979

FREEDOM OF THE CITY OF LONDON CONFERRED

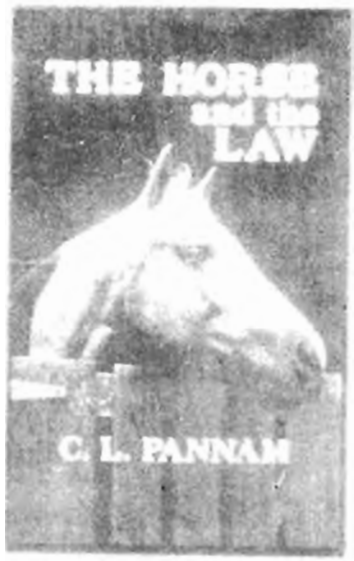
The Freedom of the City of London was conferred on Gifford Q.C. on Wednesday 5 September 1979. He was nominated by Councillor H. Olsen and Mr. S. Heather (the Comptroller & City Solicitor of the City of London). The conferring of the Freedom was by resolution of the Common Council of the City of London.

The actual conferring of the Freedom is a very ancient ceremony performed in the court of the Chamberlain of the City of London. It includes the making of a declaration of allegiance to the City of London. The Chamberlain or Vice-Chamberlain presiding over the court wears robes identical with the robes of a Victorian Q.C. save for the absence of the wig and the wearing of a brown gown with brown fur over the Windsor court coat.

After the Freedom is conferred a toast to the new Freeman is drunk in the Chamberlain's suite and the Freeman is then photographed under the coat of arms of the City of London, in the courtyard of its Guidhall. This is followed by a luncheon.

An official statement published by the City of London states that:

> "Freemen are people with whom the City is pleased to have a link and people who cherish a formal connection with the City of London".



Pannam's new book "The Horse and the Law" is advertised in the latest Law Book Co.'s newsletter. We haven't read it but it has a picture of an unusually intelligent looking lawyer on the cover.

FAMILY LAW

The Family Lawyers Association is hoping to organise a conference on the subject "Family Law and Related Commercial Aspects" during the first week of July 1980.

Venue: Maui Island, Hawaii.

It may be possible to co-ordinate this conference with a trip to the West Coast of U.S.A. and Rio de Janiero.

Watch for further notices.

CATHOLIC JURISTS

. . . are holding their Tenth Congress in Manila, Philippines from 23rd to 29th December 1979. The Congress whose subject is "The Dignity of Man" is under the patronage of His Eminences Jaime L. Cardinal Sin.

Catholic Lawyers interested apply —
Dr. Pacifico M. Castro, Catholic Lawyers' Guild of the Philippines, Inc., P.O. Box 2253 Manila. For further information contact F. Walsh PAX 424.

MOVEMENT AT THE BAR

Members who have signed the Roll (since 14/9.1979)

P. BRENNER
A.M. PASZKOWSKI
J.W. WILKINSON
P.R. MOLONEY
J. CYNGLER
T.J. GINNANE
J.W. HARDY
R. SEIFMAN (to sign 6/12/79)

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

V. STUBAN
R.M. DOWNING (to be removed 6/12/79)
C.J. McPHERSON
R.A. CAPES (to be removed 6/12/79)

Death

The Honourable Mr. Justice Menhennitt

Members in active practice: 674

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