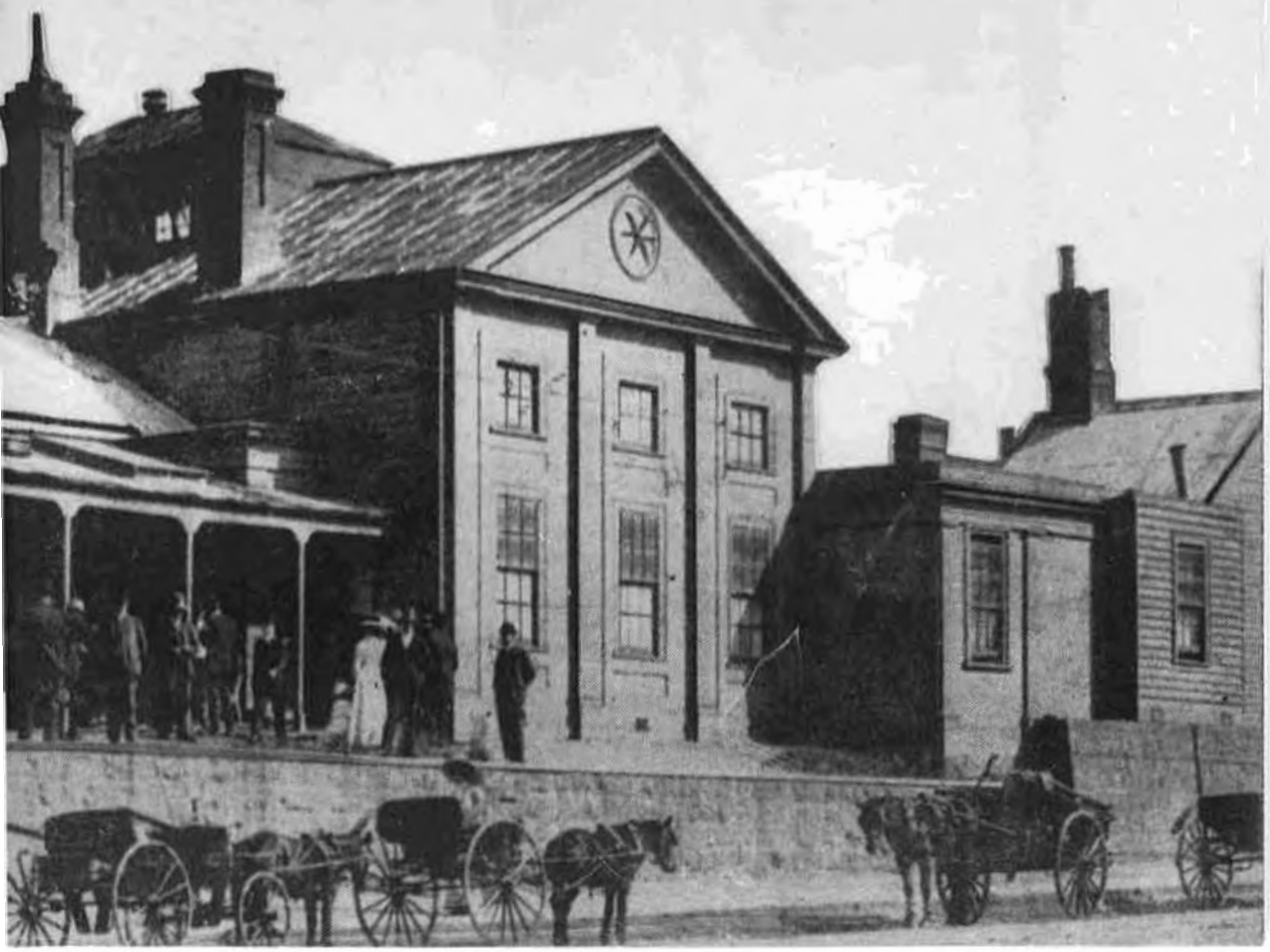
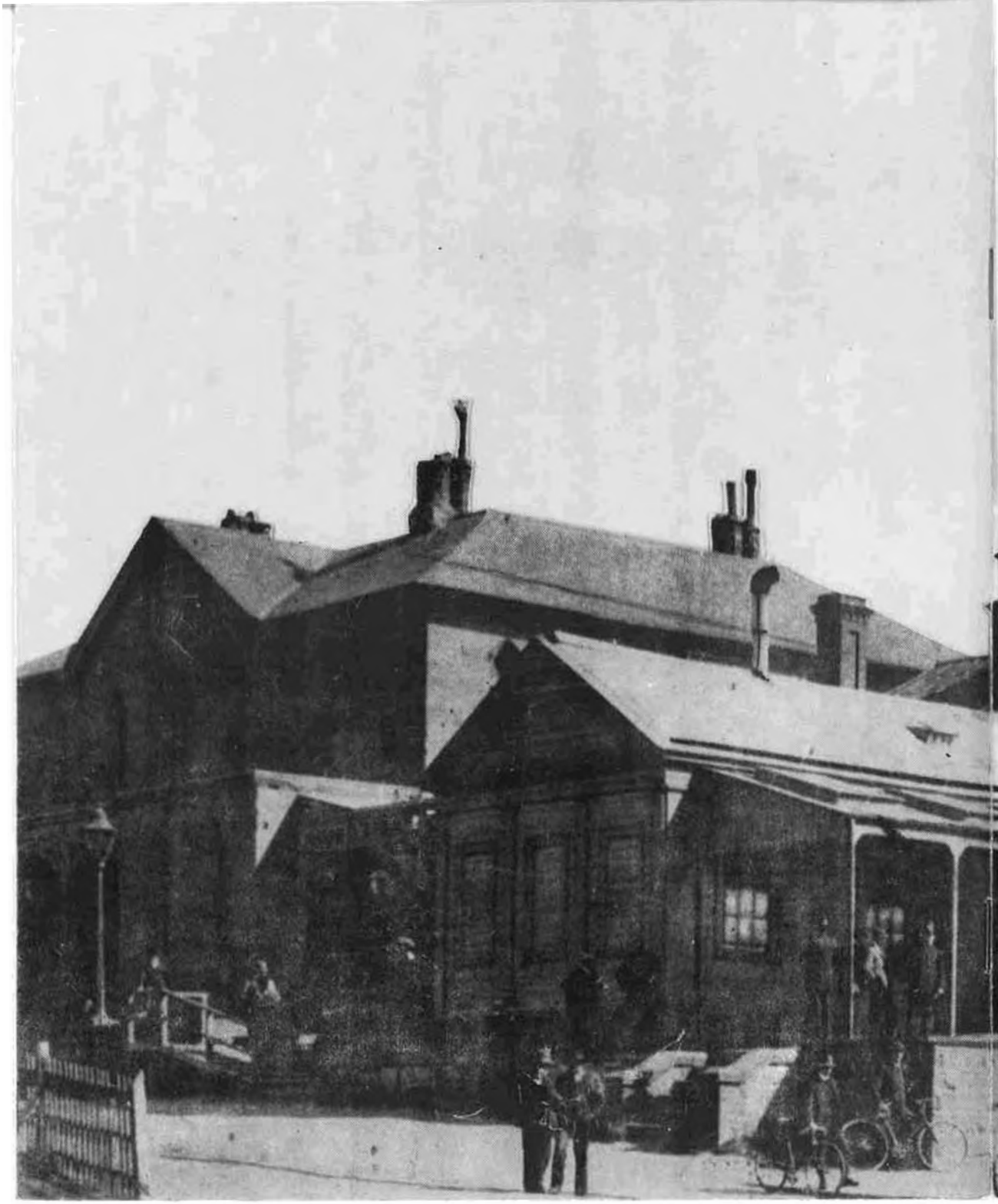
Victorian Bar News

SPRING EDITION 1980





COVER:

The old Supreme Court Building which stood on the site of the present City Court and abutted the old Gaol. It was here that Ned Kelly was tried a hundred years ago this month. This photograph and that of Barry J. appearing on page 19 were kindly made available by Mr. Shelton, Associate to the Chief Justice.

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BAR COUNCIL REPORT

READING COURSE

The Bar Council recently resolved that a new Rule 4 be inserted in the "Rules Relating to Reading at the Victorian Bar" in the following terms:

> "An applicant shall attend the Readers' Practical Course as prescribed by the Bar Council during the preliminary reading period".

The Course which has been successfully conducted in the first two months immediately following each of the two in-takes of new members to the Bar this year, involves considerable expenditure for the engagement of teachers and the preparation of materials. The total cost of the first course (which involved some establishment costs) was approximately $17,000 and that of the second course approximately $14,000. It is considered that courses in the near future will involve expense in the vicinity of the latter figure and it has, accordingly, been found necessary to increase the cost to individual readers from the present $400 to $500.

PRACTICE IN CANBERRA

It has been noted in the Winter Edition of Bar News that the Victorian Bar has secured Chambers in the A.M.P. Building in Canberra for use by members conducting practice in the A.C.T. The Bar Council has resolved that the general prohibition upon Counsel attending the office of Solicitors in Melbourne is applicable to Canberra.

LAW COUNCIL OF AUSTRALIA

The Bar Council on two occasions took the rather unusual step of inviting Mr. John Richards the then President of the Law Council of Australia to attend meetings of the Bar Council to address it on the question of reform of the Law Council's Constitution and in particular the amendment of the "veto" clause which enables any constituent body to veto discussion on topics it considers to be of purely domestic interest. Nevertheless the Bar Council has continued its opposition to amendment of that clause.

FEES FOR COUNSEL IN THE CRIMINAL JURISDICTION

Recently the Acting Treasurer approved payment of fees by the Public Solicitor to the extent of 80% of the scale of fees promulgated by the Bar Council in August 1979 with two limited exceptions. This brings to a successful conclusion a process of negotiation conducted over a period of some months between representatives of the Bar Council and the Law Department. A submission has also been forwarded by the Bar Council to the Crown Solicitor with a view to achieving appropriate increases in the fees payable to Barristers retained by the Crown to prosecute in criminal matters. Preliminary steps have also been taken to have a regular yearly review of Public Solicitor fees.

OTHER SUBMISSIONS

Other submissions have also been made by the Bar Council to the appropriate authorities in relation to:

(i) amendment of Section 5 of the Instruments Act;
(ii) amendment of the Magistrates' Courts Rules;
(iii) the Planning Appeals Board Bill (No. 2);
(iv) fees payable to Counsel in civil proceedings in the County Court.

SOCIAL

On the 19th June the second Readers' Dinner was successfully conducted. On the 24th July, 1980 the Chairman of the Bar Council and several other senior members joined the Solicitor-General for the State of Victoria and other Solicitors-General who were attending Melbourne for a meeting of Solicitors-General at lunch in the Common Room. Members of the American Bar Association recently in Melbourne were entertained to morning coffee in the Common Room and then taken in groups on a conducted tour of Chambers and the Law Courts.

R.C. WEBSTER

FAREWELL: NIMMO J.

The forensic and judicial career of Sir John Angus Nimmo presents a harmony of contrasts.

A devout Baptist, he held the deep affection of people of diverse faiths, and of no faith.

He was born in North Melbourne, the son of an engine driver, and came to the Bar during the depression. He had a life-long attachment to the poor and disadvantaged. But a large part of his career as a member of the Taxation Board of Review and a Silk, was spent grappling with the legal problems of the rich.

In the closing months of 1962 he unhesitatingly laid aside his huge taxation practice in order to join in a long, and in the end successful, struggle for the life of a man in the condemned cell, whose sanity was in question, and whom the Victorian Government was determined to hang. The same Government appointed Sir John an Acting Justice of the Supreme Court of Victoria in April 1963.

He became a Deputy President of the Commonwealth Conciliation and Arbitration Commission in 1964 but, differing from the conclusion of the President in a National Wage Case, found himself, with Mr. Justice Charles Sweeney, allocated little work of importance thereafter, until both of them were appointed to the Commonwealth Industrial Court.

He was made Chief Justice of Fiji. In the unquiet times following independence in that country, his appointment was welcomed by a mass walk-out of the Parliamentary Opposition. For years he was obliged to sleep with a revolver under his pillow.

In his early days he was the favourite junior and close friend of Eugene Gorman Q.C. In that position the Georgian simplicity of Nimmo the advocate often passed unnoticed alongside the Proto-Baroque elegance of his legendary leader. The men were life-long friends, although a greater contrast between two human beings can be imagined only with difficulty. Sir John still treasures a letter he received from Sir Eugene in the early 1970s. It commenced "I am in Las Vegas. I have just lost a stupendous sum at the tables, and am sitting in my room reading the Gideon Bible."

His retirement from the Bench was marked by an accolade never previously awarded. The drivers of the Commonwealth Car Pool in Canberra pride themselves on their sturdy objectivity – not to say scepticism – in relation to the dignitaries whom they drive. When Sir John Nimmo retired from the Bench the drivers took up a collection and presented him with a watch. They desired, as they said, to record their appreciation of the warm friendship that they had, one and all, enjoyed with Sir John Nimmo.

ETHICS COMMITTEE REPORT

1. A detailed report of the Committee's activities in the past year will be found in the Bar Council Annual Report.
2. The Committee has expressed the view that the spirit and intent (if not the letter) of Ruling No. 17 (relating to a barrister not dealing directly with the opposing party or his solicitor) extends to cases where litigation is imminent or reasonably anticipated.
3. A member of Counsel was fined $500 after a summary hearing, for failing to put an appropriate written submission as requested of him in an arbitration in circumstances where the award was published without benefit of that submission.
4. The Committee is in the course of considering the clarification of some aspects of Counsel's duty when a client on a criminal charge admits his guilt to his Counsel. (See the statement in **Gowans** (p. 81) and compare the Statement in **Gifford and Heymanson : The Victorian Solicitor** (p. 338).)
5. The Committee has resolved that at the present time there was no reason to alter the existing rules as to visiting and business cards. In general cards may not bear the profession or qualifications of Counsel except for use overseas.

"LAWYERS IN THE 80's"

A REPORT ON THE YORK CONFERENCE PRESENTED BY THE SOCIETY FOR COMPUTERS AND LAW

In early July 1980 a conference took place in York, England. Presented by the United Kingdom Society for Computers and Law it brought together over 300 delegates from some 22 countries to investigate through lectures, seminars and an exhibition how lawyers will be effected by the impact of office computers and the advent of the microchip technology. The imminent changes to our work are far-reaching and dramatic

For hundreds of years lawyers, governments, publishers and printers the world over have operated in much the same way. Legislation, having been resolved upon by Parliament or some other executive body, has been published in a permanent form. Disputes between citizens have been resolved in court cases, and such cases have been reported and published in book form. Now in the microchip age, information can be collected, collated and published in electronic form; preserved on tape, disc or in a bubble memory. It can be viewed and reviewed on video screens by thousands of people at the same time without a single ounce of printers ink being utilized. The impact of the new technology will be no less far reaching than was the advent of Caxton's printing press

Although certain aspects of the conference were designed more for solicitors than barristers, it was nevertheless interesting to consider the prospect of briefs being delivered no longer by mail or carrier, but by telephone hook up from an electronic typewriter in the solicitor's office to a facsimile machine or electronic typewriter in the barrister's Chambers.

The advances which have been made and are still being achieved in word processing technology appeared, to the layman, to be amazing. For large solicitors' practices such systems are already well used. Perhaps doubt as to the cost-effectiveness of such expensive machinery in barristers' chambers prevents speedy adoption of similar technology on this side of the profession. However current developments with systems which have one or two central processing units and which permit numerous users to have simultaneous access thereto, appear likely to mean that the Bar could find it worthwhile to invest in a centralized system. For a fraction of the present cost of an individual word processing system, each secretary whose electronic typewriter was plugged into the circuit could obtain the benefit of full word processing techniques.

The most interesting matters at the conference, so far as the Bar was concerned, were displays of and discussion relating to computer based legal information retrieval systems. Two full-texts systems are currently operating in the United Kingdom: 'LEXIS' marketed by Butterworths Telepublishing Limited and 'EUROLEX'; a company formed within the Thompson Organization. To the user both systems appear similar. Each has a keyboard, video screen and telephone link to the operating computer. It is not apparent when information is sought, that the 'LEXIS' computer is situated in Dayton, Ohio and the 'EUROLEX' computer is in London. However fundamental differences between the two systems revolve around the marketing philosophy of them

and the data base which is available through each. 'LEXIS' can only be operated through a terminal obtained through the 'LEXIS' marketing company. The terminal is provided as part of an integrated service. Through the terminal one only has access to the 'LEXIS' data base at the present time. (In the United States, perhaps due to consumer pressure, 'LEXIS' have moved to the next generation of terminals known as 'NEXIS', through which one can have access to various other data bases such as the New York Times Data Base, the Economist, Washington Post, and certain publicly held corporate information). The 'EUROLEX' subscriber can use any equipment which is designed to be compatible with the operating system; in other words he can use most standard word processing machines to perform the functions of a terminal. Thus the 'EUROLEX' subscriber can use his terminal to obtain information from any commercially accessable data base at no extra cost.

So far as the contents of the data base are concerned the 'LEXIS' data base is by far the larger of the two. It has virtually a complete coverage of US Federal case law, and State case law for each State dating back to the early 1960's. Many other US reports are also available on particular topics. In its United Kingdom Data base presently available are the All England Reports, dating back to 1945, together with the references to the equivalent case in the Weekly Law Reports or the Authorized Reports, and in the event that a particular case is reported only in the Weekly Law Reports or in the Authorized Reports then that report is available. It is intended that the near future that HMSO Statutes in Force and certain statutory instruments will be available and in the more distant future, perhaps, Halsbury's Laws. 'LEXIS' also has an 'AUTO-CITE' key. A case reference can be typed onto the terminal and 'AUTO-CITE' will give the up-to-date status of that case; whether it has been recently referred to, approved or overruled; alternative citations for it; and the full case name. 'EUROLEX' has, or shortly will have, such reports as the Common Market Law Reports, the European Court Reports, European Commercial cases, European Law Digest, Weekly Law Reports, Time, Law Reports, HMSO Statutes in Force, Current Law, Fleet Street Reports and Reports of Patent Cases.

The costs of the use of such systems are complex to calculate, being dependent upon the time during which the terminal is connected to the computer, and the extent of any search which is made by the user. For example a search restricted to headnotes of cases post 1978 is much cheaper than a search of the complete US and UK data base. Nevertheless a rough guide is as follows: the basic subscription charge (in UK) to 'LEXIS' is $170 per month ($2,040 per annum) which includes lease of the terminal, and a further charge of $120 per hour for user time. 'EUROLEX' charges $2,000 per annum by way of subscription and approximately $80 per hour in user time; but of course equipment must also be obtained. In each case a local charge telephone call is also to be costed to the user.

One further system which was on display at the conference, and which will no doubt at some stage be provided in this country, is the service for lawyers provided by a firm called 'INFOLEX' using the Post Office 'Prestel' system. 'Prestel' is a computer based information service operated by the United Kingdom Post Office. Through an adapted television set or a purpose built model, and a telephone line connection, by pressing the required numbers on a hand held calculator control pad, the TV screen becomes a visual display unit capable of showing the pages of information currently held in the post office computer. At the present time more than 150,000 pages of text are available, displaying train timetables, weather maps, hotel availability and all manner of other data. 'INFOLEX' leases certain pages from the Post Office, and displays thereon certain information of use, so it hopes, to lawyers. By subscribing to 'INFOLEX' the lawyer can obtain visually abstracts of cases or case references organized on a subject by subject basis. The cases presented are those reported on any particular topic within the last two or three years. Thus, for example, a lawyer faced with a landlord and tenant problem might search his copy of Woodfall and then check through 'INFOLEX' to see if any cases on the particular aspect which is relevant to his case, have been reported since the edition of 'Woodfall was published. This service provided by 'INFOLEX' is known as 'CLARUS' – Case Law Reporting Updating Service. A similar service for statutes will be available shortly: known as 'STALUS' this is intended to provide up to date information on any statute in force.

The costs of 'Prestel' are not high once your television screen is adapted and phone link jack plug is available: the connect time within the United Kingdom is 6 cents per minute at peak time, plus a charge per page dependent upon the information holder. 'INFOLEX' charges 10 cents per page There is also a subscription charge to 'INFOLEX' of $700 per annum which provides for the subscriber the subject

headings and their numerical location in the data base.

'Prestel' is currently being evaluated by Telecom and it seems probable that a similar system will be in operation here in the near future. Butterworths have expressed a keen interest in marketing 'LEXIS' in Australia, but when such a system could be available at a price that the average barrister would find acceptable is unknown. 'EUROLEX' might market their system here but not until confident of a market share in the UK and Europe. One thing appears clear: whether we, as barristers, like it or not, the way in which we work in the 1980's will be considerably different from our present manner of conducting our affairs. Whether the changes will enable us to give our clients a better service at a price more acceptable to them, only time can tell.

DAVID LEVIN

N.B. Levin and Cummins Q.C. are both members of the Computerised Legal Information Committee (Victoria), a committee established under the auspices of the Victorian Law Foundation to advise the Victorian Attorney-General on this subject. Any persons who wish to make their views known to the Committee are invited to contact Levin or Cummins Q.C.

THE U.K. ROYAL COMMISSION on LEGAL SERVICES

On 20th July 1976 The Royal Commission on Legal Services in England Wales and Northern Ireland was charged to conduct a fundamental appraisal of "the law and practice relating to the provision of legal services . . . and to consider whether any, and if so what changes are desirable in the public interest". Because of controversy that was rife at the time, the vexed question of unqualified conveyancers merited a special mention in the terms of reference.

Preceded by a wealth of speculation and rumour, and titillated by a few leaks, the report was finally published in October 1979. Some pertinent observations postulated that any proposals for change would undoubtedly meet the same fate as the Ormrod Committee report on Legal Education, that is, it would generate much talk but very little positive action.

It had been suggested that the report would be hostile to the Bar and might even recommend fusion with solicitors. In the event, the conclusion was that separation should continue. "We consider it likely that in a fused profession there would be an unacceptable reduction in the number and spread of smaller firms of solicitors . . .this would reduce the choice and availability of legal services . . . Fusion would disperse the specialist service which is now provided by the Bar and we consider that this would operate against the public interest. With regard to the administration of justice, the weight of evidence is strongly to the effect that a two-branch profession is more likely than a fused one to ensure the high quality of advocacy which is indispensible . . . to secure the proper quality of justice."

There was however one qualification to that conclusion: "As long as our system remains in its present form." Other recommendations included those relating to clerks, legal aid, the "two counsel rule", law centres and legal education. It was not envisaged that there will be sufficient change to merit fusion.

A detailed resume of the conclusions of the Royal Commission relevant to our Bar will appear in the next edition.

VAUGHAN

Victoria is pioneering a Law Week from October 6 to 12.

It aims to help the public understand something of the legal system and the rule of law on which their rights and freedoms depend.

Law booths will be set up in the Bourke Street Mall, City Square, suburban and country shopping centres. They will be manned by lawyers, police and Citizens Advice Bureaux.

A double-decker bus will pick people up twice daily in the Mall for tours of the courts.

Law firms will be offering free legal check-ups to let people know whether their problems are legal and how they can avoid running into legal difficulties.

These will be coupled with a crowded State-wide programme of moot courts, lectures, films, school events, police open day, tours of Parliament and things like that.

Each day the programme will be flashed on the television screen in the City Square and published in the press.

The Herald is sponsoring a cup and trip to London for the best secondary school speaker on the law. Finalists from the State's 11 education regions will be flown by Ansett for a trip to Canberra.

The police are running a primary school poster display award with the theme, "How our police help us."

For both competitions the Education Department is doing most of the organising with the co-operation of independent schools.

Newspapers, radio, and television stations have agreed to co-operate by running law-related features to direct attention to the legal system and ways in which it can be improved.

As these cannot be tailored too far in advance, barristers may be wanted at short notice to supply information or act as spokesmen. Anyone who would like to help should tell Bennett QC.

In the United States, Law Day has been celebrated on May 1 for twenty-two years, and in most States it is preceded by a week or fortnight of special activities.

It has done a lot to remove the mystique from the law and to stimulate people's awareness of their rights and obligations.

In addition to lawyers, the organising committees include police, justices, teachers, representatives of government departments, the Ombudsman, and those concerned with consumer affairs, court administration, social welfare, legal aid, human rights and civil liberties.

THE AMERICAS

Howard and Dessau recently revealed a unique component of South American justice. While visiting the District Court at Cuzco, high in the Peruvian mountains they discovered the propensity of litigants to urinate in the corridors. Their lawyers were not much better. One took great delight in showing off his office. This shared a common doorway to the Court toilet block, and boasted a middle page spread from 'Playboy' where one usually finds the "L.L.B. with Honours". Shocked, the 'Avocato Pair' headed for the hills and trekked for six days through the Andes to the lost Inca citadel, Machu Picchu.

The rigors of the Bolivian Altiplano gave way to the pleasures of St. Martin, the Carribean Island venue of the biennial conference of the International Society of Barristers (none of whom are barristers nor international as they are all attorneys from America). Their first Australian guests were treated to a great welcome from the President who opened the conference as follows:

> "Gentlemen (sic) . . . For these challenging and strained times I wish you all – good swimming, good golf, good tennis and above all, good luck at the casino. I declare the conference officially open!"

Among the impressive line up of jurists were Bill Frates, John Erlichman's attorney during Watergate; Mark Robinson from the Ford Pinto case and Doug E. Bragg Jnr. the holder of the current highest damages award in the U.S.A. – $6.8M for the Plaintiff ($2.2M was his contingency fee!)

A Spring Silk

Victorian Bar News

Mouthpiece

"What chance does he have of pulling through, Doc" asked Whitewig.

They looked at the supine figure. His ample stomach was convulsing. The poor chap was still babbling – a sure sign that the condition was worsening.

"What is the nature of the disease?" His state was of great concern to all in the Common Room.

The doctor paused for a moment. He took off his glasses. "I can't be precise at this stage", he pronounced, "except that I am sure that he has caught the dreaded logo".

"Recent studies suggest that the disease is in some way an occupational disease", he warmed to the subject.

"What are the different strains?" asked Whitewig.

"Well it manifests itself in a variety of ways" said the doctor. "The primary stage is usually logorrhoea – an excessive flow of words. Then comes logodaedaly which is verbal juggling. In short, he becomes a logolept or word maniac. A characteristic symptom is logomisia which is a disgust for certain words, usually the commonly used ones, and especially slang and the vernacular. Now and again a patient will have episodes of stuttering and coughing brought on by logamnosis which is a mania for trying to recall forgotten words."

"How does one get on in normal life with such a patient?"

"With difficulty" said the doctor sadly. "Most conversations, descend to logomachy, a dispute turning on merely verbal points. The poor blighters just can't help themselves. All these illnesses are contagious, infectious, and chronic", he concluded.

"Have any cures been found?"

"Research is still being carried on" said the doctor in rather a flat voice. "We have tried exposing these patients to terseness, brevity, simplicity and, in extreme cases, even lockjaw. The results are not very promising, I'm afraid. And this chap here is obviously suffering from a malignant strain that is resistant to any known therapy".

"Is there ever a spontaneous recovery?"

"None has been recorded in the literature, he said. "It has been suggested in a recent paper on the subject that the condition, which is brought on by the environment of the patient, may respond to educative or occupational therapy. It seems a logical conclusion but it is too early to venture any confident prognosis."

"Then, what you advise, Doc, is . . ."

"Yes, I suggest that you have him retire from the Bench and resume practice at the Bar "

Byrne & Ross DD.

NEW SUPERANNUATION BENEFITS FOR SELF-EMPLOYED

The Australian Council of Professions has been persisting. for many years, in attempts to achieve some form of recognition of the right of the self-employed professional to equiparate his superannuation requirements with that of the employee of his own private company.

The Australian Council of Professions consists of the organizations set out below:

Australian Medical Association
The Royal Australian Institute of Architects
The Institution of Engineers, Australia
Australian Dental Association
The Australian Veterinary Association
The Royal Australian Chemical Institute
Law Council of Australia
Australian Society of Accountants
The Institute of Chartered Accountants in Australia
The Institution of Surveyors, Australia
The New South Wales Council of Professions
The South Australian Council of Professions
The Queensland Council of Professions
The Victorian Council of Professions

Since 1976, the Victorian Bar has had a member on the Australian Council of Professions in O'Sullivan, Q.C., who has been Vice-President, President 1977--79) and is currently Immediate Past President. During the period 1977-79, the Australian Council of Professions was joined by the Law Council of Australia, the two Accountant Bodies and the Surveyors.

The Law Council of Australia had been making representations to the Treasury on the Superannuation problem since 1960 and, when it joined the Australian Council of Professions, the latter adopted its representations and put them to the present Prime Minister and Treasurer.

It is appropriate to pay tribute to New South Wales Solicitor, Mr. G. Ireland, a former President of the New South Wales Council of Professions and a prime mover in the composition of the submissions made to the Commonwealth Government on this point. Reference to his activities can be found in Law News of Australia (March, 1979 at p. 22 and November, 1979 at p. 21).

On 19th August 1980 the Treasurer issued a Press Release on the question disclosing the intervention of the Government to introduce legislation amending the Income Tax Assessment with respect to superannuation schemes for self employed persons.

The major feature of the new arrangements is a special income tax deduction of up to $1,200 a year for amounts contributed by people who are self-employed or employees and do not participate in superannuation benefits funded by an employer. Contributions by such eligible people will be deductible where they are to funds which qualify under section 23 (ja) or section 79 of the income tax law. These are the type of funds to which self-employed people and employees not covered by an employer-sponsored scheme at present contribute, and in fact the funds are specially designed for such people.

A section 23 (ja) fund is one that has at least 20 members and provides benefits for self-employed persons. The income from such a fund is exempt from income tax where relevant terms and conditions of the fund have been approved by the Commissioner of Taxation.

A section 79 fund is a superannuation fund that provides benefits for either self-employed people or employees. Such a fund is entitled to a special tax deduction equal to 5 per cent of the costs of specified assets provided its terms and conditions are approved by the Commissioner on the basis of rules set out in the section.

Contributions made by eligible persons after 19th August 1980 to either type of fund will qualify for the new deduction but, because of its concessional nature, the deduction will not be capable of giving rise to a carry-forward loss for income tax purposes.

Where a person contributes more than $1,200 in a year to one of these funds the excess over $1,200 will be treated as rebatable expenditure up to the

existing limit of $1,200 for life insurance premiums and superannuation contributions, in the same way that contributions by employees to an employer-sponsored fund are rebatable.

While the basic rule will be that a person will not be eligible for the deduction if he or she is "supported" by employer-funded superannuation cover at all during a year of income, a person who is "unsupported" during part only of an income year – for example where during a year, a previously self-employed person takes up employment with an employer who has a staff superannuation scheme - is to be brought within the scope of the new deduction in certain circumstances. In this sort of case the Commissioner of Taxation is to be authorised to treat such a person as eligible for the deduction where it would be reasonable to do so.

As part of the new arrangements, it is also proposed that 5 per cent of lump sums received after 19th August 1980 from a section 23 (ja) fund or a section 79 fund will be treated as assessable income, but only to the extent that the lump sum can, on a reasonable basis, be found attributable to contributions made after that date and to earnings derived by the fund from such contributions.

The proposed 5 per cent tax base for lump sums accords with the treatment under the present law of such amounts received by employees on retirement from employer-sponsored funds.

The new 5 per cent basis will apply only where a person receives a lump sum in accordance with the terms and conditions applicable to the fund at the time of payment, and also only where the recipient has been allowed the new deduction in any year of income.

As a safeguard against exploitation of the new arrangements to obtain unintended tax benefits, it is proposed that where a person receives a benefit from a section 23 (ja) or section 79 fund after 19th August 1980 and the benefit is received otherwise than in accordance with the approved terms and conditions of the fund the full amount of the benefit is to be treated as assessable income.

LAWYERS BOOKSHELF

THESE THINGS HAPPENED: UNRECORDED HISTORY 1895-1946

by F.F. Knight (Hawthorn Press 1975) (409pp.)

During the last eighty-five years, Frederick Falkiner Knight has seen much of life from many points of view. For the larger portion of his adult life, F.F. Knight was a member of the Victorian Bar. Fortunately, he heeded the statements of his many friends that certain recollections of Australia and Australians during the first half of this century should be recorded.

As a member of the A.I.F. in World War I, serving in Gallipoli and France, as a member of the Victorian Bar for many years thereafter, as President of the Victorian Taxpayers' Association for over twenty-years and as a part-time legal officer with the R.A.A.F., later to be translated to a full-time officer during World War II, the author observed and recorded numerous bizarre, diverting and humorous incidents, many of which would doubtless appeal to members of the Victorian Bar still on the Practising List.

The book makes no attempt to be an autobiography, let alone a social history, but the anecdotal style and content of its last one hundred and twenty pages relating to life at the Bar and during the last War in the R.A.A.F. do something to supply a savour to more formal records. Copies of this book may be obtained at a reasonable price by communicating with the Executive Officer of the Victorian Bar.

PRACTITIONERS AT

SMYTH, Charles Alexander (1829-1908) was the senior prosecutor at the trial. He was a son of an officer in the 27th regiment. He had been called to the English Bar by Grey's Inn on April 30, 1859. He was probably admitted in Ireland as well. He was a member of the literary staff of the Dublin "Freeman's Journal". He was brought to Victoria under engagement as a reporter to the proprietors of "The Argus", but the prospect of a career at the Bar induced him to resign, and he was admitted to practise as a barrister in Victoria on October 13, 1859. He was appointed a Crown Prosecutor in the Supreme Court on April 29, 1861.

In 1870 he was appointed for a shrot time as acting county court judge.

At the time of the Kelly trial his chambers were 32 Temple Court.

After he resigned as Crown Prosecutor in 1895 the government refused to grant him a pension. He proceeded at law. The Full Supreme Court dismissed his claim (Smyth v. R. (1897) 23 VLR 383). He appealed to the Privy Council and won (Smyth v. R. (1898) A.C. 782.

He took silk in December 1899.

Forde had this to say of him. "He was a man of great ability, experience and prudence as a criminal lawyer, and unexcelled by any of the men who have come to the front in later years. He possessed the rare merits of thoroughly identifying himself with his client whether that person were His Majesty the King or the humblest of his subjects". (pp. 242-243).

THE KELLY TRIAL

CHOMLEY, Arthur Wolfe (1837-1914) was the junior prosecutor at Kelly's trial. He was born at Wicklow on the east coast of Ireland. His father was the vicar, and his mother had been a ward of Lord Downes the Chief Justice of Ireland. His father died when he was 10. His mother took her seven sons to Australia and arrived at Port Phillip in February 1849. The family lived in a house she built in High Street, Prahran.

Chomley was educated at R. V. Budd's School, St. Peters on Eastern Hill, Melbourne. In 1853 he joined the Crown Law Department as a cadet. He studied law at the University of Melbourne. In February 1862 he was appointed secretary of the Crown Law Department. In 1863 he was admitted to practice as a barrister, but retained his Crown Law position until 1870 when he was appointed a Crown Prosecutor. His chambers at the time of the Kelly trial were at Temple Court, which is now 422 Collins Street. In 1885 he was appointed a County Court Judge. In 1906 he was appointed an acting Supreme Court Judge while the Chief Justice was on leave. He returned to the County Court bench. He retired in 1910 after 57 continuous years in the Public Service.

One of Chomley's elder brothers was Hussey Malone Chomley. H.M. Chomley had been in the police force since 1852. In 1881 he was appointed Chief Commissioner, and held office until 1902.

While he was a superintendant at Geelong, H.M. Chomley unsuccessfully volunteered to pursue the Kelly gang which was still at large.

BINDON, Henry Howard Massy (d.1893) was Kelly's counsel at the trial. Despite the fact that little is known of him and only incomplete records of the trial exist, writers have treated him harshly. In a book published 50 years after the trial, J.A. Gurner, a Crown Prosecutor described Bindon and his performance. "At his trial Kelly was defended at the expense of the Crown by a young member of the bar, dead long since, who was furnished with an exceptional belief in his own capacity and a superlative contempt for all other members of the profession, which he used freely and constantly to express.

"It was thought however that his defence did nothing to assist his client and that, I was informed, was the opinion of Ned Kelly, expressed by him in very forcible terms". (Life's Panorama (1930) p. 227). Contrast this with Kelly's reported remarks at the trial "I make no criticism of Mr. Bindon (who) did his best". (Argus Oct. 30, 1880)

Bindon was born in Dublin. His father, Samuel Henry Bindon (1812-1879) was a highly literate barrister wedded to Irish nationalism. The Bindon family came to Victoria in 1855 where Bindon Snr. came to the Bar and was subsequently appointed County Court Judge in 1869. Bindon was the only son.

Bindon matriculated in the University of Melbourne on March 4, 1871. His subsequent academic record shows passes in the single subjects of Latin II and Law Part I (1872), Law III (1873) and Procedure (1874).

He was admitted to the Middle Temple on April 12, 1874, admitted to the Inner Temple on March 6, 1876 and finally was called to the English Bar on January 26, 1878 by the Inner Temple.

On April 9, 1880, he was admitted to practise as a barrister in Victoria with one other, Isaac Isaacs. Barry J. who presided over the Kelly trial was a member of the Full Court which admitted him.

The indications are that the Kelly brief was probably one that would not be accepted by experienced counsel for the low fee of 7 guineas. Most likely Bindon picked it up as a floater just over 3 days before the trial began.

Subsequently, Bindon kept Chambers at Selbourne Chambers. He never married.

He died on September 27, 1893, after a two year illness and was buried in St. Kilda cemetery. His age recorded on the death certificate was 49.

Victorian Bar News

MOLESWORTH, Hickman (1842-1907) was Kelly's own choice as counsel. He was the elder son of Sir Robert Molesworth, the Supreme Court Judge. Molesworth was born in Dublin and accompanied his family first to South Australia in 1852, then to Victoria in 1853. He came to the bar in Victoria in 1864.

At the time of Kelly's trial he had a considerable reputation as a common law advocate with a wealth of experience in Jury trials. Ironically, his Temple Court chambers were then adjacent to those of the two trial prosecutors, Smyth and Chomley.

He was appointed County Court Judge in 1883 and was thereafter for many years judge of the Involvency Court.

GAUNSON, David (1846-1909) was Kelly's solicitor at the trial. He had appeared for Kelly at the committal and had done a competent job. In a largely immigrant profession, Gaunson was Australian. He was born in Sydney on January 19, 1846, son of a merchant. His education was in Sydney schools, and after the family moved to Melbourne in the 1850s, at Brighton. In 1862 he entered articles of clerkship with his brother in law, J.M. Grant. He was admitted as an attorney on April 10, 1869. His office was then at Eldon Chambers, Bank Place. His public career was dominated by the law, and by politics. He was first elected to the Legislative Assembly as liberal member for Ararat at a by-election in 1875. In the 1890s he began to act for John Wren the financier and gambling entrepreneur. His office was moved to 418 Collins Street. "Garside" in Hardy's *Power Without Glory* is supposedly based on Gaunson.

David Ross

SIR REDMOND BARRY
(1813-1880)

On 7 June 1813 a third son was born to Major-General Henry Green Barry and his wife Phoebe (nee Drought) at their home in Ballyclough, County Cork, Ireland. Christened Redmond, he was brought up an Anglican, and first educated at Curtains' Private Academy on the shores of Cork Harbour. In 1825, at the age of 12, he was sent to a boarding school at Bexley in Kent which specialised in preparing boys for an army career. In 1829 Barry returned to Ireland in search of a commission but was unsuccessful. He then studied law at Trinity College, Dublin, graduating B.A. in 1837, and being admitted to the Irish Bar and in 1838 to Lincoln's Inn.

In the nine years from 1829 to 1838 the young Barry earned little or no income, and the combination of overcrowding at the Irish Bar and his father's death in May 1838 compelled him to emigrate.

After a rapid tour of the Continent he sailed from London in the "Calcutta" on 27 April 1839 and arrived in Sydney on 1 September. For part of the voyage he was confined to his cabin by the captain because of an unconcealed love affair with a married woman passenger. The matter became known to Bishop Broughton and other influential people, and did not help his reputation or prospects of employment in Sydney. He was admitted to the Bar there on 19th October. After seeking positions in New South Wales and writing to inquire about vacancies in Van Diemen's Land, he sailed for the new Port Phillip settlement in the "Parkfield" on 30 October but did not land there until 13 November, so foul was the weather. From that day Melbourne was his home. Though his values were wholly those of the cultivated European, he sought to plant these values in his new land and had nothing in common with many of his fellow colonists who saw the settlement chiefly as a means to the fortune which would enable them to retire home in comfort to the British Isles.

The few pounds he had brought from Ireland were almost spent b[illegible] in Melbourne and he took as both lodging and chambers one back room in Mrs. Hoosan's cottage in Collins Street. Since no judge of the Supreme Court was then resident in Melbourne he engaged busily in inferior courts. On 12 April 1841, the first day of the first sittings of the Supreme Court in Melbourne, Barry and others were on the motion of one of them, admitted to practice by the first Judge, the eccentric John Walpole Willis. In the two years that Willis presided, Barry showed another of the qualities by which he was to be remembered – his invincible politeness and unfailing, if elaborate and old-fashioned, courtesy. The gross provocation of Willis from the Bench often reduced the young barrister to a state of almost unendurable tension; yet Barry's decorous demeanour in court was never seen to be ruffled.

In the early years of Melbourne, Barry became unofficial standing counsel for the Aboriginals. He laboured as hard and as earnestly upon their cases (often capital matters) as he did upon his other briefs, though he rarely, if ever, received a fee for such services. His interest in the Aboriginals was general and lasted all his life.

In 1841 he was challenged to a duel by Peter Snodgrass, arising out of a letter sent by Barry to a friend, in which he referred to Snodgrass in derogatory terms. Snodgrass fired prematurely in nervous haste and shot his own toe off, while Barry magnanimously and ceremoniously fired his pistol into the air.

On 2 January 1843 Governor Gipps sealed Barry's appointment to a minor judicial post, commissioner of the Court of Bequests. This was a small debts courts and his salary was £100.0.0, later increased to £250.0.0 plus a proportion of the court fees. The court sat only for the first few days of each month, and Barry therefore retained and developed his private practice. At the same time he was watching the possibility of securing a more important official post and applied unsuccessfully for a commissionership of crown lands.

On 18 August 1846 Barry made the acquaintance of Mrs. Louisa Barrow, a woman of small education and lower social position. Though they never married, the relationship between them remained affectionate, tender and devoted in the extreme until the end of Barry's life. She bore him four children, Nicholas,

Eliza, George and Fred (b. 1847, 1850, 1856, 1859 respectively), all of whom took Barry's name. Parents and children frequently appeared together on public occasions such as theatre performances. Mrs Barrow farmed a property at Syndal to the east of Melbourne and Barry, in his spare time, cultivated another small property nearby – his "Sabine farm". Both fronted what is now High Street Road. His city residence, for most of his judgeship, was in Carlton Gardens near the present Exhibition Building. He lived and entertained here on a scale of some splendour. For Mrs. Barrow he built a city house at 82 Brunswick Street, Fitzroy.

In 1851, when the Port Phillip District was separated from New South Wales as the colony of Victoria, Barry was appointed its first Solicitor-General, a position which he held briefly, for he was elevated to the new Bench of the Supreme Court of Victoria in January 1852. He was the first puisne Judge of the Supreme Court of Victoria, and after the appointment of E.E. Williams as a second puisne in July 1852, Barry held the appointment of senior puisne judge until his death.

During his whole residence in Melbourne, Barry was prominent or foremost in every phase of social, cultural and philanthropic activity. To list all the causes or organisations whose interests he promoted would be almost impossible; as examples, he was a founder of the Melbourne Mechanics' Institute (now the Athenaeum), a prominent member of the Separation movement, thrice president of the Melbourne Club, active in the Melbourne Hospital, the Philharmonic Society, the Philosophical Institute, the Royal Society of Victoria – even the Polo Club. He also held a commission in the Victorian Volunteers, the local militia. It is curious, and is perhaps attributable to his friendship with many prominent squatters, that he seems to have played no active part in the anti-transportation movement, though his opinions were distinctly against sending convicts to Victoria. His concern for the diffusion of learning was such that he allowed members of the public to come at night to read books and journals in his house, before there was a public library.

His private benevolence was liberal, though discreetly bestowed. Irish famine relief, the building of new colonial churches both Protestant and Roman Catholic, the needs of less fortunate relations in Ireland and the alleviation of personal distress in Melbourne, all made inroads upon a fortune which, though never great, he did not seek to augment by speculation. Public labour left little time for private aggrandizement. At various periods of his life he trod uncomfortably near the edge of real financial difficulty and died a poor man

Though already a celebrity when he ascended the Bench, he had not even begun his greatest and most enduring works. He was one of the founders of the University of Melbourne, of which he was first Chancellor (1853), a position he held till his death. He was equally the father of the Melbourne Public Library (now the State Library of Victoria) and its then associated Art Gallery. Over the library trustees too he presided until his death. In both spheres his achievement was great, for the University was able to attract outstanding men as its first professors and, well within Barry's lifetime, its degrees grew to command world-wide respect. In the same period the library became recognised as one of the great collections of the world, administered upon the most liberal principles. Any detailed criticism of the precise significance of Barry's role in the development of these institutions must recognise that the greatest help came from his drive, energy and influence, his ceaseless care and toil for them, rather than from any more refined or subtle intellectual powers. He was as capable at dusting books or acting temporarily as porter as at chairing the trustees' meetings at the library. At the university he would pace out the dimensions of some new building on the muddy ground before going in to preside as Chancellor. He was criticized in both capacities for being autocratic, but often he was the sole person to attend meetings of which due notice had been given.

As a judge he was hard-working, competent and conservative. He undertook more than his fair share of the cases, worked very long hours and endured the arduous travel by coach, train or horseback required by the circuit courts. Moreover, because he lived nearer to the city than any of the other judges, his leisure was frequently interrupted by urgent applications at his house for legal processes. He gave much thought to matters concerned with the general administration of the law, to the quality of the Supreme Court Library, and to the design of the new and splendid court buildings in William Street, though he did not live to sit there.

In 1864 he was involved in a dispute with the Attorney-General, George Higginbotham over the relationship between the judges and the Crown. Barry wrote direct to the Governor, Sir Charles Darling, informing him that he proposed to take a short leave in Sydney. Higginbotham insisted that an officer of his department has no right to take such a step. To admit himself merely "an officer" of the department of such a democratic Attorney-General as Higginbotham was anathema to Barry, and the dispute as acrimonious.

In criminal cases Barry had a reputation for harshness, though it was a harsh period and he was in tune with his times. The florid and slightly sanctimonious speeches with which he frequently seasoned his sentences cannot have made him loved, and certainly he valued the purely retributive elements of the law. Yet he supported the Discharged Prisoners' Aid Society and stressed the importance of the rehabilitation of a criminal who had paid his debt to society. He thought of Victoria as a frontier area where the law was not yet sufficiently respected, and he laboured long and hard to ensure that the imprint of the law was indelibly made in the fresh clay of the colony. In sentencing Henry Garrett to ten years labour on the roads for robbery in company in 1855, he said: "The sentences of the Court may be thought harsh, but those sentences will be mitigated as the country becomes more settled and composed". He presided over the trials of the most of the Eureka rebels in 1855, including that of Rafaello Carboni. No charge of bias or harshness can be urged against him there, as all the accused were acquitted. In the cases of the convicts accused of the murder of John Price, Inspector-General of penal establishments in 1857, he conducted the several trials with a rigor and severity out of keeping with the best judicial attitude, and is perhaps most open to criticism for refusing to assign counsel to defend the accused. Probably his most famous trial was that of Ned Kelly in 1880.

When the Chief Justice, Sir William a'Beckett, resigned in 1857 Barry very reasonably expected to succeed him. The post went instead to W.F. Stawell, the Attorney-General, after a series of political manoeuvres hardly in accordance with the highest traditions for judicial appointments. Their letters show that relations between Stawell and Barry remained unhappy, and the disappointment was one that Barry never forgot.

Apart from shorter sea voyages to other colonies and New Zealand, he made two visits abroad, one in 1862 to England and Europe, and the other in 1877-78 to America, England and Europe. Both tours were connected with major exhibitions, to which he was commissioner for the Victorian exhibit. However, he regarded the voyages very little as an opportunity for recreation, but devoted his time to extremely hard work on behalf of the University of Melbourne, the Public Library and the Art Gallery. He was created knight in 1860 and K.C.M.G. in 1877. The inscription on the base of his statue in Swanston Street, outside the State Library, omits to record the latter honour. On various occasions he was acting Chief Justice, and once, briefly, Administrator of the Government of Victoria.

After a very short illness he died in East Melbourne on 23 November, 1880, only twelve days after the execution of Ned Kelly. He was buried in the Melbourne general cemetery; and although the gravestone does not record it, Mrs. Barrow was buried beside him upon her death some years later.

Throughout his life a traditionalist rather than an innovator, Barry was a man of conviction and energy. He remained an Anglican, but was tolerant of other faiths and abhorred the sectarian bitterness of Victorian public life. In his later days it was said that he became vain and pompous, yet perhaps no other Australian city has had so notable a benefactor, and the tribute of his contemporary Garryowen is well merited:

> "He was the most remarkable personage in the annals of Port Phillip, for he threw in his lot with the destiny of the Province when it was a weak struggling settlement in 1839, and identified himself with every stage of its wonderful progress until he left it a bright and brilliant colony in 1880."

GUNST

RECOLLECTIONS OF SIR REDMOND

Sir Redmond Barry died on the 23rd November 1880 from a carbuncular infection contracted shortly before the trial of Edward Kelly. The infection had greatly troubled Barry during the course of the trial itself. My maternal grandmother Louisa Frances Moore, who died in 1949 and whose father James Moore was a life long friend of Sir Redmond, always retained clear and vivid personal recollections of this colorful judge. Some of those recollections are perhaps now worth recording here.

James Moore (no relation of the Victorian Judge of that name) had tutored Barry in law at Trinity College, Dublin, and in 1838, Barry, Moore and William Stawell (later Chief Justice Stawell) as young barristers set out on the grand tour of Europe then considered an essential ingredient in the education of patrician young gentlemen. The version of this tour recounted to the Moore family many years later was no doubt heavily censored, but Barry obviously savoured Europe to the full in a manner somewhat reminiscent of Childe Harold's Pilgrimage.

After the tour was over, the depressing state of the Irish Bar (closely related to the then declining Irish agricultural economy) finally convinced these young barristers it was time to go elsewhere, the first to leave being Barry who in 1839 sailed for Sydney. On the voyage to Australia Barry distinguished himself by conducting an open romance with a married woman passenger thereby scandalising the other passengers and necessitating the captain's intervention. Barry was confined to his cabin for the remainder of the voyage, a tale which at a later date was often recounted within the Colony of Port Phillip.

Proceeding from Sydney to Melbourne, Barry almost immediately commenced practice, and soon established himself as a prominent barrister. For the successful there probably never was a better time at the Victorian Bar. Barry himself was not only successful, but also played an extremely active part in the development of the young colony. He could well have been a very wealthy man but much of his income went in charity to distressed relatives in Ireland, to his less fortunate Melbourne friends and to a host of other worthy causes. He was equally generous with his time and talents.

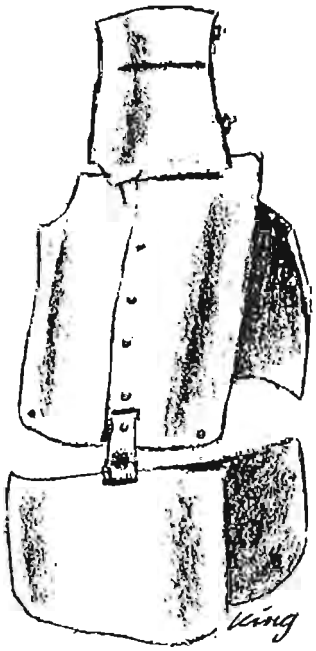
To those who knew Barry his most striking personal characteristic appears to have been his boundless energy which was displayed in a wide variety of fields. To his friends he was a hospitable, interesting and cultured host and a generous man. The Moore family often visited Barry's town mansion where, in season, lavish serves of strawberries and cream (brought from what Barry termed his "Sabine farm" near Glen Waverley) were the order of the day as afternoon tea. Many gifts (especially books) were bestowed on all thirteen Moore children and the eldest son George Moore later became Barry's associate.

In many ways Barry's life must have seemed idyllic, but in 1846 Barry fell in love with a widow Mrs. Barrow who was "beneath him in station". Under the prevailing social code it was deemed inexpedient that such a woman be brought into social contact with the wives and families of the colony's aristocracy. In particular Mrs. Barrow could not have met as an equal the wives of Supreme Court judges or barristers.

Louisa Moore, though she often visited Sir Redmond's city mansion with her parents, never came into contact with either Mrs. Barrow or the Barry children. When Louisa reached maturity the situation was discretely explained to her with some sympathy for Barry and a certain admiration for the way in which Barry had respected the code. In particular, the manner in which Barry sought to avoid the embarrassment of his social equals and his enduring faithfulness to his mistress were commended.

Late in life, Barry, Stawell and Moore had personal plaques made of themselves in triplicate, each giving copies to the other two. The likenesses were cast somewhat in the mould in which they were seen (or saw themselves) rather than perhaps in any striving for artistic accuracy. In Sir Redmond's case the plaque tells us something of him, the likeness bearing a resemblance to Julius Caesar.

Francis, Q.C.



EVENTS RELATING TO EDWARD KELLY (1855-1880)

June 1855	born at Beveridge, Vic. Schooling at Avenel.
Dec. 1866	Kelly's father dies. Family moves to a hut at Eleven Mile Creek between Greta and Glenrowan.
1869	Kelly arrested for alleged assault on a Chinaman. Held in remand for 10 days. Charge dismissed.
1870	Arrested for being accomplice of a bushranger. Held in custody 7 weeks. Charge dismissed. Convicted of summary offences: 6 months imprisonment. Convicted of receiving a mare knowing it to be stolen: 3 years imprisonment.
April 15, 1878	Trooper Fitzpatrick at Kelly house allegedly to arrest Dan Kelly (1861-1880). Fitzpatrick claimed Kelly shot him, though probably charge was groundless. Mrs. Kelly, her son-in-law William Skillion and a neighbour Williamson charged with aiding and abetting the attempted murder of Fitzpatrick. Convicted after trial at Beechworth before Barry J. Mrs. Kelly: 3 years imprisonment. Others: 6 years imprisonment. Kelly & Dan Kelly go into hiding near Mansfield. Joined by Joe Byrne (1857-1880) and Steve Hart (1860-1880).

Oct. 26 1878	Sgt. Kennedy and Consts. Lonigan Scanlon and McIntyre disguised as diggers try to capture Kelly. Lonigan shot dead. McIntyre surrenders. Later in an exchange of shots, Scanlon shot dead and Kennedy mortally wounded. Kennedy later shot dead allegedly at his own request. McIntyre escapes to Mansfield and reports killings.
Nov. 15	Gang outlawed and £500 reward offered for each, alive or dead.
Dec. 9	Gang holds up National Bank, Euroa taking £2,000 in notes and gold. Reward doubled.
Feb. 8 1879	Whole of Jerilderie N.S.W. held up for 3 days. Police locked up. Bank of New South Wales robbed of £2,141 in notes and gold. Townspeople held in Royal Hotel. Kelly makes a statement of over 8,000 words to a bank teller and extracts a promise that it be published. Rewards increased to £2,000 a head.
June 27 1880	Aaron Sherritt, police informer, shot dead by Byrne.
June 30	Gang takes possession of Mrs. Jones' Hotel at Glenrowan. Kelly wounded and captured. Byrne died from wounds. Hotel fired and Dan Kelly and Hart found dead inside.
Oct. 15	Application by Molesworth (for Kelly) for adjournment of trial until November sittings. Crown opposes. Barry J. refuses application. Gaunson (Kelly's solicitor) applies for Crown assistance to fund defence.
Oct. 18	Application by Bindon on behalf of Molesworth for adjournment of trial to next sittings based on affidavit of Gaunson. Barry J. indicated that he would not be disengaged until Oct. 28. Trial adjourned to that date. Negotiations to obtain Molesworth or similar counsel continue.
Oct. 25	Bindon briefed in the evening.
Oct. 28	Bindon applies to have the trial adjourned or stood down because he was briefed so recently. Barry J. refuses application and orders trial to proceed forthwith.
Oct. 29	jury retires : verdict guilty after ½ an hour deliberation : Barry J. pronounces death sentence after a long exchange with the prisoner.
Nov. 3	Executive Council decides not to commute sentence.
Nov. 5	Public meeting resolves to petition for exercise of prerogative of mercy.
Nov. 11	10 a.m. Kelly hanged at Old Melbourne Gaol.

DAVID ROSS

"LAGGED INNOCENT"

Some legal aspects of the trial of Ned Kelly

At precisely 10 a.m. on November 11th, 1880 Ned Kelly stepped on to the gallows of the Old Melbourne gaol to perform what another Australian bushranger described as "the dance on nothing". He had told Sir Redmond Barry from the dock that he feared death "as little as drinking a cup of tea" and he remained true to his word. He stepped calmly on to the scaffold and remarked prior to his departure to eternity "such is life".

A century later the myth and legend appears to be just as strong as when Ned complied with his mother's request to "die like a Kelly". Also surviving is the legal controversy surrounding his conviction, and some well-known criminal lawyers have expressed strong views on the subject.

Edward Kelly was charged that "on the 26th day of October in the year One thousand eight hundred and eighty at Stringy Bark Creek in the northern bailiwick feloniously wilfully and of malice aforethought he did kill and murder one Thomas Lonigan." On the 29th October 1880 following a two day trial Kelly was convicted of that charge. The trial was a long one for that time. Following Kelly's conviction, 32,000 citizens signed a petition calling for the reprieve of the death sentence passed upon him. Now another petition is being circulated calling for "immediate and appropriate steps to be taken to ensure that Ned Kelly is pardoned posthumously". Copies of this petition are available for signing by members of the Bar.

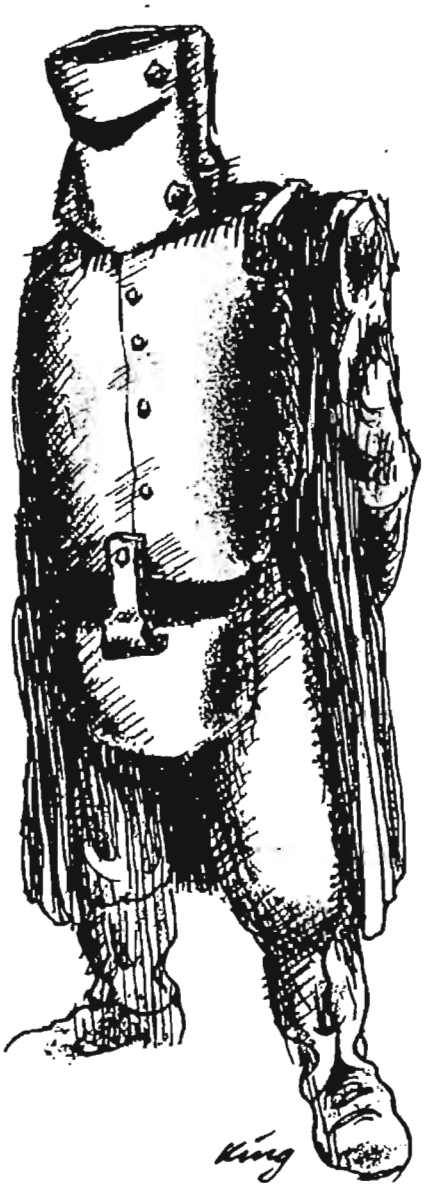
It has long been suggested that Ned Kelly's trial was not conducted in accordance with legal principles and established authority.

Controversial areas are as follows:

1. Whether the trial should have been held at Melbourne.
2. Whether Barry, J. should have excluded himself from presiding over the trial, or been excluded, on the ground of bias.
3. Whether Kelly was entitled to have the trial adjourned on October 28th 1880 when application to do so was made by his Counsel Henry Bindon.
4. Whether much of the evidence introduced at the trial was properly admitted.
5. Whether the jury was properly instructed as to the law and in particular as to the available defences.

VENUE OF THE TRIAL

Following Ned Kelly's capture at Glenrowan and his recuperation from his numerous wounds, he was taken to Beechworth to face committal proceedings on the charge of murdering Constable Thomas Lonigan. He was there committed for trial on that charge. Mr. David Gaunson solicitor appeared for Kelly at the committal proceedings.



Following Kelly's committal, the Crown made application for transfer of the trial from Beechworth to Melbourne. The Crown alleged that it would be prejudiced if Kelly faced trial at Beechworth. The application was successful. Historical records and documents that I have examined do not disclose whether it was opposed.

The press in Melbourne, both before and after the capture of Kelly, had demonstrated that it was convinced of his guilt concerning most acts alleged against him. Following his capture, the Argus wrote an editorial calling for his execution. It was also reported that Kelly had killed one of the civilians in the siege for refusing to pull back a curtain to assist him to shoot. Apparently the police supplied the information. It is now almost universally accepted that all the civilians who were shot at the siege of Glenrowan were shot by the police. It was in this atmosphere that Ned Kelly's trial was transferred from Beechworth to Melbourne.

BIAS OF BARRY, J.

Sir Redmond Barry's first association with the Kelly clan was in April 1868 when he sentenced Ned's uncle Jim Kelly to death for arson. That of itself could not be said to form any basis for an allegation of bias. However, in 1878, he presided over the trial at Beechworth of Ned Kelly's mother and two others, William Skillion and Bricky Williamson, for the attempted murder of Police Constable Alexander

Fitzpatrick at the Kelly homestead on the Eleven Mile Creek, Greta Ned Kelly and his brother Dan Kelly had warrants issued for their arrest on the same charges but could not be found. Barry J. imposed what were locally considered to be heavy penalties upon the three accused. Skillion and Williamson were each sentenced to 6 years and Ned Kelly's mother, Ellen, with a babe in arms, to 3 years imprisonment. It was following the conviction and sentence of Ned's mother that the Kelly outbreak began in earnest. Ned Kelly always claimed that he, his brother, mother and the other two were innocent of the charges brought against them. These public protestations must surely have been known to Barry J., who on that basis alone might be thought to have had a personal interest in Kelly's fate. Evidence of the Fitzpatrick incident was admitted at Ned's own trial.

Barry, J. in passing sentence at Beechworth has been quoted as saying:

> "I hope that the sentences I am going to impose on you will lead to the disbanding of the gang of lawless persons who for years have banded themselves together in the neighbourhood of Greta against the Police. Bordering on the sister colony of New South Wales this district offers great facilities for the perpetration of cattle stealing and horse stealing offences. I believe that the commitment to prison of a portion of the so-called Greta mob will have a salutary effect."

It appears therefore that Sir Redmond held strong personal views on the inhabitants of the Greta district.

More importantly Barry J. is alleged to have stated what he thought of Ned. Oral tradition has it that he said to Mrs. Kelly "If your son Ned were here I would make an example of him. I would give him a sentence of 15 years."

The report of the trial in the Mansfield Pamphlet of the time gives the sentence that Barry J. had in mind for Ned as 21 years. Further support of the fact that Barry J. did pass remarks concerning Ned Kelly can be found in a letter written by Bricky Williamson to the author J.J. Kenneally who in 1929 published the book "The Complete Inner History of the Kelly Gang". Kenneally publishes Bricky Williamson's letter in its entirety and in it Williamson alleges that Barry J. addressing the jury said the following "Well Gentlemen you all know what this man Kelly is."

Following the passing of the Felons Apprehension Act, more than 20 supposed friends and relatives of Ned Kelly were arrested and charged with giving assistance to a declared outlaw. Bail was refused and they were all imprisoned at Beechworth. There appears to be little doubt that the Crown had no intention of presenting those arrested. Week after week they were brought into Court and remanded for another 7 days on the basis that the Police were not yet ready to proceed with the cases. "Wild" Wright, who was undoubtedly a close friend of Ned's, expressed his views to the Magistrate on one occasion, "You might as well remand a man for the rest of his life." Writs for habeas corpus were issued in an endeavour to have those imprisoned released.

The applications were dealt with by Barry J. in Melbourne. In each case he refused the orders sought. Little has been reported on the grounds for his refusal and therefore it is difficult to form any conclusions upon them as a matter of law.

Barry J. when sentencing Kelly to death, became involved in an exchange with the prisoner which many have considered a gross abuse of judicial power. As reported by the Argus (30/10/80) he said (inter alia) "The end of your companions was comparatively a better termination than the miserable death which awaits you . . . your unfortunate and miserable associates have met with deaths which you might envy."

There were four other Supreme Court judges, who would have been available to hear the trial.

WAS THE TRIAL FORCED ON?

The trial was originally fixed for hearing before Barry J on the 18th October 1880. Upon that date Bindon (who announced an appearance for Kelly on behalf of Hickman Molesworth, a senior criminal counsel of some 16 years experience) applied for an adjournment until the next sittings of the Court commencing in approximately mid-November 1880.

The basis of the application, supported by a lengthy affidavit sworn by David Gaunson, was that the solicitors for Kelly were making application to the Crown Law Department for a special grant of funds so that a senior and experienced criminal barrister (Molesworth) could be briefed. Kelly himself had selected Molesworth as his counsel. Gaunson in his affidavit, submitted that the appropriate fee would be 50 guineas for a trial of such complexity and length, whereas the Crown was only prepared to allow the sum of 7 guineas. Gaunson further swore that if the funds were not available from the Crown, he believed Kelly's friends and relatives could raise sufficient money to retain Molesworth for the November sittings.

In reply, the Crown submitted that the application was entirely without foundation in law and ought not to be granted, but that it would not oppose an adjournment for a period of 4 or 5 days. Barry J. stated he would not be available until the 28th October. He refused the application and adjourned the further hearing of the trial until the 28th.

On the 28th October Bindon appeared for Kelly and again made application for an adjournment until the next sittings in November. The grounds were that Molesworth would be available to appear for Kelly in November and that he, Bindon, had only three days in which to prepare his client's case. The Crown submitted that, as Kelly's solicitors had received notice in late August that the trial was to take place in October, they had had plenty of time to brief counsel and prepare for the trial. The application for the adjournment was refused and Bindon, who had signed the roll of counsel in Victoria in April 1880, defended Kelly for his life in October of the same year.

Many of the witnesses called by the Crown were not cross-examined by Bindon, and the rest were cross-examined briefly. The main witness for the Crown, Constable McIntyre, the surviving constable from Stringy Bark Creek, gave evidence in chief which runs for 30 pages of the Notes of Evidence. The cross-examination takes up four pages.

It is not possible from available documents to ascertain why it was that Gaunson, who had received notice of the date of the trial in August of 1880, had not briefed counsel and prepared a defence by October 18th. But it could be said that the application for an adjournment should have been received more sympathetically than it was, in view of the complexity of the issues involved, the fact that the offence was a capital one, and the inexperience of Bindon.

ADMISSIBILITY OF EVIDENCE

Bindon objected to the admission of much of the evidence and in particular, evidence given by Constable McIntyre concerning the deaths of Sergeant Kennedy and Constable Scanlon. Those deaths took place at least 30 minutes after the killing of Constable Lonigan. Bindon also made application that a special case be reserved for the Full Court on whether this evidence was properly introduced. In 1880 there was no right of appeal following conviction at trial. The only procedure available was for review of questions of law by persuading the trial judge that a case be stated to the Full Court. After the Full Court had determined the question, the trial would continue in accordance with the ruling.

Sir Redmond, however, permitted the Crown to lead the evidence on the basis that it formed part of the res gestae. Even if this were correct, then it might be thought that the effect of such evidence was so prejudicial that it far outweighed its probative value.

But on what basis was evidence of the bank robberies at Euroa and Jerilderia, and of some of the events at Glenrowan admitted? For example, Henry Dudley, who was present at Faithful Creek, Euroa, swore that Kelly having "caught hold of me by the collar of my coat held a revolver to my head and said 'if you don't hold your tongue I'll blow your bloody brains out' ".

Evidence was also admitted of alleged admissions made by Kelly, but heard only by two policemen, concerning the events when Constable Fitzpatrick attempted to arrest Kelly's mother. Kelly had always been at great pains to stress that he and his family had been wronged over the Fitzpatrick incident, and those people who had been convicted were "lagged innocent". Yet it was alleged that while Kelly was lying captured and wounded with 28 gunshot wounds he made admissions concerning those events that occurred 26 months previously.

Again several witnesses who were at Jerilderie and Euroa were allowed to state that Kelly was freely exhibiting Sergeant Kennedy's gold watch.

The Crown unsuccessfully attempted to tender through Mr. Living, bank clerk from Jerilderie, what has become known as the Jerilderie letter. Living swore that Kelly handed him this document and asked him to get it printed – it being "part of his life". It included Kelly's allegation of the persecution of his family, the alleged frame-up of his relatives and friends over the Fitzpatrick episode, and a detailed defence of his actions at Stringy Bark Creek.

The document is not without its humour. Kelly describes the police actions (he is not referring to Stringy Bark Creek) as the "brutal and cowardly conduct of a parcel of big ugly fat-knecked wombat-headed big-bellied magpie-legged narrow-hipped splay-footed sons of Irish bailiffs or English landlords."

More importantly from the point of view of Kelly's trial and a possible argument of self-defence, the following appears:

> "I heard how the police used to be blowing that they would not ask me to stand. They would shoot me first then cry surrender. I heard how they used to rush into the house, upset all the milk dishes, break tins of eggs, empty the flour out of the bags on to the gound and even the meat out of the cask and destroy all provisions. They would shove the girls in front of them into the rooms like dogs so that if anyone was there they would shoot the girls first. Superintendant Smith used to say to my sisters 'See all the men I have out today. I'll have as many more tomorrow and we will blow him to pieces as small as the paper that is in our guns' "

SELF-DEFENCE

Kelly obviously knew of the constant threats being made by the police to shoot him without giving him the option of surrendering. In fact, four policemen disguised as diggers, camped within one mile of the Kelly camp. They were heavily armed, each carrying a revolver, shotgun, breech-loading rifle, and 30 rounds of ammunition as opposed to the normal 12. They had no copy of the warrant then extant for Kelly's arrest, at least not to Constable McIntyre's knowledge.

The Age (30th October 1880) contained the following passage in a summary of the Crown Prosecutor's final address:

> "Kelly's motive was one of malignant hatred of the police because the person had been leading a wild lawless life and was at war with society. He had proved abundantly by the witnesses produced for the Crown, who were practically not cross-examined, that the murder of Lonigan was committed in cold blood."

But the camp where Constable Lonigan was shot, was surrounded by thick spear grass some 5 feet high. If Kelly's motives were as suggested by the Crown, then he could have easily ambushed both Constable Lonigan and McIntyre and shot them dead without any trouble. Instead, according to Constable McIntyre, he called upon them both to "bail up, hold up your hands", and when Constable McIntyre did so he was unharmed. There is a dispute as to what happened to Constable Lonigan. The notes of McIntyre's evidence at trial state:

> "Prisoner moved his rifle from the direction of my chest to his right in direction of Lonigan and fired."

At the inquest held into the death of Constable Lonigan at Mansfield some two days after the event, McIntyre had said:

> "Constable Lonigan made a motion to draw his revolver which he was carrying. Immediately he did so he was shot by Edward Kelly."

Bindon did not cross-examine McIntyre about this previous statement. McIntyre at the trial did concede that shortly after Lonigan had been shot Kelly said to him:

> "I suppose you bastards came out here to shoot me",

and, a short time later, when Kelly learnt what type of arms were being carried by the Police, again said –

> "Well that looks very like as if you came out here to shoot me."

McIntyre also agreed that Kelly regretted the fact that he had to shoot Lonigan.

In the Jerilderie letter Kelly stated of the events at Stringy Bark Creek as follows:

> "We saw they carried long firearms and we knew our doom was sealed if we could not beat those before the others would come as I knew the other party of police would soon join them and if they came on us at our camp they would shoot us down like dogs at our work as we only had two guns we thought it best to try and bail those up, take their firearms and ammunition and horses and we could stand a chance with the rest . . .
>
> "I called on them to throw up their hands, McIntyre obeyed and Lonigan ran some 6 or 7 yards to a battery of logs instead of dropping behind the one he was sitting on. He had just got to the logs and put his hands up to take aim when I shot him that instance or he would have shot me as I took him for Strachan the man who said he would not ask me to stand, he would shoot me first like a dog . . .
>
> "This cannot be called wilful murder for I was compelled to shoot them or lie down and let them shoot me. It would not be wilful murder if they packed our remains in, shattered into a mess of animated gore to Mansfield, they would have got great praise and credit as well as promotion."

Barry J. clearly thought self-defence was not open. His charge to the jury, as reported in the Argus (30th October, 1880) contained the following:

> "Here four constables went out to perform a duty. It was said that they were in plain clothes. But with that they had nothing to do. Regard them as civilians . . . What right had four armed men to stop them? What right had the prisoner and three other men to desire them to hold up their hands and surrender? But there was another state of things which was not to be disregarded. These men were persons charged with a responsible, as it turned out a dangerous duty and they were aware of that before they started. They went in pursuit of two persons who had been gazetted as persons against whom warrants were issued and they were in lawful discharge of their duty when in pursuit of these two persons; therefore they had double protection – that of the ordinary citizens and of being ministers of the law, executive officers of the administration of the peace of the country . . ."

Sir Redmond instructed the jury that there were only two possible verdicts: Guilty of wilful murder, or acquittal. This left the jury no alternative but to convict Kelly of wilful murder. He had admitted freely on a number of occasions that he had shot Constable Lonigan.

Kelly himself in his exchange with the Judge following his conviction said:

> "Under the circumstances I did expect this verdict."

A definition of the appropriate law of the time may be found in the decision of the Full Court of the Supreme Court of New South Wales in R. v. Griffin (1870) 10 S.C.R. (N.S.W.) 91 at 100 where Sir Alfred Stephen, C.J., in discussing self-defence said:

> "Now the law clearly is, that if there is in fact such a design manifested, on the part of the deceased – an intention then and there to commit the act of violence suspected, or said to have been, by either wounding or inflicting other grievous bodily harm on the prisoner – or even, as I apprehend, if there was at the moment reasonable ground for believing that such a design existed – the prisoner was

entitled immediately to take effectual measures for his protection; . . . the person so believing could not indeed justify the taking of life, or using a deadly weapon in a manner likely to take life, unless he could not otherwise prevent the apprehended injury – or, at least, until there was reasonable ground for believing that there were no other means, and he did in truth act on that behalf . . .

"I can see that the jury here should have been directed to consider the circumstances in reference to which a verdict of justifiable homicide or possibly of manslaughter might have been returned by them; . . . and the question of design on the part of the deceased, or belief on the part of the prisoner, was not even suggested (or at all events, they were not as questions of fact put) to the jury . . .

"Even the most violent man is not to be shot by the most peaceable, without a justification or excuse recognised by the law, and established to the satisfaction of a jury."

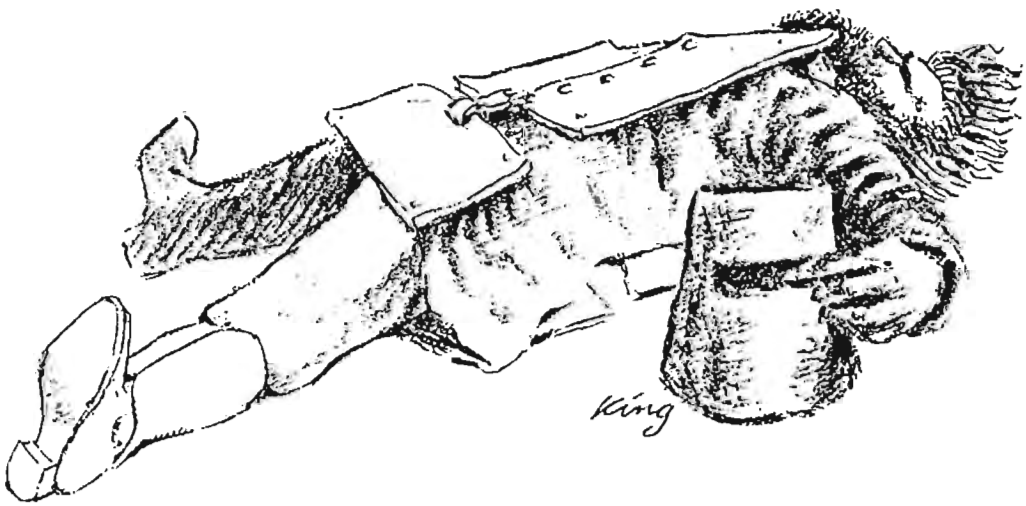
Griffin's case was also authority for the proposition that the jury ought to have been directed to take into consideration the evidence of previous threats and quarrels and of the character and habits of both the parties. At least the jury should have been directed that alternative verdicts were available for their consideration, being as I understand it, wilful murder, manslaughter or justifiable homicide. If the jury had received such directions and then returned a conviction of wilful murder at least some of the controversy surrounding the conviction of Ned Kelly would be removed.

CONCLUSION

After examining the documents, reports and sources available in relation to the trial of Ned Kelly, the inescapable conclusion appears to be that he did not receive a fair trial. If he had, the verdict may have been different. One is reminded of a passage at page 27 of the Winter edition of this paper dealing with the career of Mr. Justice Aickin:

> "On one occasion he was pressed by a now retired member of that bench (Court of Criminal Appeal) who said 'but Mr. Aickin, it is as plain as a pikestaff that your client is guilty.' 'That', replied Aickin, 'is not the exercise. It is whether he had a proper trial.' "

MONTI



LETTERS TO THE EDITORS

Dear Sir,

I have been at the bar for approximately 2½ years. As I have a family to support I am in an invidious position as I was allocated one of the newer clerks when I came to the Bar. I have been told that any application I might make to transfer to one of the established four clerking lists will be automatically rejected if it is based on a desire for more work.

This system to my mind is obviously unfair. From my experience it is clear that a person who comes to the Bar and is lucky enough to be placed on one of the four established clerk's lists he will receive an average 2-3 briefs per week from his clerk. On the newer lists this figure may be changed to possibly 1 brief per month. In my case I received only 4 briefs direct from my clerk in my first year. I do not blame him, he simply did not have much work to farm around. Thus the capacity for building contacts within the profession if one is on the newer lists is smaller. And it should not be supposed that as one gets more senior, one does not need a clerk to steer work his way. Some of the more senior barristers who joined the new lists after having been at the bar for some years later reverted to their previous list to build up their flow of work again.

Originally it was thought that the newer lists would be built up over the years and that they would become as busy as the established lists. This has simply not happened. Solicitors continue to brief the established lists much more than the newer lists.

Thus it is clear that to be one of the four established lists means a guaranteed automatic flow of work whilst to be on the newer lists means fewer opportunities and less income. I feel sure no-one can dispute this state of affairs. The most obvious solution would be to merge the news lists with the old and for them to be conducted as partnerships on whatever profit sharing arrangements the bar might think appropriate.

Yours Faithfully,
"Concerned Barrister"

P.S. I believe to put my name to my letter is inadvisable as I do not wish to upset my clerk and as you will appreciate, I am in part dependant on him for my income.

Dear Sir,

It was appalling to see the depth to which proper English usage fell in your Winter edition of 1980. I refer of course to the glaring error contained in Misleading Case Note No. 10.

It is no more appropriate to refer to Mrs. Mountbatten as Mrs. Windsor than it would be to refer to Mrs. Shifton as Mrs. Opas.

The retention by certain females of their maiden name for professional usage is an all too common and confusing occurrance. It is however only properly done where the professional office has been attained prior to marriage. Our late King George VI passed away in 1952 and as the Prince of Wales is now at least 30 years of age, even elementary mathematics leads one to the conclusion that when Mrs. Mountbatten entered her present employment she had long ago cast away her maiden name.

Signed by a very concerned reader,
JOSEPH V. KAY

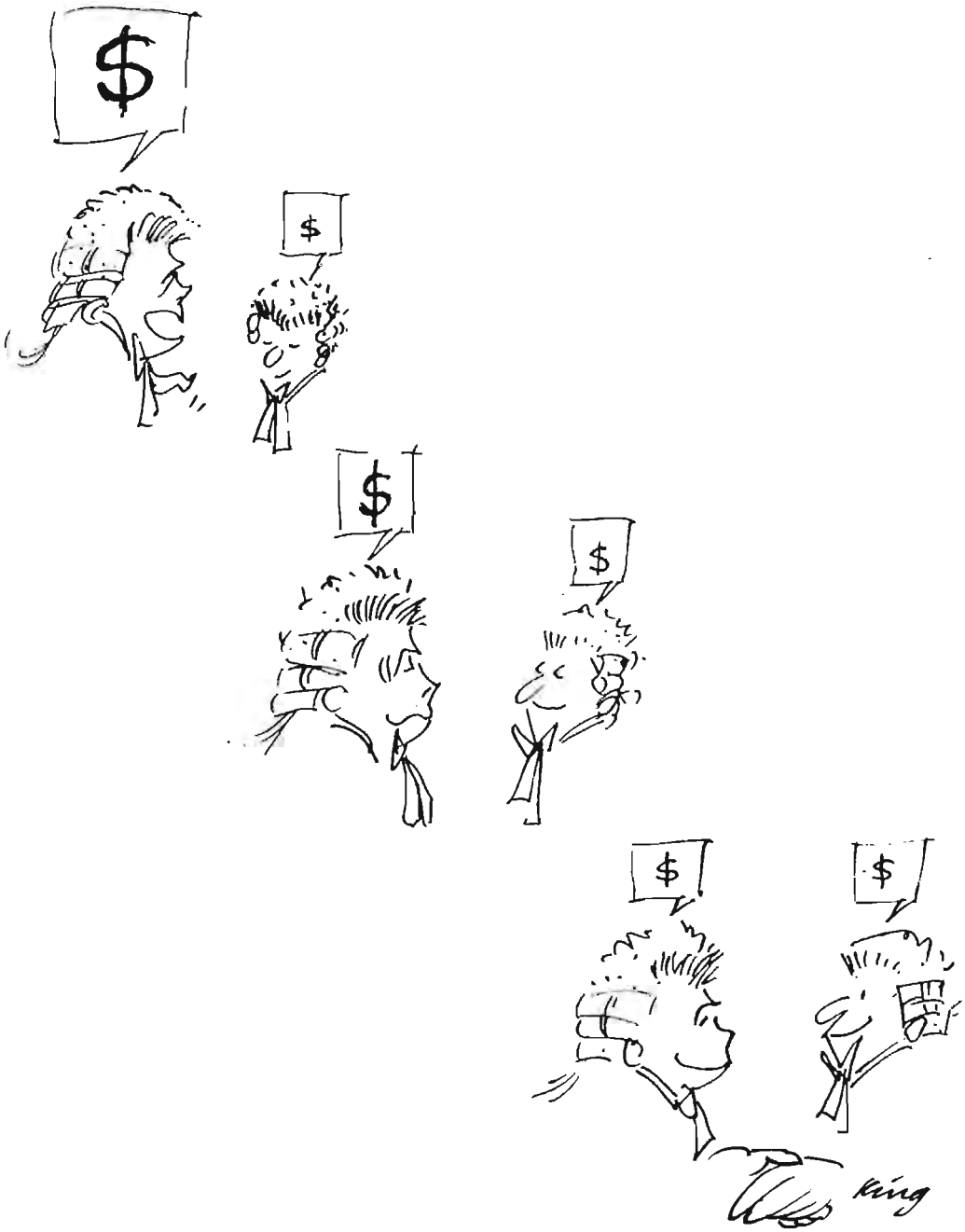
P.S. In light of the list of readers and their masters (or in this case appropriately mistresses) one wonders whether one should collectively refer to the occupants of Room 425 as Opi.

(We venture that "opera" might be a more appropriate designation – Eds.)

FOR STOTT'S CASES

A trapeze artist lost his grip but was held by the High Court not to have fallen within the provisions of the Workers Compensation Acts.

93 CLR 561.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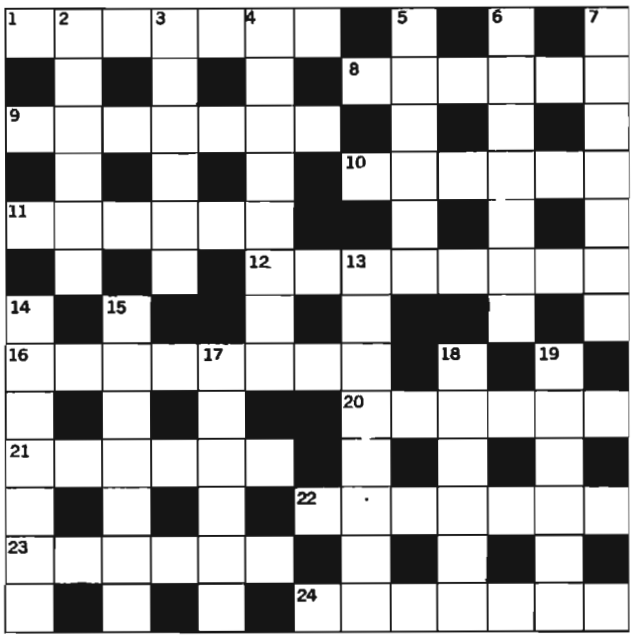
CAPTAIN'S CRYPTIC No. 33



Across:

1. Of Mohammedanism (7)
8. Sweet printers measure becomes beloved (6)
9. Disparage (7)
10. Lacked success (6)
11. Of one latin mind (2, 4)
12. Stated in detail (8)
16. Conspiracy particular (5, 3)
20. Happenings from Steven (6)
21. Right by which property is held (6)
22. Both fat and lean (7)
23. Acting Supreme Court Judge 23 April 1963 (5, 1)
24. Hostile, as a witness (7)

Down:

2. Chargers (6)
3. Scrape by violent rubbing (6)
4. Not in open court (2, 6)
5. Form of land succession (6)
6. Put back (7)
7. On the black side (7)
13. Made obvious (8)
14. Omen (7)
15. English nom de plume (3, 4)
17. Last element of affray (6)
18. Venerate (6)
19. Sums of money wagered (6)

THE RECORDING OF COURT PROCEEDINGS

Amongst the very real problems inhibiting the proper administration of justice in Victoria is the lack of proper recording facilities for the proceedings taking place in our courts and in particular the Magistrate's Court and the County Court.

When in England on a short holiday in 1975 I purchased a little booklet entitled "Royal Courts of Justice – Illustrated Guide" to help more readily find my way around the High Court which I had gone to see in action.

At page 25 of that booklet appears a short article which it is worth setting out in its entirety:

> **"The Recorders – Human and Electronic**
> An appeal is not a re-hearing. It is the trial of a trial. For that reason it is essential that appeal courts have an accurate transcript of evidence given at the lower court and the summing-up or judgment.
>
> Although some of the 18th century State trials were recorded in shorthand, the first official shorthand notes of court proceedings did not begin until 1907 when the Criminal Appeal Act gave convicted persons the right to go to a higher court. Until then a prisoner's only hope was a pardon.
>
> At first the job fell to newspaper reports in some areas, but because it was often necessary for them to leave court to meet approaching deadlines their transcripts were often unreliable.
>
> And so professional shorthand writers came into their own. These highly skilled man and women – professional descendants of Charles Dickens, who had made his living in a similar way at the ecclesiastical court of Doctors Commons – reach average speeds of 200 words a minute.
>
> There are six shorthand firms – some over 150 years old – regularly covering the High Court, as well as the Association of Shorthand Writers, under the contract of the Lord Chancellor's Office.
>
> All the courts are now equipped with tape recording machines, first introduced in 1965. The track recording the evidence runs parallel with a time clock track so that with the aid of a time log kept during the trial any particular passage can be played back without delay.
>
> All the court records are linked to two master records capable of taking up to thirty tracks each. At present, it is intended to store the master tapes for ten years.
>
> One shorthand firm is experimenting with a method which could take the recording of court proceedings into the 21st century. It revolves around the "Perry Mason" type shorthand machine used in American courts (a shorthand machine still used by some in British courts is no longer in production). It is hoped that the machine can be linked to a computer so that a transcript can be obtained electronically within a few seconds of the reporter taking down the evidence in court."

Keeping in mind that that article is now five years out of date and the technological advances referred to in the last paragraph are probably now very much a reality.

There is perhaps no better illustration of the sort of injustices that can be reaped by the failure to keep a proper account of court proceedings than the saga demonstrated in the cases of *Johanson v Dixon*.

Victorian Bar News

I don't propose to relate what I regard to be the whole sorry story of Mr. Johanson's battle with His Honour Judge Hewitt, but the interested reader might wish to see the story as set out in *Johanson v Dixon* No. 1 (1977) V.R. 574 and *Johanson v Dixon* No. 2 (1978) V.R. 243 and *Johanson v Dixon* No. 3 (1978) V.R. 377. It is sufficient for my present purposes to refer to the dissenting judgment of Murphy J., in *Johanson v Dixon and anor.* (1979) 25 A.L.R. 65 at page 75 where His Honour states:

> The absence of a proper record caused difficulties in the hearing of the appeal in the Supreme Court. Both there and in this court, the applicant sought to supplement the case by evidence of the account which he gave to the trial judge. That course is not permissible on the determination of the appeal on a case stated, although it may be permissible on an application in which it is sought to show that the case has not been properly stated.
>
> Every court from which an appeal lies should keep a proper record. Where no record, or a seriously defective record, is kept by an inferior court, the proceedings are a nullity (see Ex parte Powter; Re Powter (1945) 46 SR (NSW) 1 and De Iacovo v Lacanale (1957) VR 533. To conduct a trial in such a way that an accused person is deprived of the protection given by essential steps in criminal procedure makes a de facto conviction in law a nullity (see Lord Sumner in Crane v Director of Public Prosecutions (1921) 2 AC 299 at 331).
>
> One of the essential steps for the stated case procedure is the keeping of a proper record at the trial. A presiding judge must ensure that a proper record is kept either by himself or by a court reporter. It is generally not practicable for a judge to preside over the court, observe the demeanour of witnesses and, at the same time, keep a record of evidence. In practice, therefore, it is essential that facilities for the keeping of a proper record be available to a judge. However, counsel informed this court that facilities for the taking of a transcript or record are not available in a substantial majority of cases in the magistrates' courts and the County Courts in Victoria. Mr. Justice McGarvie said, when making absolute the order to state the case: "Until such time as the facts are stated specially by the learned County Court judge, there will be an element of doubt as to what his findings of fact actually were" (Johanson v Dixon (No. 1) (1977) VR 574 at 589). The absence of a proper record of the hearing became fully apparent from Judge Hewitt's first statement of the case.
>
> It seems to me that the hearing before Judge Hewitt was a nullity and any further proceedings on it subject to prohibition at common law. It also seems that the adoption of the restatement procedure is open to very grave objection. The power to order restatement should not be used in such a way that it requires what amounts to a new adjudication (see Stout CJ in O'Connor v Hammond (1902) 21 NZLR 573 at 577). The final version differs so markedly from the first version, in which Judge Hewitt stated that he had no independent recollection of the case, that it amounts to a new adjudication."

Whilst this is a dissenting judgment the other Judges were silent on the proposition as to whether or not the proceedings were amenable to a Writ of Prohibition because no proper record was being kept.

The jurisdiction of Magistrates courts has been extended, and there is no power to appeal other than by way of order to review. It is my experience that the review procedures are difficult if not impossible to apply where evidence is lengthy, and many cases which ought to be reviewed simply cannot be because there is no proper record before the court.

My understanding is that Victoria is the only State in which all court proceedings are not recorded.

On any given day in the metropolitan area there might perhaps be thirty to forty courts in session. I do not believe the cost of tape recordings there and in the County Court would be so prohibitive as to justify the consequential injustices that occur from not having proceedings properly recorded. No doubt the cost of proper recording facilities can be recouped

to some extent as they are in the Supreme Court from litigants requiring transcripts.

I believe that with the imminent increases in jurisdiction of the Magistrates' and County Courts that immediate steps ought to be taken by the Bar Council to bring pressure to bear on the Government to install proper recording devices in all courts.

CRAFTI

'Neil,' cried the Lord . . . and they did

THE Lord High Chancellor of England, who sits on the woolsack in the House of Lords, presiding over not only that august body but the entire British (and Australian) legal system, is a formidable figure.

Formerly plain Quentin Hogg, now Lord Hailsham, he was wandering down a corridor in the Houses of Parliament recently when he spotted an old friend, the Conservative MP Neil Marten, emerging from a doorway. "Neil," he boomed out. Just then a party of American tourists stopped to give way as the full-wigged, elaborately gowned and obviously important apparition cruised past, trying to attract Marten's attention. "Neil!" shouted Hailsham, even louder.

So the Americans duly obeyed, falling to their knees before the astonished, but amused, Lord Chancellor.

"NEWSPEAK"

His Honour: Yes?

Mr. Newspeak: At this particular point in time Your Honour, the litigating parties are presently engaged in on-going meaningful negotiations with a view to avoiding a confrontationist situation developing. The litigating parties may therefore derive some beneficial advantage if the matter were not to immediately commence at this particular point in time.

His Honour? Pardon?

Mr. Opponent:

We would like some time Your Honour.

His Honour: Oh . . . does Mr. Newspeak want that? I thought he was saying something else. Very well. I will leave the bench.

– On resuming

His Honour: Yes?

Mr. Newspeak: The litigating parties have derived some beneficial advantage from the indulgence your honour granted, but the presently bi-partisan negotiating situation that pertains is proving to have some disbenefits in that the criteria which is being applied to the resolution of the ongoing marriage conflict situation seems to be leading to a deadlock situation. If I can run up the pole to see if my learned friend salutes, it may be conducive to the avoidance of a conflict situation developing if your Honour could direct that the litigating parties be accessed to suitable para-professional resource personnel.

His Honour: What?

Mr. Opponent: Would your Honour direct that the parties seek counselling.

His Honour: Oh . . . very well. I so order and adjourn the matter to tomorrow morning at half past ten.

– On resuming

His Honour: What is the position now Mr. Newspeak?

Mr. Newspeak: May it please your Honour the litigating parties are appreciative of the accessing of resource personnel to their particular problem situation, but the parties remain in a basically confrontationist position. Can I spitball the problem around a little further and dunk it in the ink-well to see if it blots. The basal difficulty which at this particular point in time confronts the litigating parties and their legal practitioner advisers is that there would seem to be a fundamental breakdown in the ongoing inter-personal relations of the spousal couple. This has been perceived by the para-professional resource personnel to which the spousal couple have resorted on a needs basis, but the perceived problem situation cannot be resolved in the present parameters. The pecuniary demands of the female spouse have proved such as to presently preclude any resolution of the on going disputation directly between the litigating parties. If those pecuniary demands were ameliorated or even abrogated somewhat, some further forward progress may be possible.

His Honour: What do you say Mr. Opponent?

Mr. Opponent: Your Honour it's true that the parties won't speak to each other. My client, the wife wants more money than the husand will pay.

His Honour: Is that what you were saying Mr. Newspeak? Your client will have to pay something you know.

Mr. Newspeak: Your Honour the parties are indeed grateful for what has just fallen from Your Honour. It may very well assist the parties to move from single-digit figures to more realistic amounts. The parties and their advisers are of course well aware of the current economic climate and cost-push inflationary pressures on the non-farm domestic economy. They will take what your Honour has said on board and see if they can agree on a ball park figure.

His Honour: I will adjourn early for lunch. We will resume at 2.15.

– At 2.15

Mr. Newspeak: We are indeed grateful for the continuing indulgence your Honour has been kind enough to afford us. The litigating parties have resolved their ongoing differences and thus avoided a nasty litigation scenario thanks to . . .

Mr. Opponent: I'll do it. Your Honour. $50 per week, first payment next Thursday.

Mr. Newspeak: My learned friend seems to be usurping my particular position and I do . . .

His Honour: Oh be quiet. I make the order. Adjourn the court.

HAYNE

VERBATIM

Solicitor:
If your Honour pleases, I appear on behalf of the Applicant wife and I'd ask your Honour to excuse me for appearing without a tie.

Lusink J.
Well . . . where is it?

Solicitor:
I don't know your Honour – I had it on when I left home this morning . . .

Family Court, Melbourne.
pre-trial callover
August, 1980

● ● ●

Tony Hooper, as Chairman of the Town Planning Appeals Tribunal, in response to a submission by O'Callaghan, Q.C. that the Governor-in-Council might be disqualified from adjudicating in the matter because the Governor and the Premier were both patrons of one of the parties.

"I don't know about that. I read that if you can't ride two horses at once you shouldn't be in the circus."

● ● ●

COUNSEL (prosecuting) to prosecution witness:

"And I am asking you now only up until the time when you ran from your seat to the back of the shop. Up until that time do you see anyone in Court now that you recognize as being the people who came from behind the counter and had sticks?"

WITNESS: I'm sorry, I don't follow your . . .

COUNSEL: No, it is not that good. I will practise over the weekend your Honour.

coram Judge Hogg and jury
Friday Sept. 5, 1980

Scene: Return of application for an interlocutory injunction to restrain a company dealing with $8m worth of shares in another company, an interim injunction having already been granted. Silk and Junior for the Applicants, Silk and Junior for the Company, two Silks and a Junior for the Directors. Allegations that the interim injunction was obtained in scandalous circumstances with complete lack of candour. Strenuous denials and counter allegations that the Directors simply cannot be trusted. Alarums and excursions and general table thumping.

McGarvie J:

Gentlemen, I shall proceed on the assumption that each party is thoroughly outraged by everybody else's conduct.

● ● ●

Appeal against sentence on conviction for exposing themselves in a public place, to wit, urinating from a balcony onto or next to a police car.

Drake of Counsel (for Appellants)

". . . admittedly by their actions the Defendants showed an obvious lack of circumspection . . ."

Coram Judge Hewitt 11/6/80
R v Robertson de Ptchonic

● ● ●

Fullagar J. upon arriving in Court unrobed to hear a wardship case, to counsel appearing who were robed.

"I suppose this time it's a case where you cannot see me."

The following appeared in an Order sent up for signature by Crockett J.

AND IT IS FURTHER ORDERED that the Defendant pay the Plaintiff's costs and I certify that this was an application "profit to be attended by counsel".

● ● ●

(From a recent invitation to the Chairman)

Sunday Lunch –

Informal bar-b-que.

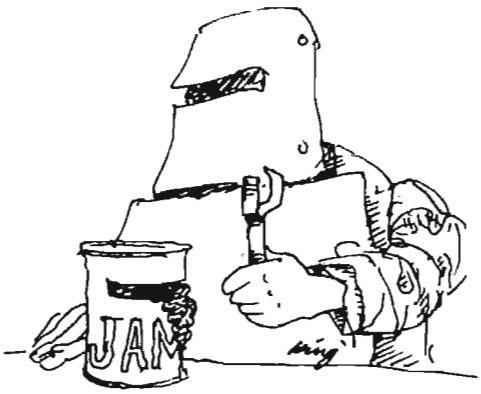
Would you kindly let me know if you are able to attend as soon as convenient. If you are unable, perhaps a delicate could attend to represent the Bar.

● ● ●

D. Campbell (solicitor) for the prisoner on a plea before Judge Howse:

"He was stabbed on the 24th day of July (1979) and that explains his slightly emancipated look"

R v. McNair
June 21, 1980



Two hapless youths recently confronted the full wrath of Caven S.M. The Defendants were fined $100 each for throwing eggs around city streets.

Clerk of Courts:
Do you want time to pay?
Defendants:
Yes.
Caven S.M.
Time to pay! What do you guys think we're running around here? . . . a hire purchase institution?

(Shocked pause by Defendants)

Caven S.M.
Come on, when are you going to sling us the dough . . .?

(Pause. Baffled Defendants)

Caven S.M.
Don't try me on son . . . make a suggestion fast or you'll be out at Pentridge.
Defendants (stammering)
". . . two weeks".
Caven S.M.
O.K., two weeks, now nick off.

Melbourne Magistrates Courts
August 20, 1980

● ● ●

Granat: (to jury)

You may be misled by the arrangement of the court into thinking that the accused are guilty. It has been said that if the Archbishop of Canterbury were sitting in the dock that he would look like a criminal. Now my client doesn't look like a criminal . .

Prosecutor: (sotto voice)

. . . nor like the Archbishop of Canterbury.

R v. Kirby & Ors
Cor Judge Dyett & jury
June 13, 1980.

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Judge Shillito (in Appeals, August 1980) on being asked to send an old laig to an attendance centre:

"Look, the last man with form like this that I sent to an Attendance Centre stole all of it's lawnmowers."

MISLEADING CASE NOTE No. 11

DONOGHUE v. ROTDENT COMPANY

Mr. Vanhurst for the Plaintiff
Mr. Lick for the Defendant

Babbling J. read the following judgement:

This is a case stated by Order of His Honour Judge Rabies in the County Court as to whether the Plaintiff is entitled to succeed in this action should the facts which she alleges be proved to be true. Some time ago the Plaintiff, Miss Donoghue, purchased from a local shop a bottle of soft drink manufactured by the Defendant. When she had consumed almost all of it, she noticed that reposing in the bottom of the bottle were the remains of a decomposed snail. This caused her various illnesses and disabilities ranging from immediate vomiting to traumatic neurosthenia, and functional overlay. Accordingly, she commenced an action for damages against the Defendant as manufacturers of the soft drink and bottle combination. Whilst the facts alleged by the Plaintiff were not admitted by the Defendant, the learned trial Judge, in view of what he termed an extraordinary submission by Mr. Lick who appeared for the Defendant, saw fit to refer the case to this Court for consideration upon the point of law so raised

No doubt there are many young men who have not the wherewithal to withstand a full time practise at the Bar, but I must deplore the ever-increasing practice of young men combining both a position at the University as a lecturer or tutor, with practice at the Bar. I am told that as an undergraduate, Mr. Lick would never contribute to classroom or tutorial room discussion, on the grounds that other students might benefit by his brilliance and therefore be more able to compete with him for academic honours Whatever the benefits of that course of conduct as an undergraduate may be, as an advocate they are very slim indeed. Mr. Lick persistently refused to put submissions to me in the course of this case and when he did deign to do so they were expressed in the most perfunctory and disinterested manner. Although I can understand his reluctance to allow others to see (and perhaps to copy) his brilliant style of advocacy, it is of little assistance to this Bench that such style (if any) is to remain hidden. When pressed by the Bench however, Mr. Lick revealed the submission which had caused the trial judge to refer this matter to me.

Had the Plaintiff purchased her bottle of soft drink in the normal fashion this matter would never have reached the stage that it has, however she chose not to pay for it by the exchange of cash for the bottle, but rather by the use of that modern form of credit called "Bankcard".

Mr. Lick, as I understand him, submitted that a manufacturer's liability for products only extends to transactions where the products are sold. Thus far Mr. Vanhurst and I are in agreement with him. He went on to say, as I understand him, that the purchase of goods by use of a Bankcard is not a purchase at all, and is therefore not a transaction by which the manufacturer becomes liable for any defects in his goods.

The essence of a simple contract is an agreement between two parties whereby goods are exchanged on the one part for money upon the other part. In legal theory there must be consideration moving from the promisee towards the promisor. Where a Bankcard is used to finance a "purchase" however, the situation is somewhat more complicated. There are of course three parties and not two to the transaction. There is the "purchaser" the "seller", and the Bank from whom the Bankcard issues The purchaser has a contractual relationship with his Bank, whereby he agrees to pay any amount lawfully demanded of him by his Bank for his use of the Bankcard. Likewise the seller has a contractual relationship with the Bank, whereby the Bank agrees to pay to the seller amounts of money corresponding to the value of goods supplied by the seller

to the purchaser. The seller for his part agrees to be bound by his agreement with the Bank, and not to make any demand for money from the purchaser in return for his supply of goods to the purchaser. Mr. Lick, as I understand him, submits that therefore there is no consideration moving between the seller and the purchaser or vice versa, the supply of goods by the seller to the purchaser being therefore a gift to which manufacturer's liability does not attach. Despite the reticent terms in which that submission was made, I am persuaded that it is correct. There must be consideration moving between the seller and the purchaser to attract liability by the manufacturer. If the "sale" by the seller to the purchaser is in fact a gift, then no such liability attaches.

What then does the purchaser give to the seller? In my view, it is nothing. The purchaser enters the shop of the seller, in the usual circumstances, and requests goods from the seller. The seller provides them to the purchaser, and makes no demand for payment. In my view such a transaction is clearly a gift. It is arguable, and indeed it was argued by Mr. Vanhurst for the Plaintiff, that the purchaser gives to the seller a right of action against the Bank. The right of action against the Bank however exists whenever the seller provides goods to a Bankcard holder. Although the terms of the agreement between the seller and the Bank are a closely guarded secret, at least as between the seller and the Bank, I can see no difference that the prior request of the purchaser for the goods makes to the existence of that right. If that is so, which I now expressly find as a fact, then the purchaser gives nothing to the seller in exchange for the goods, and the transaction is therefore a gift. The Plaintiff's claim against the Defendant must therefore be dismissed.

I can foresee that this ruling will pose some difficulties in the realms of commerce. Whereas the seller has a right of action against the Bank for the cost of any goods supplied by him to a Bankcard holder, the Bankcard holder is only liable to the Bank for the cost of goods supplied by a seller to him pursuant to a request by him. Since as I have previously found such a request is unnecessary to the supply of goods, such supply being a gift, it follows that a Bankcard holder is not liable to pay to his Bank any amount which the Bank demands of him as being due for goods allegedly "purchased" by him. Thus is follows that Bankcard holders may freely acquire goods from shops (and the sellers in such shops are expressly by their contract with the Bank required to supply such goods) without the need to pay any amount for such acquisition. As I have said this may cause some little difficulty in the commercial world in the short term, but I am sure the common sense of business men will overcome it.

There will be an order for the Defendant accordingly.

GUNST

LEGGE'S LAW LEXICON

B

Badger	A Cross-examiner
Bail	(Fr. bailler. To deliver.) A procedure designed to keep a poor person in gaol until he is delivered up for trial.
Ballast	Heavy matters such as non est factum, undue influence and rectification introduced into a defence to give it weight and to prevent its being readily upset. Ballast is usually understood to be the last resort of the hopeless and is consequently taken into consideration by the tribunal of fact with more decorum than zeal.
Banc	Three heads that are better than one.
Bankruptcy	The condition of a young barrister both before and after he sues for his unpaid fees.
Bar	A society devoted to the propagation of a practical knowledge of the evil consequences of cupidity amongst cestuis que trustent and other heathen.
Bar Council	A body elected to lead a society in which there are no followers.
Bare Trustee	The victim of an originating summons.
Barrister	A student at law who has been admitted to practise at his client's expense.
Bear	A cant term used in the personal injuries list to denote one who alleges the existence of an independent witness that he does not have in the hope of settling before the time arrives to open the defence (cf. "Bull").
Beau-pleader	A defence in confession and avoidance in an action for breach of promise of marriage (q.v.)
Bench	The raised dais or seat in a court of justice from which a judge looks down upon humanity for 15 to 20 years to the great detriment of his personality and character.
Benefit of Clergy	The difference between pleasure and alimony.
Bias	The indulgence granted to one's opponent.

Bigamist	A man who disregards the penalties of the law in order to indulge his obsession for making a virtue of necessity.
Bill of Sale	Gillard Q.C. on the Gippsland Circuit.
Bird	All wild birds are protected during the breeding season (Wild Life Act 1975).
Blackmail	(Fr. maille. A small piece of money). A species of insurance in which the premium is usually increased after the non-happening of the event insured against.
Blank Acceptance	The state of mind induced by a successful plea in mitigation.
Blasphemy	The denial or ridicule of the belief that counsel is employed by his clerk.
Bloodwit	A Collingwood supporter at this time of the year.
Body Politic	No relation to one of the current readers.
Bonus	The fee given to counsel for the respondent on an application for special leave to appeal to the High Court.
Booty of War	(1875) L.R. 4 Adm. & E. 436.
Bottomry Bond	The usual result of a successful plea in the County Court.
Bourkism	The practice (usually but not always resorted to with the assistance of silk) of running three courts on the one day in different circuits.
Brachylogy	See "Brief"
Breach of Peace	The first step towards a divorce (formerly known as matrimony)
Breach of Promise of Marriage	An action upon a promise that the defendant shall answer for the debt, default and miscarriage of another person. Accordingly, the action is not maintainable unless there is such a memorandum or note as is referred to in Section 126 of the Instruments Act 1958. There is no recorded instance of a plaintiff in such an action having successfully raised a reply of part performance to a defence of the Instruments Act.
Bribe	Advertising expenses.
Brief	Any connection with brachylogy is entirely coincidental.
Brokerage	The years in and between 21 and 30.
Burden of Proof	The additional hazard of proving a negative which is imposed upon a taxpayer appealing to the Board of Review.
Bull	A cant term used in the personal injuries list to denote one who has had brought to Court the Plaintiff's 8 brothers and sisters together with the X-rays from his last brief but one in a speculative endeavour to obtain an offer higher than the Defendant's payment into Court.
Bysax	Bysax??

SPORTING NEWS

We regret to announce that the Bar and Bench golf teams were soundly thrashed by the Services team in the annual clash which was held at Royal Melbourne Golf Club on the 27th June, 1980. For the first time in many years, neither the Bruche nor MacFarlan trophies will grace the china or trophy cases on the 13th floor. Only Lee and Les Ross, stalwarts of competitive play over many years, were able to succeed as a Bar combination. The conditions were atrocious for golf and next year we must disprove the suggestion that we are only "good weather golfers".

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For some period of time Lennon was not his usual perky self. The reason was obvious to those who had been following "Watney", a chaff bandit owned by Lennon and Merrals. Its form had suddenly become very poor but it is believed that it then overheard some reference to the vet coming along with a sharp knife. Since that time, it has won three on end, the last two in town. Perhaps the same approach could be made to "Hue and Cry" a neddy which is partly owned by Jack Forrest. The dogs have been barking about this one for some time, but it refuses to salute the Judge and Jack's reluctance to associate with his former colleagues at the Golden Age is understandable. Someone unkindly suggested that it had run more seconds than Collingwood.

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"One good turn deserves another". Sometime ago Pannam appeared for a horse trainer on an appeal and succeeded. We note, with interest, that "Live Oak" trained by the same trainer and owned by Pannam and Merkel succeeded at Ballarat the other day. It was backed from 20/1 to 10/1 and was well supported, we believe, by owners and co-tenants at Owen Dixon.

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The Bar was well represented at the recent Super Run and in fact fielded a Bar team with Berkeley at the helm. Participants included Duggan, Hockley, Neil Brown, Danos, Mattei, Castan, Webster and Stanley. They all deserve commendation particularly for their ability to resist the temptation to visit various Hotels on the way including the Hilton and Young and Jacksons. Once over the West Gate Bridge, they needed no direction signs in arriving at their destination, namely Flemington Racecourse.

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There are several stories which will be followed for the next issue. Tony "fingers" Lewis has been plucking the strings of his guitar akin to Jose Feliciano. Joe Dickson apparently yearns for a repeat of a trip he made some time ago to the north coast of Queensland. One does not require a very vivid imagination to picture him on a boat consuming prawns and a moderate amount of intoxicating liquor.

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During the recent legal vacation, Kuta Beach, Bali, was littered with washed up barristers – Fricke QC, Kirkham, Ian Crisp, McGuiness, Batten, Howard and L. Dessau. Pannam QC and Merkel refused to come down from the tranquil highlands of Ubud (only occasionally disturbed by the crow of an early cock). One highlight for all occurred when Judge Howse and his wife were confronted by a hopeful local who asked his Honour if he'd like to buy a "boong". Kirkham explained he thought it was a pipe full of marijuana. Rozenes, later there, was also looking into it . . .

FOUR EYES

MOVEMENT AT THE BAR

Members who have signed the Roll (since 19/6/80)

W.H. NICHOLAS (NSW)
R.B. MURPHY (NSW QC)
J.V. COOMBS (Miss) (NSW)
C.J. BANNON (NSW QC)

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

M.J.L. PRESTON
M.C. PRYLES
A. KORNBLUM (Non-Practising List)
G.E.M. MORGAN (Miss)
F.J. LORY
J.A. O'BRIEN

Number in active practice – 710

Applicants who have applied to sign the Roll of Counsel in October 1980
("R" – Rick Howells)

READER	MASTER	CLERK
PASRICHA, Mr. J.S.	Dr. P. Buchanan	R
RYAN, Mr. C.J.	M.R. Shatin	R
HARGRAVE, Mr. K.W.	D.L. Harper	R
DYER, Mr. R.W.	V.F. Ellis (3 mths) C. Heliotis (6 mths)	R
ALLWOOD, Mr. G.R.	C.S. Keon-Cohen	R
THOMAS, Mr. D.I.	D.G. Henshall	R
FRASER, Mr. H.W.	K.M. Hayne	R
COOPER, Mr. S.	R.G. Lopez	R
CONNELL, Mr. D.J.	R.H. Gillies	R
SHAND, Mr. M.W.	K.J. Mahony	R
GARNER, Miss J.M.	W.F. Lally	R
GOURLAY, Mr. I.S.	B.W. Collis	R
MILLER, Mrs. J.C.	H.T. Nathan	R
BRETT, Mr. J.P.	A.R. Monteith	R
LUKE, Mrs. I.	J.W.Ramsden	R
MAGEE, Mr. J.A.	N.J. Williams	R
PANNA, Mr. A.	F.G. Moorhead	R
MATTIN, Mr. J.D.	G.V. Tolhurst	R
HESS, Mr. B.J.	A.C. Archibald	R
HARRISON, Mr. C.W.	D.B. Sharp	R
MUNRO, Mr. I.H.	D.A.L. Mattei	R
CROWTHER, Mr. J.M.	J.D. McArdle	R
MOYLE, Mr. C.W.	D.E. Morrow	R.
TOOP, Ms. C.J.	J.D. Loewenstein	R
LACAVA, Mr. P.G.	R.C. Gillard	R
HENNESSY, Mr. J.P.	R. Pitcher	R

SOLUTION TO CAPTAIN'S CRYPTIC NO. 33

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VICTORIAN BAR NEWS

ISSN - 0159 - 3285

Published by:
The Victorian Bar Council,
Owen Dixon Chambers, 205 William Street,
Melbourne, 3000

Editors:
David Byrne, David Ross, David Henshall

Editorial Committee:
Max Cashmore, John Coldrey, Charles Gunst,
Tony Howard, Robert Webster

Cartoons by:
Crossley and L. King

Phototypeset and Printed by:
Active Instant Printing