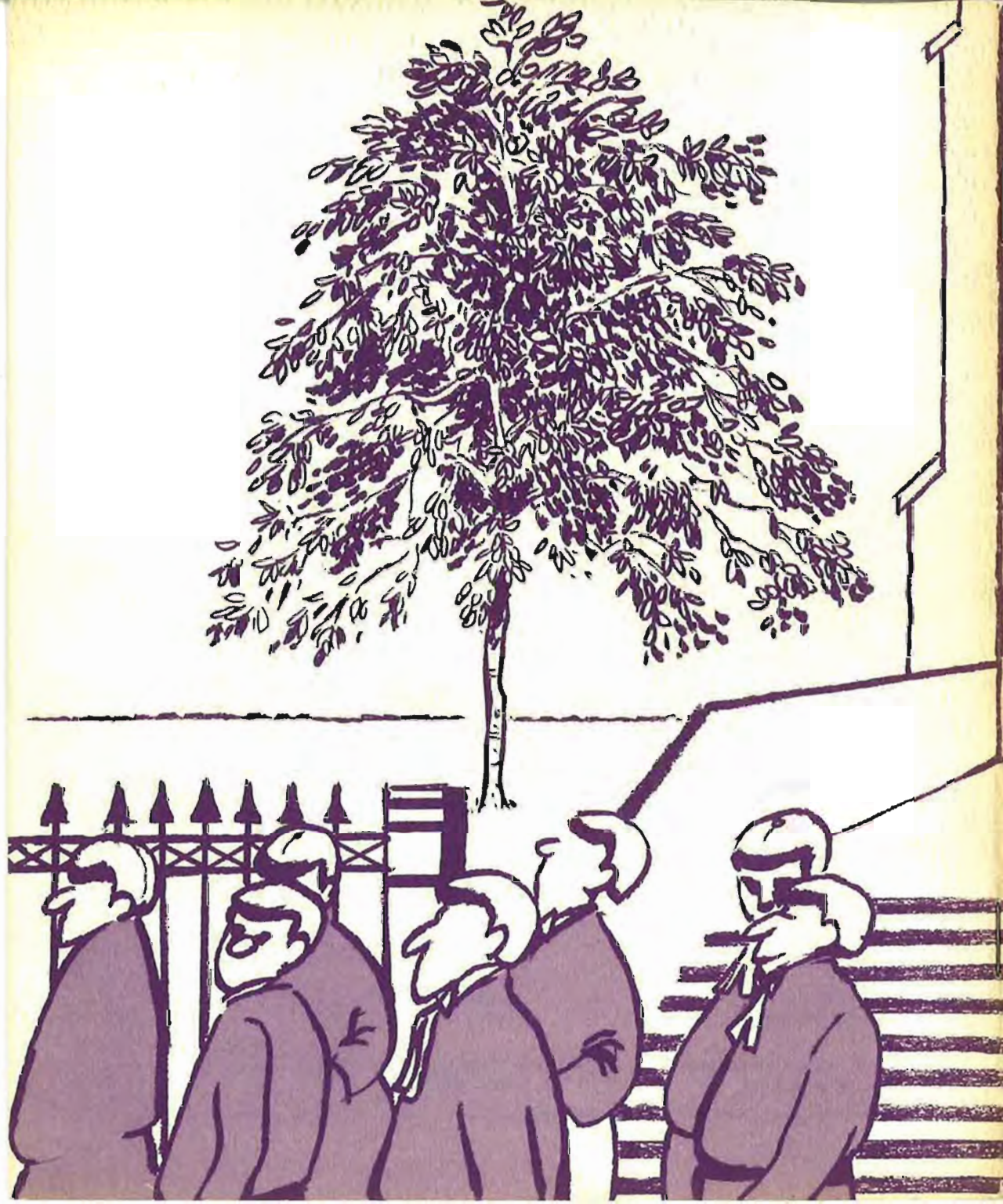
Victorian Bar News

AUTUMN EDITION 1983



VICTORIAN BAR NEWS

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BAR COUNCIL REPORT

New Vice Chairman.
S.P. Charles Q.C. was on 24th March 1983 elected Vice-Chairman of the Bar Council.

Meetings:

Since the last edition of the Bar News there have been eight meetings of the Bar Council.

Applicants to Sign Roll of Counsel:

On Thursday 18th November, 1982; 27 applicants to sign the Roll of Counsel were permitted to sign, at a dinner in the Essoign Club. The speaker at the dinner was the retiring member of the Bar, E.H. (Ted) Laurie, Q.C., whose speech amused and inspired all present.

Victorian Bar Superannuation Fund:

The Trustees of the Superannuation Fund have been permitted to engage professional managers for the management of the Superannuation Fund.

Briefs Marked "No Conference Required":

A problem has arisen, particularly in the workers compensation jurisdiction, of briefs being delivered to Counsel marked "No conference required". Upon receipt of a draft resolution from the Ethics Committee, the Bar Council resolved that:

(a) except where the refusal or return of a brief would not be proper having regard to the whole of the circumstances, Counsel should not accept or continue to hold a brief where a conference with a lay client or a witness is necessary for the proper preparation for or conduct of the proceedings, if his instructing solicitor by endorsement on the brief or otherwise denies Counsel the opportunity for such a conference;

(b) where Counsel accepts a brief which includes in the instructions a statement that in the view of Counsel's instructing solicitor no conference is required between Counsel and the lay client or any witness, or a statement to like effect, Counsel is not entitled to charge for a conference unless a prior arrangement has been made by Counsel with his instructing solicitor that a conference be held;

(c) a conference fee should not normally be charged for a conference which involves only a professional discussion (including the obtaining of instructions for negotiating settlement) between Counsel and his instructing solicitor prior to or during the course of the proceedings but can be charged where circumstances such as the time involved in discussions or advice given in the course thereof justify the charging of a separate fee.

Australian Tax Research Foundation:

Following the lead given by the Law Council of Australia and its other constituent bodies (excepting the New South Wales Bar and the West Australian Law Society), the Bar Council agreed to support the proposal of the Law Council of Australia for the establishment of an Australian Tax Research Foundation.

Appointment of Executive Director:

Barristers' Chambers Ltd. at the request of the Bar Council has engaged Mr. Edward Thomas Fieldhouse as Executive Director of the Company, following the reported need for such an officer after a management survey carried out on behalf of the Bar by Peat Marwick Mitchell & Co..

Bar Council Accommodation:

Members may have noticed that renovations are taking place on the 12th Floor of Owen Dixon Chambers. These are designed to accommodate the

Executive Director and other staff in what is now the Bar Council Chamber. The new Bar Council Chamber is to be established in what was formerly the chambers of Cummins Q.C. and Kennon.

Expansion of Chambers in Owen Dixon Chambers:

After some misunderstandings between Barristers' Chambers Ltd. and the Bar Council, the Council informed the company that it was of the view that, save in exceptional circumstances, no further expansion of chambers in Owen Dixon Chambers be allowed. After the company permitted one further expansion to take place and failed to permit another, the Bar Council has resolved that the company should in all future cases refer any such applications to it. For the purpose of determining whether such applications be approved or not, the Bar Council has constituted a sub-committee comprising Hanson, McArdle, Gunst and Lewitan.

A.B.C. Building Site:

Upon receipt of a recommendation from the A.B.C. Building sub-committee, the Council resolved that Lend Lease be given a 3 months exclusivity period within which to produce plans acceptable to the Council for the development of the A.B.C. site.

Result of Poll Re Court Dress

Members of the Bar are advised that the result of the Poll on Court Dress which closed earlier this week was: –

In favour of retaining the present court dress	390
In favour of alteration to either a gown only or no special dress (save on ceremonial occasions)	179
The break up of the figure of 179 is: –	
In favour of gown only	91
In favour of no special dress	38
In favour of gown only or failing that no special dress	50
	179

Director of Public Prosecutions

The appointment of J.H. Phillips Q.C. as the first Director of Public Prosecutions for the State of Victoria has been applauded by all who practise in the criminal law.

It is perhaps too early yet to gauge his impact on preparation and presentation of criminal prosecutions. We are confident that his quiet industry and considerable experience will be able to bring great benefits to the administration of the criminal law. It is a source of great satisfaction to the Bar that he has maintained close links with old colleagues despite the demands of his new office.

In due course, we hope to invite him to tell us about his duties and his expectations of the office.

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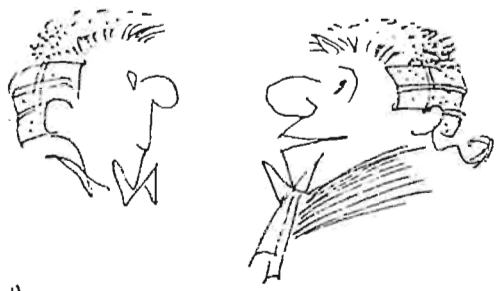

"– AND A GOOD JUDGE TOO"

Sir Murray McInerney, who retired in February after some seventeen years on the Supreme Court Bench, left behind him a fine judicial record. His judgments not only demonstrated clarity of expression and a thoughtful, deeply analytical mind, but invariably constituted a useful storehouse of well researched relevant authorities. He was learned, thorough and courteous, at all times patiently assisting Counsel to develop their submissions. It is not, however, intended here to dwell on his judicial attributes – and they were considerable – but rather to speak of Murray McInerney, the man and the barrister.

Murray McInerney was born in 1911 in Johannesburg. His early education was with the Christian Brothers in Pretoria, but, upon his family's return to Australia, he completed his secondary education at Xavier College where, at the age of sixteen, he was dux. Proceeding to Newman College, Murray was active in all its affairs, at the same time gaining masters degrees in Arts and Law, with numerous exhibitions and the Wyselaskie Scholarship in English, Constitutional History and Political Science. He also blossomed into an outstanding middle distance runner, his stamina and tenacity winning for him Melbourne and Australian blues.

On the 2nd April 1935 Murray McInerney committed what was then regarded as an act of extreme folly – he signed the Bar Roll. It was a time when even the bankruptcy jurisdiction and litigation generated by the depression were drying up. From those who

signed the Bar Roll in the years 1933-1935 His Honour and Sir George Lush remained after the war as the sole survivors in active practice, ekeing out a tenuous existence by sharing the small internal box rooms in Selborne Chambers, poorly ventilated and without external light. His earnings were supplemented by tutoring at Newman College and in 1939 he was married to Manda Franich. The 1939-45 War found Murray in the Navy, where he saw active service as a Lieutenant in Intelligence at Finschafen, and in the Pacific.

After the War, His Honour, now of ten years standing, had a box room to himself and soon became recognised as an outstanding junior. His first reader Ivan Franich (now Judge Franich) came to him in January 1948, to be followed in the next year by Xavier Connnor (later Mr. Justice Connor). Murray's small room became a meeting place of junior barristers who sought not only good free advice, but also the kindliness of his friendship. In 1949 he was appointed Independent Lecturer in Evidence and Procedure at Melbourne University. In the then division of the law he was regarded primarily as an equity lawyer, but his practice was wide, embracing a considerable volume of common law. Above all he was a tenacous advocate. By the early '50's his talents as a junior were constantly sought in important cases, his carefully prepared and fully researched arguments being much in demand to assist the leaders of the day. He took silk in 1957.

The following year Murray McInerney was engaged as leader in an application for prerogative writs against a County Court Judge, whom, it was alleged, had so interrupted Counsel's cross-examination as to prevent the proper presentation of his client's case. The Case before the Full Court (1959) VR 800, attracted tremendous interest throughout the Bar and Murray's successful conduct of it – fearless, tactful but completely determined – won him wide and immediate recognition as a prominent leader.

Murray McInerney Q.C. became a very busy silk and his juniors came to know well the Burwood home, Manda and the seven children. Many a junior, whilst waiting for Murray to complete a conference in another action, was dragooned by the McInerney children into assisting with their home work in order to avoid interrupting "Dad". The conferences often proceeded long into the night. History unfortunately records that the school results achieved by members of the Bar were not universally of appropriate standard.

In 1952 Murray McInerney had been elected to the Bar Council thereafter serving continuously until his appointment as an Acting Justice of the Supreme Court in May 1965. In 1959-61 with Oliver Gillard (later Mr. Justice Gillard) Murray played a major role in the establishment of Owen Dixon Chambers. His appointment in 1962 as Chairman of the Bar Council was in part a recognition of the enormous value of his services to the Bar during this period. He was also appointed Deputy President to the Courts Martial Appeal Tribunal.

When Murray McInerney was finally elevated, his appointment was warmly acclaimed. At a time when briefing tended to be on more sectarian lines than it is today Murray was universally popular and widely admired. His own personal life as a barrister had helped to soften some of the divisions within the profession.

Not long after his appointment, one Christmas Eve Counsel came to His Honour's Burwood home with an urgent opposed application. A Supreme Court was hastily constituted in His Honour's study. Suddenly in the midst of Counsel's learned argument, Manda's head came round the door to interrupt with a series of interrogatories directed to "Murray" on such mundane matters as Christmas shopping for the seven children, and other holiday arrangements. After the Court adjourned His Honour gently and patiently explained to Manda that the Supreme Court had been sitting and that her conduct constituted a contempt for which she could be gaoled. "Well" said Manda "That would suit me fine", and indicated a surprising preparedness to accept the peace and quiet of Fairlea, leaving His Honour to do the shopping and cook the Christmas Dinner for the family. Any thought of contempt proceedings was promptly abandoned.

Sir Murray McInerney leaves the Bench with the strong affection of his colleagues and of the Bar.

He is a warm gregarious man, deeply attached to his home and family. When Manda died in 1973 his great sorrow met with the sympathy of us all. And his many friends rejoiced with him in his subsequent happy marriage and evident satisfaction in his newly acquired family.

His Honour was a judge of quiet dignity but without pretention. His office was unable to prevent his natural good humour and friendliness from bursting forth in Court. We remember him as an affable judge, ". . . and a good judge too".

WELCOME: HAMPEL J.

On Friday the 18th March, 1983 His Honour Mr. Justice Hampel was welcomed by the profession as a Judge of the Supreme Court of Victoria. His Honour was born in Warsaw on the 4th of October1933 and had his primary education at schools in Poland, Russia and France. His family migrated to Australia in 1948 and, after a short period at Toorak Central School, His Honour completed his education at Haileybury College and Melbourne High School. He graduated from the University of Melbourne in 1956 and was articled to the late R.H. Dunn in 1957. He was admitted to practice on the 1st of April 1958 and on that day signed the Bar Roll. He commenced reading in the Chambers of Harold Ogden.

Not unexpectedly, after articles with R.H. Dunn during which he had frequent contact with the legendary Jack Cullity, his practice was involved mainly with the criminal law. He was involved in a great number of famous trials, including 100 murder trials.

His Honour educated 6 readers with most of whom he has remained in close contact: Ian Heath, Tom Danos, Michael Rozenes, Barbara Cotterell, Kevin Jacobson and Peter McGuinness.

Whilst at the Bar he made a substantial contribution to Bar Affairs. He was elected to the Bar Council in 1976 and remained there until his appointment. He was Vice-Chairman from 1982. He was involved in most Bar Committees. He was Chairman of the Fees, Clerking, Young Barristers, Client Practices, and Bar Readers Course Committees and a member of the Ethics Committee and the Police-Lawyers Liaason Committee. He was the Bar's appointee to

Photo courtesy of Law Institute Journal

the Law Council of Australia where he became Vice-President in 1982.

His great concern with the practical education of young lawyers and, to that end, he was deeply involved in a number of areas of continuing legal education including the Leo Cussen Institute, the Law Faculties of both Universities and the Bar Readers' Course. In addition he conducted a number of plea making and cross-examination seminars in Victoria and inter-state.

Yet found time for outside interests. He was a member of the Correctional Services Committee, a Vice-President of the Board of the Prahran College of Advanced Education and the Vice-President of the International Association of Jewish Lawyers and Jurists.

To maintain his fitness for such heavy pursuits he was a keen sportsman. He was often seen jogging around the botanical gardens and even seen occasionally bending his body in the gymnasium. He was a regular performer for the Bar in the annual tennis tournament.

His love for teaching and sport led him to the role of a skiing instructor at Mount Buller (a position from which it is understood he is now to retire).

It is thought that the judge looks forward to his new position as a relaxation from this exhausting lifestyle. He is looking forward to shorter hours and an increased opportunity to practise the fine arts, gourmet living, overseas tours and, of course, to attend his hitherto disastrous farming pursuits. We hope that his disappointment will not be too bitter.

His Honour was married in 1963 and has two teenage children with whom he shared his many social and sporting activities.

He will be mised at the Bar, particularly by the "Hamplettes", his close friends on the first floor and his fearless secretary Myranwy. Hopefully, not by the patrons of Campari's and the other fine eating establishments in and around the City where we are confident we will see His Honour frequently.

WELCOME: JUDGE KIMM

In December 1982 the Bar joined in welcoming His Honour Judge Mervyn Charles Kimm as an Additional Chairman of the Liquor Control Commission. In doing so we were witnessing legal history. His Honour's is the first judicial appointment in Victoria, and perhaps in Australia, of a person not of wholly European descent.

Judge Kimm was born at Ballarat on 7th April 1932. His ancestry, only several generations back, was wholly Chinese. For a profession not noted for its readiness to promote its members of other than traditional range of socio-economic groups to higher echelons, His Honour's appointment is indeed a singular achievement.

Judge Kimm was educated at Northcote High School and the University of Melbourne. He was admitted to practice on 1st April 1962. His Honour was Articled to the late Mr. Coates of the firm of Norris Coates and Hearle and practised as a Solicitor until February 1963 when he signed the roll of Counsel. He had the privilege of reading in the chambers of McGarvie.

Judge Kimm quickly developed a very wide practice, appearing regularly in the Criminal jurisdiction both for the Crown and for accused persons, and in the matrimonial jurisdiction until the repeal of the Matrimonial Causes Act. In addition, His Honour became very involved in such areas as Contract and Equity, Industrial Law, Local Government, Land Valuations, and what is commonly known as a General Commercial Practice, earning the reputation of being a formidable opponent. This involved a large component of paper work, which was always completed with meticulous care after vast research where necessary, and extremely promptly. A great deal of night and weekend work became an essential feature of such a large and demanding practice.

The high regard in which His Honour is held is attested to by the fact that, prior to his appointment, he served as a Temporary Additional Chairman of the Commission on four occasions, being appointed twice by the former Liberal Government and twice by the present Labor Government.

Five people had the enriching experience of reading in Judge Kimm's Chambers – Mulvany, Chenery (who has left the Bar), Brian Wright, Mushin and Waugh. They together with many other members of the Bar, know of His Honour's eagerness to impart knowledge and to patiently assist with any problem, no matter how small. There are people who are grateful to have been shown that a brief which they believed to have been a loser had dimensions which, when properly analysed, led to success.

Although his practice took a large amount of his time, Judge Kimm involved himself in a variety of other activities. At the Bar he belonged to a number of committees, including Town Planning and Local Government Practice Committee, the Industrial Law Practice Committee, the Legal Aid Committee, the Bar Staff Committee, and last and probably least if only in terms of work load, the Hyland List Committee.

Away from the Bar, the law is not, within the Kimm family the province of His Honour alone. The Kimms first met at Melbourne University when they were fellow students of law and following the completion of her course, his wife Joan was employed as a Law Librarian. Several years ago when their three children had all commenced school Mrs. Kimm completed her Articles and was admitted to practice on the motion of her husband. She has practised law since then.

His Honour achieved great heights in sport. He gained a University Blue as intervarsity Weight Lifting Champion and won the Australian Feather-weight Wrestling Championship in 1955. He has a cauliflower ear to prove it. Between the completion of his secondary education and the commencement of his Law Course, he took several years off, part of which time was spent in travelling overseas for training. He was on the point of selection for the Australian Olympic Wrestling Team for the Melbourne Olympics in 1956 when he decided that the pursuit of a career as a Lawyer was the first priority and he commenced his University Course.

Judge Kimm enjoys the outdoors, and spends a great deal of time with his family in bush walking. He is also an avid reader and has a particularly voracious appetite for spy thrillers, and historical war literature. His Honour bring to the Bench a vast experience of quiet, methodical and analytical consideration of any problem which confronts him. This is reinforced by fierce independence and determination, and a caring for people which will enable him to apply himself to the significant social and economical problems on which he will have to make decisions.

The Bar wishes Judge Kimm a long, happy and successful career on the Bench.

The London newspaper "The Observer" of 30th January reports that Lord Lane L.C.J. has made the unprecedented and unpublicised move of issuing Judges in the United Kingdom with a step-by-step guide to summing up in criminal trials.

It seems that His Lordship has become increasingly concerned that the time of the Court of Criminal Appeal has been occupied with "mistakes on straightforward points which one would not expect to cause any difficulty". The manual, prepared by the Registrar of Criminal Appeals, contains specimen directions to be recited word-for-word. But, His Lordship warns, these should not be regarded as "a magic formula to be pronounced like an incantation".

The Guide is believed to contain the following injunctions:

- Do not forget to describe the case for the defense.
- Do not talk about parts of the evidence which have nothing to do with the issue.
- Do remember to tell the jury that they have the right to override the judge's opinion about the facts of the case.

Bar News is attempting to obtain a copy of this most useful document.

FAREWELL: MASTER JACOBS

Charles Philip Jacobs is to retire next month after 22 years as a Master of the Supreme Court. There would be few among us who have not sat on the benches outside his Chambers, or stood about pretending to read notices of applicants to practise, waiting for the call, like schoolboys outside a Headmaster's study. Senior Master though he be, Headmaster he was not.

We remember his Chambers as austere. An immense desk, or group of desks, dominated the room. There were, of course, books and the day's files piled on one side or other of the Master, together with the cup of tea. Behind him, a handsome black clock, said to be French, never kept time. For that, the Public Works Department had provided a functional electric clock over the door, a clock that only the Master could see.

Master Jacobs came steeped in the Law. His father, Philip Ackland Jacobs, commenced practice at the Victorian Bar on 10th February 1897 and remained on the practising list until 18th September 1956. During this period he was also a regular contributor to "The Argus" and the author of a number of books on lawyers and their ways.

The son, like his father, attended Scotch College. He was admitted to practise on 1st May 1935 after completing the Articled Clerks' course at Melbourne University. His Articles, for which 200 guineas were paid, were served with Mr. Arthur Phillips of Messrs. Arthur Phillips Pearce and Just. The two clerks who preceded him with Mr. Phillips were Reginald Sholl and Edward Hudson.

In 1935 work as an employee solicitor was not available and the young lawyer commenced practice on his own account at Moe. At the time Moe was a town of 800 people served every second Wednesday by a Court of Petty Sessions whose clerk was William Cuthill. There he rented premises for five shillings a week and did his own typing. Nevertheless, he was able to make a profit of about Five Pounds a week which was then approximately equal to the wage of an employee solicitor.

At the commencement of the War, he lent his practice to Mr. F.X. O'Halloran of Trafalgar when he enlisted in the 2nd A.I.F. Field Ambulance Corps. He served in the Middle East and New Guinea obtaining a military M.B.E. at Shaggy Ridge in the Finistere Ranges. In May 1945 he was transferred to the Army Legal Corps with the rank of Captain.

At the end of the War he sold his practice to Mr. O'Halloran and, on 2nd January 1946, he signed the Bar Roll. He read in Equity Chambers with J.F. Mulvany. Thereafter he practised from his father's Chambers in Selborne. He had four readers, McHugh, Frank Gaffey, Greenwell and Leon Hayman. He wrote or collaborated in writing texts on Landlord and Tenant (1948 and 1954), County Court Practice (1953) and Master's office practice (1969).

He has served the community as an officer of the Supreme Court for 22 years, first as Master and then as Senior Master from 1971. The tasks of this office do not attract the public eye and lack the glamour and spectacle of those performed by the wigged and gowned judicial officers of that Court. But all who are concerned with the functioning of the Court know how important it is that they be performed well.

The office of Master requires learning. An appellant from a decision of Master Jacobs is aware that he has that. It requires common sense. The Senior Master is not to be seduced by mere technicality; his decisions show an appreciation of the practical problems confronting litigants and lawyers, whether they be barristers or solicitors. It requires good humour, patience and humility, which he has in abundance.

A lesser known function of the Master is that of disposing of funds lodged in Court for Plaintiffs who are under age or under some other disability. From time to time, often wihout the assistance of solicitors, these people apply to the Master for disbursement of these funds. He must be satisfied that the purpose for which the money is required is genuine and for the benefit of the applicant. Enquiries must be made with discretion and sensitivity and, at present, without the assistance of trained welfare staff. The Master is often called upon to counsel and advise them on all sorts of matters, financial and personal. The proper performance of these tasks requires sympathy, courtesy and sensitivity – qualities that the former Lieutenant Jacobs of the Field Ambulance Corps does not lack. Furthermore they have reason to be grateful for the acumen that he has brought to bear in preserving, as far as possible, the real value of the fund invested by the Court.

The Bar wishes Master Jacobs a long and happy retirement. For his past years, it says Thank-you.

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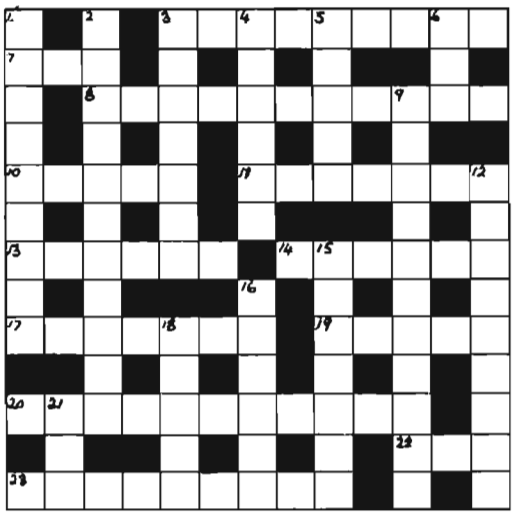
CAPTAIN'S CRYPTIC No. 43



ACROSS:

3. Anglo Saxon civil court (9)
7. Electronic data processing (1, 1, 1)
8. Superintendent of criminal proceedings (8, 1, 1, 1)
10. Tough stone for spark (5)
11. Greek place of ideal happiness (7)
13. Edible beets (6)
14. Roman courtyard (6)
17. System of knowledge (7)
19. Rigidity of body (5)
20. Forced donation (11)
22. Sun (3)
23. Chief magistrate of an old town (9)

DOWN:

1. Church livings (9)
2. Court request (11)
3. Lifted, as with a petard – Hamlett III, iv (7)
4. Lazed (6)
5. Insinuate (5)
6. Light strike on faucet (3)
9. Preliminary to driving licence (7, 4)
12. Abstracts of deed for registration (9)
15. Publius Terentius Afer (7)
16. Short familiar gumboot in England (6)
18. Not ever (5)
21. Short call from Old MacDonald's farm (1, 1, 1)

BRIAN O'KEEFFE 1917 – 1982

On December 14, 1982 Brian O'Keeffe died. Much can be said about Brian both as a lawyer and as a man. Although he was not disposed to practice in the superior courts he was well known in Magistrates' and County Courts.

Brian practised as a solicitor for many years before coming to the Bar. He was admitted to practice in 1947 after war service and came the Bar in 1969.

Brian was observed by everyone who knew him, including his opponents in Court, to be first and foremost a gentleman. Old world charm and courtesy were second nature to him. Many young barristers looked upon Brian as as a father figure, particularly in the days at Tait Chambers in the early 1970's. His extensive library was available to everyone and most juniors in Tait could not afford books at that time. He was always available to advise and counsel on professional and personal matters. There is no doubt that he was a man who helped numerous people both at and outside the Bar in many ways. Those who have been helped will be well aware of what he did for them.

Extremely popular with solicitors and clients he was particularly successful in his approach to his practice. He demonstrated that it is not necessary to be on the offensive in the practice of the law. He approached his work with an objective reality and successfully defended many clients. His approach was characterised by an integrity which was beyond reproach and a classic example for other practitioners.

It is doubtful if we shall ever see his like again and sympathy is extended to Mrs. O'Keeffe and Brian's children.

GURVICH

BEAUMONT

LAWYERS FREED IN BANGLADESH

Members will recall that the Council of the International Bar Association at its meeting in New Deli India on 22nd October 1982, was concerned that the Government of Bangladesh had arrested a number of lawyers. This was reported in **Bar News** Summer 1982.

The High Commissioner for Bangladesh has written to the Chairman the following letter –

> Dear Mr. Shaw,
>
> Please refer to your letter dated 26th November 1982, regarding detention of Lawyers in Bangladesh. We have the pleasure to inform you that all the Lawyers have been released on October 26th, 1982 following a meeting between the concerned authorities and the Bangladesh Bar Association members."

FEDERAL LAW REFORM UNDER LABOR

OUT OF THE SHADOWS

Mr. Justice Astbury is remembered for two large contributions to our jurisprudence. First, he declared the General Strike of 1926 to be unlawful. Secondly, he was reported to have uttered the immortal lines: 'Reform? Reform? Aren't things bad enough already?' There may be some in Australia who would echo these sentiments. But are we entering a new reform era?

The general election of March 1983 returned the Labor Party to the Treasury Benches in Canberra. Mr. Hawke, as is well known, qualified in Law in the University of W.A. Though he never practised his chosen profession as such, he was a respected opponent of many leaders of the Bar when he appeared before industrial tribunals. Senator Gareth Evans is a member of the Victorian Bar. In the run-up to the election he was described in the **National Times** as an 'action man impatient in the shadow'. Now in the shadow no longer, Gareth Evans, at the age of 38, has achieved the key position for a lawyer in the Executive Government of Australia.

During the election campaign, the new Attorney-General said that an attractive aspect of law reform was that, even when economic times were tough, it normally did not cost very much. In the weeks immediately following the election, close scrutiny is being paid by lawyers and law reformers throughout Australia to the law and justice policy of the incoming government. It indicates a most ambitious program and suggests that the ALRC's seventh Attorney-General will be impatient to secure significant reforms. Lawyers would do well, whatever their political inclination, to examine the published policies of the incoming Government. They give some indication of what probably lies ahead for the profession and the community.

Even in the general policy speech delivered by Mr. Hawke, a number of items on legal change were mentioned, indicating the relatively high profile for law reform chosen by the new government. Amongst the items mentioned by the new Prime Minister were:

* A review of legal aid funding with additional resources and attention to the more cost-effective delivery of legal aid.
* Provision of a national Bill of Rights and improvements in the law of criminal investigation and anti-discrimination.
* Upgrading the role and effectiveness of the Human Rights Commission.
* Revision of the Freedom of Information Act 1982, fully to implement the amendments suggested by the Sentate Standing Committee on Constitutional & Legal Affairs.
* Progressive establishment, in co-operation with the States, of a national no-fault accident compensation scheme.
* Updating of the Family Law Act.
* Creation of a national Law Reform Advisory Council.

LAW AND JUSTICE

The 'law and justice' policy of the new Government was launched on 24 February 1983 by Senator Evans. Significantly, perhaps, he was flanked by the Attorneys-General for N.S.W., Victoria and South Australia. He promised early attention to the 'neglected reports' of the ALRC on Criminal Investigation (ALRC 2), Sentencing (ALRC 15) and Child Welfare (ALRC 18). Throughout the written policy document there are numerous other references to

unimplemented reports of the ALRC including Insolvency (ALRC 6), Defamation (ALRC 11), Lands Acquisition & Compensation (ALRC 14) and Insurance Contracts (ALRC 20). Senator Evans said that the work of the Law Reform Commission had 'extraordinarily impressed the Labor Party because of its quality and quantity'.

Earliest action by the new Government can be expected on two measures which were actually before Federal Parliament at the time it was dissolved:

* Insurance (Agents and Brokers) Bill 1981. This Bill, based on the ALRC's 16th report, proposed regulation and trust account obligations for insurance brokers to address the problem of broker default described in the report. The proposals had been rejected by the outgoing Government. A Bill based on the ALRC Bill had been introduced in the Senate as a Private Member's measure by Senator Evans. It had passed the Senate with the support not only of Opposition members but of many Government senators. The proposal for reform is generally supported by the insurance industry and consumer groups.
* Crimimal Investigation Bill 1981. The commitment to the reintroduction and passage of this legislation is not remarkable. Senator Evans was the principal author of the ALRC report on which the Bill is based. The measure has now gone through three drafts since it was first settled by Senator Evans in the ALRC in 1975. It is nothing less than an endeavour to state, for the first time, the basic rules to govern the rights and duties of Federal Police and suspects in the criminal investigation process.

HUMAN RIGHTS

Those who know of Senator Evans' earlier association with the preparation of a Human Rights Bill for Attorney-General Murphy will not be surprised at the emphasis placed upon the introduction of new laws for the protection of human rights. Amongst 'key elements' in the announced human rights policy are:

* Ratification of all applicable human rights conventions and treaties.
* Enactment of a national Bill of Rights.
* Enactment of special legislation in 'areas of particular complexity', including privacy and police powers.
* Creation of a 'more effective' national Human Rights Commission with power not only to educate people but 'to effectively enforce' human rights.

It seems, from the interviews given by him during the election campaign, that Senator Evans proposes a Bill of Rights as a prelude to a constitutional statement of rights. Of course, the very suggestion will shock some lawyers brought up in the traditions of the English common law. But England itself now has a modern Bill of Rights of sorts, namely the European Convention on Human Rights. Canada too has adopted the course proposed by Senator Evans, namely passage of a statutory Bill of Rights followed by constitutional entrenchment. Time will tell whether the constitutionally conservative people of Australia agree to similar action.

COURTS AND OFFICIALS

Among the 54 items listed in the law and justice policy for an 'action program' by the incoming Government, some are likely to have general multi-partisan support in the new Federal Parliament. Examples include:

* Establishement, in co-operation with the States, of a single uniform system of courts.
* Final abolition of appeals from State courts to the Privy Council.
* Widening the range of aids to statutory interpretation of Federal statute.
* Consideration of the appointment of a Federal Director of Public Prosecutions.
* Institution of any inquiry into the law of matrimonial property recommended in 1981 by the Ruddock Committee.
* Review of the law on defacto relationships.

In late February 1983 Senator Evans, with the then Shadow Minister for Business and Consumer Affairs, announced the policy on business regulation proposed by the Labor Party. Some of the items in this policy include:

* Urgent attention of the funding of the National Companies & Securities Commission and the Trade Practices Commission.
* Adoption of the principle that future business regulation will only be undertaken 'in order to deal with clearly defined needs'.
* Introduction of the insurance broker legislation as proposed by the ALRC.
* Establishment of a prices surveillance authority.
* New emphasis on uniformity of legislation, through co-ordination with the States and draft model laws.

CONSTITUTIONAL REFORM

The policy on constitutional law reform was announced by Senator Evans at a luncheon given by the Victorian Society of Labor Lawyers at the Law Institute building. His own interest in constitutional law reform is well known. He taught Constitutional Law at Melbourne Law School before entering Parliament. Before the election, he was completing, as a co-author, a publication on constitutional review for a project of the Law Foundation of New South Wales. Now, as Federal Attorney-General, Senator Evans will have the opportunity to push some of his proposals beyond the textbooks. Amongst items in his announced program were:

* The holding referendum on four-year term Parliaments.
* Limitation of double dissolutions of the Senate and House of Representatives to 'genuinely unresolvable deadlock situations'.
* An attempt to engage Australia-wide discussion of constitutional reform as a matter of 'cross party' and 'cross-country consensus'.

Senator Evans said that he would be setting the 1988 Bicenteniary Year as a target date for a major renovation effort. One novel idea is to open up the constitutional convention 'at least partially' to direct popular election of delegates who are not politicians.

REFORM MACHINERY

Of the greatest interest to professional law reformers are the proposals for improvement in Australia's law reform institutional machinery. Heading the list of the ALP policies here are:

* Establishment of a national Law Reform Advisory Council which will include representatives from all Australian law reform agencies, together with bi-partisan representatives from the several Parliaments.
* Creation of a full-time Secretariat to serve both the Council and the Standing Committee of Attorneys-General, in order to promote more effective attention to uniform law reform in Australia.
* The provision of increased support for the ALRC.
* Encouragement of maximum public participation in the law reform process.
* Creation of the promised but not yet established Companies Law Review Committee.

Senator Evans has a long memory. In 1975, when a Commissioner of the ALRC, he took part in proposals unanimously adopted by the Australian Law Reform Agencies' Conference proposing that the meeting of law reformers should be able to suggest tasks for uniform law reform and propose which law reform agency should do the job. This unanimous resolution was rejected by the Standing Committee of Attorneys-General as it was then constituted. Senator Evans has pointed out that the Canadian and United States Federations have established machinery for uniform law reform where this is appropriate. He describes the Standing Committee of Attorneys-General as 'more a graveyard for law reform proposals than a vehicle for their implementation'. He plainly proposes to give more attention to the allocation of scarce law reform resources to avoid unnecessary duplication of effort and to ensure the maximum use of law reform reports throughout the country.

Happiest news for the ALRC is the declaration that the funding of the Commission 'is simply inadequate'. 'Labor will remedy this situation by an immediate increase in funding'. These words were made more encouraging by the commitment during an ABC interview of a new approach to the implementation of ALRC law reform reports once delivered:

> We regard in effect the onus of proof as being on those who would wish to deny the implementation of the reports. I will take the view that the Commission ought to be encouraged from the

> very outset to deal closely with the department... so that by the time we get a finished report we'll get something which reflects all the doubts, concerns, neuroses that the bureaucrats and other relevant interests might have. This leaves the decision about implementation to finally where ultimately these decisions have to be taken – at a political level. If you approach it that way, putting the onus that way, there is no earthly reason on this planet why there should be the delays we have experienced in implementing these reports.

Strong language. One suspects we will hear more of it from the Senator in the months and years ahead.

AND FOR THE PROFESSION

Of the most direct concern to members of the Bar will be the proposals reform of the Family Law Act and of accident compensation. The latter promised no immediate imposition of the Woodhouse New Zealand scheme. Instead it is proposed to introduce reform in consultation with the States and in various stages. All reassuring words. But not enough to soothe the Insurance Council of Australia which has already criticised any proposal which would mean that employers and other private interests would assume responsibility for funding general community projection against accidents.

This note is no more than an outline of some of the policies relevant to law reform offered by the new Government. It is for others to debate the merits and demerits of particular items. Most lawyers will, however, welcome the high priority that seems likely to be given to law reform under the new administration. And critics of the new Attorney-General, whether within the legal profession or without, will need to be on their mettle. As his ALRC colleagues found out, Gareth Evans has a sharp mind and a tongue to match.

KIRBY J

Chairman, Australian Law Reform Commission

AMPLA CONFERENCE

The Seventh Annual Conference of Australian Mining and Petroleum Law Association Ltd, will be held in Adelaide from 1st – 4th June 1983 at the Hilton Hotel.

Topics include Joint Ventures – Breakdowns and Repairs, Roxby Downs, Overlapping Titles – Legal Problems, Drilling Funds, Industrial Law in the Mining Industry, Takeovers and Acquisitions of Companies with Energy Resources, Governmental Financing of Infrastructure, Project Securities and Geology for Lawyers.

Detailed information may be obtained from the Executive Officer, AMPLA, 8th floor, 160 Queen Street, Melbourne 3000, (03) 67 2544.

AROUND THE TRAPS

Retirement of Magistrates

William Michael Murray of Prahran Circuit.

Arthur James Curtain of Bendigo.

AN AUSTRALIAN COURT SYSTEM

In its Fourth Report to the Executive Committee, dated 27 August, 1982, Standing Committee D of the Australian Constitutional Convention made the following recommendation:

> That the Constitution be amended to provide for an integrated system of courts based on the following principles:
>
> (a) The State and Territory Supreme Courts to constitute trial courts, based on geographic divisions, in all matters, whether of State, Territory or Federal law;
>
> (b) An Australian Court of Appeal to be established to hear all appeals from the original jurisdiction of State and Territory Supreme Courts;
>
> (c) The High Court to constitute the Final Court of Appeal in all matters; and
>
> That such an amendment take the form of a provision along the lines of section 105A of the Constitution, enabling the integrated system of courts to be given effect by an intergovernmental agreement.

A motion to this effect will appear on the agenda for the next plenary session of the Convention, scheduled to be held on 26 – 29 April 1983.

The recommendation of the Standing Commitee arose out of a report of the Jurisdiction of Courts Sub-committee. At the time it agreed to the recommendation set out above, Standing Committee D also asked the sub-committee to reconsider some parts of its report which dealt more specifically with the structure of an integrated court system. The sub-committee subsequently presented a supplementary report to Standing Committee D which included a detailed working model for an integrated court system. It differs from the sub-committee's earlier report, in its treatment of the structure of the Supreme Courts under the new system. Whereas formerly the Sub-committee appeared to assume that the State and Territory Supreme Courts would continue as separate entities, albeit as parts of the integrated court system, in its supplementary report, the sub-committee stated its preference for the Supreme Court to be constituted as "a single, nation-wide trial court" with States and Territory geographic divisions and functional divisions as considered necessary. This recommendation draws upon the model for a single system of courts developed by Sir Laurence Street.

Victorian Bar News

The Standing Committee accepted the supplementary report in principle, subject to further examination of some of the details of the working model, including –

- the method of appointment of judges to the Australian Court of Appeal
- provision for the accountability of judges
- nomenclature
- the question of the extent to which the Family Court should be integrated into the system.

The supplementary report will be printed and distributed to delegates for the plenary session.

I have been asked to prepare a short paper setting out possible approaches to three questions concerning an integrated court system on which the views of the AIJA have been sought. The questions are as follows:

(a) If the appointments within the system are to be made following consultations between Commonwealth and State Governments, what are the best forms for that consultation to take at the various levels?

(b) By whom should judges at the various levels be removable?

(c) What provisions should be made for appeals from courts or tribunals below the Supreme Court in a State or Territory?

• • • • •

(a) *If appointments within the system are to be made following consultations between the Commonwealth and State Governments, what are the best forms for that consultation to take at the various levels?*

Before dealing with the options for forms of intergovernmental consultation two preliminary matters should be mentioned. The first is the concept of a Judicial Commission in relation to the integrated court system. The second is the relevance of the method adopted for the appointment of judges to the Court of Appeal to the form that intergovernmental consultation should take at both the Supreme Court and the Court of Appeal levels.

A Judicial Commission

Several of the proposals for an integrated court system that have been made in the past have suggested the creation of a "Judicial Commission" to advise on or make appointments to the courts, particularly to the Court of Appeal. The role envisaged for the Commission varies from one in which the Commission merely gives advice, to one in which the advice of the Commission must be accepted by the appointing government, to one in which appointments are made by the Commission itself. Equally, proposals for the composition of the Commission vary. In some cases it is proposed that it be confined to persons drawn from the legal community who can offer expert advice independent of the political process. Other proposals would confine it to representatives of all governments.

The concept of a Judicial Commission was rejected by the sub-committee and by Standing Committee D. The sub-committee saw "little prospect that any government would be prepared to surrender its power of patronage in relation to a judicial appointment to an independent body such as a judicial commission." In the circumstances, there seems no point in pursuing this option further. The alternative is to leave the appointment of judges to one or other of the levels of government, subject to some form of consultation with the other.

Relevance of the method of method of appointment

There appears to be general agreement that appointments to the High Court should continue to be made by the Commonwealth Government after consultation with the States. Equally, it is accepted that appointments to the Supreme Courts, or to the geographical divisions of a single, national Supreme Court, should continue to be made by the governments which presently make the appointments after consultation with other, relevant

governments. If the Supreme Court is to be organized into functional divisions as well (for example, industrial law, family law) there is a question whether the responsibility for appointments to federal law divisions should rest with the Comonwealth. The alternative would be heightened consultation with the Commonwealth by the States on these appointments.

The remaining level of court which requires consideration is the Court of Appeal. Discussion so far has assumed that this will be a federal court and that appointments to it will be made by the Commonwealth Government after consultation with the States. In each case responsibility for appointments is accompanied by primary responsibility for the funding and overall organization of the Court concerned.

The form that intergovernmental consultation should take is directly linked to the method adopted for the appointment of judges and in particular to the existence of a nexus between membership of the Supreme Court and of the Court of Appeal. If such a nexus were to exist the requirements for consultation at the Court of Appeal would be correspondingly less stringent but the Commonwealth might seek a more effective form of consultation over appointments to the Supreme Court. Conversely, if there is no nexus a form of seal and effective consultation will need to be devised for appointments to the Court of Appeal.

These issues arise in this form only after the integrated court system has commenced operation. The supplementary report of the sub-committee recommends that the initial composition of the Court of Appeal be

> "drawn from existing judges of the Federal Court, State Supreme Courts and the Family Court with particular emphasis being given to existing State Courts of Appeal and the judges of the Federal Court, State Supreme Courts and the Family Court who normally sit wholly or substantially on appeal."

There appear to be three broad options for membership of the Court of Appeal within an integrated court system of the kind recommended by Standing Committee D.

(1) Appointments to the Court of Appeal could be confined to judges previously appointed to a State of Territory Supreme Court, or if the Supreme Court is reconstituted as a single national court, to judges appointed to the Federal, State or Territory divisions of the Court. Although this option is open to objection on the ground that it would exclude some persons otherwise suitable for appointment it should not be overlooked that the Commonwealth would have the power of appointment of some Supreme Court judges, namely, those for the Australian Capital Territory, and possibly for some federal divisions of the Court as well.

(2) Membership could be drawn primarily from the same sources as in option (1) with the modification that a specified proportion of judges of the Court of Appeal might be appointed from persons not already holding office as judges of the Supreme Court(s). The proportion usually mentioned is 10%, but clearly other views are possible on what a suitable proportion might be.

(3) There might be no restriction of the kind outlined above on persons who may be appointed as judges of the Court of Appeal. Appointments might be made either from judges appointed to the Supreme Court(s) or from members of the legal profession not already holding judicial appointment.

The question of the method of appointment to the Court of Appeal was considered by the sub-committee in both its reports to Standing Committee D. In its first report the sub-committee recommended –

> "Appointments to the Australian Court of Appeal to be by the Commonwealth Government from judges of the Supreme Court subject to a small proportion, say, 10% of that number of appointments being made direct from persons other than State and Territory judges, the making of the appointments also being subject to appropriate consultation with State and Territory Governments."

In its supplementary report the sub-committee reconsidered this recommendation. It concluded that the 10 per cent formula "seems contrived and might operate arbitrarily . . . there might be long intervals between outside appointments and such an occasion might not arise at the right time" (para. 22). It recommended instead that appointments to the Court of Appeal should not be confined to judges of the supreme Court but that "a more

rigorous consultation procedure" should be adopted instead.

This latter recommendation now represents the position of the sub-committee on the method of appointment of judges to the Court of Appeal. As mentioned earlier, the supplementary report of the sub-committee was accepted in principle by Standing Committee D but not endorsed in detail. It should not necessarily be assumed, therefore, that this recommendation has been accepted by the Standing Committee or will be accepted by the Convention in plenary session. If it should be accepted, however, the possibility of achieving a consensus between governments on an integrated court system will depend even more heavily on the development of an effective form of consultation, which is acceptable to all, over appointments to the Court of Appeal.

Options for intergovernmental consultation

One form of consultation over judicial appointments exists already in Australia, in relation to appointments to the High Court. Section 6 of the High Court of Australia Act 1979 provides that

> "Where there is a vacancy in an office of Justice the Attorney-General shall, before an appointment is made to the vacant office, consult with the Attorney-General of the States in relation to the appointment."

The procedure which has been followed pursuant to this provision is described in the sub-committee's report as follows –

> ". . . the Commonwealth Attorney-General has written to the State Attorneys-General advising them of a vacancy or prospective vacancy on the High Court and inviting their views as to a suitable replacement. The current procedure does not involve the Commonwealth informing the States of the Commonwealth views as to prospective candidates. Undoubtedly, some informal contacts take place at a political level, but there is no formal interchange of names of candidates." (para.18)

The sub-committee commented that there was a question whether consultation of this kind would be regarded by all parties as adequate in an integrated system of courts, concluding that "it would seem to be necessary to establish a system of consultation regarding appointments going beyond that currently operating under the High Court of Australia Act 1979." (para. 19)

It would be possible to derive a wide variety of forms which intergovernmental consultation could take. Five variations which have been the subject of discussion in Standing Committee D are as follows:

(1) At one extreme is a system of mutual "black-balling". No appointment could be made unless all Governments concerned agreed to the appointment. At the trial court level, an appointment could not be made by the State concerned unless the Commonwealth Government agreed to that appointment. At the Court of Appeal level, an appointment could not be made by the Commonwealth unless all of the States agreed. To adopt this option would ensure that judicial appointments would only be made where the person appointed was satisfactory to all Governments involved in the appointment. One effect could be to exclude from judicial appointment any person possessing any public political affiliation.

(2) The appointing Government would be required to produce a short list of persons from whom is was proposed that an appointment be made. The other Government or Governments concerned might then indicate any objections to persons on that list. The appointing Government would then be free, without further consultation, to make an appointment from amongst those on the list against whom no objection had been registered without discussion with the objecting Government.

(3) A variation of the last option would be to provide for a mechanism of discussions between Attorneys-General where objection had been registered by any Government to a person proposed by the Commonwealth for appointment to the Court of Appeal.

(4) A partial adoption of the concept of a judicial commission would be to establish a body in each State charged with the task of suggesting a panel of names from the jurisdiction suitable for judicial appointment. Such a body could include, for example, the Chief Judge of the State or other Geographical division of the trial court, the President of the local Bar Association and/or the local Law Society. Once this body had produced a panel of names, the appropriate Attorneys-General could consult in an endeavour to agree on an appropriate appointment.

(5) Finally, there is the method of consultation currently followed under the High Court of Australia Act 1979, in which there is no obligation for the appointing Government to notify the other interested Governments of the names of its prospective candidates and no obligation to appoint only from the list nominated by the Government or Governments consulted.

The list is by no means exhaustive. For example, if an intergovernmental ministerial council were created it would be possible to make the exercise of a power of appointment dependent upon majority agreement in the Council, or the absence of a majority veto, or some other such formula.

The sub-committee recommended the adoption of option (2) above for consultation on appointments to courts at each of the three levels. Standing Committee D has agreed that this issue needs further consideration: politically, it is likely to be one of the most difficult to resolve. It is not necessary for the same method of consultation to be adopted for appointments to all levels of courts. It would even be possible for different forms of consultation to be adopted for appointments to different divisions of the same court. This might be necessary, for example, if there were separate federal divisions within the Supreme Court for which the States nevertheless had the primary responsibility for making appointments.

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(b) By whom should the judges at the various levels be removable?

In a court system operating within a single jurisdiction, judges usually are removable by the Crown acting on an address of both Houses of Parliament. Thus section 72 (ii) of the Commonwealth Constitution provides that federal judges

> "Shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity."

Clearly this method would need modification if an integrated court system were adopted. The formal act of removal could remain with the Crown. Thus judges still would be removable by the personal representative of the Crown in right of the appointing jurisdiction. The more difficult question is that of the source of the advice or address on which the Crown should act.

Some possible options are that the Crown would be required to act on –

(1) An address from both Houses of the Parliament of the appointing jurisdiction.

(2) An address from both Houses of the Parliaments of the appointing jurisdiction and the Commonwealth or, where the Commonwealth is the appointing jurisdiction, of the State or territory with the geographical connection with the judge concerned.

(3) As in (1), subject to the proviso that majority agreement of the Ministerial Council must also be obtained.

(4) A majority resolution of the Ministerial Council with no requirement for a parliamentary address.

(5) Advice from an independent judicial or other legal body.

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(c) What provisions should be made for appeals from courts or tribunals below the Supreme Court in a State or Territory?

Discussion on the proposal so far has assumed that all courts and tribunals below the Supreme Courts should be left as they are and not brought within the integrated court structure. Appeals, if any, would lie to the Supreme Court. There is a question whether they should be heard by a single judge of the Supreme Court or a Bench. Appeals would not lie to the Court of Appeal from these courts.

The foregoing is the text of an address presented to the Australian Institute of Judicial Administration by Dr. Cheryl Saunders of Melbourne University on 15th March. It is reproduced by kind permission of the Institute.

MISLEADING CASE NOTE No. 21
RE: FABIAN

The High Court yesterday handed down the following joint judgment:

These are three applications for special leave to appeal against orders committing each of the Applicants to gaol for contempt of Court. For the reasons set out below, we have considered it appropriate to treat each application for special leave as the hearing of the appeal itself.

Each of the Applicants is a Judge. The Applicant Sample is a Judge of the Supreme Court of Victoria, recently appointed. The cross-Applicant Mozart is a Judge of the Family Court of Australia, not so recently appointed. The second cross-Applicant Southey is a Judge of the Federal Court of Australia. The unhappy circumstances giving rise to these applications may be shortly stated.

Having won Tattslotto, a form of lottery much practised in Victoria, a Mr. Fabian asked a Miss Grendel to marry him, promising to endow her with his worldly goods. The proposition was put and accepted by telephone but it was never acted upon by Fabian.

In due course Miss Grendel brought an action in the Supreme Court of Victoria for breach of promise and for a declaration that he held the proceeds of the lottery win in trust for her. The action was listed for hearing before the Applicant Sample in March of this year.

The father of Miss Grendel, having overheard the telephone conversation on an extension, expended a substantial sum in anticipation of the wedding. He brought an action under the Trade Practices Act in the Federal Court seeking damages for deceptive and misleading conduct. Since the conduct complained of was a telephone communication the Applicant Southey issued issued an ex parte injunction restraining any other Court from entering upon the dispute, (see section 6 (3) of the Trade Practices Act).

The Applicant Sample, all of whose cases for his first month on the Bench had settled, was aggrieved upon hearing of this injunction. He also made an order enjoining any other court from entering upon the dispute before him.

Meantime, Fabian made an application before the Applicant Mozart in the Family Court, alleging that the dispute was in truth matrimonial in character and seeking a determination in that court. Following a report from a Court Counsellor the Applicant Mozart also enjoined any other tribunal from entering upon the dispute.

The competition now existing between the State Supreme Courts the Federal Court of Australia and the Family Court of Australia has existed for some years. Competing jurisdictions and remedies are offered by each Court, each promising a superior product to the consumer of its legal services.

Difficult and unsatisfactory though this competition is, we are unable to say that it is unprecedented. In the 17th Century, the Courts of Kings Bench, Common Pleas, and Exchequer competed with one another by advocating and producing Writs superior to those previously invented by their competitors. Even earlier, the great charter itself, Magna Carta, was in some ways rather less a philanthropic statement of rights than an advertisement for the King's Courts. The expression "to none will we delay or deny justice" was, in our view, not so much a disinterested piece of legal rhetoric, as a blurb designed to denigrate the baronial courts with which the King's Courts were then competing. It is trite law to observe that the existing common law system, which is an ornament of our civilisation, is the product of this healthy free enterprise.

In our view, as with each such conflict in the past, market forces ought to be left to determine the victor. Accordingly, it is not for us to say that a Judge

of any Court cannot be gaoled for contempt of a competing Court, for ordering a stay of the latter Court's proceedings.

Nevertheless, it is a matter of some concern to this Court that three of Her Majesty's judges are presently lodged in gaol. We have been informed by the Solicitors-General who have each presented able and succinct arguments before us, that none of the Applicants is prepared to purge his contempts. This is a situation which we cannot ignore.

In these circumstances we offer the following avuncular observations in a genuine effort to resolve the impasse.

First, it has been drawn to our attention that the Applicant Mozart was born in a country other than one then (or indeed now) ruled by the Crown. Accordingly, under the Act of Settlement 1701, he could not have been validly appointed as one of Her Majesty's Judges of the Family Court of Australia. Therefore, his purported exercise of power as a Family Court Judge is ineffective.

Secondly, the order of the Applicant Southey was pronounced in a building in Little Bourke Street which is owned by the State of Victoria. The learned Solicitor-General of that State in his reply asserted that the Federal Court was a trespasser on those premises. A trespasser has, of course no rights. It follows that, on those premises, the Federal Court had no right to issue the injunctive orders which are the basis of the alleged contempts. Accordingly the orders for committal by the Federal Court are equally ineffective.

Thirdly, for the same reasons, all proceedings which led to these ineffective orders are a nullity. Applying the maximum **nulla sint nihil,** there is nothing in the eye of the law which can be relied on as constituting a contravention of the injunction of the Applicant Sample.

It follows that, although the appeals are dismissed, all of the Applicants must be discharged. As for the litigants, themselves, the less said the better.

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SNAIL CHANGES COURSE OF LEGAL HISTORY.

C. PRICE

A.T.L.A. CONVENTION – HAWAII 1983

The Sheraton Waikiki was the congenial venue for the 1983 mid-winter convention of the Association of Trial Lawyers of America.

The organisers set a cracking pace by arranging a sunrise breakfast at 8.00 a.m. on the first day of the programme. The guests at the breakfast were addressed by Mr. Justice Padgett, Associate Justice of the Supreme Court of Hawaii. His Honour demonstrated that the tendency of Judges to lament the decline in the standards of advocacy is not an exclusively antipodean characteristic. Mr. Justice Padgett had been a practising trial attorney when the Chief Justice of the United States Supreme Court had made very critical statements about the quality of advocacy in the United States. He had then thought that the Chief Justice was a little unfair, but, having listened to argument from some three years, he considered that the criticisms had been justified.

His Honour did, however, make the criticisms a little more palatable by telling a story about the New York attorneys. Four of them had gone down to Georgia for a hunting vacation. They were inexperienced, and took no equipment, so that they had to hire all of the equipment, including a hunting dog. The dog was called "Ole Lawyer" and was most proficient. The quartet were very happy with their vacation, so they returned the following year. On their return, they made the same arrangements, with similarly gratifying results. Likewise, on the third visit.

On their fourth visit, however, the proprietor endeavoured to dissuade them from using the same dog. They expressed complete satisfaction with his previous performances, and asked why "Ole Lawyer" shouldn't again be used. The proprietor replied, "He was doing such a good job, that we promoted him to a Judge. Now all he does is sit on his butt and bark."

After the sunrise breakfast, the formal sessions continued from 9.30 a.m. to 1.30 p.m., without any break whatsoever. These dealt with the sources of expert testimony, the use of unusual experts, psychologists on psychometrics, human factor specialists and rehabilitation experts.

The same pace was maintained on the Tuesday, in which speakers dealt with medical illustrations and models, use of thermograms, innovative demonstrative techniques and "recreation: the tool of the winning lawyer". I had assumed that the latter was concerned with vacation pursuits, but the word "recreation" was used in the sense of recreating the circumstances of an accident, by the use of stunt drivers.

The next day's sessions were concerned with highway safety, safety in the workplace and automobile design.

Thursday's sesions were interesting. The first was by Dr. Janette D. Sherman, a medical expert witness, who spends six months of the year in Michigan, and six months in Hawaii. She projected a number of maps showing the incidence of various toxic injuries in the United States, and explaining them by reference to industrial locations. When she showed the map relating to cancer of the rectum, she commented that you could not ascribe that to smoking. After the laughter had subsided, she added "Unless you've been eating Mexican food".

The next paper was on "economics" by Dr. Larry D. Stokes. Dr. Stokes performs the functions which used to be performed by actuaries in Australia – i.e., in assisting in quantifying damages for lost earning capacity. The commentary was in fact given by a husband-wife team, for Dr. Stokes' wife is also an economist.

Larry would speak for five minutes, then sit down, whereupon his wife would add a few of her comments, and so on. The final paper on Thursday dealt with aviation accidents.

American trial attorneys are obviously more aggressive and innovative than their Australian counterparts. They frequently use medical illustrations and models (skeletons were on sale in the foyer of the Sheraton Hotel at 10 per cent discount to members of A.T.L.A.!). They are constantly on the lookout for new ways to make testimony more dramatic and credible. They frequently use video tapes of expert witnesses, in lieu of the dry and uninspiring transcript of evidence taken on commission. But perhaps the size of the contingent fee has something to do with their enthusiasm and energy.

Fricke

Victorian Bar News

Mouthpiece

"You're looking a bit tired for a young fellow. What have you been up to to get those bags under your eyes?" asked the Waistcoat with a rare show of genuine concern.

"I went to help out at the Free Legal Service. It really takes a lot of time. But at least I'm being of service to the community", said Whitewig.

"You know, it's a pity that the old Legal Aid Committee was disbanded", said Waistcoat. "That was helping the people all right. We ran it ourselves. Oh yes we did. Of course there was a staff to lend a hand, but we financed it largely ourselves, administered it, and accepted only a percentage of our fees. I know it's before your time. But it worked like a charm. We all pitched in and worked like billy-oh. By the way, what happens now?".

"Well you have a thing called the Legal Aid Commission now", said Whitewig.

"How does it work?" asked the Waistcoat.

"Well the first thing is that they have fixed fees, and they are well under what you get in any other jurisdiction. Then you have to take only 80% of the brief fee. Then you have to wait until they have the money to pay."

"Sounds like an enormous improvement I don't think", said the Waistcoat.

"And now they're talking about a new professional body to fix fair fees", said Whitewig.

The dapper young man beside him had remained quiet until now. "Fair fees at last? That'll do me".

Byrne & Ross D.D.

AUSTRALIAN MILITARY LAW SOCIETY

Since its recent amalgamation with the Australian Military Law Association, the Military Law Society has considerably increased the scope of its activities. A formal dinner is to be held at the Naval & Military Club, Melbourne on the evening of Friday 29th April.

The guest speaker will be The Honourable Sir John Starke who has agreed to address the members on the topic "Court-Martials in War Time". Membership of the Society is largely confined to barristers and solicitors serving on the Reserves of the three services, but on this important occasion some provison will be made for the attendance of persons other than members.

Members of the Bar who desire to attend the dinner should communicate with Francis Q.C.

AVIATION LAW ASSOCIATION

Mr. Justice McGarvie will address the Victorian Branch of the Aviation Law Association at a dinner to be held at Noah's Hotel, Melbourne on the 26th May. The topic "Liability of Employees and Agents" should be of wide interest to members of the Bar. The cost to members will be $22.50 and non-members $27.50. Further information can be obtained from Julian Ireland (c/o Mr. H.D. Muir).

LEGGE'S LAW LEXICON

"L"

Label. A means of evading liability under the Health Act.

Labourer. Except in Victoria, professional footballers are not employed by way of manual labour, (1928) W.N. 96.

Lagan. Goods (other than drugs of addiction) which are tied to a buoy and sunk in the sea.

Land Cheap. A fine paid on the alienation of land. The motto of the R.E.S.I.

Larceny. One of the many synonyms for clerk's fees.

Last Day Of Term. An obsolete custom that on the last day of term the junior barrister present in court was entitled to make his motion the first. The custom was forthwith abandoned when the number of silks for the first time exceeded 30.

Latent Defect. A barrister with a speech impediment.

Laterare. To lie sideways in opposition to lying endways. A corroborating witness in the County Court.

Law Merchant. Order 65 of the Rules of the Supreme Court.

Law Officer. It is said that a bad lawyer may make a good politician. Australian law officers are generally spared the vulgar humiliation of knighthood imposed upon their English counterparts (Edwards, 284).

Law Reform. All the abominations that have taken place since 1875.

Law Reports. Any collection of the delphic utterances. The two-faced oracles are moved to utterance by donning the vestments of the distant past and mounting a high altar in the specially constructed temple which is situate at the centre of all state and provincial capitals. The required state of mind is induced by meditating on the incantations of the acolytes (see "lawyer").

Lawyer. An acolyte of the oracles devoted to representing that the Law Reports have some connection with reality. These sermons are known as "advice". He also purports to mediate between the laity and the oracles by putting their requests into the sacred language. For these catacheses he is rewarded by offerings known as "fees" (q.v.).

Lay Observer. Any puzzled looking person in the vicinity of the 12th Floor of Owen Dixon Chambers.

Leading Question. Taking a witness by the nose. Leaders are so-called because they may ask leading questions with impunity.

Leakage. The years after Watergate.

Leave To Defend. The benediction pronounced by the Master at the end of the service known as Order 14.

Legal Aid. A scheme which enables the poor to acquire the middle-class vice of ritual hatred.

Legal Ethics. The moral state which enables a law person to argue with conviction against the unassailable proposition that she propounded with vehemence the day before.

Legal Memory. The ability to recall the names of solicitors whose fees have been outstanding since before the commencement of Richard I.

Legislature. This mythical deity is supposed to have established the oracles so that its will might be made known to the laity. In classical mythology the divine purpose is often frustrated by the Draftsman.

Legitimation. An order of the Full Court confirming an order of the County Court.

Levy. A mythical impost exacted of barristers in Victoria by persons unknown for purposes unspecified. Although said to have some basis in historical fact, no trace of it is now to be found.

Lex Fori. The rules of tennis.

Life Assurance. Death insurance.

Limited Liability. The duty of care which a barrister owes his client.

Lineal Descent. Hanging.

Liquidated Damages. Recovered in **Rylands v. Fletcher** (1866) L.R. 1 EX 265.

Litigants. They are chosen by lot to be sacrificed by the lawyers. Those found to be unfeed are offered up to summary judgement the others are mulct. A select few after many trials may even be admitted to the law reports.

Long Vacation. The maximum sentence for an indictable offence.

Logic. The process by which a principle of law is pushed beyond the bounds of common sense.

Lythcoop. ? ? ? ?

Autumn 1983

LAWYERS' BOOKSHELF

IN DEFENCE OF THE CORPORATION by Robert Hessen; Hoover Institution Press, Stanford University; 1979; xviii and 133 pages; Hardcover $9.50

Throughout the world in recent years the company as a concept and a method of doing business has come in for considerable criticism. Numerous proposals have been made for reform and many of these have been implemented. In America much of this criticism and many of the proposals have originated from the pens of Ralph Nader and John K. Galbraith. Their writings have been influential throughout the world. On the international level the United Nations bas berated corporations, and many of its various agencies have passed or proposed a range of codes designed to control and regulate them.

In Australia, recent pronouncements indicate that in the field of company law we are going to have to come to grips with changes on a very frequent basis. So called "black letter law" which tells you exactly where you stand or what you have to do to comply is said to be possibly no longer appropriate in this area. A change has been foreshadowed to a more flexible system administered by a body given extensive discretionary powers, with authority to exercise them on an ad hoc basis. Changes, if necessary, will be made retrospectively. In general, companies are to be and are regarded and treated as being very different to individuals.

Justification for such, if needed, is said to lie in the fact that incorporation is a privilege granted and bestowed by the State. Since the company if a creature of the State it is only proper that it serve its purposes, with whatever controls and regulations the State chooses to place upon it. This theory for which there is no lack of authority is sometimes referred to as the "concession" or "privilege" theory.

Another theory with which the concession theory is frequently linked is the theory that the assets and sharecapital of large corporations should no longer be dealt with by the State as private property. They are not entitled to the protection under the law that private property normally enjoys, since the immediate control of corporate assets by management and their ultimate ownership by dispersed shareholders have effectively destroyed the traditional nexus between property and proprietor. Such corporations, it is claimed, become large and have no place in a capitalist society. In fact, they pose a danger to it by becoming virtually separate governments. Finally, the argument is put, since the corporation is regarded as an artificial legal entity, distinct from its owners and officers, there is no justification for attributing to it those rights or legal protections which are properly attributable only to natural persons.

These theories, influential and authoritive though they may be in the Common Law world, are challenged by the author of this thought-provoking, scholarly and readable book. Hessen is an historian whose previous work has been concerned with the steel industry. The book is essentially non-legal. It is written by a non-lawyer for a lay readership. Nonetheless he does review the history and reasoning behind these essentially legal theories and in so doing finds them wanting.

The writer's main aim in writing the book is expressed to be a response to what he sees as an attack on corporations by Ralph Nader and to criticise the remedies proposed in his 1976 book "Taming the Giant Corporation". Much of Hessen's book is taken up by the consideration and evaluation of the various arguments and proposals raised by Nader. They include such questions as: is corporate democracy a worthwhile goal? are giant corporations private governments? and is Federal chartering of corporations necessary or desirable?.

The real value of this book to those interested in the development of company law in Australia lies in the author's analysis of the concession theory and his insistence instead on the validity of what he calls the "inherance" theory i.e. that a corporation is not a separate entity but rather an aggregate of its members created and sustained entirely by the exercise of the individual rights of association and contract.

The author examines the features said to distinguish a company from a partnership and on which reliance is placed in support of the concession theory including entity status, perpetual duration, and limited liability in contract and tort. All are fully compatible or reconcilable he argues with the inherance theory. He traces the origins of the modern company not to the medieval corporations such as the guilds, the trusts, the Church, and the boroughs, but rather to joint stock companies of 16th century England, a completely new type of business organization.

Victorian Bar News

To Hessen, the idea that companies exist to serve the public interest has no more validity than that the individual businessman or partnership exists for the same purpose. Those of his readers who agree with him will be reassured by the apparent thoroughness and logic of his arguments, whilst those who disagree will have the satisfaction of testing their own view by exposure to a forceful and challenging contrary one.

Sharp

• • •

SPORTING NEWS

On the 21st November, 1982 Thompson, Q.C. took a team of tennis players to Ballarat to play the local solicitors.

The last bastion of male chauvinism was broken down this day when Lindis Krejus performed the impossible task of joining the tennis team.

Ably partnered by Hammet she played a significant part in the victory achieved by the Bench & Bar.

• • •

It was New Years Day. Many a punter had promised to abide by his resolution to honour that time-proven maxim "odds on – look on". Temptation to break that resolve ("only the once") befell those die-hards who went to the Merton Picnic Races anticipating that Killarney Glove would simply go through the motions in collecting the Ladies' Bracelet for Improvers. After all, she was only racing against one other horse, Irish Ruler. And when that steed was soundly defeated in an earlier race that day, it appeared that this was surely a case of "put in and take out".

Franich and Lee "put in" but were "taken out" for the course in an embarrassed and angry mood. With inflation running the way it is, the odds of 10/1 on appeared very attractive, the race would only take just over one minute. Admittedly it was close, but expressions such as "you were stiff" tend to inflame rather than defuse the emotions of the punter. The Glove was immediately entered for the Disposal Stakes.

• • •

For many years Burnside was a keen cyclist. He rode to the shops, he rode to Court, he rode to Chambers, and finally, on one occasion, he rode to Adelaide. But fitness has its price. Bulging thighs made him visit the tailor to have his trousers let out. He is more sedate of recent times, but he maintains fitness by gymnasium work. It will probably mean more visits to the tailor to have trousers taken in and jackets let out.

• • •

On the 20th December, 1982 at the Albert Ground the annual contest for the O'Driscoll Cup took place. At the end of the round Thompson, Q.C. declared the Bench & Bar had won, but his figures were immediately challenged by Teague who alleged his Special Damages were notoriously wrong and a re-count showed that the Solicitors had won 25 sets 284 games to 25 sets 283 games.

It was felt that the defeat was brought about by the fact that the cricketers who were playing at the Old Scotch Ground sent over during the afternoon and purloined all the refreshments. This was a bitter blow to Collis and others who ran out of steam for the remaining matches.

The Bar's team was greatly strengthened by ex-solicitor, Kovacs together with Hammet who won their 5 sets.

The former Vice Chairman (now Hampel J.) is in grave danger of being dropped next year.

Meagher, Q.C. his talents having been sharpened by the Costigan Royal Commission was in great form.

• • •

Judge Dyett and "Bushy Bruce" McTaggart made short work of the opposition when they captured the individual pairs trophy during the running of the Bar and Bench Golf Match at Royal Melbourne on 28th February 1983. McTaggart scorched round the course in 77 strokes, off a handicap, as it then was, of 17. Judge Dyett lent solid support. Their effort, however, was not sufficient to prevent the Solicitors from capturing the Sir Edmund Herring Trophy which will be missing from the trophy cabinet at the Essoign Club for twelve months.

• • •

"FOUR EYES"

VERBATIM

On a .05 charge: –

Prosecuting Sergeant: His eyes were slurred?
Informant: That's correct.
Prosecuting Sergeant: And he was blood shot?
Informant: That's correct.

Cor. Gleeson SM.
Oakleigh Magistrates Court
22nd November

● ● ●

Shavin was seeking an injunction to restrain the Defendant from unlawfully selling T-Shirts and Surfboards with a well known label.

Sweeney J.: Is there any evidence of surfboards?
Shavin: No. We would be content if Your Honour gave final relief in T-Shirts.
Sweeney J.: Well, I know there is a move to abolish wigs and gowns, but . . .

Ripcurl Pty. Ltd. v. Jenkins
10th December, 1982

● ● ●

Ray: concluding his (prosecution) address to the jury: "If you believe the stories these men have told you, ladies and gentlemen, you must still believe in the Jolly Green Giant and the Tooth Fairy".
Jones: defending, flipped a 2 cent coin into a glass in front of Ray on the Bar table.

Cor. Judge O'Shea,
at Mildura
December 1982.

● ● ●

Houlihan: commencing a plea: If Your Honour pleases I have a report of a Consulting Phychologist which I would ask Your Honour to read ab initio.
His Honour: Certainly, Mr. Houlihan – and while I am about it, I shall read the rest of the document as well.

Cor. Judge Walsh,
at Ballarat
25th February, 1983.

● ● ●

K. T. Smith (rising to object to a "question" put by Hedigan Q.C. in cross-examination):
"Your Honour, my learned friend is giving evidence from the Bar Council".

Cor. Tadgell J.
4th March, 1983.

● ● ●

Before Lush J. in the Practice court on an appeal from Master Jacobs on an Order 14 Summons **Levin** appeared for the appellants. **Ritter** appeared for the Respondent.

Ritter: My learned friend has informed me that he intends to rely on Levin's case **(Australian Can Co. Pty. Ltd.** v. **Levin & Co. Pty. Ltd.** [1947] V.L.R. 322). However, in my submission, his Affidavit in Opposition to the Summons is defective in that insufficient particulars are set out: I rely upon Ritter's case **(Ritter** v. **North Side Enterprises Pty. Ltd.** (1975) 132 C.L.R. 301).

[Note: Sadly no word exists as to whether **Jacobs** v. **Booth's Distillery Co.** (1901) 85 L.T. 262 was cited before the Master!]

• • •

Scene – High Court hearing in Canberra.

During argument a large crackling reverberates through the Courtroom.

Wilson J. – "Mr. Goldberg, I think you are knocking your papers against the microphone."
Mason J. – "It sounds like thunder."
Goldberg Q.C. – "I thought it was approval of my argument."

• • •

P. Tehan, for the first accused in a final address:

"Ladies and Gentlemen, in this case the realities are unreal. . . ."

R. v. Vincec & Ors
cor. Judge Dyett and Jury
18th May 1983.

Autumn 1983

"IT'S A BILL FROM ST. PATRICK'S FOR THE COST OF THEIR OPENING OF THE LEGAL YEAR SERVICE !!"

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SOLUTION TO CAPTAIN'S CRYPTIC No. 43

1 B		2 A		3 H	A	4 L	L	5 I	M	O	6 T	E
7 E	D	P		O		O		M			A	
N		8 P	H	I	L	L	I	P	S	9 D	P	P
E		L		S		L		L		R		
10 F	L	I	N	T		11 E	L	Y	S	I	U	12 M
I		C		E		D				V		E
13 C	H	A	R	D	S		14 A	15 T	R	I	U	M
E		T				16 W		E		N		O
17 S	C	I	E	18 N	C	E		19 R	I	G	O	R
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	I			E		I		C		22 S	O	L
23 P	O	R	T	R	E	E	V	E		T		S

MOVEMENT AT THE BAR

Members who have signed the Roll since the Summer 1982 Edition

Charles Francis KILDUFF	Stone	
Gellert Josef BAKOS	N.S.W.	
Ronald Garth MARDEN	N.S.W.	
Michael Antony SCARFO	Ruddle/Muir	(re-signed)

Member who has transferred to the Masters & Other Official Appointment List

S.R. Morris

Member who has retired from Practice

F.G. Tinney (Crown Prosecutor)

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

A. Endrey Q.C.
Peggy Goldberg
B.L. Devenish
P.L. Cain

Member who has died

B. O'Keeffe

TOTAL NUMBER IN ACTIVE PRACTICE: 803

VICTORIAN BAR NEWS

ISSN-0150-3285

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

Editors:
David Byrne Q.C., David Ross.

Layout and Cover:
David Henshall.

Editorial Committee:
Max Cashmore, Charles Gunst, John McArdle.

Cartoons by:
L. King, C. Price

Photos by:
Burnside

Phototypeset and Printed by:
SOS Instant Printing.