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THE HANGING MAN
Victorian Bar News
SUMMER EDITION 1983
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JUSTICE
WHEEL of FORTUNE
THE FOOL

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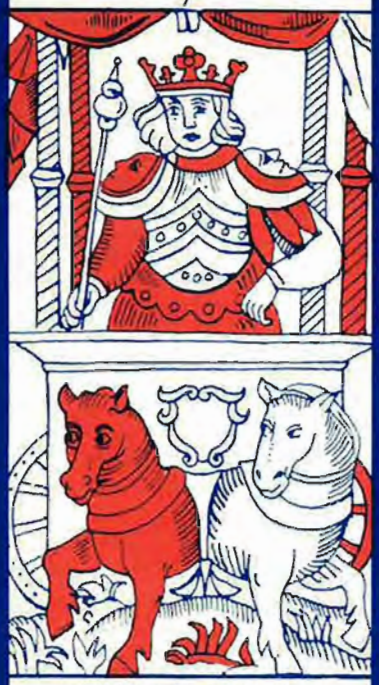

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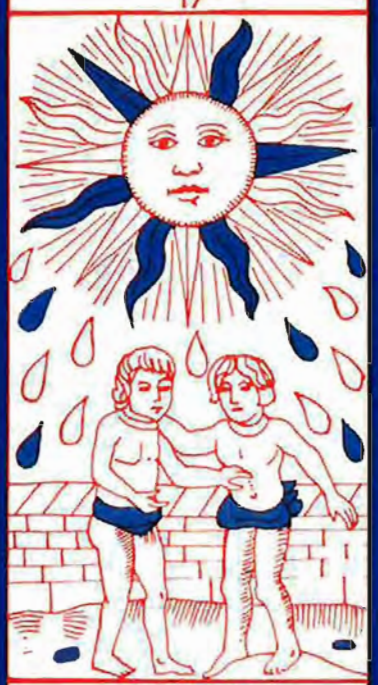

THE SUN

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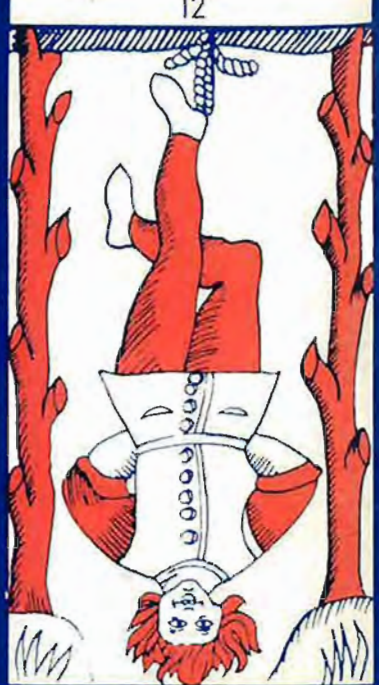

THE HANGING MAN

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JUSTICE

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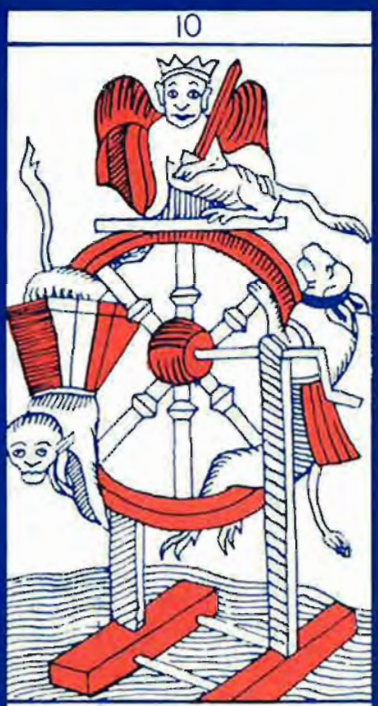


WHEEL of FORTUNE

THE FOOL

Cover. Nothing being certain save death, taxes and the desire of some people to impose changes on the Bar (see e.g. p. 4) those ancient symbols of a search for certainty, the Tarot Cards seemed apt.

VICTORIAN BAR NEWS

SUMMER 1983

CONTENTS PAGE

BAR COUNCIL REPORT

Office-Bearers 1983-1984

S.P. Charles QC was elected Chairman of the Bar Council. N.R. McPhee QC was elected Vice-Chairman and, following the amendment to Counsel Rules, J.E. Barnard QC was elected as Second Vice-Chariman. Chernov QC, Habersberger and Finkelstein were re-elected Honorary Treasurer, Honorary Secretary and Assistant Honorary Secretary respectively.

New Bar Council
The results of the poll which closed on the 28th September last were —

(a) **Counsel of not less than 12 years standing**
N.R. McPhee Q.C.
J.E. Barnard Q.C.
P.A. Liddell Q.C.
J.H. Phillips Q.C.
S.P. Charles Q.C.
P.D. Cummins Q.C.
M.J.L. Dowling Q.C.
E.W. Gillard Q.C.
F.H.R. Vincent Q.C.
A. Chernov Q.C.
R.K.J. Meldrum Q.C.

(b) **Counsel of not less than 6 or more than 15 years standing**
P. Mandie Q.C.
J.D. McArdle
D.L. Harper
R.A. Lewitan

(c) **Counsel of no more than 6 years standing**
M.B. Kellam
K.M. Liversidge
B.S.T. Vaughan.


Chairman Charles Q.C.

Proposal for Reform of the Legal Profession

The Attorney-General recently announced that his department would be preparing a discussion paper on reform in the legal profession. Matters of interest to the Bar in such a discussion paper are to be the governing structure of the profession, the method of election of the Bar Council and its composition, procedures for dealing with complaints and disciplinary offences, and alleged restrictive practices such as the two Counsel Rule. He proposes to look again at the question of court dress. The Bar Council and the Chairman have held discussions with the Attorney regarding these matters and further consultations are expected prior to the preparation of the Research Paper next February.

Social

(a) On the 19th of October 1983 the Victorian Bar in a function held at the Essoign Club entertained some 34 Victorian Stipendary Magistrates.

(b) On the 13th of November 1983 the Presidents of the Country Law Associations, the Suburban Law Associations together with the President and Vice-President of the Law Institute of Victoria together with their spouses were the guests of the Bar Council at a dinner held in the Essoign Club.
(c) On the 1st of September 1983 the new readers were welcomed to the Bar over drinks.
(d) The 1984 Bar Dinner will be held at the Moonee Valley Function Centre on Saturday the 2nd of June 1984.

Accommodation — Sharing of Chambers
The Bar Council has resolved that, in the light of the existing accommodation situation, Barristers Chambers Ltd. should allow any members of the Bar under 5 years call to share chambers with one other member of Counsel under 5 years call on such terms as Barristers Chambers Ltd. deems appropriate.

Delays in the Supreme Court
A committee appointed by the Bar Council monitored the new Supreme Court listing procedure during the months of August, September and October of this year. A report, prepared by Ormiston Q.C. (the Chairman of that committee), based on observations of that committee was considered by the Bar Council and forwarded to the Chief Justice, the Judges of the Supreme Court, the Attorney General, the Listing Master and the President of the Law Institute.

Attorney-General
The Bar Council tendered its congratulations to the new Attorney-General, the Honourable J.H. Kennan M.L.C., upon his appointment to that position.

As an ex-officio member of the Bar Council, the new Attorney-General attended the meeting held on the 13th of October. During that meeting he addressed the Council on the following matters —
(a) proposals to reduce the delays in both the criminal and civil jurisdiction. To this end it was intended that a quantity of the civil work presently being determined in the Supreme Court should be moved to the County Court. The first priority of the Government in this area was to reduce the delays in criminal litigation and to an extent this had been successful as a result of the activities of the Director of Public Prosecutions;
(b) the Attorney-General enquired of the Bar's attitude to the appointment of temporary Judges for a period of 12 months. He proposed that four such Judges be appointed to the County Court. He was informed that the Bar Council opposed the appointment of acting Judges;
(c) the Attorney-General indicated that because of the proposed jurisdictional changes between the County and Supreme Courts country circuits will be restructured;
(d) the Attorney-General outlined a number of Bills to go before Parliament in the near future including an Occupiers Liability Bill and amendments to the Crimes Act together with a Legal Fees Tribunal Act.

Fees
(a) In August of 1983 Counsel assisting the Attorney-General enquired of the Bar Council of its view upon a proposal that delays in criminal cases might be overcome if the trial Judges had authority to certify for refreshers. After obtaining the views of the Criminal Bar Association and considering the matter generally the Bar Council resolved that the Attorney-General be notified that the proposed solution was as a matter of principle unacceptable to the Bar.
(b) Pursuant to a request from the Chief Judge of the County Court the Bar Council will make submissions concerning a proposed review of fees in the County Court.

N.S.W. Law Reform Commission into a Transport Accident Scheme in that State
Members of the Victorian Bar formed a joint committee with members of the Law Institute of Victoria to prepare a submission to the New South Wales Law Reform Commission in response to a working paper entitled "A Transport Accident Scheme for New South Wales". The Bar Council resolved that it was in agreement with the substance of the submission.

Occupational Licensing Tax
In May of this year a Committee of Inquiry into State Government Revenue Raising recommended that the Victorian Government should consider the introduction of licensing fees and/or a business franchise fee on certain occupations (including the practice of law). A submission opposing these proposals prepared and forwarded to the Attorney-General and other members of Parliament is summarised on page 23.

OPENING OF THE LEGAL YEAR

Religious Observances for the Legal Profession

The Services for the Opening of the Legal Year in 1984 will be held on Wednesday, 1st February 1984 as follows:

St. Paul's Cathedral, Corner Flinders Street and Swanston Street, Melbourne, at 10.00 a.m

St. Patrick's Cathedral, Albert Street, East Melbourne, at 9.00 a.m. (Red Mass).

East Melbourne Synagogue, Albert Street, East Melbourne, at 9.45 a.m.

St. Eustathios' Cathedral, 221 Dorcas Street, South Melbourne, at 10.00 a.m.

All members of the legal profession, together with their staff, family and friends, are cordially invited to attend one of these services.

Arrangements at St. Paul's Cathedral

The Procession will commence at 9.40 a.m., and will be in two parts, each led by a Verger and assisted by a Marshall. The order of procession within each part (from front to rear) will be:

Part 1:

Law Students; Law Clerks; Officers and Members of the Institute of Legal Executives; Solicitors; Crown Law Officers — Supreme and County Courts; Law Council of Australia; Law Institute Council; Members of Law Faculties; Barristers; Queen's Counsel.

Part 2:

Office Bearers and members of the Hon Justices Association; Stipendiary Magistrates; Judges' Associates; Masters; County Court Judges; Solicitor-General of Victoria; Lord Mayor; Federal Judges (other than High Court); High Court Justices; Attorney-General of Victoria; Supreme Court Judges.

Those in Part 1 of the Procession should assemble in the Cathedral Close not later than 9.30 a.m.

Those in Part 2 of the Procession should assemble in the ground floor corridor of the Chapter House not later than 9.30 a.m.

Robing facilities will be available in the Chapter House.

The sermon will be preached by The Very Rev. Tom W. Thomas, Dean of Melbourne.

The lessons will be read by the President of the Law Institute and the Chairman of the Bar Council.

Arrangements at St. Patrick's Cathedral

Members of the Profession are asked to assemble in the Cathedral grounds not later than 8 45 a.m. Robing facilities will be available at the Choir Sacristy.

Arrangments at the East Melbourne Synagogue

Members of the Profession are asked to assemble not later than 9.30 a.m. Robing facilities will be available at the Board Room at the rear of the Synagogue. The address will be given by Rabbi M Mandel.

Arrangements at St. Eustathios' Cathedral

Members of the profession are asked to assemble in the Cathedral grounds, not later than 9.45 a.m Robing facilities will be available at the Manse at the rear of the car park.

Processional Order

The order of procession set out above for St. Paul's Cathedral has been settled by the Chief Justice and should be followed at other venues.

Court Sittings

The Law Lists will advertise the usual arrangements for the Supreme Court, County Court and other tribunals Practitioners attending the Services who have matters before the City Court should notify the Clerk, who will arrange for them to be heard after 11 00 a.m.; similar arrangements may be possible with other Magistrates' Courts if the Clerks are notified in advance.

Questions

Any questions regarding the arrangements for the Services should be directed as follows:

St. Paul's Cathedral: Revd. Albert McPherson phone 63 3791 or Mr D. Wells phone 62 0761

St. Patrick's Cathedral: Father D.J. Hart phone 662 1977 or Mr. W Mehan phone 60 0311.

East Melbourne Synagogue: P. Mandie Q.C. phone 602 2011

St Eustathios' Cathedral: Father Basil phone 699 9936 or C. Nikakis phone 67 6331.

FAREWELL:

LUSH J.

Sir George Hermann Lush retired as a Judge of the Supreme Court of Victoria on 4th October 1983, having served the State as such since 1st February 1966.

His career in the law spanned nearly fifty years as he was admitted to practise in 1935. He signed the Bar Roll on 21st June, 1935.

Following war service, he practised as a junior till 1957. During this period he was independent lecturer in Mercantile Law at the University of Melbourne. After taking silk he served as Chairman of the Bar Council and President of the Australian Bar Association from 1964 to 1966.

Notwithstanding his judicial duties, he found time to be a member of the Council of Monash University from 1969 to 1974 and Chancellor of that University from 1983. He has also been Chairman of the Council of Ormond College since 1981. He was created Knight in 1979.

Sir George was a courteous and correct judge whose manner was lightened by an impish humour. He once entered the Practice Court, looked around and remarked, "Well, Miss Cameron, I don't wish to be ungallant, but you appear to have the advantage over everyone else present."

The affection and respect in which he was held by the profession as a whole was demonstrated at his farewell by the warmth of the speeches and by the large numbers in attendance to hear them. The Bar will miss him as, no doubt, will his colleagues on the Bench.

LETTER TO THE EDITORS

(from Jenkinson J. — Federal Court)

Dear Sirs,

The supposition by David Ross (Victorian Bar News, Spring 1983, p. 19) that John Moloney coined the expression "purple gutzer" (vars.: gutser, gutsah (Angl.)] is mistaken. It was Jim Morrissey. Nor is the suggested etymology correct. The error or misfortune contemplated was not that of counsel, but of the judicial progenitor of what was printed in purple. But the primary inspiration was the chromatic similarity of the print and a liqueur then favoured by certain ladies.

Yours faithfully,

K.J. JENKINSON

SECRETARY
to
THE BOARD OF EXAMINERS FOR BARRISTERS AND SOLICITORS
and
SECRETARY
to
THE COUNCIL OF LAW REPORTING
Salary approx. $21,000 p.a.

This is a new position which will combine the duties of two offices. Applications are invited from qualified legal practitioners. The appointment combines executive responsibility for the operation of both organizations. The position will be of interest to members of the legal profession contemplating retirement from practice yet seeking to retain a close association with the law and its administration.

Further details may be obtained from the Associate to the Chief Justice to whom all applications should be addressed.

The closing date for applications is 31st January, 1984.

WELCOME: MR. JUSTICE ORMISTON

William Frederick Ormiston was appointed a Judge of the Supreme Court on 22nd November, 1983.

His Honour was born on 6th October, 1935. He was educated at Melbourne Grammar School and the University of Melbourne graduating LL.B (Hons) in 1958. Thereafter he studied at the London School of Economics. He was articled to the late Mr G.V. Harris of Oswald Bust & Co. and admitted to practise on 2nd March 1959. He signed the Bar Roll on 18th December, 1961 and took silk on 25th November, 1975. He read with the late R.G. DeB. Griffith (later Mr. Justice Griffith). His Honour quickly developed a very successful practice which ranged over a wide field, including crime, despite the strong demand for his services in the Equity field.

From his master who was a self-confessed eccentric, His Honour inherited an eccentric approach to his practice. A particular example of this is his special interest in the law relating to charities; another being his habit, even when a junior, of always carrying two brief cases.

His Honour has been a prodigious worker. He seemed to have an insatiable appetite for learning, not limited to his own fields, but in all areas of the law and beyond, extending to almost every topic available for study. His Chambers and his home for many years now have given the impression that they have been inhabited by a bibliophilic magpie. Not only is every available bit of wall space used for bookshelves, but floors and furniture are the repository of precarious piles of books of every description.

But this love for and great knowledge of books was not kept to himself. His generosity concerning his library is something that will be missed by seniors and juniors alike, now that he has departed our ranks.

Notwithstanding his great capacity for work, Bill Ormiston was always available to other members of the Bar, especially the very junior ones, who sought his advice. If a junior sought his own view on something when His Honour was engaged, he would invariably seek out the inquirer later to offer his aid, and he often remained back in chambers to give the advice that was sought.

He had five readers; Geoffrey Gibson, A.X. Lyons (now Registrar of Titles), Tom Roach (deceased), Rohan Walker (who has left the Bar) and Michael Adams. As a Master he took his role seriously: he went out of his way to ensure that his pups appreciated the customs and traditions of the legal profession and the Bar as well as the need to serve the client in a gentlemanly manner. His concern for his pupils' welfare was admired by those who know him and those who benefited from it.

Upon Griffith's appointment to the Bench, Ormiston became Bar librarian which office he held until his appointment. This was not the only task he performed for the Bar. During his career at the Bar His Honour's services were made freely available to the Bar Council. For many years he lectured newcomers to the Bar on Pleadings and Originating Process. He represented the Bar on the Supreme Court Library Committee and the Supreme Court Rules Committee, taking such an active role upon each committee that the Chief Justice has asked him to continue notwithstanding his elevation to the Bench. With the change in Supreme Court Listing Procedures in July 1983, he undertook the task of reviewing its operation. This involved daily attendance upon the Listing Master, consultation with counsel and solicitors involved in the lists, and an investigation of alternative procedures. As a result, a detailed, lucid and innovative report on the system prepared by him has been submitted to the Chief Justice by the Bar Council. A replacement for him in this role will be impossible to find.

At the welcome tendered to His Honour by the legal profession on 25th November, the great pleasure of the Bar and the solicitors of this State at His Honour's appointment was apparent. His qualities of learning, hard work, enthusiasm and fairness were acknowledged publicly. The speakers confidently expressed an expectation that he will be an ornament to the Bench. We wish him well and look forward to appearing before him.

Victorian Bar News

Ormiston J.

Nathan J.

WELCOME: MR. JUSTICE NATHAN

On Tuesday 22nd November the appointment was announced of the Honourable Mr. Justice Howard Tomaz Nathan as a judge of the Supreme Court.

The new judge assumes office after an education that took him from Toora State School, to Wesley College, to Melbourne University and to London University. He was admitted to practise in March 1961. After a stint as a solicitor in Canberra and academic at the Australian National University he came to the Bar on 28th May 1964. He read with Hazelwood Ball.

His early practice was before the Workers' Compensation Board and later in crime, personal injury claims, industrial law, administrative law and town planning. He had four readers before he took silk in 1980, J.H. Kennan (the present Attorney-General), Bicknell, Prideaux and Joan Miller.

His Honour brings to the bench a truly singular breadth of experience. How many judicial brethren can boast a Jewish background, a Methodist education and a period of training as an Anglican priest? Or a term as a secretary of the Melbourne University Liberal Club and a longtime involvement in Labour politics? Or an intimate knowledge of the practical workings of politics at every level — as Special Advisor to Senator McLelland in Canberra in 1974, as Counsel assisting the Attorney-General of Victoria in 1982, as Municipal Councillor and then Mayor of South Melbourne in 1970-1974, and as member of the Bar Council in 1982?

His wit and sense of the ridiculous are famous. So too his energy and boundless enthusiasm. Beneath this exterior he has a more serious nature, a genuine and practical concern for the disadvantaged, a professional dedication, even at the expense of his own immediate interests, a love of art and music. It comes as a surprise to read in Who's Who that his recreations are listed as hunting, shooting and fishing.

On 28th November a large crowd of his colleagues at the Bar, of solicitors, of friends and well wishers gathered in the Banco Court to welcome Mr. Justice Nathan and to offer to him their genuine good wishes and support in his new and challenging office.

WELCOME: JUDGE ROWLANDS

On Friday the 4th of November 1983 the Bar joined in welcoming His Honour Judge Alwynne Richard Owen Rowlands as a Judge of the County Court.

Judge Rowlands was born on the 26th September 1937. He was educated at Grimwade Hall and Melbourne Grammar School, matriculating in 1955. After graduating in Law at Melbourne University he served his articles at Messrs. Whiting and Byrne. He was admitted to practice on the 1st March 1963 and signed the Bar Roll six days later. He read in the Chambers of Haddon Storey He took silk in 1982.

The Judge really started in the law as a schoolboy, when on vacation he worked as a messenger for the late Mr. Jim Foley, the barrister's clerk.

After signing the Victorian Bar Roll, His Honour went to England and read at the English Bar His enthusiasm for travel then took him to the United States where he was employed part-time as an insurance loss assessor Doubtless, the insight gained from this experience has been of value in his subsequent legal career.

Back in Melbourne His Honour acquired a large and varied practice in Crime, Common Law, Family Law, Town Planning, Local Government Law, Maritime Law and, more recently, in Industrial Law. He appeared for the Commonwealth before the Australian Conciliation and Arbitration Commission in no fewer than 12 National Wage Cases, both with a leader and on his own. In fact, His Honour entered the Industrial arena in the turbulent years that followed the Whitlam Administration, and his submissions helped to consolidate the Centralised Wage Fixing System that was to last as long as five years.

Judge Rowlands has served the Bar on the County Court Practice Committee, the Town Planning and Local Government Practice Committee and the Court Procedures Reform Committee

He appeared often at the Hamilton Circuit, first in the County Court and then in the Supreme Court, often opposed to his good friend Alastair Nicholson.

His Honour has long had a love for the sea. He joined the Royal Australian Naval Reserve as a cadet in 1954 and in 1955 joined the Emergency Reserve On New Year's Eve 1956 he was appointed a

midshipman, and in the middle of 1979 he achieved the rank of Commander. Judge Rowlands had extensive experience as Judge Advocate, Prosecutor and defence counsel with the Navy. He is a Foundation member of the Naval Legal Panel and of the Naval Legal Aid Scheme in Melbourne. He has been a long time member of the West Brighton Club.

This experience was doubtless called upon when he appeared on behalf of the Seaman's Union of Australia at the enquiries concerning the Tasman Bridge, the "Blythe Star" and the "Straitsman". His Honour also assisted in the "Bass Trader — Wyuna" Collision Inquiry. His Honour appeared with distinction at the Academic Salaries Tribunal and the Medical Fees Inquiries.

Judge Rowlands had four readers, Maguire, P.W. McDermott, G.M. McDermott and Devries all of whom have been imbued with a wealth of knowledge and experiences both legal and non-legal

Judge Rowlands will bring to the Bench a background of many jurisdictions with a style that will enhance the County Court. We are confident that his experiences from many sides of life will be reflected in a compassionate, tolerant and learned approach to his difficult judicial duties.

Congratulations Judge Rowlands The Bar wishes you a long and happy appointment.

Victorian Bar News

"WE HAVE!!"

FOR THE NOTER UP

Supreme Court of Victoria

Delete: Lush J. (retired)		
Insert: Ormiston J. 6.10.35	1983	2007
Nathan J. 14.11.36	1983	2008

Masters of the Supreme Court

Delete: Master Bergere (retired)		
Insert: Master Evans 20.3.43	1983	2015

County Court

Delete: Wright (deceased)		
Insert: Ostrowski 9.9.35	1983	2007
Rowlands 26.9.37	1983	2009

NEW SILKS

NEESHAM Thomas Anton
Signed: 23.11.61; Admitted: 2.11.60;
Read with: Greenwood; Readers: Bongiorno, Rees Jones, Colbran.

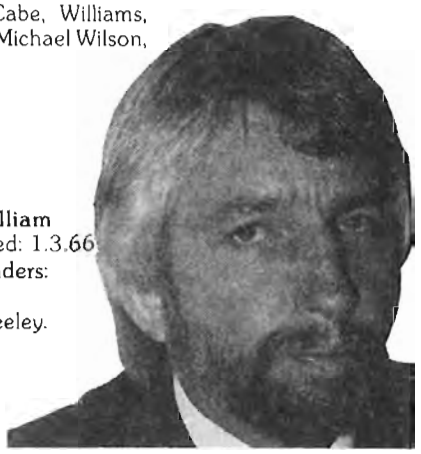
STOTT Barton Harold
Signed: 3.8.67; Admitted: 1.3.63;
Read with: Southwell; Readers: Scott, Bannister, Couzens, Kledstadt, Walters.

ASHLEY David John
Signed: 17.8.65 Admitted: 1 4.65
Read with: Beach; Readers: Ireland, Jewell, Schneider, Bromley, A. Maguire, Nightingale.

GUEST Paul Marshall
Signed: 13.2.69; Admitted: 1.4.65;
Read with: Greenwell; Readers: McIntosh, Watt, L. Dessau, McInnis, M. Lord, Darling.

KIRKHAM Andrew John
Signed: 9.2.67; Admitted: 3.5.65;
Read with: Vernon; Readers: Phillips, Crisp, R. Young, Wilkinson, Paszkowski, Bretherton.

STANLEY Richard John
Signed: 15.9.66; Admitted: 1.3.66;
Read with: Gobbo; Readers: McCabe, Williams, Forrest, Scanlon, Batten, Sharpley, Michael Wilson, Stone.



MORRISH Graeme William
Signed: 21 3.68 Admitted: 1.3.66
Read with: O'Bryan; Readers: Champion, Patmore, Grant, Corker, Pirrie, Heeley.

EVANS Gareth John
Signed: 10.2.77; Admitted: 1.4.68
Read with: D. Ryan; Readers: Nil.

MANDIE Phillip
Signed: 27.3.69
Admitted: 2.5.66
Read with: Brusey;
Readers: Gibson, A. Davies.

ARCHIBALD Alan Cameron
Signed: 29.10.70 Admitted: 1.10.70
Read with: Todd; Readers: Tribe, Randall, Hess.

And from N.S.W.:
Derek Ian Cassidy
John Perry Hamilton
Peter Ross Graham
Michael John Finane
Brian Wade Raymond
Barry Edmund Mahoney
Douglas Bertram Milne

N.T. CRIMINAL CODE — MAVERICK WITH HORNS!

On 1st January 1984 a Criminal Code will come into Operation in the Northern Territory. This Code could fairly be described as one of the most regressive outmoded and unfortunately drafted pieces of legislation in the history of this Country. Yet apart from the frantic and desperate efforts of a mere handful of people, its passage through the Legislative Assembly and its imminent operation have been greeted by a resounding silence. One can only assume that the reason is that no one is interested in what happens in a remote place with a population of 130,000 only, no one has read it or both.

It would be impossible in this edition of the **Bar News** to review the whole Code which comprises 440 sections, but we beg you to stay with us whilst we examine some of its basic principles.

INTOXICATION

We start with section 154.

"Dangerous Acts or Omissions

(1) Any person who does or makes any act or omission that causes serious, actual or potential danger to the lives, health or safety of the public or to any member of it in circumstances where an ordinary person similarly circumstanced would have clearly foreseen such danger and not have done or made that act or omission is guilty of a crime and is liable to imprisonment for 5 years.

(2) If he thereby causes grievous harm to any person he is liable to imprisonment for 7 years.

(3) If he thereby causes death to any person he is liable to imprisonment for 10 years.

(4) If at the time of doing or making such act or omission he is under the influence of an intoxicating substance he is liable to further imprisonment for 4 years.

(5) For the purposes of this section voluntary intoxication is relevant only to penalty."

It will be noticed that this section creates a serious offence of what may be a negligent act which causes actual or potential danger to another. The maximum penalty is dependent upon the effect of the act or omission. This is not surprising. What is surprising in a modern code is that intoxication is not a mitigating or exculpatory factor. Intoxication actually increases the maximum penalty!

A number of comments might be made of this last observation. First, no distinction is drawn between voluntary and involuntary intoxication. Secondly, intoxication may be one of the circumstances which might have prevented the ordinary (intoxicated) person from foreseeing danger. That this provision is not an oversight is demonstrated from a telex dated the 26th September 1983 from the Chief Minister and Acting Attorney-General, Mr. Everingham, to Central Australian Aboriginal Legal Aid Service. He stated, inter alia, in relation to specific criticisms of the code —

> "The intolerable level of alcohol related crime in the Territory, namely 80% of violent crime, warrants the provisions under these provisions"...
> (S.7, S.154 and S.383)
> "These provisions give effect to the policy that a defence based upon voluntary intoxication has very little merit. The alcohol problem in the Territory is far worse than anywhere else in Australia and tough measures are required"

What is not mentioned in the Code, but is in fact reality, is that it will be aboriginals who will largely suffer the sting of this and other alcohol related provisions. In 1982 according to Dr William Clifford, Director of the Australian Institute of Criminology in "An Approach to Aboriginal Criminology" (1982) 15 ANZJ Crim 3-21, 8-9 —

> "As at 30th June 1980, Western Australia had 920 non aboriginals sentenced and in prison — as against 439 aboriginals. That is to say that 32.3% were aboriginals. During 1979/1980 Western Australia imprisoned aboriginals at the rate of 1300 per 100,000 as against 81 per 100,000 for other races. Corresponding data for the same date in other states is not easy to find but it may be taken that the Northern Territory would show similar high proportions of aboriginal prisoners, whilst other States would be lower... these are dramatic rates of imprisonment by any standards and for any community. Just to quote them is to question their justification. You have to believe either that the aboriginals are the most criminal of minorities in the world or that there is something inherently wrong with a system which uses imprisonment so readily."

It is obvious to anyone familiar with aboriginal society in the Northern Territory that the above figures reflect the destruction of aboriginal tribal life and social and economic deprivation experienced by many caught in "no man's land" between European and Aboriginal culture. A manifestation of this situation is that almost all aboriginal crime is alcohol related (especially assaults).

In R. v. Benny Lee/S.C. No. 221 of 1974 Forster CJ had this to say in sentencing an aboriginal for the murder of his tribal wife:

> "As I have said frequently before and again this morning I regard the over use of alcohol as being more a mitigating circumstance in the case of aboriginal people than in the case of white people. First, until comparatively recently, they had no experience of intoxicants at all. Secondly, I think that aboriginal people are often led out of despair into drinking."

Not surprisingly, these sentiments have been invariably applied and often repeated in subsequent cases in the Territory. That the Code contains a complete reversal of this essentially humane attitude is as odious as it is unexplained and contrary to all modern penological principle.

Let us then turn to section 7, the first section referred to in the Telex:

> "In all cases where intoxication may be regarded for the purposes of determining whether a person is guilty or not guilty of an offence, until the contrary is proved, it shall be presumed that —
> (a) the intoxication was voluntary; and
> (b) unless the intoxication was involuntary, the accused person foresaw the natural and probable consequences of his conduct and intended them."

"Intoxication" is not defined, although it may be taken to mean "under the influence of an intoxicating substance" (Quaere — to what extent? See definition of "involuntary intoxication"). Intoxication is expressly referred to in the Code as relevant to conviction, only in section 36 which permits the defence of insanity where the abnormality of mind is caused by **involuntary** intoxication. Yet "abnormality of mind" is defined as "abnormality of mind arising from a condition of arrested or retarded development of mind or inherent causes induced by disease illness or injury." In view of this definition how can there be an abnormality of mind caused by involuntary intoxication? Furthermore, it would seem that such abnormality of mind is not such as to permit a person charged with murder to rely upon diminished responsibility so as to convert that offence to manslaughter (S.37).

Section 7, then, concerns the proof of foresight, consequences and intention. It may also bear upon the excuse offered by section 31 (1):

> "A person is excused from criminal responsibility for an act, omission or event unless it was intended or foreseen by him as a possible consequence of his conduct."

Although the Code draws no distinction between voluntary and involuntary intoxication in its effect on intent or prescience, it apparently seeks by section 7 to shift to the accused the burden of proving either that his intoxication was involuntary (in which case it would seem that the Crown would have to prove intent notwithstanding intoxication), or that he did not foresee the natural or probable consequences of his act or did not intend them.

In defence of section 7, it is claimed that it draws support from **R. v. O'Connor** (1980) 29 A.L.R. 449 and in particular the judgement of Murphy J. The following passages appear in His Honour's judgement: (at 485)

> "My reasons for rejecting the view that proof of criminal intent may be dispensed with, where an accused was intoxicated, do not depend upon the rejection of the traditional presumption that a person intends the natural and probable consequences of his actions. The description, "natural and probable", does not seem to have caused any problems. The presumption, which is a rebuttable presumption of fact, has a long history and appears in most legal systems. In the absence of contrary evidence, once a person is proved to have done something, a tribunal attributes to him the intention to bring about the natural and probable, that is, the ordinary, consequences of his action. This applies in both the criminal and civil systems; both would be practically unworkable without some such presumption. If any eyewitness testifies that an accused aimed at, shot and killed the deceased and if there were no admission from the accused and no more evidence, is the accused necessarily to be acquitted of murder because there is no presumption that he intended to kill or wound the deceased? To overcome this, it is said that the tribunal may make inferences and that the proper and only reasonable inference is that the accused did so intend." (p. 485).

"In **Stapleton v. R** (1952) 86 C.L.R. 358, (p. 485) it was stated that: 'The introduction of the maxim or statement that a man is presumed to intend the reasonable consequences of his act is seldom helpful and always dangerous. For it either does no more than state a self evident proposition of fact or it produces an illegitimate transfer of the burden of proof of a real issue of intent to the person denying the allegation: cf **R. v. Steane** (1947) K.B. 997 at 1003, 1004' (at 365).

"In **Smyth,** the reference was to the 'supposed presumption, conclusive or otherwise, that a man intends the natural, or natural and probable consequences of his acts'. The confusion of the two ideas, one erroneous and the other a practical intellectual instrument, seems to have arisen from attempts to mitigate onerous divorce laws by imputing (irrebuttably) intention to desert in certain constructive desertion cases (see **Lang v. Lang** (1955) A.C. 402; (1954) 3 All E.R. 571). Perhaps no harm will be done if the (rebuttable) presumption continues to be used, even if it is described as a process of inference." (p. 486).

It would seem that the Architect of the Code has, despite express warnings in **O'Connor's Case** done exactly that which he has been expressly warned against. He has turned a "practical intellectual instrument" into "an erroneous legal presumption" and enshrined it in section 7.

It has been argued, we believe, that section 7 is no more than an evidentiary provision with the ultimate onus remaining on the Crown to prove the case beyond reasonable doubt. But is this so? Section 440 (1) deals with the ultimate standard of proof.

"(1) Any matter that has to be proved by the defence in a trial must be proved on the balance of probabilities; otherwise the standard of proof is proof beyond reasonable doubt."

Why should this not apply to section 7? By way of contrast S.207 provides:

"In a prosecution of a crime defined by this Division the burden of proving all issues shall be on the prosecution."

The crimes referred to in this Division are unlawful publication of defamatory matter and publishing or threatening to publish defamatory matter with intent to extort money

How then does one discharge the onus? Unsworn statements from the dock have been abolished: S. 360 (1). This means that, in many cases, the onus can only be discharged by an accused giving sworn evidence. Those who have appeared for tribal oriented aborigines know that, for a number of reasons, in many cases the calling of an accused to give evidence on oath is an impracticality or near impossibility. In the case of **R. v. Anunga** (1976) 11 A.L.R. 412, certain guidelines were laid down relating to police interrogation of aboriginals. These include the following —

"(3) Great care should be taken in administering the caution when it is appropriate to do so. It is simply not adequate to administer it in the usual terms and say, "Do you understand that?" or "Do you understand you do not have to answer questions?" Interrogating police officers, having explained the caution in simple terms, should ask the aboriginal to tell them what is meant by the caution, phrase by phrase, and should not proceed with the interrogation until it is clear the Aboriginal has apparent understanding of his right to remain silent. Most experienced police officers in the Territory already do this. The problem of the caution is a difficult one but the presence of a "prisoner's friend" or interpreter and adequate and simple questioning about the caution should go a long way towards solving it."

(4) Great care should be taken in formulating questions so that so far as possible the answer which is wanted or expected is not suggested in any way. Anything in the nature of cross-examination should be scrupulously avoided as answers to it have no probative value. It should be borne in mind that it is not only the wording of the question, which may suggest the answer, but also the manner and tone of voice which are used". (page 414).

Yet a Crown Prosecutor's right to cross-examine in Court (which in our opinion places extra pressure on the accused) is in no way curtailed. Whatever may be said for the view that the unsworn statement ought to be abolished in a sophisticated modern society, we respectfully agree with the preliminary view expressed by the Australian Law Reform Commission Reference on Aboriginal Customary Law Research Paper No. 13

"It is considered that there are distinct advantages in particular for traditionally orientated aborigines to have the right to make an unsworn statement. This is a strong argument for the general retention of the right.

Furthermore, an illiterate or semi-literate person should be able to receive assistance in the preparation of a statement and if necessary have the statement read for him in court. However, as with the law on admissibility of evidence on oath the problem is an aspect of the general law of evidence rather than one which causes specific problems for traditionally-oriented Aborigines as distinct from all other persons. What can be said is that the difficulties in giving evidence experienced by many Aborigines, as well as others with problems of illiteracy and poor comprehension of English, are powerful reasons for not abolishing the right to make an unsworn statement. In particular, it is regrettable that the Northern Territory, where these problems occur with some frequency, proposes to abolish unsworn statements in its new Criminal Code."

If you are appearing for a person charged with an offence committed whilst intoxicated and he is or she has the good fortune of being found not guilty, don't start celebrating just yet! Turn instead to section 383, the third of the sections referred to in the Telex.

"Acquittal on Ground of Intoxication

(1) If, on the trial of a person charged on indictment, it is alleged or appears that he is not guilty by reason of intoxication other than intoxication of such a nature that section 35 applies, the jury are required to find specially, if they find he is not guilty, whether his is not guilty by reason of intoxication and whether such intoxication was voluntary.

(2) If the jury find his is not guilty by reason of intoxication and his intoxication was voluntary the Court may order him to pay by way of fine and amount not exceeding the costs of bringing the charge including the costs of all reasonable investigations relating thereto and the costs of the committal proceedings and, in an appropriate case, may make an order for the payment of compensation and restitution pursuant to section 393.

(3) The court, pending any assessment of costs or compensation, may adjourn the proceedings and order that the person concerned be imprisoned or admitted to bail.

(4) The court may itself assess such costs or order that they be taxed by the proper officer of the Supreme Court."

(Section 35 deals with insanity.)

This section introduces the novel concept of punishment by fine following acquittal. There are difficulties in determining whether the innocent persom may be ordered to serve six months' or twelve months' imprisonment in default of payment of fine.

We commend the observation of Muirhead J. in **R. v. Douglas Wheeler Jahanunga** (unreported N.T. Supreme Court 16th October 1980).

"The courts cannot effect a cure or diminution of the incidence of alcohol induced violence, but the situation cries out for community concern, intelligently planned programmes and actions rather than words. All the Courts can do in the meantime, is to punish those who kill or injure, but the deterrent value of what we do is, I am afraid, precisely nil. . ."

These comments are supported by preliminary views expressed in Australian Law Reform Commission Reference on Aboriginal Customary Law Research Paper No. 6:

"One thing, however is clear. Despite recent moves in this direction, the more vigorous application of legal penalties for drunkenness is practically certain to be ineffective, resulting in more and longer terms of imprisonment for offenders whose real problems remain unaddressed, and without any element of general deterrence."

OBSCURITIES

Many sections are unnecessarily obscure. For example, section 141 —

Trafficking in Dangerous Drugs

(1) Any person who carries on the business of selling unlawfully any of the substances described in Schedules 1, 2 and 3 so that he lives off, wholly or in part, the proceeds thereof or begins or prepares to carry on such a business by unlawfully buying, making, dealing in, obtaining, possessing, growing or cultivating any of such substances with the intention of living off, wholly or in part, the proceeds thereof is guilty of a crime and is liable to imprisonment for life.

(2) If, upon his conviction, he proves to the presiding judge that he did not carry on, or begin or prepare to carry on, the business of selling unlawfully any of the drugs set out in Schedule 1, he is liable to imprisonment for 14 years.

(3) If, upon his conviction, he also proves to the presiding judge that he did not carry on, or begin or prepare to carry on, the business of selling unlawfully any of the drugs set out in Schedule 2, he is liable to imprisonment for 10 years."

This provision should replace the Cryptic Crossword for this edition. When you have unravelled section 141, have a look at sections 143 and 145; and for those who are sentenced to life imprisonment under section 141 (1), the Court is empowered by section 147 to impose an unlimited fine in default imprisonment for a further three years.

COMMON PURPOSE

Consider also section 8 which deals with common purpose. Under this provision, where two persons agree to trespass on another's property to shoot rabbits and one of them commits an offence in the course of the venture, the other is equally guilty unless he proves that "he did not foresee the commission of that offence was a possible consequence of prosecuting" the tortious venture. And section 9, under the heading **Mode of Execution Different from that Counselled.**

> "When a person counsels another to commit an offence. . .and an offence is committed by that person to whom the counsel is given. . .but the offence committed is different from the one counselled. . .the person giving such counsel is presumed to have counselled the offence committed unless he proves the conduct giving rise to the offence committed was not foreseen by him as a possible consequence of giving such counsel."

The Code is riddled with these reverse onus provisions. Moreover there are many objectionable sections where basic and traditional defences and rights have been eroded and concepts widened to spread the net of criminal responsibility.

We have already referred to section 31 (1) which is expressed as an excuse available to the accused. It is far from clear upon whom lies the evidential and ultimate burden of establishing the intent to perform the prohibited act or that the prohibited act was foreseen as possible (not that it was probable). That one or both of these burdens is imposed on the accused is suggested by the proximity in the Code of traditional defences such as mistake of fact (S.32), provocation (S.34), insanity (S.35) etc.

In relation to provocation, an accused is excused from criminal responsibility in circumstances in which, amongst others, "an ordinary person similarly circumstanced **would** have acted in the same or a similar way". The inclusion of the emphasised "would" rather than "might" imposes an unnecessarily heavy burden on an accused and narrows accepted principles. The "ordinary person" is defined in this or a similar way in every section where it is mentioned.

MISCELLANEOUS

It would be unfair to anyone contemplating residence in the Territory if attention were not drawn to section 29 entitled "Examination Of Person Of Accused In Custody". The section entitles a doctor to examine the person (including orifices) of the accused who is in custody and take samples of blood, saliva, hair or other substance where it is reasonably required to provide evidence of the commission of the offence. All that is required is that a police officer request the examination and sampling. And it is permissible to use reasonable force to perform these tasks!

If you appearing in the Territory and the Crown Prosecutor passes you over a "Notice to Admit Facts" think twice before you tear it up. According to S.380 "if a convicted person at his trial refused to make an admission requested in writing by the Crown of such a nature that, in the opinion of the Court, the making of it could not have prejudiced him in his defence, the Court may take such refusal into account when passing sentence."

In the case of a murder conviction, sentencing discretion has been taken away from the sentencing Judge. This discretion had hitherto been usefully applied in the case of Aboriginals. Life imprisonment is now mandatory for everyone (S.164) at a time when law reform Commissions are considering its abolition. In fact the discretion has been recently conferred on Supreme Court Judges in New South Wales.

If the whole thing becomes too depressing and you decide to do yourself in, make sure you don't botch it, because if you do you are liable to a term of imprisonment for twelve months pursuant to section 196. "Any person who attempts to kill himself is guilty of a crime and is liable to imprisonment for one year."

POLITICALLY DANGEROUS AND THREATENING PROVISIONS

Section 51 relates to the "Proscribing of Organisations". It is based on the U.K. Suppression of Terrorism (Temporary Measures) Act which is designed to deal with the emergency created by the I.R.A. It permits proscription of organisations by the Administrator subject to ratification by a Unicameral Legislature, of an organization that in the opinion of the Executive Council has as its objects or one of its objects the use of violence to achieve its ends. The N.T Legislative Assembly consists of 19 members (soon to be increased to 25) of which the present Government comprises 11. A person who is a member of a proscribed organization is liable to 2 years imprisonment.

There is no opportunity to appeal the proscription and none of the protections which exist under Commonwealth Legislation relating to potentially dangerous organizations (e.g. Court protections) exist. Public expression of support for a proscribed organization becomes illegal. The holding of a meeting to secure support for the reversal of such a proscription would be an illegal act and those who attend it probably guilty of a crime. In substance the provisions create extraordinarily dangerous restrictions of fundamental political rights and freedom of speech. If there were no other defect in the Code these provisions alone would justify its universal condemnation.

CONCLUSION

The overall operation of the Code will, we believe be totally confusing. More unfortunately it will operate in such a way that the people in the community who are, perhaps, least able to comprehend its provisions and who are in need of constructive assistance and understanding are the very people who are going to be its principal victims. The Northern Territory is notorious for its lack of services for the socially deprived. Gaol, apparently is to be the answer.

By the time this article is published we hope there is general condemnation of this Code as a manifestation of a cruel, inhumane and discriminatory piece of regressive legislation. We trust that law schools and law societies Australia-wide will finally have a look at the Code and stir themselves to protest. If the Code comes into force it will constitute a slur on all Australians and a monument to the apathy of Australian lawyers.

Vincent Q C.
Hore-Lacy
Van de Wiel
McIvor
Morgan-Payler
Barnett
Parsons
Howie
Loorham

LEGGE'S LAW LEXICON
"O"

Oath. A mediaeval formality designed to convert mendacity into perjury. It has had little practical effect since the abolition of compurgation. The decision of the High Court in **Gianarelli v R** (Nov. 1983) has now made it wholly ineffectual.

Obiter Dicta. Senile maunderings.

Objection to Evidence. If a question tendered by one party be objected to then all the counsel on the side objecting may be heard against its admissibility and all on the other may be heard in support. **Wharton (1953) 708.**

Oblata. Gifts or offerings made to the King by any of his subjects. In N.S.W. commonly called a fee or a commission.

Obligee. A politician.

Obligor. A property developer.

Obscene Publication. Matter of an erotic, pornographic or sexually delightful nature such that the person on the Clapham omnibus would be likely to enjoy it in private. It is an offence to publish such matters to those whose minds are open to sexually immoral influences, (1868) L.R. 3 Q.B. 360, 371, i.e. all males between puberty and senility other than Stipendiary Magistrates and members of the Vice Squad.

Obscenity. No judge has ever succeeded in defining obscenity successfully but those of the Supreme Court of Queensland know a dirty book when they see one, (1963) Q.R. 67.

Obsolete. Some such practices might usefully be revived. Pressing to death for want of a plea is probably more efficacious than entering judgment in default of a defence and the indictment for eavesdropping (2 Hawk P.C. 132) might be adapted to curb the worst excesses of ASIO.

Office. Bentham (Ev. 3,379) On Useless Offices; "If half the hands employed in heaping together that execrable mass of moral and intellectual filth called in technical language a record were but employed as they so easily might be, what might not be rendered to the ends of justice."

Office of Profit. A Royal Commission.

Official Liquidator. Chilean Ombudsman.

Official Manager. The Senior Master.

Onus of Proof. The burden discharged by an accused who makes a statement from the dock.

Opening the Case. The commencement of a customs prosecution.

Opinion. A previous inquiry into the merits of an action performed by a barrister on incomplete and incorrect evidence and at his client's expense.

Oppression. An unjustified allegation of lack of sexual harrassment.

Order 14. A procedure in which the lying defendant always beats the lying plaintiff.

Order in Council. A form of legislation much favoured by Governments that do not control the Upper House.

Order of Course. An interim injunction obtained on Saturday afternoon.

Ordering Witnesses Out of Court. Another formality for creating perjury from which the members of the corroboration squad are happily exempt.

Orphan. A parricide.

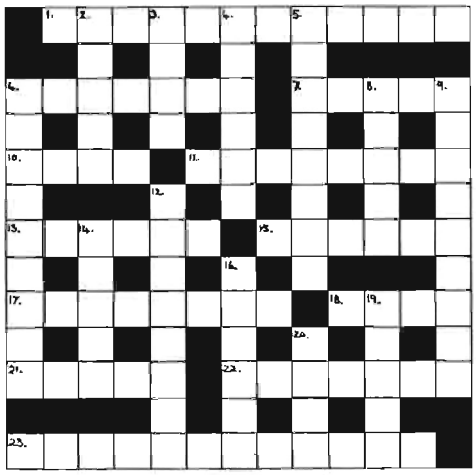
Ostensible. The authority of a judgment of the Family Court.

Outgoing. Not the right word to describe a retiring Judge.

Outhouses. Aickin, Tait and Latham.

Outsucken Multures. ???????????

CAPTAIN'S CRYPTIC No. 46



ACROSS:
1. Looks like a fatal male joke (12)
6. David's judicial son (6,1)
7. Pretended or represented (5)
10. Cavilling fish (4)
11. Elastic new judge (8)
13. In truth (6)
15. Requests of the potent (6)
17. A1 drowns in judicial change (8)
18. Unless (4)
21. Sounds like a creepy nest (5)
22. Soft offers of assistance (7)
23. Maritime Lease (12)

DOWN:
2. Fragrance of the Rose (5)
3. Disfigurement on the body politic (4)
4 Foreswear (6)
5. Cold and rigid rivers (8)
6. Miserere mei Deus etc. (4,5)
8. Tenth (5)
9. Powerful families (9)
12. Best of cleaner (8)
14. Oarsman between row and rowest (5)
16. One who separates the wheat from the chaff and prints the chaff (6)
19 That is, in Rome (2,3)
20. This lady has one sixteenth part of a rupee (4)

(Solution Page 37)

MILESTONES — 1983

During the year past the following milestones were attained —

	Admitted to Practise	Signed Bar Roll
55 Years		
Sir A. Adam (former J, Supreme Court)	3.8.28	
50 Years		
Sir J Nimmo (Arbitration Commission)		12.5.33
45 Years		
Sir S. Frost (former CJ Papua New Guinea)	2.5.38	
40 Years		
Judge Gorman		10.9.43
35 Years		
T.W. Smith (former J, Supreme Court)	— took Silk 1948	
Judge Franich		6.2.48
Crockett J	1.3.48	
Professor HAJ Ford	1.4.48	
Judge McNab	1.4.48	23.4.48
H. Ball	3.5 48	16.7.48
Judge Forrest		16.7.48
Judge Martin (retired)	15.7.48	8.10.48
Master Brett	15.7.48	
Judge Hewitt	2.8.48	9.9.48
B.K.C. Thomson QC	7.8.48	9.9.48
A.J. Scurry QC	2.8.48	9.9.48
Murphy J	2.8.48	13.9.48
Young CJ	2.8.48	
C.H. Franics QC	1.10.48	
Connor J (retired)	1.10.48	
Judge Just	1.10 48	8.10.48
Judge Campton	3.11.48	5.11.48
Professor Sir D.P. Derham	3.11.48	

	Admitted to Practise	Signed Bar Roll
30 Years		
Beach J	2.3.53	20.3.53
S.E.K. Hulme QC	2.3.53	17.7.53
F.X. Costigan QC	2.3.53	
A. Monester QC	2.3.53	
W.B. Lennon QC	2.3.53	
J.H. Morrissey	2.3.53	
P.A. Wilson	2.3.53	
J.G. Colman	2.3.53	
B.W. Bourke	2.3.53	
D. Cross	2.3.53	
W.B. Frizzell QC	1.4.53	26.6.53
Judge Somerville (retired)	1.4.53	2.10.53
Judge Bland	1.5.53	
Jenkinson J (Federal Court)	3.8.53	2 10 53
Robinson J (Arbitration Commission)	1.12.53	
25 Years		
PHN Opas QC	took silk 1958	
Judge Kelly		3.2.58
Judge Dyett		3.2.58
V.F. Ellis		3 2.58
J.H. Phillips QC (DPP)	3.3.58	
G.G.H. Buckner QC	3.3.58	
P.G. Nash	3.3.58	
Smithers J	3.3.58	
Hampel J	1.4.58	17.4.58
K.T. Smith	1.4.58	17.4.58
P.A. Liddell QC		17.4.58
Judge Walsh		17.4.58
J.L. Sher QC	1.5.58	
H.W. Fox QC	1.8.58	27.10.58
R.K. Todd (Admin. Appeals Tribunal)		30.9.58

20 Years

C.A. Sweeney J — Bankruptcy Court 1963

10 Years

Murphy J — Supreme Court 1973

Judge Spence — County Court 1973

VICTORIAN BAR'S SUBMISSION UPON OCCUPATIONAL LICENSING TAX

1. The Victorian Bar unequivocally opposes the proposed introduction by the Government of a flat occupational licensing tax as a fee for registration to practice specific professions (including law).

2. The aim of this submission is to inform the Government of the Bar's opposition to the introduction of such a tax and to set out, shortly, the reasons for such opposition. Some of those reasons deserve elaboration and the Bar proposes to present a more detailed analysis in the near future.

3. The basic thrust of Chapters 8 and 9 of the Report of the Inquiry, which review the current Victorian tax mix and canvass the possibilities of different replacement or additional taxes as instruments of reform, is that the present narrow based miscellany of taxes is unsatisfactory and that greater equity and efficiency will be achieved through replacement of these by broad based, buoyant revenue measures. (Preface p.xxii) The adoption of the proposed occupational licensing tax would not accord with that basic recommendation of the Committee; it would simply add to the present unsatisfactory range of narrow based taxes.

4. On grounds of ordinary fairness, it would generally be accepted that occupations should not be singled out from the rest of the community for additional taxation unless there are good and compelling reasons. The reasons advanced in the Report for the imposition of the occupational licensing tax do not satisfy that test.

5. The Committee proposes the tax be visited upon those occupations which are part of a self-regulating statutory monopoly and that it should not be imposed on occupations which do not control the numbers entering the occupations and which face the countervailing power of an employer or producer. On this basis, it is said that lawyers qualify for the tax.

6. The Committee appears to accept, indeed assert, without more, that lawyers enjoy a monopoly over the kind of work they do. That this is not the case is demonstrated by the following considerations: –

   (a) The **Legal Profession Practice Act** 1958 ("The **Act**") does little more than set up a licensing procedure designed to protect the public from unqualified practitioners. It imposes no restrictions on the number of persons who may practise law.

   (b) The Bar represents those practitioners admitted to practise by the Supreme Court of Victoria who wish to practise exclusively as barristers. The Law Institute of Victoria represents those who wish to practise as solicitors. The Bar does not attempt to limit the numbers which join it. In fact, it endeavors to make entry as easy as possible and, through a variety of measures at the expense of those with established practices, endeavours to assist new barristers to the stage when, hopefully, they too will be established.

   (c) No special extra qualifications are required of persons wishing to practise as barristers in Victoria.

   (d) Admission to study law is not determined by the legal profession. The Commonwealth Tertiary Education Commission determines the overall numbers of students attending university. In turn, the universities have committees (for example, in the case of the University of Melbourne, the Student

Numbers Committee) which determine first year entry numbers for the respective courses at university. In turn, within the Faculties of Law, entry is based upon normal selection criteria, namely academic merit.

(e) The only restrictions upon law graduates becoming members of the Bar relate to the maintenance of adequate professional standards of competence and integrity. No attempt has been made to establish any form of residential qualification for admission such as exist in other places. No attempt has been made to restrict the numbers of individuals signing the Roll of Counsel or to limit the number of persons engaging in practice as barristers. Instead a system of reading has been devised under which experienced practitioners undertake responsibility to train and assist readers without remuneration. The classes conducted for these readers are heavily subsidized through the provision of voluntary instruction given by senior people, and are designed to complement existing forms of legal education with reference to the particular skills and standards required of barristers. Again clerking systems and accommodation policies have been developed on the basis that the law should endeavour to assist young practitioners by securing as far as possible an equality of opportunity between them in these very important areas. It is thus an operational principle of the Bar that any appropriately qualified person is entitled to undertake practice as a member of the bar and that his or her professional colleagues will assist as far as possible in the manner previously indicated. The Victorian Bar is proud of its democratic tradition.

(f) The number of counsel at the Bar has almost doubled since 1974. There are many reasons for this rapid growth, not the least of which is the encouragement the Bar gives to people who wish to join it. This growth in numbers further ensures for the community a highly competitive profession in which the only guarantees of economic security are hard work and the pursuit of excellence in all aspects of practice.

7. As to the proposition that the Bar is an occupation which does not face the countervailing power of an employer or producer, it certainly faces increasing competition in the following respects: –

   (a) It is subject to substantial and increasing monopsony power on the part of public authorities and instrumentalities which use barristers' services from time to time. Many members of the profession are employed in the public sector and there is an emerging practice, particularly through the Legal Aid Commission, of "in house" lawyers being used to perform work that hitherto has been performed by barristers.

   (b) "Court substitutes" are being set up in increasing numbers and provisions excluding or cutting down the right of barristers to appear in certain areas are becoming more common.

8. It might be said that the claim that there is a monopoly can be justified, not on the grounds advanced by the Committee, but on the broader basis that the course of study which aspirants must complete successfully, necessarily limits the numbers to be admitted to practice. However, on this basis, many more occupations than those specifically identified would qualify as monopolies under this test. In paragraph 6 of Part C of Chapter 9 it is said that the tax can also be seen as a **de facto** way of "recouping" . . in some sense the public subsidisation of education of these groups". Such reasoning covers all University graduates and, thus, a tax on a selected few would be inequitable. Further, it would not distinguish between older practitioners whose University education was funded either by their parents or relatives or by money earned in part-time or vacation employment and younger barristers whose courses were funded by the Government.

9. The other primary reason for the proposal by the Committee is that members of the named professions, particularly doctors and lawyers, have high incomes. As with many other occupations, there are some in the law who earn substantial income and others who do not. Most young practitioners would find an impost of $500 per annum a considerable burden and, for some, it could be the extra disincentive which leads them to decide to take up some other livelihood. But in any event, if it is the wish of the Government to tax the rich, then it ought do so across the whole community.

10. Data included in the Committee's Report demonstrates that, relative to other occupations in the community and to wage and salary earners generally, incomes of lawyers have dropped substantially during the last decade. This trend will have become even more marked in the last 18 months when the level of fees of barristers and solicitors have remained frozen though most wage and salary earners have received increases of between 17% – 20% in that period.

11. Although the tax suggested of $500 per annum is substantial, it would produce little revenue because the nominated professions represent a very small group in the community. Nevertheless, the imposition of such a tax must create considerable disquiet for those in other professions and occupations who, on the basis of the reasons above, are equally eligible for its imposition.

12. The Victorian Bar is also unequivocally opposed to the suggested introduction of a franchise or tunover tax. The Bar intends to make a separate submission upon that matter shortly.

• • •

GOOD SENSE, COURTESY & THE UNCOOPERATIVE OFFICER — THE PROBLEM NOT EXPLORED IN BAKER v CAMPBELL

The Question is, whether the officer to whom a valid search warrant is addressed is entitled to seize from counsel documents to which legal professional privilege attaches and which has not been lost by waiver or otherwise?

The Answer is, no — unless the statute empowering the issue of the warrant abrogates the privilege in express terms or by necessary implication.

The Authority is **Baker v. Campbell,** a decision of the High Court delivered on 26 October 1983.

The Expectation is, that "a little elementary good sense and courtesy" will be displayed by each party when the officer arrives to execute the warrant so that, whilst the documents in question are preserved, counsel will be given time to consider them and to obtain the necessary instructions as to the purpose for which they were brought into being and if necessary execution will be postponed until the issue of privilege is adjudicated by a judge.

The Problem is, that the expectation may not be fulfilled — that good sense and courtesy may not be displayed, or the officer may not cooperate.

The Regret is, that the problem was not explored in **Baker v Campbell.**

Statement of Principle

For legal professional privilege to attach to a document the document must be one which constitutes a confidential communication between a legal adviser and his client, brought into existence for the purpose of giving or receiving advice or for the purpose of use in existing or anticipated litigation.

The document must be brought into existence for that sole purpose.

The test is not whether the legal adviser received the document for the purpose of tendering professional legal advice but whether the document was brought into existence for that sole and innocent purpose.

The privilege does not attach to documents which constitute or evidence transactions such as contracts, agreements, conveyances, declarations of trust, offers or receipts or extracts of other transactions, even if they are delivered to a legal adviser for advice or for use in litigation.

Nor does it attach to documents which are the means of carrying out, or are evidence of, transactions which are not themselves the giving or receiving of advice or part of the conduct of actual or anticipated litigation.

There is no privilege for documents which are themselves part of a crime or fraud or civil offence or made in pursuance of it, whether or not the legal adviser knows of the unlawful purpose.

It does not attach to documents lodged with a legal adviser for the purpose of obtaining immunity from production.

It is important to distinguish the principle of legal professional privilege from the wider requirement of confidentiality.

Limits to the Privilege

The privilege may be lost by waiver (and bear in mind that privilege is that of the client not of the legal adviser who has no implied authority to waive it) or arguably by the contents of the document ceasing to be confidential if, for example, either accidentally or (query) even by trickery or dishonestly the document falls into the hands of someone other than the client or the legal adviser (in which circumstances see inter alia **Bunning v Cross** (1978) 141 CLR 54, **Cleland v The Queen** (1982) 57 ALJR 15; 43 ALR 619.

The privilege is overridden if the document would tend to establish the innocence of a person charged with a crime.

It is clear therefore that the documents to which legal professional privilege attaches are "closely confined", to use the words of Dawson J in **Baker v Campbell.**

The above summary of the extent and limits of the privilege is based on expressions in that case. Because of the assumption made therein that the privilege attached to the documents there in question, the definition of the privilege did not arise for decision. An examination of the doctrine can be found in **Cross on Evidence** (Second Australian Edition) page 273 ff.

The Privilege out of Court

The principle enunciated in **Baker v Campbell** differs from that enunciated in **O'Reilly and Ors v The Commissioners of the State Bank of Victoria and Ors** (1982) 57 ALJR 130; 44 ALR 27.

In **O'Reilly's case,** Gibbs CJ, Mason and Wilson JJ (Murphy J dissenting) held that the protection of legal professional privilege is confined to judicial and quasi-judicial proceedings. The case concerned the attempt by officers of the Australian Taxation Office to enforce against a solicitor a notice under section 264 of the Income Tax Assessment Act 1936 (Cth.) requiring him to produce certain documents which he held in a professional capacity.

In **Baker v Campbell,** Murphy, Wilson, Deane and Dawson JJ (Gibbs CJ and Mason J dissenting, Brennan J dissenting on the issue of statutory interpretation but otherwise virtually agreeing with the majority view) held that the protection extended to administrative or executive proceedings. That case concerned the attempt by a member of the Federal Police Force to execute against a solicitor a search warrant issued pursuant to section 10 of the Crimes Act (Cth.) (a section similar to but with significant differences from section 465 of the Crimes Act of the State of Victoria).

The decision in **Baker v Campbell** received publicity under the heading "High Court shuts out tax men" in an article in **"the Age"** newspaper dated 27 October 1983.

That article contained a number of misunderstandings or misconceptions.

It stated that "The four to three majority decision handed down in Perth yesterday specifically means that Federal Police, armed with a search warrant, cannot ask a lawyer to produce records supplied to the lawyer by a client seeking advice about his or her taxation affairs."

This statement is too wide, as is the following statement "Nor can the police seize copies of the lawyer's written advice to the client."

In **Baker v Campbell** the Court did not decide that any particular document the subject of the warrant was covered by legal professional privilege. For the purpose of the decision the documents in question were assumed to be so covered.

The article also attributed to a chief inspector of the Victoria Police, the view that "the reported decision was an encouragement to every 'crook in Christendom' to hide evidence of criminal activity in solicitors' offices. If evidence of a criminal act can be secreted in a solicitors' office under the guise of legal professional privilege then what is to stop every crook doing it".

The very limited application of the privilege does not justify such fears. This is not to say that experience will justify the confidence of Murphy J that "Denying the privilege against a search warrant would have a minimal effect in securing convictions. . ." I prefer the words of Dawson J that "In the first place, those communications to which legal professional privilege attaches are closely confined and the extent to which the privilege could constitute an impediment to administrative or executive investigations is limited".

The task confronting the High Court was one of balancing the principle that communications between clients and legal advisers should be confidential (the public interest in the proper functioning of the legal system), against the principle that all relevant evidence be available to resolve the issues for decision in litigation (the public interest in discovering the truth). The majority of the Justices have come down in favour of the former

Statutory Limitation of the Privilege

It is clear however that the legislature has power to abrogate the privilege, albeit that it must do so in clear language.

"The legislature may, of course, if it sees fit to do so cut across the doctrine of legal professional privilege on occasions when it considers that it is more important to obtain information than to preserve the privilege and no doubt the inclination to do so will be greater in administrative proceedings where the principle has not been seen to operate as it has in judicial proceedings. The legislative imposition of an obligation to disclose professional confidences to the executive is relatively recent, although of increasingly frequent occurrence. But it does not seem to me that the law should ease the way for the legislature to expand the practice nor should it disguise the fact that a principle which the law regards as fundamental is involved". Dawson J.

"It must be recognized that competing public interests may be involved. New forms of criminal activity pose a clear threat to the public welfare and may call for new measures of criminal investigation and law enforcement. The dictates of good administration of complex social and commercial legislation may require increasing resort to compulsory procedures. But it is for the legislature, not the courts, to curtail the operation of common law principles designed to serve the public interest. In any event, the limited range of communications to which the privilege extends will of itself ensure that the area of possible conflict is strictly confined". Wilson J.

The revelation by a number of recent and current Royal Commissions and Boards of Inquiry of the degree to which organised criminal activities permeate our society may provide an impetus to increase resort to compulsory procedures. The community may have to question whether the balance should be legislatively tipped in favour of the second of the principles referred to above. The tendency towards overgovernment and the proliferation of tribunals might however give the community cause for second thoughts.

Baker v Campbell is not only concerned with the common law doctrine of legal professional privilege but is an exercise in statutory interpretation. The only search warrant which issues at common law is for stolen goods. It will remain essential therefore to examine carefully any statute authorizing search warrants or other compulsory procedures to see whether or not the statute abrogates the common law privilege.

A list of acts under which search warrants may be issued is contained in Nash, Magistrates Courts Act among the annotations to section 22A. There is a list (no doubt then current) of Commonwealth statutes permitting the issue of search warrants in (1979) 53 ALJ 116. Certain rules in respect of warrants are set out in the Magistrates (Summary Proceedings) Act 1975 especially sections 12 and 13.

Practical Difficulties

It is acknowledged by a number of Justices in **Baker v Campbell** that there are practical difficulties involved in the execution of a search warrant in the office or chambers of a legal adviser and it is salutary to consider the number and extent of such difficulties.

Confining consideration to the question of privilege and ignoring eg questions of the validity of the warrant and whether the officer is otherwise entitled to seize particular documents (and **Baker v Campbell** does not touch these matters), a number of difficulties immediately come to mind. Mature reflection and experience will unearth many others.

You may not have read your brief (or having read it, not done so with privilege in mind) when you are presented with the warrant. You may not even know, therefore, what documents you have in your possession.

If you are given time to examine your brief to discover its contents, you will still need further time to consider each document from the point of view of privilege.

An examination of a document may not provide the answer. You may well need time to obtain instructions from your solicitor and/or lay client as to the purpose for which each document came into existence.

If you are satisfied that you have documents to which the privilege does not attach and they are seized, do you ask for a receipt identifying each of them and if you obtain one, does it then constitute a document at least discoverable in the action in which you are briefed and a document not attracting privilege?

Without a detailed receipt how do you know what has been seized? What problems will arise if you photocopy the documents before they are seized?

If you do hand over those documents to which you are satisfied that privilege does not attach and you prove to be wrong, do they not then cease to be confidential so that the privilege in respect of them is lost?

The officer may not agree with your opinion that certain documents are protected by the privilege, even if he accepts the operation of the doctrine.

The execution of a warrant is said by Gibbs CJ to call for "tact and consideration" "Any search must be conducted reasonably and, particularly when there is no suggestion that the solicitor himself has been guilty of complicity in any offence, the officer executing the warrants should ensure that it is executed in a way which will cause the least possible inconvenience and embarrassment. As at present advised I

agree with the view expressed in **Crowley v Murphy** (1981) 34 ALR 496 that the constable is not entitled to conduct a 'negative' search, ie a search of papers relating to the affairs of persons not mentioned in the warrant for the purpose of ensuring that there was no relevant documents amongst them. The difficulties which the situation creates should be much reduced if, as Lord Widgery suggested in **Reg. v Petersborough Justice, Ex p. Hicks** (1977), WLR at 1376, both sides display a little elementary good sense and courtesy' " Gibbs CJ.

"In approaching the scope of the authority given by the warrant we must keep practical considerations steadily in mind. It is simply impossible for a police officer executing a warrant to make an instant judgment on the admissibility, probative value or privileged status of the documents which he may encounter in his search. Generally speaking, it is in the course of the subsequent investigation following seizure of the documents that informed consideration can be given to the documents and an assessment made on their worth or significance in the respects already mentioned."..."In the case of production on discovery and under subpoena duces tecum there is a court or tribunal already exercising jurisdiction in the matter which could determine questions of relevance and privilege. It is otherwise in the case of search and seizure under a warrant." Mason J.

"It is asserted that the claim of privilege in circumstances where the proceedings in respect of which it is made have not begun immediately raises procedural difficulties if the claim is contested. There is no judge already seized of jurisdiction in the matter to determine the disputed claim. The interests of all parties must be protected pending a determination of the dispute. In my experience the procedural difficulties can be overcome consistently with that objective if the members respectively of the police force and the legal profession cooperate in a reasonable and responsible way. I do not think it is necessary for the purposes of the stated case to explore the problem." Wilson J.

But the problem exists, as the recent experience of one member of counsel shows, although it must be said that at that time **O'Reilly's Case** meant that privilege did not extend to the relevant warrant, and in most cases one would confidently expect the cooperation of the officer.

Practical Solutions

The difficulties that will arise, however, make it quite clear that so long as the statutes authorising the issue of warrants do not set out procedures to overcome them, common sense requires that a set of rules or guidelines be agreed between the Bar, the Law Institute and the police to preserve the documents but to allow time for informed consideration of them and an opportunity to have the issue of privilege decided by a judge. Other parties to such an agreement should ideally include all officers and departments entitled to apply under any of the other fifty odd statutes previously referred to for warrants to search for and seize documents. The practicability of achieving such widespread agreement is not yet known.

The means of determining the applicability or otherwise of the privilege is also discussed by a number of Justices in **Baker v Campbell.**

Gibbs CJ thought that statutes authorising a search warrant should also provide a procedure "under which an independent authority, whether judicial or administrative," might determine whether the documents are privileged.

Mason J said this; "Quite apart from the force of these considerations there is the problem which I mentioned in **O'Reilly** (57 ALJR at 138-9) and Brennan J referred to in **Pyneboard Pty Ltd v Trade Practices Commission** (1983) 45 ALR 609 at 629, that of imposing upon unqualified persons the task of deciding difficult questions of legal professional privilege. Their decision of such a question would not be conclusive. A decision of a court (a) on a prosecution for contravention of the statutory obligation or (b) in proceedings for a declaration as to the existence of the privilege, would be required in order to provide a conclusive answer."

Brennan J was of the view that "Declaratory relief or prosecution seem to be the only avenues of judicial resolution" in the absence of specific procedures contained in the empowering statute.

Dawson J did not see "any real difficulty". "In the first place, the doctrine of legal professional privilege is not ordinarily difficult to apply and there is no reason to suppose that its application in a non-judicial

context is any less appropriate than the application of the many rules of law which must frequently be applied in proceedings other than judicial proceedings. Moreover should any dispute arise, the means exist whereby a judicial determination of th dispute may be obtained as is indicated by this and the other cases in which such a dispute has arisen".

These statements however do not solve the immediate practical problem of what to do when the officer enters your chambers with a search warrant and "wants the documents now".

Your Response to the Warrant

How do you avoid the execution of the warrant and the seizure and removal of documents to which the privilege properly attaches, and what good will it do your client to subsequently obtain an order requiring their return and the return, even on oath, of any copies or notes made, and how can the memory of the officer who read them be erased? As Swanwick J observed in **Frank Truman Ltd v Police Commissioner** (1977) 1 QB 952, an order restraining an officer from making use of any information derived from the documents "is impossible of enforcement, for who is to tell for example whether a question in cross examination. .is or is not founded on some information obtained from the documents". It is all very well to have the matters rectified subsequently but the harm may be done before your application to the court is heard or even whilst it is being heard.

Providing that Common Law protection has not been abrogated, then clearly, any documents in your brief to which privilege attaches cannot properly be made the subject of a search warrant and you should not permit their seizure.

The practical difficulty is to know whether privilege attaches to any particular document.

It is to be hoped, and in most instances to be expected, that "good sense and courtesy" will prevail. You will explain to the officer that you wish to claim privilege and that you wish to examine the statute authorising the warrant to see whether it abrogates the privilege and that you wish to consider any documents in your possession and obtain from your solicitor and/or lay client instructions as to the purpose for which each document came into existence. The officer will tell you whether it is suggested that you are guilty of complicity in any and what offence and whether, and why, in his opinion any document which he seeks does not attract privilege as you otherwise might have thought because eg it is in furtherance of a crime or for some other reason which you may not know about, and he will agree to postpone execution to allow a reasonable time for these matters to be considered and you will undertake to him to preserve the documents in the meantime and even to seal them in the presence of and under the signatures of both of you and unless the issue can be resolved between you, you will both agree to take the documents before a judge for his adjudication and order before the warrant is executed.

In the event that "good sense and courtesy" do not prevail, then your actions will depend, inter alia, on your knowledge of the relevant statute and of the documents you hold and on the information and instructions you then have as to the purpose for which they came into existence and on the principles limiting the privilege. If you are able to form an opinion that certain documents do attract privilege then, in my view, you should not hand them over, the privilege constituting legal excuse for refusing to do so, and you should as a last resort resist their seizure whilst attempting to bring the matter before a judge. You might even discuss with the officer questions of contempt and trespass.

If you cannot form that opinion but are of the belief that there may well be privileged documents in your brief, (it might reasonably be anticipated that your brief will contain instructions to counsel and they they at least will prove to be privileged), I still do not think that you are required to hand over any documents and indeed it would be your duty not to do so. Check the warrant and its empowering statute carefully. They probably authorise the holder to do certain things. They probably do not require you to do anything. Without otherwise unlawfully obstructing the officer in the execution of his duty it is, in my view, proper to claim that some at least of the documents may be privileged and to protest the seizure of any documents until you have the opportunity to form an opinion in respect of them and to attempt to restrain it by application to a judge. You should in other words require a seizure rather than hand anything over. If necessary you should adopt the unseemly expedient of tucking the papers under your arm and making a dash for the nearest judge, (or perhaps better still, tucking some other papers under your arm and making a dash for a judge).

I acknowledge that the course is not without its problems both legal and practical. For example, before making a dash, and weighing your chances of eluding the officer (should he be a police officer) standing between you and the door of your chambers, reflect on section 13 (1) (c) of the Magistrates (Summary Proceedings) Act 1975 and in particular the words "and to bring it together with any person apparently having the possession custody or control thereof before the Justice" etc. and the absence of the word "immediately" or "forthwith" in that phrase.

However, it could be argued that a search warrant which on its face authorises the seizure of privileged documents is invalid, **Descoteaux v Meirzwinski** (1982) 70 CCC (2d) 385, and further argued that **Baker v Campbell** and **Frank Truman Ltd v Police Commissioner** would justify even this expedient. Gibbs CJ in **Baker v Campbell** said of the **Frank Truman case** "Although the headnote suggests that his Lordship held that the police could not have removed the privileged documents if the solicitor had not consented, it is by no means clear from the judgment that this is so, although the learned judge did say that 'documents which are clearly both privileged and inadmissible' could not be seized".

Dawson J said with apparent approval, "In **Frank Truman Ltd v Police Commissioner**,. . .it appears to have been assumed that a solicitor might lawfully withhold from police attempting to seize documents under a search warrant those documents otherwise within the scope of the warrant to which legal professional privilege attached. In **Reg. v Peterborough Justice; Ex parte Hicks** (1977) 1 WLR 1371 it does not appear to have been questioned that in a proper case legal professional privilege could validly be claimed against the production of documents to police acting under a search warrant".

If "Legal professional privilege precludes the making of a judicial order to compel the production of a privileged document in the hands of the solicitor or client. . ." (Brennan J) so must it surely justify refusal to cooperate in the execution of a warrant directed to or including privileged documents, until the applicability of the privilege to certain documents is established, especially when one takes account of the harm which might flow from premature or unauthorised perusal of them

If the brief contains documents which are in fact privileged, those documents cannot be lawfully seized.

If they are seized, even in error, then (at least arguably) the privilege in respect of them is lost.

If you don't know whether or not the documents in your brief are privileged, then in view of the above and of the irreparable harm which will be done to your client if the documents are seized unlawfully, common sense requires that you be entitled to an opportunity to obtain a ruling from a judge before their seizure. If that is common sense, it is probably also the law.

If the officer won't allow you such an opportunity, the steps suggested must surely be justifiable. After all you are offering to go before a judge immediately to obtain a ruling or at worst a short stay and at the same time undertaking to preserve the documents.

Even if the documents are (in your opinion) clearly privileged, it would be prudent to obtain a ruling unless the officer is prepared to accept your assurance that they are so privileged (and if he is so prepared then 'good sense and courtesy' will already have operated so the problem will not arise).

Baker v Campbell is concerned with search warrants only insofar as their execution may be affected by legal professional privilege. As to the validity of the warrant itself see "Judicial Review of Search Warrants and the Maxwell Newton Case" (1970) 44 ALJ 467 and "Search Warrants – Validity and Lawful Execution" by Pannam QC (1982) 56 **Law Institute Journal** page 467.

The whole subject is of such growing significance that it deserves much greater consideration and treatment than is covered by this note I understand that a joint committee of the Bar and Law Institute is considering it.

As a quite unrelated but perhaps topical matter, not the view of Gibbs CJ that "It is necessary for the proper conduct of litigation that litigants should be represented by qualified and experienced lawyers rather than that they should appear for themselves. . .".

HART, QC

ARE BARRISTERS ESQUIRES?

Wagner, in his **English Genealogy**, writes of the four Inns of Court, the Inner and Middle Temple, Lincoln's Inn and Gray's Inn, becoming, under the Tudors, "in effect the third university of England, to which the nobility and gentry sent their sons".

Also Plucknett, in his **Concise History of the Common Law**, refers to the Inns as being like a university, providing for "general education of common life" and where the "youth of wealthy and noble families" could undertake a "full and fashionable education" consisting of the study of law together with "history, music and dancing". (Which all sounds much more fun than the Readers' Course).

Fortescue, in **De Laudibus Legum Angliae**, writing of his day (c. 1470), tells us that, because of the cost of residence at the Inns of Court (influenced perhaps by the cost of music and dancing), there were not many students in the Inns except the sons of nobles. He writes, "Hence it comes about that there is scarcely a man learned in the laws to be found in the realm, who is not noble or sprung of noble lineage".

Wagner, in his work referred to above, interprets Fortescue's explanation as an affirmation that the barristers "came mainly from the families of knights, esquires and gentry". This is supported by Clark, in **An Introduction to Heraldry**, who states "anciently, none were admitted into the Inns of Court but such as were gentlemen of blood".

With these origins it becomes relatively easy over a period of time for barristers to reason that, by virtue of their membership of the profession, they are not only gentlemen but also esquires, irrespective of their birth, somewhat along the lines of the argument of Serjeant Doderidge in the **Abergavenny Case** 1588. And the claim to be gentlemen is no doubt supported by the modern Victorian Supreme Court practice of describing the newly-admitted barrister and solicitor, on his admission certificate, as a gentleman.

As this paper is concerned with esquires, rather than with gentlemen, further discussion will be directed to the use of the title, esquire, by barristers. The gentleness of the profession will wait another day.

Argument as to whether a barrister, as such, is an esquire is not new. Squibb, in his work, **The High Court of Chivalry**, cites the case of **Pincombe v Prust** 1640 where the plaintiff called a witness to depose that he "was and is commonly accounted, reputed and taken to be an Utter Barrister, having studied in the Middle Temple, London, and therefore an Esquire as he believeth, for he is commonly called by the name of Esquire".

As esquires were "that vocation growen to be the first degree of gentry" (Glover), and as from "the fifteenth century to the nineteenth the esquires were the top layers of the gentry" (Wagner), this question was of some importance.

Glover, who was Somerset Herald, in 1580 set out specific qualifications for the title, and as late as 1681 these instructions were given (by Dugdale) to heralds making a Visitation:

> "to allow the Title of Esquire to these and to no other,
>
> 1. The heir Male of the Younger Son of a Nobleman
> 2. The heir Male of a Knight
> 3. Officiary Esquires. Viz. Such who are made so by the King by putting on the Collar of S.S. or such who are so Virtue Officii without that Ceremony as the high-Sheriff of a County, and a Justice of the Peace, during their being in Office or Commission . . . .
>
> Barristers at Law, you shall Enter by that Title, but you shall accept them as Gentlemen only, unless otherwise qualified to bear the Title of Esquire." (College of Arms MS)

(Presumably, by the time of the above there were, at the Inns, persons from more humble background than had been the case previously).

An idea of the esquire's relative position and proportion in society can be gained by the estimate of King in 1695 that there were 3,000 esquires, as against 600 Knights and 12,000 gentlemen (Stubbs, **Constitutional History of England**).

Esquire has been depicted as an office of function (Poole in **Debrett's Peerage**) and as a description of a state (Fox-Davies, **Amorial Families**). Gayre of Gayre and Nigg in **The Nature of Arms** states that esquire is a rank and not an organic order of society. Gayre says that a man can be "at the same time both an esquire in precedency and a gentleman in the order of his nobility", this according to the same precepts of nobiliary law by which the writer, in an earlier work, could explain how a person could be "an esquire, a nobleman and a gentleman", all at the same time.

The word "esquire" comes from the Old French esquier and the Latin scutarius. The esquire was originally a shield-bearer and personal attendant to a knight, ranking immediately below the knight. The esquire would be from a noble family himself, entering his training in arms and chivalry at an early age as a valet or page, becoming an esquire at about fourteen, and then being knighted when he came of age. Like the knights, esquires arose out of war. Although esquires existed before the reign of Richard II, it was not until then that the term was used as a title (Cassons, **Handbook of Heraldry**).

In the course of the thirteenth century, knighthood came to be looked upon as a burden (on account of the financial obligations involved), and the man of knightly birth and training who had not been knighted remained simply an esquire (Wagner). By the start of the fifteenth century, esquire was the customary description of holders of knights' fees who had not taken up their knighthood – whence the surviving custom of calling the principal landowner in the parish "the squire" (Poole). Thus the (otherwise untitled) landed gentry.

Debrett's states that, by the fourteenth century, esquires had reached equality with the knights in function and privileges, and Stubbs remarks that, by the middle of that century, "the class of squires had then for all practical purposes attained equality with that of knights, and all the functions which had once belonged exclusively to the knights were discharged by the squires".

With the decay of the feudal system, the title lost its original meaning, and in more recent times "it has come to be used quite incorrectly as a means of address on envelopes to almost anybody above the artisan class" (Puttock, **A Dictionary of Heraldry and Related Subjects**). Even **Debrett's Correct Form** states quite incorrectly, "It is for the writer to decide whether one should be addressed as John Brown Esq. or Mr. John Brown", (adding that the rank and definition of esquire "is now only of academic interest"). With this statement, Queen Victoria, who created John Brown an Esquire by investiture, would not have been amused.

As Fox-Davies quite firmly states, "Neither usage, custom nor abuse can now alter the legal right to the description". As Gayre says, "Since the fifteenth century the dignity of esquires (as well as gentlemen) has had to be determined in courts of chivalry". (Such courts last sat in England in 1954, but still sit on a regular basis in Scotland).

As recently as 1960 the true meaning of esquire was seen in the controversy which arose on the occasion of the marriage of the then Mr. Armstrong-Jones and Princess Margaret, and the suggestion that this might be a misalliance. A search of the relevant marriage register will show that the bridegroom gave his rank as esquire, and a search of the pedigree at the College of Arms will indicate that this was by inheritance, both grandfathers being noble, and that, far from a morganatic marriage being called for, this was in nobiliary law a proper marriage between a member of the noblesse and the royal house.

It is a pity that the policy in France, under the old code, was not followed here, whereby, for the improper use of the title ecuyer, a fine of 500 louis d'or was levied in favour of the nearest hospital (Innes of Learney, Diploma of Nobility for De Landa, **The Juridical Review**). This would certainly help reduce the burden of the taxpayer and the hospital fund contributor.

Also it would be a nice gesture for the Crown to reintroduce the creation of Esquires by investiture, where a silver collar was placed around the neck of the candidate, and he was presented with a pair of silver spurs as a mark of his new rank and distinction.

These days, in deciding just who is an esquire, resort is usually had to lists of various kinds. Such lists, in addition to the one mentioned earlier of Glover, have been drawn up by Camden (who was Clarenceaux King of Arms), Coke, Selden, Blackstone, Fearn, Fox-Davies and Debrett, and these lists are still used today by the College of Arms and by other authorities.

The lists are very similar, as would be expected, and usually consist of a series of seemingly unconnected categories. A modern list divides all esquires into four divisions or groups, which has the advantage of being better understood, and will allow proper reference to be made to the place of barristers. It is based on the categories of Sir John Fearn, viz., creation, birth, dignity, and office (**Glory of Generositie.** 1586).

The first group is that of esquires by inheritance or blood. These include hereditary esquires and their issue as have been created or confirmed as such. Included are Glover's heirs male of noblemen and knights, and the chiefs of names and their heirs apparent (who are hereditary esquires as well as gentlemen: Macpherson, **Loyall Dissuasive**). Subsumed here also are "those who by long prescription can show their lineal ancestors so styled" (Debrett). Of course, if they succeed to the main title, the title of esquire may no longer be used (though the persons of whom we speak would still be esquires in blood).

The second category is that of esquires by office, as seen in Item 3 of Glover's list. The reasoning behind this is that, if a person takes on certain high office, such as was formerly occupied by only the nobility or gentry (refer to the comments at the beginning of this paper in relation to the Inns of Court), it is assumed that, if he is not already an esquire, he should be, at least whilst he holds office (in much the same way as all Catholic bishops are assumed to be armigerous, even today). Such positions include Justices of the Peace, Masters of the Supreme Court, Sheriffs, Kings and Heralds of Arms, certain commissioned officers in the services (such as of and above the rank

of captain in the army (Gayre)), principal officers of the royal household, serjeants-at-law (Fearn refers to sergeants at the coif) and king's (or queen's) counsel (with whom we treat later in this paper). Those mentioned are generally described as esquires in their letters patent of appointment.

The third grouping is that of esquires of honour. These include commanders and companions of the orders of chivalry and Royal Academicians (since George III inserted this privilege in their charter in 1768).

The fourth division are those styled as esquires in a patent or other official document from the Soverign. As the Queen is the fount of all honour, if she describes you as an esquire in letters patent, then you have been so created or confirmed. As investitures are no longer held, this is now the only method adopted for the creation of esquires.

One can, of course be a member of more than one of the above categories.

Now although barristers are described as esquires by Pine (**Guide to Titles, The Genealogist's Encyclopedia**), who gives the title to all members of the legal profession (i.e. including the solicitors), and have found their way as such into **The Shorter Oxford English Dictionary**, and Osborn's **Concise Law Dictionary**, they are not shown as esquires in any of the lists mentioned. In fact, Glover's instructions which were, and are, followed by the College of Arms, specifically state that barristers-at-law, as such, are not esquires, and this view is confirmed explicitly by Fox-Davies (himself a barrister).

However, the lists generally include serjeants-at-law, and many of them include king's (or queen's) counsel as esquires. The serjeants were certainly esquires, and Plucknett refers to them, at the peak of their power, as ranking with the knights. King's counsel ranked next below the serjeants, and it seems clear that, by office, those who are king's (or queen's) counsel are esquires. Although the serjeants are no longer with us (being dissolved in 1877), and the work of senior counsel has changed over the centuries, the serjeants have, for all practical purposes, been supplanted by queen's counsel. It thus seems meet that queen's counsel should be esquires, and it is noted that the current Debrett includes them as such.

The modern precedence tables (all of which are based on an Act of Parliament of 1547) do not mention queen's counsel for England or Scotland, but for Northern Ireland place queen's counsel ahead of esquires (all the tables placing esquires ahead of gentlemen). The significance of all this is not quite clear, unless it means that in England and Scotland, senior counsel would, or should, be in the precedence tables in another category in any event, but that, for Northern Ireland, no-one is quite sure.

The College of Arms still describes Esquire as "a style of worship . . . . regarded as an honour" and controlled by strict rules. The official view is that "only the Crown can decide who is an esquire". Regrettably, for the junior bar, this view is "that the style of worship Esquire is not accorded to barristers". (Correspondence with the College of Arms).

However, a search through the books indicates that some few members of the junior bar are esquires by virtue of membership of one of the other categories. Such esquires would, generally speaking, take precedence in nobiliary terms of their senior brethren qualifying by office alone, thus reflecting "the predominant authority of a different power" (Bagehot, **The English Constitution**).

In conclusion, in order to complete, or to complicate, matters, it should be mentioned that there is a view that the entitlement to the rank of esquire by right of office alone does not extend outside the United Kingdom, and that, accordingly, Queen's Counsel (and Justices and Masters) are not, in the former colonies, entitled to be addressed as esquires. This is an opinion with which the writer does not agree, founding his objection to such view on not only nobiliary law but also common law. However, a fuller discussion on this issue will have to wait for another day.

WALSH OF BRANNAGH

FULL OF STRANGE OATHS

"But above all things, my brethren, swear not, neither by heaven neither by the earth, neither by any other oath: but let your yea be yea; and your nay be nay; lest ye fall into comdemnation"

james v. 12

In a recent case before Judge Howse, **DDP v. Di Clementi and Sinani** (23 September 1983) His Honour experienced some difficulty in establishing whether a twelve year old boy understood the oath sufficiently to be sworn, although the boy in fact attended a religious school. His Honour invited I. Crisp for the Crown to give the boy such instruction as might be needed. The learned Prosecutor declined this invitation.

This incident raises the ghost of an interesting problem which, until it was resolved by statutory reform, plagued the Courts in the eighteenth and nineteenth centuries: a witness incapable of taking the oath could, generally speaking, not give evidence at all. Several murderers had reason to be grateful for this high principle. Such witnesses fell into three obvious classes: infants, non-Christians and the adult ignorant.

The growth of the Empire rendered the second class of some importance in the period of which we speak, but the competence of its members, subject to a proviso was early assured in the well known case of **Omychund v. Barker** (1744), 1 Atk 21 in which members of the Gentoo sect were permitted to give evidence having already been sworn in the following interesting fashion, ". . .the oath prescribed to be taken by the witnesses was interpreted to each witness respectively; after which they did severally with their hands touch the foot of the bramin or priest of the Gentoo religion". The requirement was that the religious beliefs of the witness should enable him to "imprecate(s) the vengeance of God upon him if the oath he takes is false". If so then his testimony would **mutatis mutandis** be as good as any Christian's.

The first and third classes of incompetent witnesses were amenable, as obdurate Pagans were not, to instruction. But this posed a different problem. If a member of such a class were the sole or an indispensible witness, was a prosecution to collapse by reason of the absence of that which catechetical instruction might supply?

The answer was no, and in 1835 the learned Prosecutor in **R v. Williams** (7 Car. & P. 321) is reported to have said that "it is every day's practice to put off a trial in order that a witness may be instructed as to the nature of an oath". However, the results of instruction are in every case, as educationists know, uncertain. On this occasion the child returned to Court after "she had been visited twice by a reverend clergyman" fortified with the information that "she should go to hell if she told a lie". But at this point her knowledge of infernal geography wavered and she added (perhaps in answer to that one question too many) that Hell, she understood, was to be found under the kitchen grate. The report concludes:

> "The child was not examined.
> Verdict: Not Guilty"

The practice of deferring trials for the purpose of instruction until the next session (**Pace** the Criminal Listing Directorate) was deprecated in 1849 by Alderson B as being no better than "preparing or getting up a witness for a particular purpose and is on that ground very objectionable" **R v. Hall** (1849) 14JP 25 Col. 1. Nevertheless, half a century later, the Common Serjeant of the Central Criminal Court adjourned a matter until the following session for this very purpose **R v. Cox** (1898) 62 JP 89

As **R v. Williams** indicates, however, near enough is not good enough in this branch of Dogmatic Theology. But once the concept that Eternal Punishment is the appropriate penalty for perjury is grasped by the witness, his or her position becomes unassailable, whatever other admissions might be made. In the Victorian case of **R v. Lyons** (1889) 15 VLR 15, a

child of eight and a half replied to the usual question, with a perspicacity to be commended, that if she broke the oath she "would go into everlasting fire". The court forbade Defendant's Counsel from cross examining the witness on this question. With a contumelious disobedience wholly uncharacteristic of the profession, Counsel for the prisoner at the first opportunity asked the witness "Do you understand the nature of an oath". She replied "No" — but this was dismissed by the Court no doubt on the well known principle of the incompetence of a witness to express opinions on matters of law — a prohibition which did not in the Court's view extend to matters of Eschatology.

To some extent the sting has gone out of this issue now that witnesses may affirm and children commonly give unsworn evidence. But one might note that, if instruction is to be given by Counsel, then now that the Bar is open to members of many sects and persuasions, the conduct and outcome of such instruction is even less predictable than in earlier days. Yet in spite of this, judicial ingenuity is, we know, inexhaustible, and the example of Hallet J in **Shrinagesh v. Kaushal** (1956) **The Times** Oct. 3, will be present to all minds:

"The parties being Hindus, it was found that a copy of their sacred book was not available. By their Counsel the parties stated that they believed in one God, and his Lordship directed with the Consent of the parties, that the oath should be administered in the short Scottish form".

M. CRENNAN

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SOLUTION TO CAPTAIN'S CRYPTIC No. 46

■	1 M	2 A	N	3 S	L	4 A	U	5 G	H	T	E	R
■	■	T	■	C	■	B	■	L	■	■	■	■
6 N	A	T	H	A	N	J	■	7 A	C	8 T	E	9 D
E	■	A	■	B	■	U	■	C	■	I	■	Y
10 C	A	R	P	■	11 O	R	M	I	S	T	O	N
K	■	■	■	12 C	■	E	■	E	■	H	■	A
13 V	E	14 R	I	L	Y	■	15 O	R	D	E	R	S
E	■	O	■	E	■	16 E	■	S	■	■	■	T
17 R	O	W	L	A	N	D	S	■	18 N	19 I	S	I
S	■	E	■	N	■	I	■	20 A	■	D	■	E
21 E	E	R	I	E	■	22 T	E	N	D	E	R	S
■	■	■	■	S	■	O	■	N	■	S	■	■
23 C	H	A	R	T	E	R	P	A	R	T	Y	■

VERBATIM

Chief Supt. Coysh (Traffic Operations Group) giving evidence about the Ash Wednesday Fires at Beaconsfield —
"I saw the fire travel at an excessive speed across the highway."

Cor. Ellis SM. Coroner
Pakenham Magistrates' Court
14th November 1983

● ● ●

From a Police Antecedent Report —
"...He assisted Police through enquiry and spoke freely of the above mentioned offences. Record of Interview as conducted, he agreed true and correct but would not sign same. He agreed to initial the spelling and styping errors. He was totally co-operative in this enquiry."

Cor. Judge Spence
19th October, 1983.

● ● ●

There are only two kinds of people I don't particularly trust. One are barristers. The other are newspaper reporters. They try to make capital out of things that are done wrongly, said wrongly.

Brian Ritchie
Chief Inspector of Police
Reported in "The Age"
18th October, 1983.

● ● ●

"Much has been said to me about the liberty of the subject, but I have not much respect for the liberty of a subject who deserves to be imprisoned."

Per Kay J. **Petty v. Daniel** 34 Ch. D. 172 at 181.

Cited with express approval and applied by Kekewich J. in **re Evans** (1893) 1 Ch. 252 at 256.

Examination-in-chief of Italian witness through an interpreter.

Prosecutor: Did Mario go towards the car?

Witness: Yes, and he asked them to move the car.

Prosecutor: My trouble is this. I am only allowed to let the jury hear certain of the evidence and I cannot let them hear evidence of the conversation. So do not worry about the conversation, just tell us what you saw.

Witness: Well, I saw Mario ask them to move the car.

R. v. Waters
Cor. Judge Read & Jury
October 5, 1983.

● ● ●

The **Bar News** is just an undergraduate magazine.

Kennan, M.L.C.
Attorney-General
October, 1983.

● ● ●

In a County Court Appeal in which the Appellant was charged with hindering Police who were arresting a third person:
Prosecutor: And what was Sergeant Evans doing?

Constable: He was sitting on top of (the third person).

Prosecutor: And why was he doing that?

Constable: He was trying to seduce him.

His Honour: Do you mean subdue him constable?

Constable: Yes Your Honour.

Nicholls v. Evans
Cor. Judge Dixon
16th November, 1983.

● ● ●

In the course of summing up the evidence in a running down case —
"...Somebody ought to tell the Defendant that he should watch what he says in Court. I was mindful to send him to Pentridge for a while but then I thought that was an inappropriate course to take in respect of such a first class comedian."

Jones v. Cust
Cor. Judge Lazarus
29th September, 1983.

Mouthpiece

Most of the books on advocacy have a section about making pleas. The accepted wisdom is that a plea must be tailored to its own facts, for it is unique. For that reason, so it is said, it should sound unique. The advocate must try to find something in his material to show how special this case is.

A moment's thought will demonstrate that all the books are quite wrong. The fact is that each plea should be the same. If it isn't the advocate and the judge will be confused. Especially the judge. All he wants to know is what pigeon-hole to put the case in. He will probably have only a few pigeon-holes. I once knew a judge who had ten or so, but he is an exception and not really worth talking about.

The wise advocate will do his best to slot his client's case into the appropriate pigeon-hole of the judge. For an average judge they are —

Young person/old person of good character gone wrong — minor aberration — stern talking to — bond.

Down to,

Hardened crim. with bad record on serious charge — take no nonsense — give some concurrency to show you are a man of the world.

Now there are some well known ways of making a rattling good plea and achieving the desired result. Such a plea depends on a mixture of —

(a) cliche and hackneyed phrase;
(b) misquotation;
(c) using words in their incorrect sense,

remembering that you must commence every plea with your client's age, date of birth, and position in the family.

Now for an example —

> "Your Honour, the prisoner has pleaded guilty to two counts of robbery having been born on the 18th December 1960 which he will be 23 at the end of this year."
> (Note the clever use of incorrect syntax. As difficult for an educated mind as for a good musician to play out of tune deliberately.)

"He was the third and last of three children. At an early age he was left to the tender mercies of his own resources. When a mother should have been a tower of strength, in actual point of established fact he was knocked from pillar to post."

"Life's a fortune and it is an irony of fate that he comes to you through a comedy of errors. He placed his trust in the co-accused as his guide, philosopher and friend in this particular case. His generosity makes him his own worst enemy. The co-accused led him astray and tempted him with the ill gotten gains when my client thought and believed that he was doing a favour free gratis and for nothing!!

At this you may expect the judge to interrupt.

"But wasn't your client the ringleader?"

There is only one reply.

"Not in any way shape or form Your Honour".

Now go on with the plea, as this universal response will keep any decent judge happy and quiet.

"The last participant in this nefarious escapade is conspicuous by his absence. All the same, for my client, this charge may be a blessing in disguise. He was caught in the nick of time in terms of being at the crossroads of life."

This is brilliant stuff.

"The prisoner tells me that there is no rhyme or reason why he can't make compensation to the powers that be, irregardless. I don't want to gild the lily or put too fine a point on it but he has been more sinned against than sinning."

"Last but not least, Your Honour, he has implicit confidence in his ability to turn over a new leaf. There must be some glorious uncertainty about this so far as the prisoner himself is concerned but in his blissful ignorance he throws himself on the mercy of the court."

BYRNE & ROSS DD

LAWYER'S BOOKSHELF

AUSTRALIAN CONSTITUTIONALISM

R.D. Lumb

Butterworths, 1983, XVI & 176 pp. Limp, $23.00.

Constitutional law has always been regarded by lawyers as somewhat of a singular field. Perhaps this is partly because a number of disciplines and professions apart from lawyers claim an interest and a voice in its affairs; political scientists, philosophers, historians, economists, and politicians all see it as a legitimate area of concern. There is also the view that constitutional law is a law above the law, or a fundamental law and it therefore requires a particular aptitude or skill.

Nevertheless, for an author to threat the Constitution as just another Act of Parliament and to produce an annotated text in the fashion of many legal books on particular Acts can obviously be a legitimate and useful exercise. However, such an approach no matter how detailed can only be of limited use without some understanding of what a Constitution is and for what particular role and purpose its various sections exist. A knowledge and understanding of the basics is an essential requirement, not only for a proper comprehension of the contents of the Constitution itself, but also for any useful participation in the day to day legal problems which are or can be affected by it. Such knowledge and understanding has become particularly useful in the last decade when the Constitution has again become something of much debate. Yet short of a return to Constitutional Law I and II, the opportunity for those whose University days are well behind them, to readily and easily re-acquaint themselves with the basics has been, of late, somewhat lacking.

Butterworths has now sought to remedy this deficiency by publishing this short text which it describes as "an exceptional new book that offers a rare back-to-basics approach to Australian Constitutional Law". The notes on the author contained in the book itself are disappointingly brief and reveal little more than he is Professor of Law at the University of Queensland with the degrees of LL.M. from Melbourne and Ph.D. from Oxford. The current issue of Who's Who is Australia however is more informative It reveals that Professor Lumb is 49, seemingly from Victoria (educated at Xavier College and the University of Melbourne), and the author of **Constitutions of the Australian States** (1977), **Constitution of the Commonwealth of Australia**, Annotated (1981) and **Law of the Sea and Australian Off-Shore Areas** (1981) as well as a number of articles on Constitutional Law.

The book's title "Australian Constitutionalism" is both interesting and accurate. It highlights two things. First the unique nature of Australia's Constitution. Second, that what is being examined is a concept of Government itself rather than a system of laws relating to or concerning the relationship between government and people The writer has divided the book up into two logical parts. The first part deals with the background to the Constitution including its historical and philosophical origins and the separate influences of Britain and the U.S.A. Chapter 1 of the first part deals with the meaning of Constitutionalism and the related concept of democracy. Typically it is only three pages long with the footnotes (which are grouped at the back of each chapter) occupying another page.

The remaining chapters of the first part deal with Natural Law including the philosophy of Locke and Hobbes; the British Constitution; the United States Constitution; and lastly British and American influences on the development of Australian Constitutionalism in the nineteenth century. In the chapters on the British and U.S. Constitutions the author extracts what he sees as their major features and briefly contrasts and comments upon them.

Professor Lumb adopts a similar approach in the second part of the book. Six of the seven chapters in this part deal with major features of the Australian Constitution. These include Representative Government; the Separation of Powers and Responsible Government; Bicameralism; Judicial Review; Federalism and the Division of Power; and Constitutional Amendment. In the twelfth and final chapter the author allows himself to contemplate future Constitutional developments including a number of the proposals mooted in recent times.

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Lawyers are likely to feel more familiar with the second part of the book. Throughout these chapters the author refers to and expounds a number of judicial decisions, using them to illustrate the various constitutional concepts and to show the changes which have occurred in the interpretation of these concepts. He quotes Professor Sawer's famous 1967 comment that Australia was the "Frozen continent, constitutionally speaking" but notes that the events of the last decade have shown that that description if once appropriate, is no longer so.

Scattered throughout the book are also a number of interesting ideas and insights such as the argument on pages 62 and 146 that the American system of party primary elections may be a desirable way of restraining control of Parliament by the various political parties through their otherwise unconstrained choice of candidates.

Production and presentation of the book are generally of a high standard despite the odd typographical and textual error. The Index, Table of Cases, and Table of Statutes could be described as adequate rather than full for a book of this nature. The Bibliography however which contains references to many recent works will provide much interesting reading for those so inclined.

The author, given the multi-disciplined approach which is required for such a work, is to be congratulated in that he has condensed such a major undertaking into what is a relatively small book without sacrificing its readability and interest. But, doubt whether the book really is about the basics, if that term means the basic principles for those who have no knowledge whatsoever of the subject. Rather, the book seems to be written for the educated layman or a practitioner with some knowledge of the topic but who, nonetheless, wishes to acquaint or re-acquaint himself with the concepts and principles involved. It does not require any major effort of time or willpower to enjoy this book. On the contrary, those interested in the subject will read it through in one or two sittings and derive much information and pleasure in the process.

SHARP

MELBOURNE MAGISTRATE'S COURT

Change of Telephone Number

The telephone number at this Court has been changed to:—

667 6111

Direct contact is available as shown to the following officers:—

Clerk of the Magistrates' Court, Melbourne	667 6126
Court Co-Ordinator	667 6136
Chief Stipendiary Magistrate's Secretary	667 6163

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Summer 1983

MORE UNREPORTED JUDGMENTS OF THE COURT OF CRIMINAL APPEAL
— No. 4 —
December 1983

EVIDENCE

Misconduct on prior occasions properly admitted — (a) to show a pattern or system of behaviour; (b) to rebut a possible defence.
R. v. Rehshat August 15, 1983

APPEAL

Appeal — Fresh Evidence — Onus lies on the applicant to satisfy the court that the evidence fresh — Evidence led on appeal — Return of memory is fresh evidence – Court rejects evidence. **Ratten** discussed.
R. v. Stramandinoli September 7, 1983

CONSPIRACY

The fact of combination and acts done in pursuance of it are often confused because the acts of individuals may be evidence of both. Detailed consideration of treatment of such evidence in judge's charge. (**R. v. Zampaglione** C.C.A. 28/4/1981 explained)
R. v. Minuzzo & Williams September 15, 1983

IDENTIFICATION

Identification of the accused from a progression of defendants brought for remand to dock of Melbourne Magistrates' Court — Comment by Murray J. that this is not "dock identification".
R. v. Mansfield November 11, 1983

JUDGE'S CHARGE

— It is not proper for a judge to direct a jury as to which of a number of counts they should consider first, although he may make a suggestion of that sort. — A judge must direct a jury on what evidence is relevant to what counts.
R. v. Dillon November 8, 1983

PRACTICE

Where there are various counts each of which has various alternatives the proper manner of taking a verdict is to go down the presentment in order of seriousness to take a verdict on the first count and then if there is an acquittal on the offence charged to take verdict on each of the alternatives to that count. Not until that is done should a verdict be taken on the second count, assuming that it is next in seriousness, and then to proceed in the same way down all the counts on the presentment.
R. v. Bradshaw September 9, 1983

SENTENCE

Sentencing judge fails to acquaint counsel with psychiatric report, contrary to **R. v. Carlstrom** (1977) VR 366. CCA sets aside sentence and resentences the applicant after hearing evidence and obtaining reports.
R. v. Harding October 28, 1983

Elaborate detailed findings of fact and conclusions are not required of a sentencing judge.
R. v. Mayor September 13, 1983

SEXUAL PENETRATION

"This Court should now remove any doubts making it clear that **DPP v. Morgan** (1976) AC 182 is to be followed in Victoria. A mistaken belief in consent need not be reasonable: the reasonableness of the belief bears only on its existence."

Evidence of fresh complaint may be admitted on a charge of rape notwithstanding that the complaint is not of rape.
R. v. Saragozza October 5, 1983

VERDICT — Inconsistent

Jury acquits of robbery but convicts of assault with intent to prevent lawful apprehension — **R. v. Nanette** (1982) VR 81 applied. Conviction quashed.
R. v. Mansfield November 10, 1983