Victorian Bar News

SPRING 1985

BAR COUNCIL REPORT

Election Results

The following were declared elected to office on the 30th September 1985.

Counsel of not less than 12 years' standing

N.R. McPhee Q.C.
J.J. Hedigan Q.C.
J.E. Barnard Q.C.
P.A. Liddell Q.C.
S.P. Charles Q.C.
A.W. McDonald Q.C.
D. Graham Q.C.
P.D. Cummins Q.C.
M.J.L. Dowling Q.C.
E.W. Gillard Q.C.
A. Chernov Q.C. (Chairman)

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

D.L. Harper (Treasurer)
B.A. Murphy
D.J. Habersberger
M.B. Kellam

Counsel of not more than 6 years' standing

J.E. Middleton
A.L. Cavanough
C.J. Ryan

Portrait

It has been resolved that, subject to the Executive Committee approving the artist and the cost involved, the Bar Council agrees to join with the Law Institute of Victoria in contributing to the cost of a portrait of the Chief Justice, the Honourable Sir John Young, such portrait to be hung in the Supreme Court Library.

Congratulations

It was resolved that the Chairman write a letter of congratulations to the new Lord Mayor, Councillor T.S. Lynch.

Presentation by the Law Institute

On the 24th June the Law Institute held a small function at their premises when the Chairman was presented with a silver salver to mark the centenary of the Bar. The Law Institute Executive suggested that the salver be used in the Chairman's room rather than be placed in the cabinet on the 13th Floor. The Bar is grateful to the Law Institute for its gift and good wishes.

Bar Archives

Merralls Q.C. has been requested to look after the archives of the Bar.

Venue for 1986 Bar Dinner

The Leonda Convention Centre will be the venue for the 1986 Bar Dinner which will be held on Saturday 31st May 1986.

Legal Aid Task Force

The Bar Council has had occasion to consider a report of the Legal Aid Task Force. The Task Force was established as a result of a decision by Federal Cabinet in December 1983 for the purposes of examining cost effective practices and considering ways of insuring a uniformity of approach between Legal Aid agencies in all the States and the Territories. The Task Force considered a wide range of issues, one of particular interest to the Bar being the idea of employing salaried Counsel. The Bar Council strongly opposes the concept of salaried Counsel for a number of reasons. These included a concern for the independence of Counsel in the giving of advice and in representing clients, and an apprehension of a reduction in professional skills if Counsel were required to perform tasks other than those customarily performed by Counsel. The Bar Council further argued that it was against the public interest for salaried Counsel to be retained by Legal Aid Commissions. These arguments were accepted by the Legal Aid Commission of Victoria and adopted by the Law Council of Australia. The Law Council of Australia submitted a lengthy report to the Federal Attorney-General incorporating the Victorian Bar's arguments. The Task Force has now released a final report which recommends, contrary to the Law Council's submissions, that salaried Counsel be engaged, at least upon a trial basis. The Law Council and the Victorian Bar are both in the process of making further detailed submissions to the Commonwealth Attorney-General upon this matter.

Proposed Alterations to the County Court Jurisdiction

The Courts Amendment Bill contemplates an increase in the jurisdiction of the County Court to $100,000 in civil non-personal injuries matters. The Bill also proposes concurrent jurisdiction with the Supreme Court in matters arising under the **Property Law Act**, the **Transfer of Land Act**, the **Settled Land Act**, the **Strata Titles Act** and the **Administration and Probate Act.** The Bar Council has resolved to oppose these proposed changes on the ground that they are contrary to the best interests of litigants and other members of the community generally in this State. The Bar Council

considers that the creation of concurrent jurisdiction in land matters, in particular, is an unwise use of available expertise being the expertise which now exists in the Supreme Court and the expertise of those members of the Bar who practise in matters concerning land. Other relevant considerations were considered to be the fact that jurisdiction in relation to land, in particular, would be a new jurisdiction for the County Court and further there are no reports of County Court decisions. The Bar Council less strongly opposed concurrent jurisdiction under the **Administration and Probate Act.**

Accommodation

The Bar Council has resolved that the new building be named "Owen Dixon Chambers West".

The Accommodation Committee chaired by Hansen Q.C. is well advanced with plans for the re-location of barristers when the new building is complete. On 24th September 1985 the Bar Council passed the following resolution with respect to this matter —

(a) The new building should be filled as soon as practicable;

(b) Sub-leases of Aickin Chambers (except the 27th floor), Latham Chambers, Equity Chambers and Stawell Chambers should be terminated to coincide with the availability of chambers in the new building;

(c) The temporary right for counsel under five years' call to share chambers should be withdrawn upon chambers becoming available;

(d) A substantial proportion of internal rooms in Four Courts Chambers and the new building as well as of "C" Rooms in Owen Dixon Chambers and "C" Rooms in the new building facing Guests Lane (below the 15th level), be reserved principally for counsel under five years' call;

(e) The rent of large rooms in Owen Dixon Chambers be raised to reflect the amenity offered by such accommodation and such increase be used to reduce the rent of the internal "C" rooms in the new building.

The Bar was informed of these Resolutions by Circular dated 1 October 1985. As a result of representations made at meetings of counsel who occupy the various chambers threatened with closure, and later by individuals, a joint meeting of the Bar Council, the Directors of Barristers' Chambers Limited and the Accommodation Committee has resolved that a Committee consisting of Shaw Q.C. (Chairman), O'Callaghan Q.C., Forsyth Q.C., Harper and N. Magee consider and report to the Bar Council on the following matters.

a) In allocating rooms in O.D.C.W., should any and if so what priority be given to counsel who are required to move from Aickin, Latham, Equity and Stawell Chambers (outlying chambers)?

b) In allocating rooms in Four Courts Chambers which become vacant because of counsel moving from that building to O.D.C. or O.D.C.W., what principle should be applied as between applicants for such rooms from the outlying chambers?

c) Should the policy against sharing be relaxed in any and if so what circumstances and to what extent to compensate for any hardship that may be suffered by counsel from outlying chambers as a result of their compulsory dislodgment from those chambers?

d) Should any policy be implemented to make space available in Four Courts Chambers for counsel compulsorily dislodged from any of the outlying chambers?

e) How should seniority be taken into account in the context of group applications for rooms in O.D.C.W.?

That meeting also requested Barristers' Chambers Limited to consider the question of whether the requirements of the Bar for future accommodation are such as to make it desirable to retain the Bar's tenancy of any part of Aickin, Latham, Equity or Stawell Chambers.

Applications for accommodation in Owen Dixon Chambers West have not yet been called for.

Fees

The proposed increase of 6% sought by the Criminal Bar is a matter which is presently being pursued with the Legal Aid Commission.

A Fees Tribunal Bill has been received and will require further consideration. Two matters, however should be noted. One is that notwithstanding that the Civil Justice Committee recommended that the Tribunal be chaired by a Supreme Court Judge, the Bill proposes that it be chaired by the President of the Industrial Relations Committee. The other matter relates to the proposal that counsel will not be able to collect fees in excess of the scale fee as set by the Tribunal unless a written waiver has been obtained from the solicitor. The Bar Council is making representations to the Attorney-General which are critical of these matters.

WELCOME: JUDGE NEESHAM

If diversity of legal (and other) experience makes for good judges, then the judicial future of His Honour Judge Thomas Antony Neesham QC, appointed to the County Court on 1st August, 1985 seems assured. A Captain in the Royal Military Police, who became the Deputy to the first Victorian Ombudsman, now finds himself sitting on the County Court bench.

No one who has ever heard Tom speak will be surprised to learn that he comes from Bristol, where he was born on 11 th May, 1932. He was educated at Bristol Grammar School and then at London University, where he took a Bachelor of Laws degree. After keeping terms at Lincoln's Inn he was called to the English Bar just in time to be called up for National Service. He undertook his military training in the Royal Military Police, which he entered as a Private and left almost four years later as a Captain.

Military service over, in 1960 Tom decided to emigrate. He arrived in Australia and was admitted to practise in Victoria on the basis of his having been called to the English Bar. After overcoming the initial migrant's culture shock, he worked for a year, as a solicitor, for Arthur Robinson & Co. to "find out what it was all about". In 1961 His Honour entered the Chambers of the late Ivor Greenwood (Senator and sometime Federal Attorney-General) as Greenwood's first Reader.

A busy career in crime and matrimonial causes, town planning and almost anything else that came along followed. His room in Owen Dixon Chambers (No. 404) was soon liberally strewn with depositions, plans, maps and the other paraphernalia of the town planning jurisdiction and, of course, discretion statements. Readers occupied a desk in the corner while Tom, with feet often on desk, discussed burglary, shopping centres and adultery with solicitors and clients.

In 1972 His Honour sought refuge from private practice by once more accepting the Queen's shilling and becoming a Crown Prosecutor. Shortly thereafter he was appointed assistant to Mr. J.V. Dillon (later Sir John Dillon), Victoria's first Ombudsman — a post he was to hold until early 1981 when he returned to the Bar. He took silk in 1983 and shortly thereafter accepted a position as Chairman of a Board of Inquiry into aspects of the Victoria Police Force. His report in respect of that Inquiry was presented almost contemporaneously with his appointment to the Bench.

Tom Neesham shares the Englishman's love of dogs and horses. He has four grown-up children. His tastes in literature are English if not catholic, and include Alice in Wonderland and Winnie the Pooh.

One could not imagine a better background for an appointment to the County Court. Although he has been sitting for only a few weeks (and has already had a fortnight's holiday) the casual observer would be convinced after only a short time in his court that he had been a judge all his life.

The Bar wishes Tom Neesham well in his appointment. If he approaches it in the same way he has approached the other aspects of his diverse career to this date one can feel confident that he will be a wise and courteous judge.

FOR THE NOTER UP

Corrigendum

County Court				
Byrne	59	22.10.25	1972	1997
Add				
Neesham	53	11. 5.32	1985	2004

ATTORNEY-GENERAL'S COLUMN

The Spring Session of Parliament is about to commence. I propose to introduce a number of items of legislation of interest to the Bar. In the last few weeks I have sought the views of the Bar on a number of these proposals and have received valuable suggestions. Among the legislation which I plan to introduce is the following:

COURTS AMENDMENT BILL

This Bill incorporates a number of recommendations from the report of the Civil Justice Committee which was released last year. A number of recommendations of that report such as the expansion of pre-trial conferences and the appointment of a County Court Master have already been implemented. Consultation and planning is continuing in relation to a number of other recommendations. The main features of the Courts Amendment Bill will be:

(i) Senior Status Judges: This proposal is to supplement the Judge-power of the Supreme and County Courts by providing that retired Judges who are 60 but not 70 be appointed as Judges for a limited period to assist in disposal of the business of the Courts. It will enable the Courts to temporarily replace Judges who are absent by way of illness or leave. It will also enable the Courts to increase their Judge power temporarily for the purpose of blitzing backlogs in particular lists.

(ii) Councils of County Court Judges & Magistrates: A major recommendation of the Committee was that the Judges of the Supreme and County Courts and Magistrates should have a major role in the planning and management of their respective Courts in a partnership arrangement with the Executive Government. The Bill will provide for the establishment of a Council of County Court Judges and a Council of Magistrates which will take increased responsibility for the administration of their Courts.

(iii) Retiring Age for Judges: To bring Victoria into line with other States and Federal Judges it is proposed to reduce the retiring age for Judges from the present 72 to 70 years.

(iv) Increased Jurisdiction for the County Court: It is proposed to increase the general jurisdictional limit of the County Court to $100,000 in all cases and to provide that the Court should have the same power to grant injunctions and declarations in respect of land as the Supreme Court up to the jurisdictional limit. The Court will also be given jurisdiction up to the limit under the Property Law Act and Transfer of Land Act and the Administration and Probate Act.

(v) Powers of Contempt in the County Court: It is proposed that the County Court be given the same powers and authority presently held by the Supreme Court in respect of contempt of Court. The County Court will also be given a wider power over costs so that, as in the Supreme Court, costs may be awarded against a practitioner personally.

PENALTIES & SENTENCES (AMENDMENT) BILL

As I indicated in my last column earlier this year I released a discussion paper on sentencing laws. I have had many responses to the options canvassed in that paper from members of the Bar as well as from the judiciary and other interested parties. I will be introducing legislation to make a number of changes which will restore the authority of the Courts in sentencing while widening the options available to Judges and Magistrates. The changes include:—

- Sentences are to commence on the day on which they are imposed and not to be backdated to the commencement of the Court sitting.
- The present provision allowing for pre-discharge temporary leave will be tightened up to ensure that it is only used where specific criteria are met.
- A provision allowing the Office of Corrections to transfer prisoners from prison to Attendance Centres by administrative action will be repealed.
- Courts will be able to take into account remissions when sentencing offenders. Remissions will be credited to offenders at the start of their sentence.

— The distinction between Attendance Centre, Community Service and Probation Orders will be abolished. Courts will be empowered to impose community based orders, which will be equivalent to probation and also to impose special conditions on those orders including a combination of community work, attendance at a community correction centre or specialised supervision or drug treatment.

— The pre-release program will be modified so that it only applies to prisoners sentenced to at least 3 years and then only the last 6 months of sentence.

— A new sentencing option, a suspended sentence, will be provided for Judges and Magistrates.

— A further sentencing option, a split sentence, which will allow the Court to impose a custodial sentence of up to 3 months combined with a community based order of up to 2 years will be legislated for.

— In addition it is proposed that the Penalties & Sentences Act will consolidate all sentencing provisions in the one Act.

— Finally, an expert Committee chaired by Sir John Starke will carry out a detailed examination of sentencing laws including an evaluation of effectiveness of various sentences, penalties and treatment programs.

EVIDENCE (AMENDMENT) ACT

A Family Conciliation Centre has been established in Noble Park as one of two pilot projects funded by the Federal Attorney-General's department. The Centre provides free and confidential information to family members with the aim of assisting them to resolve family disputes. As many of these disputes involve defacto spouses or grandparents and grandchildren they are not covered by the Family Law Act. It is therefore proposed to amend the Evidence Act to confer the same confidentiality provisions to family mediation sessions as currently applied to marriage counselling sessions under the Family Law Act. The Bill will provide that parties to a family mediation session will be protected from actions for defamation, that staff acting in good faith will be protected from suit and to provide that agreements made at mediation sessions should not be enforceable.

CRIMES ACT AMENDMENTS

I have been concerned to ensure that the Crimes Act is progressively revised to keep it up to date and responsive to community needs. The Criminal Law Working Group has completed a report on the law of attempt and in this session I propose to introduce legislation to implement that report. The existing law will be clarified by reducing it to statutory form and problems in the law relating to impossibility, jurisdiction and penalties will be simplified. The amending Bill will also revise the law relating to offences against the person. Sections 11-43 of the Crimes Act date from 1861 United Kingdom legislation. The present legislation is confusing because considerable overlap exists between a number of offences. Further there are a large number of anachronisms and the emphasis on railways and gun-powder does not conform to modern needs. In addition, the provisions are expressed in language inappropriate to present social usage. The present provisions unnecessarily complicate the essential issues before tribunals of fact and simplification and consolidation will allow for a concentration on the central elements of criminality.

ADMINISTRATIVE LAW ACT AMENDMENT — UNIVERSITY VISITOR

I propose to submit to Parliament an amendment to the Administrative Law Act to provide that an aggrieved member of a University should have the option of taking proceedings under the Administrative Law Act rather than present procedure of an exclusive appeal to the University visitor. Members of universities are currently disadvantaged compared with other members of the community by virtue of the provisions of the Administrative Law Act which excludes the jurisdiction of the Court. The matters determined by the visitor are often very significant and can effect the future livelihood and career of an individual, academic or student and it is in the community interest that these matters be the subject of judicial scrutiny.

COURTS ADVISORY COUNCIL ESTABLISHED

In August I announced the establishment of a Courts Advisory Council which will monitor the introduction of the Government's program to reform the administration of the Courts system. The 14 membered Council will be chaired by the Chief Justice of the Supreme Court, Sir John Young. It is designed to improve communication across the whole Court system and oversee fundamental reforms to the system. The establishment of the Council is a recommendation of the Civil Justice Committee which is referred to above. Members of the Council are the Chief Justice, McGarvie and O'Bryan JJ of the Supreme Court, Chief Judge Waldron, Judge O'Shea from the County Court, Chief Stipendiary Magistrate Alex Vale, Deputy Chief Stipendiary Magistrate John Dugan, Mr. Dick Stanley Q.C. of the Bar, a Solicitor, Mr. Bill Clancy, a management expert, Mr. Bill Byrt, Ms. Mary Paton, Director of Nursing, Royal Children's Hospital, the secretary Professor David St. L. Kelly and the Deputy Secretary of the Law Department, Mr. John B. King, Professor Bob Baxt and a representative of the Department of Management and Budget.

OPENING OF THE COMMERCIAL ARBITRATION CENTRE

On 8th August, 1985 I opened the Australian Centre for International Commercial Arbitration which is located in the World Trade Centre. This Centre will encourage the arbitration of disputes arising under international agreements and will reinforce Melbourne's role as the commercial centre of Australia. There is a world trend towards international commercial arbitration and there has been a recognised need for a centre to serve the South East Asian and Pacific rim countries. The Centre will also assist in development of trading relations with China and Japan and parties which are signatories to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards will be encouraged to arbitrate in Australia as a result of the establishment of the centre. It is well recognised that the settling of a dispute by arbitration enables the matter to be resolved speedily and cheaply by an arbitrator with expertise in the subject matter of the dispute.

SHORTER TRIALS COMMITTEE REPORT

The long criminal trial is one of the most serious problems facing the criminal justice system The report of the Shorter Trials Committee therefore comes at a propitious time and will I believe be seen as a milestone in improving the administration of justice. The report is comprehensive and is addressed to all the participants in the criminal justice system — Judges, practitioners, Government departments and agencies, educators and the public generally. I am anxious that its recommendations be implemented because without them our system of criminal justice will drift into crisis. A number of the recommendations can be implemented without legislative change but those recommendations requiring amendments to the Crimes Act, the Evidence Act, the Legal Aid Commission Act and the Penalties and Sentences Act will be introduced this session.

CORRECTIONS BILL

The legislation governing the operation of the Office of Corrections is presently contained in the Community Welfare Services Act and a number of other acts. The Bill will provide for the functions of the Office of Corrections, appointment and discipline of staff and a disciplinary regime for prisoners. The Bill will also contain for the legislation governing community corrections.

KENNAN

FAMILY LAW BAR ASSOCIATION

Professor David Hambly, the Australian Law Reform Commissioner enquiring into Matrimonial Property Law invited members of the Family Law Bar Association to meet with him for an interchange of views on the matters in his discussion paper issued early in July. A well attended meeting was held at Four Courts Chambers on the 31st July where lively debate took place. The Association is most grateful to Professor Hambly for the opportunity afforded to us to air our views. Notwithstanding the discussion, written submissions are still sought by the Law Reform Commission. Copies of the discussion paper can be obtained from Kay's Chambers and all views (no matter how outrageous) will be forwarded on to the Commissioner.

On the 5th July 1985, the Melbourne Registry of the Family Court re-structured the pre-trial list by having Registrars exercise powers pursuant to Section 37A of the Family Law Act. There was initial confusion and certain grossly unsatisfactory aspects of the manner in which that was implemented. There was, however, immediate discussion between the Registrar and members of the Family Law Bar Association with implementation of almost all the recommendations of the Association. Whilst the initial confusion was unfortunate, the co-operation of the Court with the profession in sorting out the problems was most welcome.

Most readers of this august journal will no doubt have been exposed to the remarks of Chief Justice Gibbs at his welcoming address to the 23rd Legal Convention. Those remarks have been viewed by the Association as untimely, unfortunate and wrong. A public reply to the remarks has been made through the Family Law section of the Law Council of Australia.

KAY

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APPOINTMENTS

The Bar takes great pride in welcoming two of its members to the magistracy.

Margaret Rizkalla becomes, we think, both the first woman magistrate in the State, and the youngest.

Sally Brown thus becomes the State's second woman magistrate.

VALE — PERCY DEVER

To few men is accorded the achievement of becoming an institution within their own lifetime, but Percy Dever during his allotted span achieved just such a status. For years to come it will be difficult to think of our clerking system without remembering his cheerful face and exuberant personality.

Percy Roy Dever was born at Williamstown on the 10th day of May, 1915, the second son of George and Cora Dever. He was educated at North Williamstown Primary School but, like so many boys at the time of the Great Depression, Percy left school at fourteen to seek work. In August, 1930, he found employment as a messenger boy at Blake & Riggall, and later graduated into their costing department. Although law clerks in those days worked a five and a half day week, in his spare time Percy nevertheless trained with the Royal Australian Naval Reserve.

In May, 1943, Percy went on active service with the Royal Australian Navy and after training at Cerberus, he went on patrol boats in the Indian Ocean, New Guinea and in the Pacific area. In February, 1945, he joined the HMAS Australia, trained on torpedoes and was in the Australia when it made its final wartime voyage through the Atlantic to England for refitting. At the close of the War, he returned to Melbourne and early in 1946 was attached to Lonsdale prior to his demobilisation.

It was during this period that the grand old law clerk Arthur Nicholls, who was then approaching the zenith of his power, sent for Percy to discuss with him a job in his office. Arthur had eventually inherited the list originally established by William Theophilos Druce in or about 1860. Druce was born at Liverpool, England in 1841 and migrated to Australia in 1852. He lived at Emerald Hill and worked as a clerk until as a very young man he first established his business at Temple Court. Druce moved his business to Michie's building, which for a time was the main home of the Bar, but after Selborne Chambers was built in 1881, Druce and most of his list eventually moved to what had then become the Bar's main building. In 1892 Druce was joined by his son, Frank, who inherited the list when Druce died in 1911. In turn, Arthur Nicholls, after serving in the 1914-18 War, joined Frank Druce.

Arthur Nicholls' list thus enjoyed the longest continuous history in the life of the Bar and then included amongst its silks P.D. Phillips, Donny Campbell and Bill Coppel, such prominent members of the middle bar as Reg Smithers, Greg Gowans and "Snowy" Burbank, whilst his up-and-coming juniors included John Starke, Lionel Revelman, Tony Murray, Bill Kaye and Jack Mornane. Arthur (nicknamed "the Kingmaker") was a shrewd judge of persons and decided Percy had all the necessary attributes for the job. In March, 1946, Percy joined Arthur's office at Room 27 on the ground floor of Selborne Chambers. In him Arthur found the ideal employee — loyal, efficient, thorough and dedicated, whilst Percy found what was to be his chosen career for the next 39 years.

Percy Dever quickly became a well known figure in Selborne Chambers and was one of the "Solo school", which met at lunch time in the room then shared by Mornane and Revelman, and from which emanated those singularly inappropriate noises disturbing other barristers more zealously employed. Eventually Arthur Nicholls decided the Solo games were inconsistent with Revelman's mercurial rise in status, and the game sadly dwindled away to its eventual extinction.

In 1953 Arthur took Percy into partnership, and on Arthur's retirement after the move to Owen Dixon Chambers, Percy became the sole owner of the business. As such he became a noted "salesman" of his list, securing a very considerable volume of all barristers' work for his men.

It is most important that, although the Clerk "sells" the services of his barristers, the solicitor must also be able to rely on the judgement of the clerk when the clerk recommends one of his barristers for a particular brief. Very many solicitors came to rely on Percy's judgement and, if at times Percy perhaps praised his barristers a little too warmly, he was quick to warn them of the expectation he had already created in the solicitor's mind.

He was very much a team man. The barristers for whom Percy worked became a team and he was much sought after by young men coming to the Bar who wanted him as their Clerk, and by Solicitors who wanted his barristers. That intense dedication, which can scarcely be overemphasised, ensured a great service to all who came to him. To Percy himself it brought a reputation of pre-eminence within the law. Long before 9 each day he was already at his desk and except for a brief lunch he was there until 5.30 p.m. with never an idle moment. Even when he went home, the black book containing his barristers' Court engagements invariably went with him. The solicitors who rang late at night or on the weekend received swift, courteous and friendly assistance. The barrister who found himself holding briefs in two lists on the one day knew that the ever reliable Percy could somehow save the situation, no matter how late the problem had been neglected by Counsel.

Percy felt his job precluded him from ever taking long holidays and he was never far from his list, even during Court vacations. He took great pride in the success of his barristers and when, as happened, so many of them were elevated to judicial positions, he continued to watch their careers with warm and friendly interest, and equally they too often dropped over for a friendly chat.

If at times Percy was impatient, it was the problem of a man who had to fit too many hours work into each working day. But his irritation was momentary and almost invariably his basic cheerfulness soon crept back.

The Bar will remember him not only for all he did for his barristers, but also for his human and endearing characteristics. He loved a joke and to bring mirth to those around him. At the end of the day he liked to be with his friends for a few beers. He loved his home and his garden, and on weekends he loved fishing. When his barristers were overseas Percy delighted to receive the cards they sent depicting the places to which he knew, because of his job, he would never go, and if the cards portrayed unadorned feminine pulchritude so much the better.

Who can forget Percy's desk, its mass of slips of paper with messages on them, and his aged blotting paper, liberally tattooed with phone numbers, doodling and outmoded memos so that it was more black than white. When one day late in 1982 Mr. Justice Kaye paying one of his periodical visits to Owen Dixon Chambers dropped into Percy's room, looking at Percy's blotting paper His Honour exclaimed "Dever, when are you going to get a new piece of blotting paper? That one has been there at least fifteen or twenty years." "That's not true" said Percy, "Sir Keith Aickin gave me that piece when he went to the High Court". (For the record Sir Keith was elevated in 1976).

Turning to Bill Hattam, Kaye J. said "Bill, go down the street, buy some blotting paper at Harstons and charge it to Mr. Dever." Came the rejoinder from Percy — "Bill, when you are down the street, buy some hair restorer for His Honour and charge it to His Honour".

Who too will forget Percy's frequent introduction to the latest gossip. "This is strictly confidential and you're not to hear it but. . ."

Despite his somewhat frugal nature Percy had a very generous streak. He assisted Legacy, Lion's Club and a number of other charities. Often his generosity was secret even from the beneficiaries. One leading silk recalls that when he first went to the Bar, newly married and penniless, he sought a substantial overdraft from his bank manager. The interview could not have been more unpromising. He was somewhat surprised a few weeks later when a call from the Manager informed him that his request was to be granted in its entirety. Many years later when this silk was going through the Bank's papers with a later Manager he was handed a document he had never seen or known of before — Percy's personal guarantee of the overdraft, given when the silk was an unknown reader.

Percy was a youthful 69 and had seldom been near a doctor, (a breed he heartily disliked) when very late in 1984 he began to feel the pains and sickness which took him so swiftly from us. Late in January this year he went to hospital and learned that cancer had spread through much of his body and that there was little hope. He bore it all with courage and fortitude, still hoping even a few weeks before his death that somehow he would be back at his desk.

His 70th birthday in May was a happy occasion, attended by many of his list, to whom he showed his home, his garden, Janet's kittens, and his many other domestic interests.

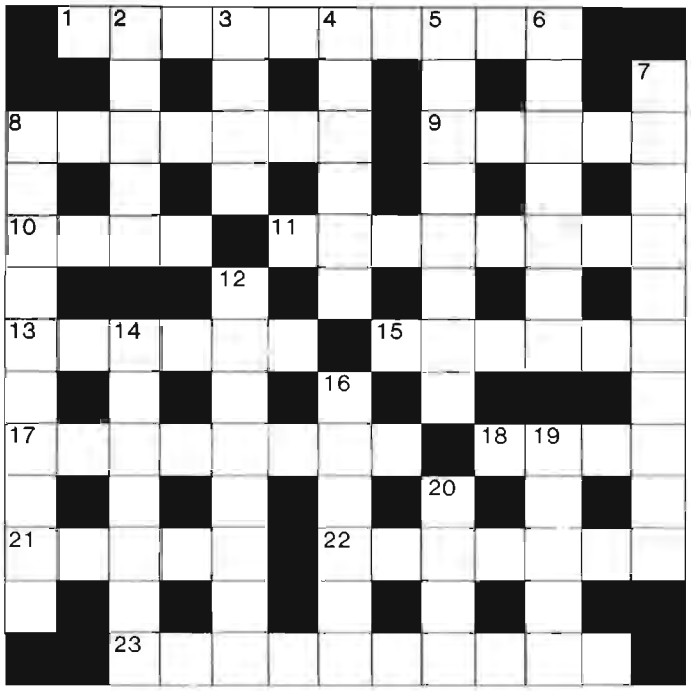
Percy took great interest in his children's achievements and it was a matter of real pride when John came into the business and, in particular, when just before Percy's death, John was finally appointed a fully fledged Barrister's Clerk in his own right controlling the business built up over so many years.

Percy died on the 2nd August and was buried on the 6th at Springvale. His whole life had been one of service and devotion to our profession and his funeral was well attended. If, from the Elysian fields, Percy could have seen it all he would have been proud and touched by the presence of so many judges, solicitors and members of the Bar, (many of whom were from other lists), but I suspect that even though it was the Winter Vacation he would have been concerned that so many of his own list were out of the Court that day.

"Sic transit gloria" and to Percy's family the Bar extends its deep sympathy. To us like them he will remain unforgettable.

CHARLES FRANCIS

CAPTAIN'S CRYPTIC No. 53



Across

1. The subject of Act 22 of 1914 (Comm) (6,4)
8. New judge is born humbug (7)
9. Roman shadow in eclipse (5)
10. Unless (4)
11. Sounds like these barometers would be painful to sit on (8)
13. First elements of judicial contracts (6)
15. Thespian keeps going (4)
17. Recovers from the wreck (8)
18. To be a palindrome (4)
21. Put an end to a nuisance, like a dangerous morsel (5)
22. Doubt for the philosopher (7)
23. Those things without which one cannot do (10)

Down

2. Looks like Indians (5)
3. A long pain sensation (4)
4. Weasel fur for judge (6)
5. The right to another's fruits (8)
6. Dinkum freshwater crustaceans (7)
7. Persons taken for a ride (10)
8. For a Roman it does not follow (3,7)
12. Morant's waves (8)
14. Six for a horse, now eighteen for a person (4,3)
16. Individual or company of uncertain sex (6)
19. Fibre for making rope (5)
20. Abominable (4)

(Solution page 29)

LAW REFORM COMMITTEE REPORT

The following matters have been discussed by the Law Reform Committee over the last three months.

Legal Representation before Tribunals

The Committee wrote to the Director, Policy Research Division, Law Department, asking it it was now the policy for State Government to allow legal representation before various Tribunals by leave of that Tribunal. At a previous meeting at the Law Reform Committee which was attended by Mr. O'Connor, members of the Committee gained the impression that the "anti-legal representation" attitude adopted by the State Government and manifest in some of its legislation has now been modified. The Law Reform Committee stated in its letter to Mr. O'Connor that it was of the view that there should be an automatic right to legal representations before any Tribunal.

In reply Mr. O'Connor indicated that the approach to legal representation, which used to be found in a number of Bills, is reflective of a Government Policy designed to ensure simplicity and speed in administrative proceedings.

Mr. O'Connor referred to "by leave" provisions where legal representation is given by leave of the tribunal concerned. Mr. O'Connor stated that he was "not aware of any instance where 'by leave' provisions exist where legal representation has been denied unfairly".

If any member of the Bar has any instance where the client has been denied legal representation before any State Tribunal the Law Reform Committee would be pleased to hear from them.

Local Government — Rating Appeals Bill

The Chairman of the Law Reform Committee has written to the Director General for Local Government Department in regard to the proposed Bill. The Chairman indicated in his letter that the Bill goes further than intended and prevented a person whose property was to be rated under a separate rates scheme from challenging the inclusion of his property in the scheme even though it derived no benefit from the works to be executed pursuant to the scheme. The Chairman also indicated that the only basis for challenging the decision of the County Court on a Rating Appeal is by means of a case stated to the Supreme Court. The Chairman suggested that an appeal on a question of law should be able to be brought from a decision of the County Court to the Full Court of the Supreme Court. This measure would be similar to the procedure of rating appeals under the *Valuation of Land Act* 1960 relating to Appeals from Land Valuation Boards Review.

Coroner's Bill

The Chairman has indicated in a letter to the Attorney-General that the "new-speak" or "Kennanisation" or plain English of the statutes can create some problems in a complex Bill such as the Coroner's Bill.

Theft Act

Proposals to reform the Theft Act were forwarded to Weinberg for comment and report.

Weinberg indicated that he was in the process of forwarding a detailed report on the proposed legislation but in essence his view was that the test for dishonesty in *Salvo* was unduly narrow. He preferred the views expressed by McGarvie J. in *Bonollo* as constituting an appropriate and proper response to the difficult question of dishonesty. The English Courts have made a mess of this concept. There is no doubt that we are the better in Victoria. Weinberg pointed out that there is still room for improvement and in this regard drew attention to the A.C.T. Draft Claims (Amendment) Ordinance (which is currently before the A.C.T. Assembly) contains precisely the reform which is contemplated. This reform proposal endorses the McGarvie J. approach to dishonesty.

Barristers Acting as Arbitrators

The Committee has written to the Executive Committee of the Bar requesting a ruling on whether barristers may act as arbitrators and whether they can publish their name in a list and book published by the Institute for Arbitrators. If Barristers were able to act as Arbitrators then the calibre of people available to sit on International Arbitrations to be held in the new Australian Centre for International Arbitration in the World Trade Centre in Melbourne would be increased. It is highly likely that the venue chosen by parties involved in an International Arbitration may well depend upon the calibre of the Arbitrators available to sit on the matter.

Red Light Cameras

The Committee is concerned with three aspects of the proposed legislation. The Committee is against the requirement that the owner of the vehicle must "dob in" the driver. The reversing of the onus of proof is objected to but the Committee is of the view that if the owner were allowed to file a sworn statement then that would be sufficient. A majority of the Committee can see no justification for the exemption from the above legislation for vehicles owned by companies.

If any member has any views on the above legislation the Committee would be pleased to hear from them.

JOHN HOCKLEY

SHORTER TRIALS COMMITTEE REPORT

The law has never been noted for its public pizzazz. What little dash it has is always shown in semi-private. The outfits of the lawyers in court are the main prop used for effect and there's not much colour in them. But robes have the effect of daunting the lower orders. Judges particularly, show their regalia to the world for this reason.

When the report of the Bar-inspired Shorter Trials Committee was released a new public technique was was tried. The first break with tradition was to invite along the news people in lieu of the lower orders. Speeches were given. The Report's team was led by State champion, Young C.J., not robed, but in trendy dark double breaster and new black shoes. What a great Report this was for the administration of justice. What a silencer of Bar critics. Similar plays were made by Acting Chief Judge O'Shea, by Professor Kelly who is the head of the Law Department, by Peter Sallman of LaTrobe University who wrote The Report, by McGarvie J. who chaired the committee, and even by Chernov Q.C. (never loath to get in on the act).

Apart from the news people, the invited guests from the Bar were generally practitioners in criminal law. An eavesdropper would have marvelled at the surprise amongst the attenders, not that the Report had taken three years, but that anything had been produced at all. Did it contain any camels? Why is there no opportunity to ask questions about the recommendations.

No, it was not a night for questions. More was it a chance for the Bar to affect a with-it image, and please have a few drinks and go home and read the Report.

We did. The Report of the Shorter Trials Committee is very long — two volumes and signed by the pretty impressive team that put it together. At the end is a Statement of 108 Recommendations, which seemed a good enough place to start. Bearing in mind that the purpose of the Report was to consider how trials might be shortened without disadvantage to the community, we passed quickly over the recommendations dealing with the establishment of a Criminal Justice Committee. The remaining parts deal with Criminal Investigation, Charging and Prosecution, Pre-trial Disclosure and Review, Sentence Discount and Plea Negotiations and the Trial.

Central to the whole problem of the length of criminal trials is the enormous cost involved. This is estimated by the Committee as $30 per minute in the Supreme Court and $20 per minute in the County Court, all of which is borne by the Community. (Recommendation 105).

Criminal Investigation

The Committee recommended that statements by suspected persons to public investigators should be tape-recorded. This would save time in voir dire hearings and increase the number of guilty pleas. The existing practice of electronically recording the reading back of a written statement was considered to be unsatisfactory for reducing disputes about the circumstances and admissibility of the statement.

The implementation of this recommendation would require amendment to the standing orders of the Chief Commissioner of Police so that, wherever practical, police be obliged to make tape recordings of any statement relevant to an indictable offence made by a suspected person. A copy of the tape should be made available to the legal representative of the suspected person as soon as possible and, where a transcript of the tape recording is available, he should have a copy of this too.

The Committee recommended that legislation be enacted to come into operation of its own force three years from the date of The Report, which will provide that a statement of a suspected person shall not be admissible as part of the Crown case upon trial for an indictable offence unless the statement is recorded. The legislation would provide also for power in the court to admit evidence where good cause is shown, notwithstanding it did not comply with the above requirement.

Charging and Prosecution

The test traditionally applied in Victoria to determine whether a person should be tried on a particular charge is whether there is a prima facie case against him. The Committee was of the view that this test was not strong enough. It recommended that the test be whether there is "a reasonable prospect of

conviction on the charge". Recommendation 23 was that the D.P.P. should consider furnishing guidelines or a statement of prosecution policy designed to achieve a substantial degree of uniformity of attitude and practice among Crown Prosecutors in presenting persons for trial. These guidelines should include a requirement that the prosecutor have regard to limiting the charges in a presentment to those which deal with the core of the allegation against the accused person — conspiracy should not be charged where a substantive offence is available and in any event not without the express approval of the D.P.P. The guidelines should also include a requirement that the prosecutor decide whether it is preferable to have a joint trial or one or more separate trials.

The recommendations also included one that the accused person be served with a copy of the presentment filed in the court. Where the presentment is that on a charge of conspiracy, a statement of particulars of all overt acts relied on by the prosecution to establish the conspiracy should also be served upon the accused person with the presentment.

Pre-Trial Disclosure and Review

The report contains a long series of recommendations on this topic. The apparent intent of these recommendations is to identify the real issues between the accused and the Crown and to make available to the accused the fullest details of the case against him.

Recommendation 36 is directed to the Director of Public Prosecutions. He should make available to the accused all statements of witnesses, including those which the prosecution is obliged to disclose but who are not proposed to be called at trial. He should also provide him with all statements and records of interview by him. These should be made available to the accused or his solicitor in advance of the trial at the earliest practicable time — at least within 28 days from the filing of the Presentment. The obligation of disclosure is a continuing one. If material becomes available to the prosecution after that time, it should forthwith be given to the accused or his solicitor. The accused is also entitled to copies of all documentary exhibits proposed to be tendered at trial, of expert and scientific reports proposed to be used at trial. He is to be permitted to examine any other exhibits. The prosecution is also to make available to the accused reasonable facilities to allow forensic tests to be conducted on material held by the prosecution and to permit the accused and his legal representative to hear and view any record of a statement made by him including any video tape or photograph of him.

The recommendations also include provision for a Pre-Trial Report. This is to contain a great number of particulars from the Crown and from the accused as to matters which are likely to arise in the trial. These particulars, which are set out in paragraph 4.231 of The Report include matters such as special pleas which the accused may raise and admissions of fact which the accused is prepared to make.

On receiving the completed Pre-Trial Report the Listing Director is to arrange a pre-trial conference between representatives of the prosecution and each accused where it is considered that such a conference would be necessary with a view to reducing the time required for the trial. Both the prosecution and defence should pay to counsel for attending pre-trial conference or hearing and for other pre-trial work fees which would provide sufficient incentive to attract counsel who is to appear at the trial to do the pre-trial work.

These recommendations, admirable though they may be in their intent, raise the difficult question whether it is in the interests of the accused to expose to the court and to the prosecution the defences that will be run. If the representatives of the accused take the view that it is not in his interests to make any early disclosure of these matters or to make concessions of fact, it is unlikely that these recommendations will serve any useful purpose other than to provide work for barristers who may find themselves with some spare time following the closure of the industrial accident jurisdiction.

Sentence discount and plea negotiations

Legislation should be introduced to make it clear that a plea of guilty should of itself be a mitigating factor in sentencing. This should be the case notwithstanding that the plea proceeded only from a recognition by the accused of the inevitability of conviction. In taking into account the guilty plea, the Court should have regard to the time at which the plea is indicated and to the circumstances in which the accused decided to plead guilty. Principal among these circumstances will be whether the plea was the result of a negotiation between the prosecution and the defence. The Committee had no objection to negotiations as to the charge taking place between the legal representatives of the accused and the Crown, provided these negotiations are conducted in "an open, fair, responsible and straight-forward manner". The Committee was concerned that counsel or the solicitor for the Defence should not exert undue influence on a client to plead guilty to any offence, and it recommended that the prosecution should never initiate negotiations with an unrepresented accused.

The Committee adopted the position that the judges should act in accordance with the views expressed by the Court of Criminal Appeal in **R. v. Marshall** (1981) V.R. 725, and should not become involved in negotiations between the parties by giving indications of the sentence they would be likely to impose or otherwise.

The Trial

The Committee recommended that all trials should be by judge and jury, further, that a unanimous verdict of the twelve jurors should continue to be required in all cases.

Since the Committee was not persuaded that the preservation of the right of an accused to make an unsworn statement added to the length of the trial or led to charges being defended which would otherwise be pleas of guilty, it did not consider that the question of abolition or modification of the practice was within the scope of its enquiry. Nevertheless, it indicated a view in favour of the retention of the present right and procedures in the interests of fairness and justice.

Central to the recommendations of the Committee with respect to trial was the recommendation that endeavours should be made at the pre-trial stage by all concerned to ascertain the issues which will be contested at the trial. Procedures were recommended whereby at pre-trial hearings or at the trial the judge have power to direct how particular facts might be proved including the power to dispense with the Rules of Evidence with respect to particular facts or exhibits.

Where the accused is represented by counsel at his trial, Recommendation 75 provided —

a) at the conclusion of the opening address of counsel for the prosecution, in open court in the absence of the jury, the Judge should confirm the issues if they have previously been ascertained and if not, should ascertain them from counsel.

b) before the commencement of evidence the jury should be informed of the issues between the prosecution and the accused in the trial, without elaboration.

c) at the option of counsel for the accused the jury should be so informed of the issues by counsel for the accused or by the Judge.

d) the Judge should have a discretion in a particular case to direct that the jury be not informed of the ascertained issues.

e) the Judge should have a discretion during the trial on the application of defence counsel to add to, alter or delete issues and inform the jury accordingly.

Clear and simple standard specimen directions on points which directions are frequently given by trial judges to juries should be prepared under the supervision of the judges and be available for use by all judges. The Committee was concerned lest trial judges use these standard directions as a mechanical aid, without tailoring the direction to suit the particular facts of each case. Nevertheless, it was thought that the use of standard directions, which is merely a formalisation of a practice which presently exists among the judiciary on an informal basis, would do much to expedite trials and minimize appeals.

The Committee made recommendations dealing with the training of judges and lawyers generally in trial procedures with an emphasis on expedition and efficient conduct of the trial.

Recommendation 93 is in the following terms:

> The Legal Aid Commission Act 1978 should be amended to give the Commission specific power to remove from the panel kept under Section 30 the name of any counsel who habitually takes excessive time to defend criminal charges and the Commission should not hesitate to exercise the power in appropriate cases. (para. 7.200 – 7.213).

The Committee also got into the argument as to the desirability of lump sum fees for counsel. In the event the following recommendation was made:

> 99. Pilot systems should be established by the Legal Aid Commission and the Director of Public Prosecutions respectively, under which the fee of counsel is a lump sum fee and the operations of the systems should be monitored.

A reading of the report shows that the Committee vote was close — 8:7. What emerges from the dissentients is that they represent the Legal Aid Committee, the D.P.P. and the Criminal Bar Association. Their dissenting report appears at paras. 7.317 – 7.324 of The Report.

The report contains a wealth of valuable information of a practical nature in the administration of the criminal trial system. It repays a careful reading and members are recommended to avail themselves of the copy of the report which is in the Bar Library. A copy may be purchased upon enquiry to Miss Dorothy Brennan (Ph. 7111). The Victorian Bar is grateful to the Victorian Law Foundation, the Department of the Attorney-General for the Commonwealth and LaTrobe University for providing the funds and support for the project and to the Australian Institute of Judicial Administration Inc. under whose auspices this Report was prepared and written.

BYRNE & ROSS DD

THE SENTENCE FOR MURDER

The new Law Reform Commission has put out its first report. The Commission was set up under the Law Reform Commissions Act 1984. The report concerns the sentence for murder. Presently the sentence is "imprisonment for the term of his natural life" (Crimes Act s.3).

The following is the summary of the Commission's recommendations —

That Section 3 of the Crimes Act 1958 be amended to provide that a person convicted of murder shall be liable to imprisonment for a maximum period of the term of his or her natural life. (Para 50).

That the judge imposing a sentence for murder, whether a term of years or a life sentence, be empowered at the same time to fix a non-parole period, in accordance with the provisions for parole (i.e. minimum terms) governing the sentencing of other offenders. (Para 50).

That when a person has been sentenced to life imprisonment with a non-parole period, the Parole Board shall, when ordering the release of that person on parole, set a period of not less than five years during which the person is to be under the active supervision of the Parole Board. (Para. 64).

That a single judge of the Supreme Court be empowered to set a non-parole period for each person currently serving a life sentence for murder, upon a report from the Parole Board, the Director-General of Corrections, and any other relevant person or body, the decision to be reviewable by the Full Court. (Para. 70).

A.B.A. CONFERENCE

John Coldrey in the happy time before he became Q.C., before even he became D.P.P., developed a long-standing association and affection for Central Australia. It was during a sojourn in those parts that he contributed an article to the Bar News, Spring Edition 1982, suggesting a Law Conference in Alice Springs. Someone must have read it, for the Australian Bar Association has decided to hold its Second Convention in August 1986 at Alice Springs and Uluru (Ayers Rock). Presumably the double venue is made necessary by the large numbers expected and made possible by some Aussat hook-up. The Convention has every prospect of being successful. An energetic organising committee comprising D.M.J. Bennett Q.C. (NSW — theirs not ours), E.W. Gillard Q.C. (Vic), R.R. Douglas Q.C. and G.C. Martin (both Qld) has ideas of a stimulating programme and has already made block bookings.

Pencil it in for August 1986 and await further announcements.

WILD BUNCH AT LINCOLN'S INN

The Bar Council in England comprises 39 members, mainly silks. The London **Observer** of 28th July 1985 reports that for some time there has been a feeling that the Bar Councillors have been more interested in jobs for the boys than other more immediate problems facing the profession.

The Annual General Meeting of the Bar is normally an uneventful affair. They hold elections for membership of the Council and for the Senate Committee, but very discretely. Scrivener, leader of a ginger group of young and dissatisfied barristers described these elections as "the wand being passed deftly around the magic circle".

Many junior barristers in England believe their pay is too low and that the Bar Council has not fought sufficiently hard with the Government to increase fees. The barristers also feel that the Bar Council is doing too little to protect the profession from attempts to reduce the Bar's monopoly on 'rights of audience', where only they can represent the plaintiff or defendant in certain courts. So they organised a ten man ticket for the eleven Bar Council vacancies that fell for election at the Annual General Meeting at Lincoln's Inn last July. And about 1000 supporters turned up to ensure that the ticket was elected. The meeting was adjourned to larger premises but the "Wild Bunch" still had the numbers. Their team was elected to the Bar Council and the 19-man Senate Committee which really makes the decisions. They had a resolution passed whereby the Bar Chairman is to be elected by the entire Bar rather than by the Council itself.

Former Bar Chairman Du Cann Q.C. protested against criticisms: "Senior members of the Council have worked very hard on behalf of the profession". And Scrivener said he wanted a "strong independent and united Bar".

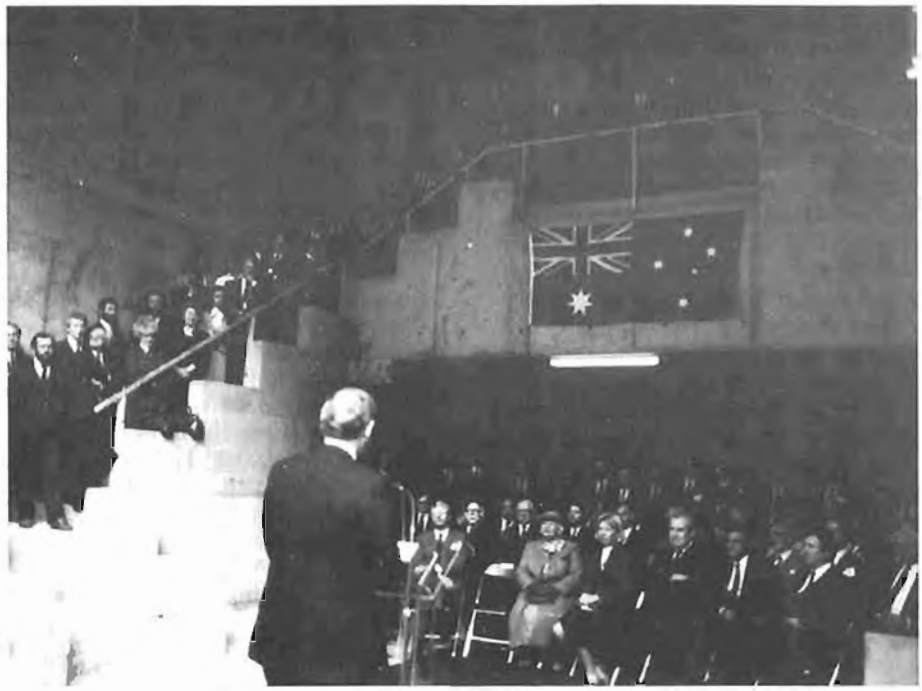
A SILK'S TAPESTRY

On 2nd October 1985 a well-attended meeting of Silks considered a proposal that they make a gift to the Bar of a substantial art work to adorn the Lonsdale Street foyer of Owen Dixon Chambers West. It was proposed that the Silks commission the design and manufacture of a pair of large tapestries which would be hung on the east and west walls of that foyer above each of the staircases.

The proposal has been tentatively costed at about $70,000 so that a contribution of $1000 each would be required. The meeting agreed to the proposal and a committee comprising Berkeley Q.C., Shaw Q.C., Charles Q.C. and Byrne Q.C. is consulting with the Architect and with Miss Susan Walker of the Victorian Tapestry workshop to settle an appropriate design for the art work.

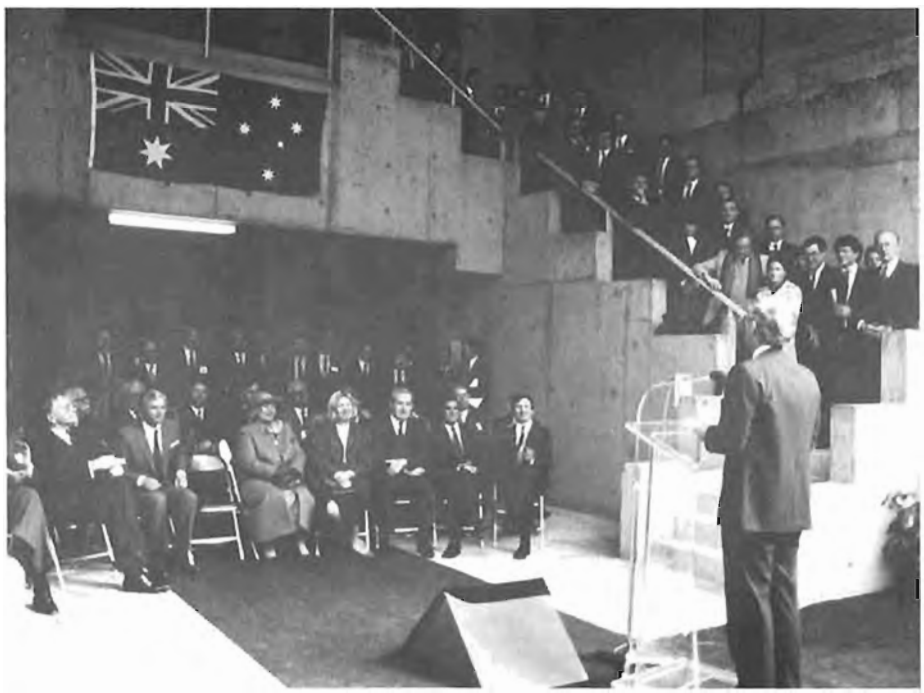
Members may obtain some idea of the possibilities of tapestry as an art medium and of the proposed work from the Booklet which is at the entrance to the Essoign Club.

OWEN DIXON CHAMBERS WEST



Photos (including cover) by Ian West Photography

"UNVEILING THE PLAQUE"
AUGUST 1985




FREE
NORM
ROSS

RADIO PROGRAMMES ON THE LAW

A little while ago I was having a cup of coffee with David Ross and happened to recount an anecdote I heard on a radio programme called "Lawyers, Guns & Money". Shortly thereafter I received a directive from the same Ross this time in his role of editor/commissar of information requiring me to (a) listen to, and (b) criticize radio programmes on the law. This directive was accompanied by a list which I set out below.

Monday — AW:
8.30 p.m. *Talking Law — with Richard Roe*
Tuesday — AR:
6.30 p.m. *The Law Report*
Thursday — CR:
6.00 p.m. *Legal Service*
Friday — AR:
7.43 a.m. *Law Commentary: Gary Sturgess*
Saturday — CR: 12 noon *Civil Liberties*
— RRR: 12 noon *Lawyers, Guns & Money*
Sunday — DB:
10.00 a.m. *Legal Forum*

To say that I was somewhat startled by this development understates the position. My last venture into journalism was nearly 30 years ago for another undergraduate magazine called "De Minimis". On that occasion the efforts of my fellow editor and myself led to a public meeting at which we were roundly denounced by, inter alia, Mo Staley and Cliff Pannam, as he then was, and at which our principal defender, whom I believe to be now a member of A.S.I.O., made a public fool of himself. The cause of all this was the concern expressed that we were printing obscenities in the law students' magazine. I seem to recollect such horrors as:

Who takes care of the caretaker's daughter
While the caretaker's busy taking care?

If it ever became any juicier than that I now can't remember and if I could I wouldn't admit it. However, you can get the general gist of just how slack our morals and editorial standards were.

Imagine then how thrilled I was to be invited to rejoin the ranks of undergraduate journalists after all this time and the particular pleasure with which I subsequently received a hectoring letter reminding me of the first publication deadline. In an earnest endeavour to pull up my socks I examined the list with which Ross had furnished me. I discovered, as doubtless you already have, the list indicated that, with the possible exception of the Saturday programmes, all of the others went to air at times when any decent barrister would be either working, drinking or sleeping. Before receiving the list I had heard none of these programmes with the exception of an occasional earful of Lawyers, Guns & Money. Save that due to circumstances beyond my control I have heard parts of three broadcasts of the Law Report, that remains the position.

I turn now to the second part of my assignment, namely to criticize. Lawyers, Guns & Money is broadcast on an FM station. I was inadvertently snared into listening to it by failing to switch my radio back to AM band in order to hear the Goon Show which is broadcast at the same time on 3AR after listening to two very good programmes which are broadcast on 3RRR at 10 o'clock and 11 o'clock respectively about football and racing.

The first called "They Could Have Been Champions" is quite amusing and derives most of its appeal from the fact that it is stridently critical of the V.F.L., Jack Hamilton, Dr. Aylett, Carlton Football Club and umpires, not necessarily in that order. The second, called "Punter to Punter", sometimes verges on the hilarious, being an hour-long spoof of the other boring racing programmes going to air at about the same time. All this provides a rather lengthy run up to the wicket for Lawyers, Guns & Money which from my absentminded, infrequent and inattentive audition of it is an irreverent review of some of the more important legal issues claiming public attention, e.g. Police v. Matthews, the Norm Gallagher demonstrations, would Gordon Lewis make a fine or merely good judge, etc. It is conducted by two fellows calling themselves Donoghue and Stevenson and its highlight is a regular feature entitled "Beak of the Week" in which a prize, usually consisting of a dozen bottles of beer to be collected at a pub somewhere in Preston, from my recollection is awarded to the magistrate or judge who in their view has produced the best bon mot. When I last

listened Dugan, S.M. was careering away with an unbeatable lead in the competition for the most awards for the year. His Worship has denied to your reporter that he has actually collected any of his prizes but alleges that at least one weekly winner was detected lurking around the bottle shop of the pub in question. This program is worth listening to at least once if only as a change from the usual diet served up on radio but I would not recommend trying it without at least some portion of Punter to Punter and/or They Could Have Been Champions. On the whole, I prefer the Goons.

As mentioned above, the only other one of these programmes I have heard is The Law Report. This is conducted by Sturgess and is long on measured tones and weighty deliberation. On the occasions I have heard it Kirby, P. seems to be one of its stars. The first time I heard him he was attempting to justify some junket he had been on to Salzburg by discussing inframatics and cross border data flows. The next time he was giving us the benefit of his vast experience on the competence of lawyers appearing before the Appellate Division of the Supreme Court of New South Wales. Other features of the programme were Ashe, D.C.J. simultaneously attempting to retain his dignity, be polite, defend the standard of judicial appointments to his Court and correct the Chief Justice of the High Court, a task in which he was not totally successful. One other impressive feature of this programme was an interview with an American who I gathered had ben an Associate (not Associate Justice) to Warren, C.J. of the American Supreme Court at some stage of the game. This gentleman was discussing with Sturgess the opportunity given to the High Court by R. v. Murphy to throw off the dead hand of legalism and seize a wider power base in order to achieve a position from which it could work greater social justice. Now I don't know about you but a little bit of that diet goes a very long way in the Hanlon household. With due respect to Sturgess and his guests I think I at least will be giving The Law Report a miss.

One thing which has surprised me since deliberately turning my back on the remaining programmes nominated by Ross is just how much law is discussed on the radio when you begin to listen for it. First of all there is the ubiquitous Gordon Lewis and then there are numerous occasions when one hears gratuitous legal advice being given by doubtless highly authoritative sources, and then there is the phenomenon which appears to be developing on both arms of the electrical media which I lump together under the title "Trial by Talkback Radio".

Now on these matters let me make it clear that anything that Gordon Lewis and/or the Law Institute says or does has my total and unqualified support and if that statement is not craven enough I am willing to consider any further and better grovel that might be prescribed for me by the said Lewis and/or Law Institute.

As to the second phenomenon I don't listen to sufficient radio to be able to say how it has arisen but I have heard only in the last week or so somebody who has been put forward as legally qualified and competent to do so, give legal advice on all manner of subjects to people telephoning 3DB with their questions. The piece that I stumbled on lasted only about 10 minutes while I was listening and in that time the adviser managed to get the onus of proof in criminal matters wrong. Obviously this little segment is well worth getting hold of if you can manage to catch it. I gathered that this was a regular feature of a radio programme conducted by one Douglas Aiton but on that matter I may be mistaken.

Finally, I've noticed a couple of our kings of talkback radio, Schildberger and Hinch, have developed a feature in their programmes along the same lines as that which Willesee used to conduct and Day still does on television. In the case of the firstnamed he invites his listeners to ring up and complain about any beef they might happen to have so that he can pursue the matter with the person or institution accused. This not infrequently leads him into legal areas and I have heard him resort to obtaining his own legal advice on such complicated points as whether a price label on goods on display in a shop constitutes an offer. The tendency is in the type of situation thus created to use publicity and the intimidatory effect thereof as a dispute solving mechanism, which is something about which I occasionally experience misgivings.

The other branch of what I call "Trial by Talkback Radio" is the undue importance which some of these operators appear to attach to their own views and excellent examples of this are available in the fiasco arising from the jurors from R. v. Murphy parading their wisdom to John Laws about their deliberations and ultimate verdict, a subject upon which Cantor J. had some pretty tart and if I may say so with respect, correct things to say subsequently.

Before I really let my hair down about the electronic media journalists, and for that matter print journalists, I suppose it would be apposite to remind myself of what commissar Ross informed me was my real task in writing this article, viz. "fill up a page or two". Having succeeded at least in doing that I conclude by pointing out to our good commissar/editor that as W.C. Fields once said: "There's a moral to this story for all young men who come to the city— Don't go round breaking people's tamborines".

HANLON Q.C.

LAWYERS' BOOKSHELF

Fox and Freiberg: **Sentencing: State and Federal Law in Victoria,** Oxford University Press 1985. 615 pages, $125.

I first met Richard Fox in 1974. There was a subject called 'Sentencing' being run at Monash. The students included Frank Vincent, Peter Martin, Ray Johnstone, Rex Wild and me. This course would be a bit odd, I thought, an academic trying to teach practitioners about things that only practitioners know. At the first class it became apparent that this fellow would be no pushover. True, he didn't know the finer points of practice. But he had at his fingertips a wealth of decisions and statistics on sentencing at a time long before they were in common use. By the end of that first class he had picked our brains on a lot of day to day things in courts. By the next class he had amended the course, and unashamedly we set to learn from him.

Arie Freiberg I met for the first time a few weeks ago. He had the book under his arm and was as excited as a new father. It took nine years to write he said. They must have started just after that first sentencing course finished.

Now, the book — I have read it. The flyleaf contains the following description of it.

"This book is the first comprehensive text on the law relating to the sentencing of offenders in Victoria, and thus is of vital importance to the judiciary, to prosecuting authorities, to practitioners and to those responsible for implementing sentences. Extensive recent amendments to the statutes regulating the sentencing powers of the criminal courts, and the growing numbers of offenders passing through Victorian courts for breach of federal law within the state, have made the need for a text on state and federal sentencing law urgent.

"Fox and Freiberg have been meticulous in bringing together, in a scholarly and comprehensive manner, a wealth of statutory and case law material. Reference is made to some 150 Commonwealth statutes, 250 Victorian statutes and in excess of 1,600 cases, including High Court and Federal Court decisions, those of other states and unreported sentencing decisions of the Full Supreme Court of Victoria. In addition, the work presents statistical tables containing up-to-date information on sentencing patterns in the superior courts for the most important or frequently charged indictable offences.

"The opening chapters examine such matters as the distribution of sentencing authority between the various arms of government, the interpretation of penal provisions, and the procedural aspects of the sentencing stage of a criminal prosecution. The machinery of appeals against sentence by both the Crown and the accused is covered, together with an examination of the role of the prerogative writs as an additional possible means of review. The bulk of the book consists of a detailed analysis of every sentencing option and ancillary order open to Victorian courts in disposing of offenders. The position under both state and federal law is explored and the interrelationship between the two sentencing systems is explained. The final part of the work examines, with numerous examples, general sentencing principles as enunciated by the Full Supreme Court of Victoria and looks at the way in which sentencing for the most common indictable offences coming before the courts has been handled."

Perhaps because of that sentencing course I began to make a note of cases useful on pleas. The odd few are not in the book and I pass them on. **Stevenson** (1984) 35 SASR 237 on the onus of proving facts in dispute; **Williams** (1982) 7 A. Crim R. 46 (NSWCCA) on sentencing escapees. For sentencing drug offenders see **Rasic** (1983) 10 A. Crim R. 299 (Fed. Ct.) and **Stevenson** (1984) 35 SASR 237. For statistical and other effects on the going rate for rape see **Puru** (1984) 1 NZLR 248, a decision of a six member court of appeal. These are small complaints. If the book has a vice it is this. It makes you ask yourself what have you done in the last nine years that would hold a candle to this.

What the flyleaf does not say is that directly on availability it will be the standard text. Judges will not only use it and quote it but will expect counsel to do the same. You will be unarmed on a plea for leniency without it. Overnight the rules have all changed.

If it is your habit to dip into a book as you need it let me make two observations. The first is that the book has an excellent index, a hope too frequently unfilled. The second is break your habit and read "The Role of Counsel" in Chapter 2. What is contained in those seven pages proves that the remainder of the book is compulsory reading.

Not only have the authors brought immense talents and industry to bear on a difficult area of law, but they have produced a tour de force, and we are in their debt.

This book is essential.

DAVID ROSS

Evil Angels by John Bryson, Viking, 1985 R.R.P. $24.95, 550 pages.

Writers have an important part to play in the administration of the criminal law. It is up to them to make a fair and accurate report. For the most part there is not so much reporting of current trials in Melbourne, but when you go to the country a serious case is a cause celebre which is extensively reported.

There is a second level of writing. Every now and again a conviction will go against the grain of some writer. The verdict will not ring true. He will write about it and publicise what he says is a miscarriage. The most recent success from a journalist digging his heels in resulted in a Royal Commission in Adelaide into the conviction of a man called Splatt. Abbott Q.C. represented Splatt, and the Commission ran for eighteen months. Splatt, the convicted murderer was pardoned.

Now John Bryson has entered the lists for Lindy Chamberlain. Some at the Bar will remember John Bryson. He was a careful, quiet gentleman but stubborn as well, and capable of reserved passion. He left the Bar years ago to pursue his career as a writer. Up to the Chamberlain trial you would see his short stories appearing in newspapers now and again. Penguin Books published a collection of them. He is no slouch as a writer.

This book is not short and it is not superficial. Bryson has sifted through the transcript of the two inquests and the trial. He has analysed and weighed it all. He gives a long account of the tenets and practice of Seventh Day Adventism and finally sets to rest those cruel and sinister rumours which had as their foundation a suggestion that this little known religion was macabre and bizarre.

He gives an account of the tactics of the investigation. His criticism is only thinly restrained when talking about the strategems used by Sturgess Q.C. of the Queensland Bar who assisted the Coroner in the second inquest. Bryson shows that the police and Sturgess had already decided to lead evidence suggesting murder, but that this was concealed from the Chamberlains, from her Counsel Kirkham and Rice Q.C. and from the Coroner himself, Galvin S.M. That evidence was revealed piecemeal and only after the Chamberlains had given sworn evidence.

Bryson was at the trial in Darwin and immersed himself in it. I think he had access to Kirkham and Phillips Q.C. His treatment of the trial is careful and thorough. The opinion evidence particularly is explained and evaluated. He gives scant space to the final addresses and the charge of the trial judge, Muirhead J. After his own analysis of the evidence the speeches wouldn't have added much. After all this is the book about a verdict and the sufficiency of evidence, not a biography of the lawyers. But Muirhead J.'s charge was, I am told, a very strong one for acquittal, and more reference to that might have helped Bryson's thesis.

Time has marched on since the verdict. **Chamberlain v. R.** (1983) 153 C.L.R. 521 is now High Court authority on miscarriage and on drawing inferences. Barritt S.M. once of our Bar who conducted the first inquest is still a N.T. magistrate. Phil Rice Q.C. who grew up in Alice Springs and then practised in Adelaide was appointed a District Court Judge in South Australia and is now on the N.T. Supreme Court. Sturgess Q.C. achieved fame of a sort for being the draftsman of the N.T. Criminal Code of doubtful value (see Bar News Summer 1983 p.14). Phillips Q.C. who led Kirkham at the trial is now Phillips, J. Joy Kuhl, who gave Crown evidence of the analysis of blood is now employed by the N.T. government.

Mrs. Chamberlain is still in Berrimah jail for her crime without motive and reliant for her future on the likes of John Bryson.

This is a disturbing book about a celebrated trial.

DAVID ROSS

LEGAL BOOKS GO IN FIRE

The famous Dalhousie Law School at Halifax, Nova Scotia, has lost virtually its whole library in a disastrous fire.

Law Council Vice-President, Michael Gill, in a call from Halifax where he is attending the Canadian Bar Association's annual meeting, said the School lost almost all its Australian statutes and case reports.

The Law Council, with the help of its constituent bodies, is trying to find out what replacement material might be available for purchase by the School, or which might be given to it.

The material lost in the fire includes:

Queensland State Reports
Law Reports for all other States
Commonwealth Law Reports
Australian Current Law
Commonwealth and all State Statutes.

Anyone with any of the above material for sale, or who would consider making it available on another basis, is asked to contact his own Bar Association or Law Society, or the Law Council, so that the availability of the material can be made known to the Dalhousie Law School.

Michael Gill said the loss of its library was a tragedy for Dalhousie Law School, and he hoped Australia could help replace it by providing Australian material.

Anyone who wished to contact the School direct could do so by writing to Professor Tom Cromwell, Dalhousie Law School, Nova Scotia, Canada B 3H 4H9. Telephone (902) 4242114.

SPORTING NEWS

John Lee claims that he went to the Penshurst race meeting on Boxing Day of 1984. It was not a pleasant day. It was cold and wet. One needed the "folding stuff" for insulation against the elements, but it was hard to get. Monti had Smerdock running in the 2 year old handicap. We only had one side of the story but Lee claims that Monti asserted that his steed "has a bit of dog in it — I should be feeding it Pal". Lee watched in horror as Smerdock outclassed the opposition and landed a big betting plunge. Monti bred the horse as he raced the dam. It has since won in the bush and twice at Flemington! We know as a fact that Monti was openly confident of the two successes at "head quarters" and several members of the Bar had good days. Substantial offers to purchase the horse have been rejected by Monti who has a high opinion of that horse.

* * *

Phil Dunn is the part owner of the smart mare "Phoenix Rising" which has won approximately $75,000 in stakes. She was narrowly beaten in a photo finish in the $100,000.00 Manikato Stakes at Moonee Valley in late August. We will be anxious to see Dunn's movements if she races in some of the big races which are held mid week during Court sittings. We believe there is a chance she will go to Sydney to contest some of the important Spring races.

* * *

One could be excused for concluding that a theft or burglary must have occurred at the Essoign Club on or about the 30th August 1985 due to the sudden disappearance of the MacFarlan trophy from the Trophy case. This display unit was already looking rather depleted following the loss of the MacFarlan Cup in 1984. In actual fact, both trophies are now being appreciated by the combined Services following their ruthless display of power golf at Kew Golf Club on the 30th August 1985. We will need more players, and hopefully some younger members of the Bar, when we attempt to wrest the trophies from the opposition next year.

* * *

Few would know of Kingsley Davis' musical talents. For twenty years or more he has been a lead shofar player. For those who do not straight away know the shofar, it is the ram's horn such as Joshua ordered to be played to make the walls of Jericho crumble.

* * *

Omen punters would have supported Base Fee when the mare won at Flemington on 7th August 1985. The horse is part owned by Merralls Q.C. and Searby Q.C. The race was the Legal Convention Handicap and the trophy, donated by the Law Council of Australia, was gratefully received by Merralls who was lavish in his praise of the trainer and his staff and Harry White, the jockey.

* * *

A Calcutta will be staged at the Essoign Club on Melbourne Cup Eve and details will soon be available. To create the appropriate atmosphere, racing memorabilia — photos, trophies, racing colours etc., are being collected by John Lee. There is some chance that "Hard Luck Harry" may be available to conduct the Calcutta — keep your eyes on the Notice Boards.

* * *

Chester Keon-Cohen has just returned from a camping trip to outback Australia and is prepared to pass on hints to those considering such an adventure. He started out from Adelaide and proceeded to Birdsville, Mount Isa and through the Lawn Hill Gorge in north west Queensland to "Hells Gate". This was the township where "law and order ceased" in the old days. Ultimately he made his way to Roper Bar and across the top end of the Northern Territory. From Katherine to Darwin — down to the Kakadu National Park and the UDP Falls. He stayed on a cattle station on the Daly River at Florina. Barramundi put up token resistance to Keon-Cohen's strength although he apparently blanched when he saw an 18 foot crocodile which spanned a causeway. Weeks of camping under the stars has renewed his enthusiasm for work and more successful golf at Royal Melbourne.

* * *

Research is taking place to determine which male member of the Bench or Bar has married at the latest age. Sir George Pape may have held the record but now Judge Rendit (D.O.B. 11/6/29) would appear to have that distinction. Hore-Lacy married at 42 but he points out that Neil Brown Q.C. was older than 42 when he first married. Dyson now has a son who, according to family tradition, will be either a barrister or horse trainer.

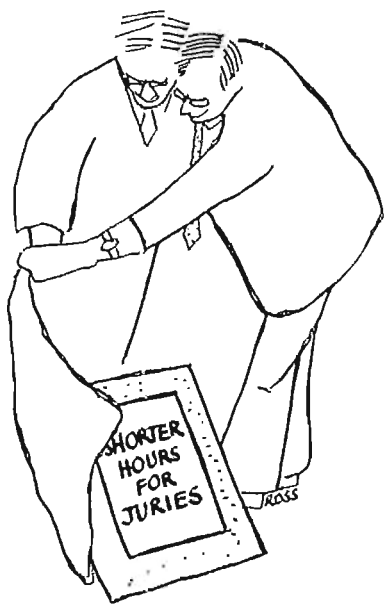
* * *

Hanlon Q.C. certainly can't be accused of being a chauvinist. He had young Theresa Payne on board Pagmamahal when this 8 year old gelding streeted the opposition at Sandown on the 10th August 1985. Quietly confident of success, one can imagine his language when it was nominated on the radio as "3DB's longshot of the day". It was no longshot when it started but the way in which it won at 8/1 was most rewarding. Some horses tremble and shake if a tap is turned on but this one likes the mud up to its hocks. It was bought to replace "Grow to Grace" which met with a fatal accident at Kilmore following a short but successful career.

* * *

Hooper Q.C. and Walmsley have been doing an Appeal to the Full Commission of the Liquor Control Commission. Further details may be available in due course but we believe that the brief involved a "view" at a hotel whilst watching a disco into the early hours of the morning. The conduct of the patrons is apparently a relevant consideration for a 3 am licence. We suspect that Walmsley was chosen because he used to run "Silvers" Night Club in Toorak.

* * *



Stanley Q.C. and John Riordan have just returned from a five week trip to U.S.A., England and Italy. Travelling first class. I am pleased to relate that it was paid by the taxpayer. It is difficult to get information from them but the purpose of the mission was to investigate and report on Repetitive Strain Injuries to assist the problem in Australia. We do know they flew first class and consumed first class wines. Someone unkindly suggested that they were chosen because both had experienced some RSI symptoms — caused by excessive use of the pen in writing up their fee books! Riordan is due to fly to England to complete some additional studies and hopes to return as Professor Riordan.

* * *

Nicholson J received strict instructions. The excitement of skiing comes from attacking the slopes and never mind the consequences. He followed his orders to the letter. Alas his skill did not match his boldness. A tree stump jumped into his path. The result was a marked list to port and a fine scar on the forehead to prove it. Lessons from Hampel J are recommended.

* * *

FOR THE PERIPATETIC

Those for whom the A.B.A. Conference in Centralia and the Commonwealth Law Conference in Jamaica next August hold no interest, should note the following —

South Pacific Law Conference
25-29th August 1986
Apia — Western Samoa
Theme — Legal Options for small nations
Enquiries — Peter Askin,
Diners World Travel,
P.O. Box 1533,
Auckland, New Zealand.

* * *

Australian Mining and Petroleum Law Association
10th Annual Conference,
19-21st June 1986
Regent Hotel, Melbourne
Enquiries — Alfreda Rosenthal — 67 2544

LEGGE'S LAW LEXICON
"U" — "V"

Ubiquity — The fiction that the sovereign is in all courts at the same time. Thus "ubiquity Bourke".

Ultra vires — A bride who is 30 or more years junior to her husband.

Umpire — One mind that is better than two.

Unclaimed Property — A letter bomb which fails to go off.

Unconscionable — Happily agreeing to a statement of facts from which plaintiff's counsel has left out an essential part of his cause of action.

Undertaker — An entrepreneur who signs himself "Yours eventually".

Undue influence — The relationship between a Clerk and his barrister.

Undue preference — The advancement given to our contemporaries.

Unit Trust — A means of spreading risk by allowing an incompetent and usually insolvent manager to invest other people's money in a large range of speculative securities.

Unnatural Offence — Declining a fee because the case was settled.

Usual Covenants — Solemn promises invariably given on certain occasions e.g. I shall do your interrogatories today. I shall still love you in the morning. I posted the cheque yesterday.

Utter Barrister — One licensed to plead.

Vacant Possession — The state of junior counsel whose leader is not there when the other side finishes their examination in chief.

Vagabond — A barrister without chambers.

Valuation — A work of fiction constructed according to the Institute of Valuers logical method. This usually requires that during cross-examination the valuer will disappear up his own major premise.

Value Added Tax — A fee for a conference which was in fact held.

Vendor's lien — A method of enforcing payment on delivery. It is often wrongfully resorted to by maternity hospitals.

Venire de novo — A recipe for a long and successful marriage.

Verbal — A voluntary unsigned confession.

Verdict — The almost unanimous decision of 12 persons ostensibly reconciling their irreconcilable opinions. Justice is thus seen to be done.

Verily I believe — A protestation of faith used on interlocutory applications to ward off the usual consequences of perjury.

Versification — The activity of leading counsel attending a Royal Commission e.g. the Ballad of the Man from Wangaratta. It is expected soon to be carried out by computer thus requiring two leading counsel for each party represented.

Vested — A barrister in his robes.

Vesting Order — "I can't hear you Mr Smith".

Vexatious Litigant — The Incorporated Nominal Defendent.

Vibration — This may amount to a nuisance but regard must be had to the character of the place.

Vicarious Liability — An Anglican curate.

View — A litigious process in respect of which juries are required to believe nothing and Judges are entitled to believe everything.

Vinculo matrimonii — A form of attachment of the person enforceable anywhere except within the liberties of the West Brighton Club.

Vindictive damages — Those awarded by a jury to over-compensate for defendent's counsel not admitting the specials.

Visitor — A person entirely ignorant of university life and procedures who is appointed to review its more esoteric practices.

Voire dire — A rehearsal requested by an accused in which his counsel prepares the police witnesses for their cross-examination before the Jury.

Voluntary Confession — One recorded on video tape and verified on oath by a J.P. in holy orders.

Vote (Early and Often) — A form of suffrage popular before the middle class discovered the attraction of inner suburbs.

Vraic — Benest v. Pipon (1829) 1 Kn 60.

Solution to Captain's Cryptic No. 53

PLAIN YIDDISH FOR LAWYERS

Reprinted with permission from the ABA Journal, The Lawyer's Magazine

The movement to require the use of "plain English" is picking up steam. Even federal judges are competing, redrafting their jury instructions and boasting that their version has fewer words than some other judges.

But it's time for a counter-revolution. Sometimes the best word to convey a concept or an idea is not a plain English word — it's plain Yiddish. Lawyers and judges with a rudimentary knowledge of the virtues of plain Yiddish will find that it puts plain English to shame when one is groping for that special word to convey what is really in the pit of your stomach.

Take, for example, the dilemma faced by Judge H. Sol Clark of the Georgia Court of Appeals. Called upon to decide an appeal by a man convicted of breaking into the sheriff's office in a county courthouse and stealing eight pistols and five shotguns, Judge Clark could not find a plain English word to describe appropriately the brazen gall that crime requires. But he found what he needed in the classic Yiddish expression, "chutzpah."

He cited the definition offered by Leo Rosten in *The Joys of Yiddish*, "The classic definition of 'chutzpah' is that quality enshrined in a man, who having killed his mother and father, throws himself upon the mercy of the court because he is an orphan." *Williams v. Georgia*, 190 S.E.2d 785 (1972).

Judge Clark's precedential use of this Yiddish phrase has been followed, and one now can collect a string of cases competing for the most monumental display of audacity by simply running "chutzpah" through Lexis or Westlaw. (The word has not yet been assigned a key number.) My nomination for the winner of this competition is *Maryland v. Strickland*, 400 A.2d 451 (1979), by Chief Judge Gilbert of the Maryland Court of Special Appeals. Confronted with a defendant who, having been convicted of paying a $2,500 bribe to a judge, sought to have his $2,500 refunded to him, Chief Justice Gilbert concluded that, "for whatever else he may lack, (the defendant) suffers not for lack of chutzpah."

Glossary

Chachem: A clever, wise or learned person, or used sarcastically, a fool.
Chutzpah: Outrageous gall.
Draikopf: One whose head is turned around; a confused person.
Gonsa: Large; big.
Goyim: Non-Jews, or someone who is insensitive.
Kashe: Mush; a mess; a question.
Kibbitzer: Meddlesome adviser.
Klots-kashe: Literally, a question only a blockhead would ask.
Kreplach: Jewish ravioli. A magnificent combination of ingredients which exceeds the sum of its parts.
Kvetch: A whining complaint.
Maven: A connoisseur or expert.
Megillah: A long story (the biblical Book of Esther).
Meshugge: Mad; crazy.
Mish-mosh: A mix-up, mess or hodge-podge.
Nebbish: A nobody; a loser.
Pisher: A little squirt; a nobody.
Putz: Verb, to fool around; noun, see schmuck.
Schlemiel: A social misfit who fails through his own inadequacy.
Schlimazel: Someone who's always unlucky.
Schlock: Cheap or shoddy merchandise.
Schmuck: A penis; an idiot; fool.
Schnook: A pathetic but loveable fool.
Shadchen: A matchmaker or marriage broker.
Shaygitz: A young, non-Jewish male; a charmer.
Shlump: A slob.
Shmegegge: A buffoon.
Shtick: A performer's bit.
Shmoozing: Intimate small talk.
Shnozzle: Nose.
Shtup: To push or shove. (Vulgar, to fornicate.)
Trombenick: One who blows his own horn.
Tsitser: A kibbitzer who goes, "tsk! tsk!"
Yenta: A blabbermouth or nag.

Pleadings and opinions

A single Yiddish word can capture all the subtle nuances you wish to convey about the opposing party in legal pleadings. Rather than saying, "The defendant then and there, without due circumspection and caution, entered the intersection while the light was red," you can simply say, "The draikopf ran a red light."

You also can communicate contempt for the tactics of opposing counsel. Rather than an indignant "Counsel for the defendant is deliberately interposing frivolous objections to delay these proceedings," you can simply chortle, "The nebbish is putzing up this case." Be careful when applying Yiddish labels to judges, however. One exuberant lawyer told a court of appeals justice that a recent opinion of his was "kreplach" and received a smack in the shnozzle in return.

Judges have been known to apply Yiddish labels to each other on occasion. The most famous example is Justice Robert Thompson's classic footnote 2 in *California v. Arno*, 153 Cal.Rptr. 624 (1979). Presented with a kvetching dissent, Justice Thompson spelled out his response in unusual form. The first letter of each sentence forms the word "schmuck":

"We feel compelled by the nature of the attack in the dissenting opinion to spell out a response:

1. Some answer is required to dissent's charge.
2. Certainly we do not endorse 'victimless crime.'
3. How that question is involved escapes us.
4. Moreover, the constitutional issue is significant.
5. Ultimately it must be addressed in light of precedent.
6. Certainly the course of precedent is clear.
7. Knowing that our result is compelled.

(See Funk & Wagnall's *The New Cassell's German Dict.*, p. 408, in conjunction with fn. 6 of dis. opn. of Douglas J., in *Ginsberg v. New York* (1967) 390 U.S. 629, 655-656.)"

The German definition of "schmuck" is a jewel. The Yiddish definition is somewhat less flattering although equally treasured by some, referring to a male reproductive organ. As the *Ginsberg* footnote cited by the court declares, however, which definition one prefers may depend on your own neuroses. The dissenter protested that press accounts of the footnote used the Yiddish definition, which was found in Webster's dictionary: "One certainly cannot fault the *Los Angeles Times* for using an English dictionary (Webster's) since California published opinions for over 125 years have been written in English and our jurisdiction obviously does not extend 7,000 miles to the Rhine in Germany."

Thus, the dissenting footnote can be cited by counsel to support the use of any Yiddish terms that have found their way into English dictionaries.

This exchange also illustrates one of the great advantages of Yiddish words for lawyers. Frequently the same word can be used to insult in one context and express admiration in another. You can deftly avoid an accusation of contempt by citing the alternative definition. "Shaygitz," for example is an ethnic slur for young non-Jewish males, meaning "disgusting because uncircumcised." But it can also mean a handsome lad of any religion who is irresistably charming to women. "Shiksa" is the female version of shaygitz. A similarly adaptable word is "pisher," meaning either an inconsequential nobody or a cute little squirt, depending on whether it is applied to an adult or a child. "Chachem" can denote a savant of great wisdom, or a foolish jerk, depending on the intonation. Thus, you might greet a judge's overruling of your objection, "Such a chachem."

Jury instructions

Yiddish can be put to good use in clarifying the complexities of the instructions judges give to juries. Just a few examples from Devitt & Blackmar's *Federal Jury Practice and Instructions* (3rd ed. 1977) will illustrate the point:

English: The sanity of the defendant at the time of the commission of the alleged offense is an element of the crime charged and must be established by the government beyond reasonable doubt, just as it must establish every other element of the offense charged. A defendant is insane within the meaning of these instructions if, at the time of the alleged criminal conduct, as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

Yiddish: If you find that the schnook was meshugge when he did it, you should acquit him.

English: The plaintiff in this case claims damages for personal injuries, alleged to have been suffered as a proximate result of negligence on the part of the defendant. Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, when prompted by considerations which ordinarily regulate the conduct of human affairs. It is, in other words, the failure to use ordinary care under the circumstances in the management of one's person or property, or of agencies under one's control.

Yiddish: If you find that the defendant is a schlemiel, you should make him pay. If you find he is just a schlimazel, give him a break.

There's a difference

The difference between the schlemiel and the schlimazel was summed up in *Dictionary Shmictionary!*, by Paul Hoffman and Matt Freedman, as follows, "The schlemiel brings on his own misfortune, unlike the schlimazel, who gets it handed to him. For example, when a schlimazel drops a piece of buttered toast, it always lands buttered side down. But when a schlemiel drops a piece of toast, he has buttered both sides."

The "schnook" is probably more closely related to the "schlimazel" than the "schlemiel". It's easy to get them confused, for they frequently travel in pairs. Even Justice Douglas of the U.S. Supreme Court apparently got them mixed up, if this account by Edward Bennett Williams in 34 F.R.D. 184 is correct:

"Mr. Justice Douglas publicly observed on one occasion that the most important distinction impressed upon him in his days as a Columbia law student was the difference between a schnook and a schlemiel. He said a schnook is a fellow who gets dressed up in his dinner jacket and goes to a very elegant dinner party and proceeds to spill the soup, and spill the gravy from the entree, and then slobber the chocolate sauce when the dessert is served. The schlemiel is the fellow he spills it on. It has been my experience that in every case involving 20 or more defense lawyers on the criminal side of the court we are apt to draw one or more schnooks, and it makes all the rest of us into schlemiels."

More accurately, it is the schlemiel who makes all the rest of us into schlimazels. The schnook is frequently the judge.

Trial objections

Yiddish can supplant the stock of evidentiary objections available to every trial lawyer. Instead of objecting to a question because it calls for a narrative answer, counsel should simply say, "I object, he's asking for a gonsa megillah." When opposing counsel is badgering a witness or asking argumentative questions, you can interpose, "Stop shtupping." I tried that once, and the delighted judge yelled, "Shushtained." When an expert witness gets carried away with his qualifications, you can offer to "stipulate that this trombenick is a maven."

Yiddish objections are especially effective in unnerving opponents during their final summation to the jury. Loudly moving to "strike the schlock" is guaranteed to bring an explosive response. If he gets too close to the jury box, object that "the shlump is shmoozing." When he starts telling cute stories, you can politely interpose, "Although I hate to interrupt counsel's shtick, this kashe is not in evidence." The most effective derailer, however, is the klots-kashe, a question from left field. Jumping up and asking "What does truth have to do with justice?" is an effective klots-kashe. If your opponent interrupts your closing argument, you might respond, with great disgust, "More mish-mosh from the kibbitzer."

One final word of caution to my fellow goyim, however. While the use of plain Yiddish can vastly expand our communicative powers, we must proceed with caution (scrutinize the glossary with care). A single goof can make us look like a shmegegge. We had a recent example in an interview of Justice Sandra Day O'Connor in the *Ladies Home Journal*. She was quoted as saying, "I'm the yenta of Paradise Valley. I have introduced a number of couples, including my own sister and brother-in-law."

While Yente was the name of the matchmaker in *Fiddler on the Roof*, a "yenta" is a blabbermouth. Justice O'Connor may be a shadchen, but a yenta she's not.

VERBATIM

R. v. Whelan promises vintage copy for our columns. It is to be a long trial, and Judge Bland had received the depositions well in advance. An early submission was made:

His Honour:
I want to make it clear that I know nothing about the facts, the background facts of this trial, the reason being that there were two and a half thousand pages of transcript and I did not know where to delve or where to start and I thought it best to wait for the opening day. So I mention that only because you should operate from now on in relation to this present submission on that basis, that I know nothing about the facts.

Later His Honour was concerned about the amount of paper involved in providing two copies of transcript for each side:

His Honour:
I have been to China a few times in my life. When people go shopping in China they go with a string bag. . .and everything they buy is in the string bag without wrapping.

Murphy:
We are not after ducks, Your Honour.

R. v. Whelan
Cor. Judge Bland and Jury
4th September, 1985.

• • •

Starke J:
(refusing to hear a Practice Court Application involving, inter alia, a bookmaker).
I am sorry gentlemen but I can't hear this matter. We frequently have transactions with each other and, while he is not a friend of mine, relations between us are very cordial. And so they should be the way I'm going!

Faulkner v. TCN 9 Pty Ltd & Anor.
11th April, 1985.

• • •

A witness named Atherinos was being cross-examined:

Wraith:
"Even though you had this small amount of expertise, namely, you were studying accounting at R.M.I.T. and working in a solicitor's office, therefore you, I suppose, picked up the atmosphere of the law at least?"

Witness:
"If you can call filing accounts away".

Wraith:
"Barrister's accounts?"

Witness:
"Yes".

Wraith:
"Of course you never paid them; your instructions were not to?"

Witness:
"That's correct".

R. v. Clarkson & Ors.
Cor. Hampel J. and Jury
28th August, 1985.

• • •

The Magistrate was giving his decision in a police case which had proceeded ex parte. Heavy rain was falling on the tin roof. Immediately after announcing that the Defendant would be convicted a deafening thunderclap made all jump.

Before he could proceed and announce a penalty a voice from the body of the court was heard to observe:

"Moloney you should have given him a bond!"

Cor. Frank Moloney SM
Sunshine Magistrates' Court

• • •

CASENOTE:

VIGUS v. DONOVAN
(County Court - Judge Walsh - 21 June 1985)

It was 18th March 1982 when the collision occurred in North Melbourne. The plaintiff driver suffered a soft tissue whiplash injury. The procedural chronology was as follows —

13th September 1982 — Summons issued
24th October 1983 — Liability admitted
9th April 1984 — Certificate of Readiness signed
2nd July 1984 — Pre-Trial Conference — trial fixed 6th August 1984
4th July 1984 — Plaintiff's Solicitor delivered Brief on Trial marked $500 and $60
18th July 1984 — $25,000 paid into court
3rd August 1984 — Plaintiff accepts payment in.

The matter before Judge Walsh was an application for review of decisions of the Registrar in the taxing of the plaintiff's party and party bill of costs. The items in dispute included Counsel's fee on Brief and Conference which the Registrar had disallowed.

The Defendant and the Registrar relied on the decision of the Chief Judge in **Hancock v. Tynan** (8 June 1984) where counsel's Brief and Conference fees were disallowed on the basis that delivery of the Brief was premature. It had been delivered on 13th December 1983 for a trial at Ballarat for hearing in the March sittings.

The test to be applied is that laid down by the High Court in **Stanley v. Phillips** (1966) 115 C.L.R. 170 (fees of two Counsel).

> Would a reasonable and prudent, but not overcautious man, in all the circumstances seek the services of two counsel notwithstanding the expense? In determining this question the Taxing Master should take into consideration and should balance both the attainment of justice and the interests of the party in the successful outcome of the litigation . . .

The Chief Judge in the earlier case held that the reasonable and prudent solicitor would not brief counsel for trial in mid December when the trial would not take place until some time in the following March. Such a solicitor at that time might properly instruct counsel to advise on evidence and/or upon liability and quantum. The only advantage in briefing so early was to increase the likelihood of counsel appearing at the trial. The Chief Judge added:

> In an uncomplicated and unexceptional case such as this I am of the confident view that delivery of the brief to counsel on trial two weeks prior to the commencement of the sittings, would have afforded more than ample time for counsel to become fully prepared to present the plaintiff's case on trial.

Judge Walsh accepted that the test was as stated by the High Court but felt that he was not bound to reach the same conclusion as the Chief Judge. Each case must turn on its own facts and it is these facts against which the reasonableness of the conduct of the instructing solicitor is to be measured. In assessing this conduct it is not proper to have regard to hindsight, the facts facing the solicitor are those to be examined.

The facts of the instant case are not uncomplicated from a forensic point of view since the plaintiff had suffered a subsequent similar injury. Following the failure of the pre-trial conference the defendant's solicitors had arranged for a medical examination on 17th July. His Honour held that it was reasonable for the plaintiff's solicitor to assume that no payment in would be made until that medical report was received, by which time the hearing would be imminent. Accordingly it would have not been prudent to defer the delivery of the brief until after the defendant's medical examination.

Judge Walsh placed reliance on the following dictum of Madden C.J. in determining that the solicitor had acted prudently and that the disbursements should be allowed —

> I am emphatically of the view that Briefs cannot be too soon prepared. Clients are not fairly treated by having their case prepared and put in the hands of counsel at the very last moment; and counsel too are placed at a great disadvantage by this too common practice.
>
> **International Financial Society v. Smith** (1896) 22 V.L.R. 114 at 119.

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