VICTORIAN BAR NEWS

NO. 66

SPRING 1988

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VICTORIAN BAR NEWS

NO. 66 SPRING 1988

The late E. D. Lloyd Q.C.

Dr. P. H. N. Opas

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Cover: The late Woods Lloyd pictured with colleagues of the 10th floor, Owen Dixon Chambers. Left to right standing: L. Boyes, P. Costello, J. Keenan, J. Larkins Q.C., M. Brenton, J. Bingeman. Sitting: the late E. Lloyd Q.C., M. Black Q.C., W. Paterson Q.C.

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THE EDITORS' BACKSHEET

THE SORRY STATE OF THE JUDICIARY IN VICTORIA

Elsewhere in this issue former Bar Council Chairman Alex Chernov Q.C. reviews the serious problem of governmental attitudes towards the Supreme Court, which seem to have been quite unaffected by the release of the Bar Council's statement on the Sorry State of the Judiciary in Victoria.

A startling statistic which throws this problem into focus was revealed at the AIJA Annual Seminar in Canberra on 3rd September. Professor Glen Withers of Latrobe University and Dr. Alan Barnard of ANU presented a major study of the financing of Australian courts over the last 30 years — a hitherto completely unexplored area. The study revealed that, over the whole period, Victoria's per capita spending *was substantially less then every other state.* In 1985 (the last year for which figures were available), Victoria spent *50% less* than the Australian per capita average.

By a different measure, the staffing numbers of the Supreme Courts, New South Wales is of course far ahead and has for many years had a permanent and highly successful Court of Appeal, Queensland is almost equal in numbers and is likely to have a Court of Appeal and Western Australia is about to have some three extra judges appointed and a Commercial List staffed by four judges. Incredible though it may seem, in terms of numbers of judges and efficient dispatch of business, in the foreseeable future Queensland is likely to overtake Victoria and Western Australia will not be far behind.

As the Withers and Barnard report shows, this sorry state extends far back beyond the advent of the

present government. Party politics probably have little to do with it. More likely, as Alex Chernov's article suggests, there has been amongst those who have exercised power (both political and bureaucratic) in Victoria since the war a fundamental lack of appreciation of the historical and constitutional importance of the judiciary as a separate arm of a democratic system of government. It is not just a question of judicial salaries or research assistance or comfortable courtrooms — important as all these things are. The court system does not exist to provide "court services" in the same way as other departments provide health services or transport services. Certainly the court system provides a vital service to citizens as well as government since it resolves disputes in a peaceful and rational manner, but it also operates as a check and restraint on government.

Fair-minded people of whatever political persuasion ought to realise that independence in function cannot be separated from the capacity to perform that function, which boils down to the hard facts of money and support.

THE LATE WOODS LLOYD

We are very grateful to Garry Sturgess, a member of the Bar and formerly a well-known journalist, for providing us with the transcript of an interview with Woods Lloyd recorded in 1984. We hope that all were privileged to know Woods as a friend and colleague will recognise in the interview the perception, wit, warmth and eloquence which made him such a towering figure.

DAVID WILKEN

We are delighted to inform readers that Bar News will be getting the assistance of David Wilken, formerly the editor of the Law Institute Journal and now an independent publishing consultant. Over forthcoming issues we are sure that David's journalism and publishing skills, as demonstrated by his outstanding track record with the Law Institute Journal, will be reflected in an upgrading of Bar News for the enlightenment and entertainment of members of the Bar and, hopefully, others as well.

GEORGE BRETT

On 16th September many members of the Bar joined with solicitors in the Banco Court for a formal farewell ceremony on the retirement of Master George Brett.

At the time of his retirement, George Brett was the longest serving judicial officer of the Supreme Court.

He was a very much liked and respected figure amongst members of the Bar. He disposed of the business before him in a firm and decisive but good-natured and practical style. Usually he seemed to get things right and many a time a barrister must have come away from Master Brett's chambers after a loss thinking that well, perhaps, that interrogatory was a bit wide. Indeed on one notable occasion Ninian Stephen Q.C. and Brian Shaw (as they respectively then were) had their defence struck out but did not take the matter on appeal.

One feature of Master Brett's chambers which probably gave rise to mild curiosity over the years was the row of volumes stretched across his desk like a rampart. At his farewell, the secret was revealed. When issuing Certificates of Means under the old Matrimonial Causes Act, he found it convenient to write out the certificate while the parties were still arguing, this saving much time and expense.

JUSTICE ROWLANDS

Justice Rowlands of the Family Court has been appointed a Presidential Member of the Federal Administrative Appeals Tribunal. He will remain a member of the Family Court.

When a County Court judge, he was the first President of the Victoria AAT and presided over various important FOI cases including those relating to the SEC Portland Smelter documents, the Nunawading By-Election, the Continental Airlines Affair and Government Opinion Polls (the final determination of this matter still awaits a decision of the Full Court of the Supreme Court concerning "Cabinet Documents").

The new appointment is the first time in Victoria that a Presidential Member has come from the Family Court rather than the Federal Court and is seen as an example of the trend towards diversity of judicial work for members of the Family Court, a subject touched on in the paper of Paul Guest QC published elsewhere in this issue.

Like its State counterpart, the Federal AAT handles FOI cases and a variety of other matters including Deportation, Compensation, Aviation and Taxation Appeals.

SUNSHINE STATE

By 1992 the member nations of the European Economic Community will have achieved full economic integration. One consequence of this is the removal of any restrictions on professional practice from persons qualified in a member country. A Portuguese lawyer will be able to appear in a Scottish court.

One might have thought there was more in common between other Australian States and Queensland in terms of language and legal system then there is between Portugal and Scotland. Nevertheless Queensland steadfastly seeks to protect its citizens from the depredations of southern States' lawyers by restrictive admission rules.

Up until 2nd July 1987 those rules provided that an applicant for admission as a barrister of the Supreme Court of Queensland had to be a resident of that State. The rules were challenged unsuccessfully by a New South Wales barrister *(Street v Queensland Bar Association* (1987) 74 ALR 604) on the ground that the rules contravened ss.92 and 117 of the Constitution.

The applicant sought special leave to appeal to the High Court (79 ALR 579) but was met with a change in the rules. The substantial effect of the amendment was to delete the condition precedent as to residence and substitute another, namely that the applicant intended to practice principally in the State of Queensland. The respondents opposed the grant of special leave on the ground that the question was now academic, but the High Court adjourned the application so that the applicant could file in the High Court a statement of claim seeking a declaration of an invalidity as to the new rules. Mason CJ and Wilson J described the case as raising "issues of general importance which ordinarily would warrant the grant of special leave" (at 580).

Meanwhile, other States seem to have survived remarkably well any ill-effects which might arise from the appearance in their courts of Queensland barristers who do not reside in those States or do not intend to practice principally in them.

And if leading Queensland barristers such as G.L. Davies Q.C. (currently President of the Australian Bar Association), G.E. Fitzgerald Q.C. and Ian Callinan Q.C. are a fair indication, one would have thought the Queensland Bar did not have much to fear from outside competition.

READERS COURSE

The Bar's Readers Course, established some years ago under the leadership of Michael Black Q.C. has developed over the years into a most successful institution. Practitioners from outside Victoria have been admitted to a limited number of places. Presently undergoing the course are Kelly Naru and Daniel Liosi of Papua New Guinea. Previous students from that country were Stephen Madana and Robert Aisi.

KEN SPURR

Recently Ken Spurr celebrated the notable achievement of 25 years as a barristers' clerk.

Ken commenced his practice in somewhat inauspicious circumstances. The Bar Council of the day had granted a licence to two new clerks, one Jack Hyland and the other an Englishman who apparently came with glowing references and much style and aplomb. However he only lasted a short period and Ken Spurr, then employed by Messrs Nicholls & Dever had to step into the breach. He has been a most successful and respected clerk and his list has always been a strong one, with a particular emphasis on commercial work. Away from chambers he is very much concerned in the affairs of the Coburg Lions Club.

NEW CHIEF JUSTICE OF NSW

Even the most parochial Victorian would acknowledge that one of the great judicial offices of this country is that of Chief Justice of New South Wales.

Following the retirement of Sir Laurence Street, Murray Gleeson Q.C. will shortly take up that position.

After taking silk in 1974 at the age of 36, Murray Gleeson has become universally recognised as one of the truly outstanding advocates at the Australian Bar, appearing frequently before the High Court and Privy Council and in mega-litigation such as the Bass Strait oil royalty dispute.

Displaying that versatility which is such a hallmark of the Sydney Bar, his Honour successfully defended a leading political figure in a criminal jury trial some years ago.

In his limited spare time, his Honour is an accomplished skier and tennis player.

"SQUEAKERS"

Well known legal bookseller Jim Wade was recently negotiating with a member of the Bar for the sale of a set of the Authorised Reports belonging to a newly appointed Judge.

In lauding the quality of the volumes, Jim pointed out that they fell within that category known in the trade as "squeakers" since they squeak when opened — because of the rarity of previous use.

Anyway, we hope his Honour's care of his books — for whatever reason — was rewarded by a fair price.

UP TO SCRATCH

The proud boast of the Victoria Police Detective Training School, as reported recently in the Sunday Observer:

> "If you want to go to Melbourne University and become a barrister, you only need 51 per cent to pass. But if you want to be a detective, you have to get 75 per cent."

No detail was given of the curriculum of the VPDTS, but presumably it includes such courses as History and Philosophy of Corroboration IIA.

The Editors

CHAIRMAN'S MESSAGE

ON 19TH SEPTEMBER THE MELBOURNE HERALD referred to me as "the man, who as Chairman, has pushed the low-profile Victorian Bar Council firmly into the public arena". I am sure most of the Bar would consider this was fair comment, but a few would probably consider that as Chairman I should have been less outspoken, and perhaps more tactful in my correspondence with the Attorney-General.

The very nature of a Bar and the challenges of our profession inevitably means that we attract to it some of the best minds in the State. Because of its expertise a Bar does need, from time to time, to speak publicly. In the first twenty years of the Colony of Victoria the two men who made the greatest contribution, not only to the development of our judicial system but also to the State itself, were two members of our Bar, Redmond Barry and William Stawell, both of whom spoke out on innumerable public issues.

In the latter half of the nineteenth century nearly all the most prominent members of our Bar, such as Richard Ireland Q.C., Archibald Michie Q.C., Sir George Stephen Q.C. (later Mr. Justice Stephen), George Higinbotham (later Chief Justice) and James Purves Q.C., were not only practising barristers but were at one and the same time active members of Parliament. At that time there was little need for the Bar as such to express any public views, because the views of the Bar were at all times fully ventilated in State Parliament. No doubt one of the reasons why Victoria was able to develop such an outstanding judicial system was the presence in Parliament of so many men who, whilst differing widely in their political views, all recognised the tremendous importance of a strong independent judiciary. Nor can there be any doubt that the presence in State Parliament of so many prominent barristers made a very significant contribution to the development of the State as a whole.

Unfortunately today none of our leaders still practising actively at the Bar are also members of State Parliament. It is probably no longer possible to combine the two. This inevitably means that the voice of the Bar is heard less and less in the deliberations of State Parliament and in the decision-making processes of State Cabinet. That, I believe, is a great pity and must operate to the detriment of our community.

Insofar as the present Bar Council has spoken out publicly and communicated with the Government on the state of the judicial system and some of the many attendant problems, I believe what we have said needed to be said. The recent Report of the Australian Institute of Judicial Administration on Judicial Finance in Australia contained some interesting but alarming figures relevant to this issue.

According to this report Australians are spending only two and a half times more on their court system than they did in 1950. The information is based on a major national study conducted for the Institute. Among the trends which the study detected was that within the court system, the core of courts with general jurisdiction, such as the Supreme and County Courts, have been squeezed by the greater growth of courts of special jurisdiction and by administrative tribunals.

As regards Victoria, the study says that "the position of one State consistently stands out. This is the case of Victoria's longstanding lower real per capita outlays on the courts". In 1985 Victoria was recorded as spending 50% less than the Australian per capita average on courts. It is also noted that of the total amount spent on courts in Australia in 1985, New South Wales spent 35.53%, whereas Victoria spent 13.45% and Queensland at 12.5% almost as much as Victoria.

In fairness to the present Government, ever since 1968 there was a progressive decline in expenditure on the Victorian court system, and in the current year the Government has now very considerably increased its expenditure. However, the main emphasis has been on the County Court and the Magistrates' Courts. Whatever political party is in power, I believe that the Bar Council should continue to press for further increased expenditure which will rectify the present problems.

High on the list of problems remains the problem of delays and listings and enormous inconvenience and loss of time to barristers, solicitors, clients and witnesses when there is no guarantee as to when a case will commence. Reserve Lists in the Supreme Court and the County Court are never satisfactory, and most of us would hope such Lists are a temporary arrangement only, and that they will never form a permanent feature of the system.

The Bar's Pilot Default Listing Scheme in respect of unpaid barrister's fees is now in operation and so far has caused no significant problems. It is, of course, at a preliminary stage, but initially it is providing some very useful information.

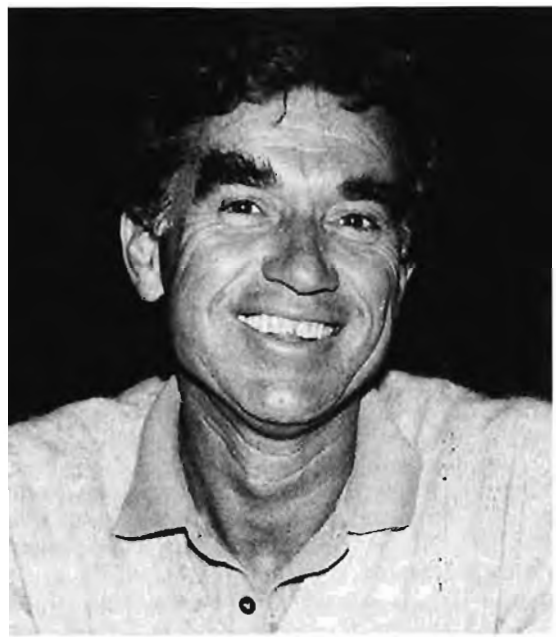
It is too early to form any conclusive view as to the value of the Scheme, but its initial operation clearly suggests that some such Scheme is necessary and that it is likely to have a significant effect on the present delays in payment.

May I conclude by thanking all members of the 1987-88 Bar Council for their loyal support and for the valuable work which I believe has been done by them for the Bar. For the most part the year has, I believe, been one of significant achievement and I hope 1988-89 will be an even better year for the Bar. I am in particular grateful to our two Vice-Chairmen, Abe Monester Q.C. and Andrew Kirkham Q.C. Finally, I am very grateful to the Bar itself for the opportunity to serve as your Chairman. I am very conscious that it was a great honour to be your leader.

Charles Francis

WELCOME

JUDGE KEON-COHEN



THE ELEVATION OF HIS HONOUR JUDGE Chester Keon-Cohen to the County Court Bench was warmly endorsed by the profession on the occasion of his Honour's welcome on 9th August 1988.

His Honour was a student at Scotch College where he commenced a long association with the sport of rowing, which association he pursued with distinction throughout his residence at Trinity College, Melbourne University and beyond. Golf eventually replaced rowing as a sport pursuit and the power which he used to such effect as stroke for numerous crews now propels the golf ball prodigious distances. However, the contact is not always perfect; local seismologists have come to ignore Saturday readings approximating 5 on the Richter scale which have an epicentre at the Royal Melbourne Golf Club. It is now accepted that such phenomena are caused by his Honour taking a divot somewhat larger than intended.

Reference was made at the Welcome to his Honour's passion for his "beloved Demons" and to the fact that invitations to attend matches as a guest of Bar luminaries who support opposing teams, are never renewed. It appears that his Honour's verbal encouragement to his team to perform, compares in intensity with Lenin's exhortations to the workers and peasants to rid Russia of the Romanovs. It is understood that since his appointment the Chief Judge of the County Court, with whom he read, has directed that if he insists on attending Melbourne matches he should do so wearing dark glasses and a plastic raincoat.

His Honour and his wife, Sue, are very keen gardeners and they take great pride in their "Kew Gardens". Vegetables are grown in compost that is edible and his Honour supplies most of Melbourne and Geelong's trendier restaurants with blueberries that he personally nurtures on his country estate at Upper Beaconsfield.

He has a love of fine music. He has seen almost every opera performed in Melbourne over the past few years. He treks in the outback, takes Flying Doctor type excursions into the Kimberleys and scuba dives, occasionally in the Maldives. All these activities have somehow meshed with a successful and demanding common law practice. At the time of his appointment, he was an acknowledged leader of the Junior Bar and this breadth of experience and expertise undoubtedly qualifies him for his appointment to the Bench.

JUDGE STRONG

WAS THERE A HINT IN THE APPEARANCE BY Michael Strong as Judge in the 1984 Centenary Bar Revue? His performance was such on that occasion that few were surprised when on 6th September he was sworn in as a judge of the County Court.

Judge Strong's appearances in the Revue (he also played a law lecturer) must have whetted his appetite for the stage for soon after he commenced performing in the Chorus of the Victorian State Opera. His appointment is certainly a first for the State Opera. The Director of the Opera describes him as having a fine baritone voice, "not the sort of town and country baritone used to augment grief at funerals". It is said that he enjoys the pomp and ceremony of the opera and apparently is a fine hand with makeup. One hopes that he manages to separate his extra-curricular activities from his curial role in the coming months as he is about to play both a prisoner and a prison officer in the forthcoming production of Fidelio.

Born in 1947 and educated at Xavier College, Judge Strong came from a legal family with both his father and grandfather having practised as solicitors in the country. He completed the Articled Clerks course at RMIT and after admission in 1972 practised in litigation with Mallesons before signing the Bar Roll in 1975 and reading with Douglas Meagher.

He soon established a busy civil practice in the Magistrates and County Court, increasingly in the personal injuries area. Not content with building his practice, in 1977 he was appointed a director of Barristers Chambers Ltd, a position he held until 1981 and during that time he was responsible for getting Latham Chambers off the ground.

As his civil practice developed it was complemented by prosecution work for the Corporate Affairs Commission. This foray into the white collar crime area led him in 1980 to a defence brief in the Caravan Conspiracy Case, then this state's second longest trial.

After this his practice focussed on the white collar crime area and in late 1981 he was appointed a Prosecutor for the Queen and joined the newly formed Commercial Crime Group. In that capacity he appeared in a series of trials in the Supreme and County Courts arising out of a Royal Commission into the land deals of the late 1970s.

Following his return to the Bar in 1984 his practice concentrated on the rapidly growing commercial crime area where he much sought after and appeared for both defence and prosecution in a number of major trials, some of which are noted in the law reports. He has acted for some notable business figures who can thank him for preserving their reputations. His approach to cases has been characterised by painstaking preparation, command of the relevant material and a restrained vigor in cross-examination which invariably produced the best result for his client.

On two occasions his expertise in commercial and corporate crime has been harnessed by government. With Michael Dowling Q.C. he was called in to prepare a report on the prosecution policies of the Corporate Affairs Office which apparently rocked the place to its foundations. With Robert Redlich Q.C. he became part of the Legal Team charged with getting to the bottom of the Continental Airlines affair. The full report has never seen the light of day but no doubt when it does it will be testimony to the fairness and rigour of its co-author.

In recent years Judge Strong's criminal practice has broadened into the industrial arena and he has appeared for a number of unions and leading union officials in industrial cases in the Federal and other courts both here and interstate. He has taken the case of a well known building union official to the highest court in the land and has earned the same respect of his colleagues in this jurisdiction that he holds in the more mainstream areas in which he has practised.

In the last two years Damian Murphy, Sean McLaughlin, Mark Dreyfus and Christopher Howse have read with him and been well served by their Master.

When he is not preparing his cases Michael is known for his devotion to his wife and three young children or clashing on the tennis court with a diminutive media personality. His sense of public duty has made him active in community affairs including being a long serving member of voluntary legal services in the Kew and Hawthorn areas.

The Bar welcomes his appointment and can be confident that the wide-ranging nature of his practice makes him well qualified for the various jurisdictions of the County Court. His pleasant temperament, sense of fairness and capacity for hard work will serve him well in judicial office.

JUDGE MEAGHER

JUDGE JOSEPH GERRARD MEAGHER (JOE TO all who know him) was born at Bendigo on 2nd September 1933. The son of a T. & G. Life Insurance Manager (both his parents are still alive and active, aged 89 and 85), Joe's secondary schooling was at St. Patrick's College, East Melbourne. The Jesuits, however, failed to hold Joe's interests long enough for him to Matriculate at that establishment. Always in a hurry, Joe was keen for the business world to feel his impact.

Armed with his Leaving Certificate, he landed a job with the Commonwealth Bank but soon realised that the General Manager's job was not readily available within a limited period. He decided, after a short while, to return to studies. He obtained his Matriculation and set about letting the Legal world know of his existence, capabilities and capacities. He studied Law at Melbourne University and was admitted to practice in 1961. At University, he made many lifelong friends, of whom the present writer is privileged to be one.

On entering Articles, Joe was indeed fortunate to be articled to the late Gerald Delaney whose wealth of experience and wisdom were no doubt invaluable to this ageing law student. So much so that on admission, his services as a solicitor were quickly snapped up by Messrs. Weigall & Crowther (now Sly & Weigall — if your Honour pleases). Two years was as much as he could take of office work, and, in 1963, he joined the Bar, there to remain for the next 25 years.

His Honour read with Mr. Jim Forrest, who during the reading period was elevated to the County Court and Joe's "Indentures" were transferred to the late Harry Mighell. With such tutors, it is no wonder that he succeeded in his chosen role as Counsel. He graduated through the Magistrates Court (then known as Petty Sessions), to General Sessions, the County Court and the Supreme Court. He did considerable circuit work, especially at Mildura where he became part of the furniture, and he appeared in the new High Court in Canberra. He developed a very busy practice involving considerable criminal work, and in the later period, Civil Causes and Jury work. His practice was both in Court and in paper work. He kept his secretary (the ever reliable and faithful Mrs. Barbara Canty) very busy with his 'urgent' work. At least this year, Barbara might well get Christmas Eve (a Saturday) off.

Whilst acknowledging Joe's success in the Law as a consequence of hard work, diligence and conscientiousness, there is no doubt that he was able to combine his work and play to a very marked degree. Those who have holidayed with his Honour and his family in places as widely separated geographically as Torquay, Merimbula, Noosa Heads and Fiji, will attest that there is no time in his legal vacations for physical or mental relaxation. He is a renowned organiser and his holidays are run on a tight schedule with early morning tennis, followed by surfing, windsurfing and swimming in the later morning period, pre-lunch drinks followed by a less active afternoon on the sand, pre-dinner drinks and a meal out, all generally highly organised by his Honour. Certainly, after such vacations, his Honour would return to Melbourne refreshed and his friends exhausted.

It is not only on vacation, however, that his Honour is so active. Even at his busiest times at the Bar, he always found time for his Thursday night tennis, his Saturday competition tennis in season, his pursuits of surfing and windsurfing which were not confined to the Summer months, and on wet Saturday afternoons in Winter, he could be seen on the outer wing with a 'tinny' wherever his beloved Hawks may be performing. In more recent times his Honour has shown an interest in the Sport of Kings and is a Member of the Victoria Racing Club.

There can be little doubt that the self satisfaction his Honour would have experienced on being offered his Judicial Appointment would have been matched by the great thrill he would experience in the knowledge that his parents were alive to share in the rewards of his endeavours within his chosen profession. Like Joe, his parents' interests in sport are not confined to one activity and on the Saturday following his Welcome, and following a somewhat late Friday night Dinner engagement enjoyed by Joe and his wife Denice and by both his parents, both parents accompanied Joe to see Hawthorn, in the pouring rain, at Waverley.

No commentary on his Honour would be complete without reference to his greatest attribute — that of family man. Joe and Denice have four children, two boys and two girls and the family has always been of the greatest importance to him. No doubt, greatly influenced by his own background, Joe has always placed family first and is reaping the rewards as he sees each of his children maturing into fine adults with the same family attitudes.

His Honour will beyond doubt bring wisdom, common sense and maturity into his Judicial deliberations.

The Bar wishes Judge Meagher all the very best in his well deserved elevated position.

OBITUARY

JAMES HUGH NANKIVELL 1901-1988

JAMES HUGH NANKIVELL, WHO DIED ON THE 13th July 1988, was eighty-six years of age. He was born on 1st September 1901, the son of Hugh Nankivell, a partner (and later senior partner) in the firm of Malleson, Stewart, Stawell and Nankivell. Jim was educated at Melbourne Grammar School where he was lightweight boxing champion, swimming champion and a member of the athletics team. At Melbourne University Jim was a distinguished sportsman both as a lightweight boxer, and as an athlete, gaining a blue and winning the intervarsity mile in 1923 and 1924. At that stage, Jim did not complete his law course, but went to work at Mallesons, where he became managing clerk, and then later was managing clerk at Backhouse and Blakemore. He was also a fine amateur golfer playing in Royal Melbourne's Senior Pennant team.

When war broke out in 1939, Jim was already 38, but he dropped his age to 33 and immediately enlisted as a private in the 2nd/5th Infantry Battalion of the Sixth Division. He saw active service in the Middle East and New Guinea rising to the rank of Major.

After the war, Jim joined the Legal Corps of the Permanent Army serving in Japan and Korea, rising to Lieutenant Colonel, and instructing in military law. In 1962 he returned part-time to Melbourne University to complete the law course he had begun forty years before. In his final examination in Constitutional Law II, Jim was delighted to find the examiner Professor David Derham (ex-Major, 2nd AIF) had included a question involving a knowledge of military law.

When Jim came to the Bar with considerable trepidation in August 1965, his age was by now a closely guarded secret. He read with Austin Asche and worked hard, soon building up a very busy Magistrates' Court practice. Curiously he soon found himself successfully representing a number of conscientious objectors who were seeking to avoid service in the Vietnam War.

Although Jim seldom appeared in "important" cases in the Superior Courts, he always knew that to the client his own case was the most important of all. Sometimes I felt Jim was our most successful barrister. Untroubled by ambition, the work Jim did he did very well. Everywhere he went he was liked and respected. Yet each weekend he found adequate time for golf, snooker or fishing. He was uniformly cheerful and courteous, kindly and generous, and greatly interested in his colleagues at the Bar and their families. His bubbling good humour and enthusiasm was typified by the framed motto in his chambers which read "Sue the Bastards".

Late in 1985 Jim lost his wife Gwynne after more than fifty years of marriage. Although by then 84, he was still a busy practitioner. It was a very heavy blow from which he never entirely recovered. When he retired two years later, Jim was our oldest member, and held in great affection by all who knew him. The day before he died, he played his usual 18 holes at Royal Melbourne.

Jim is survived by two sons, Ross, a member of this Bar and an academic in the United States, and Ian, an Executive Consultant.

Charles Francis

FREDERICK CHARLES JAMES

FOR EACH GENERATION OF BARRISTERS THERE are a few among their ranks who are seen to epitomize the nature and spirit of our calling. They are not always to be found among the most financially successful, nor are they necessarily widely acclaimed, but they are accorded great respect by their peers. Upon them the Bar confers its most significant recognition, the status of a "damn good advocate."

Fred James was one of this very select group and his recent death occasioned much sadness, particularly among the senior members who knew him well. In addition to an acute intelligence, he brought to his work considerable forensic ability and experience, and a measure of articularity that the rest of us could only admire and against which it was discouraging to assess one's own skills.

Fred was always proud to be a member of the Bar. I remember discussing with him as a young law student, the possibility of pursuing this career and hearing him express his perception of the profession. Then, and throughout the years which followed, he saw the court room as a field of honour on which warrior advocates armoured in principle fought with flashing blades of intellect and language. In such combat only ignorance and injustice could ultimately suffer defeat.

It was hardly surprising, therefore, that Fred James enjoyed the highest reputation for personal integrity, and that he was so generous with his time in contributing to Bar activities, including the teaching of many groups of readers.

His family, to whom the Bar has extended sincere condolences, his friends and the Bar generally will miss him. I certainly will.

Frank Vincent

THE GOVERNMENT AND THE SUPREME COURT

Alex Chernov QC reviews the progress, or lack thereof, in dealing with the problems exposed in the Bar Council's recent report The Sorry State of the Judiciary in Victoria.

NOTWITHSTANDING THE RELEASE BY THE BAR Council almost six months ago of its detailed report highlighting gross deficiencies in the Victorian courts and, in particular, the Supreme Court, nothing tangible seems to have been done by the government to demonstrate its commitment to alter that situation. The Supreme Court lists remain clogged, judicial morale continues to be low, the facilities at the court have not improved and there is no suggestion of the court being reorganised into divisions or that a permanent court of appeal is likely to be formed in the near future. To see that the current situation is no different to that which prevailed at the time of the release of the Bar Council report, one only has to look at the position of two critical sections of the Supreme Court, namely, its Commercial List and the Full Court.

The Commercial List, which was established to deal expeditiously with commercial disputes, is hopelessly undermanned. It is administered by two hardworking judges who are under constant pressure to resolve disputes quickly so as to ensure that the list does not reach unmanageable proportions. Those judges are grossly overworked. They have limited opportunity to reflect on judgments which they hand down, yet notwithstanding their efforts, the list of cases awaiting hearing has grown significantly and probably well beyond that which was envisaged when the list was started. Generally as to the expansion of work in the Commercial List, see the interview with Mr. Justice Beach published in issue 65 of the Bar News, Winter 1988.

This situation may be contrasted with the approach taken in Western Australia where consideration is being given to establishing a Commercial List and the suggestion is that four judges will be assigned to it. This in itself is a recognition of the judicial manpower required to cope with cases coming into a list of this type. It is deplorable that in our jurisdiction where commercial activity is significantly greater than in the west and the number of commercial disputes is correspondingly larger, that only two judges are expected to cope with that workload.

In a sense, the Commercial List is in a "Catch 22" situation. The better its service, the greater is the demand for it. As the demand grows without a corresponding increase in the number of judges, its ability to deal properly and quickly with cases, must decline.

Arguably, such a situation may be tolerated and the interests of litigants protected if there were available to them an effective appellate process. Regrettably, such is not the case. Despite the fact that the judges have streamlined some of the procedures and introduced new concepts in relation to the hearing of small appeals, the civil Full Court does not cope with the present workload, let alone accommodate easily the hearing of urgent appeals at short notice.

This means that litigants who require speedy resolution of cases and who are dissatisfied with the decision of a single judge do not have, as a matter of reality, an appellate procedure available to them in Victoria. It follows that in many instances, the decision of the single judge becomes the final decision in the case.

By contrast, the New South Wales civil Court of Appeal, which usually sits in two divisions, is able to provide for the hearing of appeals at short notice and generally processes a large volume of business. It controls the time taken for the hearing of appeals by various means, including call-overs (usually conducted by the President) at which issues to be argued at the hearing are isolated and the duration of the hearing of the appeal is fixed and generally adhered to. This can only be achieved in the context of a permanent court of appeal. It is not surprising, therefore, that last year over 700 originating applications issued out of that court, more than twice that in our court.

It is clear as to what should be done immediately to improve the position in the Supreme Court. In general terms, additional judges must be appointed, at least another six. The Court should be organised to sit in divisions, with a permanent civil Court of Appeal. Moreover, factors going to judicial morale and efficiency should be tackled. In the longer term, serious consideration should be given to the Supreme Court having statutory autonomy so that it is responsible for its own administration as well as other matters concerning its operation as is now the case with the High Court.

These are not novel suggestions. The profession has been telling this to governments of both political persuasions for decades, but the proposals have obviously fallen on deaf ears. For instance, in relation to some of those matters, see the statements of the Bar Council concerning delays in the Supreme Court going

back to August 1967 and the many statements of the Law Institute on that topic. As to the need of a permanent appellate structure, see the article by Stephen Charles QC in issue 61 of Bar News, Winter 1987.

Obviously, the additional judges should be of the highest calibre and be practitioners with relevant experience. The principal reason why only judges of the highest calibre should be recruited was recognised by Sir Anthony Mason in his address to the Bicentennial Legal Convention on 29 August last. They are more likely to keep hearing times within reasonable limits as compared to judges who are less able or experienced.

The organisation of the court into divisions and a Court of Appeal, will enable it to reap the benefits of specialisation in the form of increased court efficiency. Whether judges should move between divisions after a given time, can be left for final determination to be made in light of experience gained after the new structure has operated for a year or two.

There are many factors which go to the current relatively low morale amongst the judges, but perhaps the most important of these is the way in which the government has failed to provide them with adequate facilities with which to carry out their work and its general attitude to them and to their requests.

A major problem is that the government seems to treat the court like a government department and its judges as part of the bureaucracy. Such an attitude appears to be based on a failure to understand or to give due recognition to the position of the court and its judges. They are an arm of the government and do not constitute a department of the executive. While this is no doubt understood, the government does little to give effect to that position. It should do so. The judges stand between the executive and the citizen and they determine disputes not according to their subjective views of the situation, but according to law. One must never lose sight of this fundamental point. To treat the court and its judges as yet another department of the executive government, is to move towards the situation which was recently experienced in Malaysia and Fiji, where the executive governments in one case removed and in another, threatened to remove, judges who made decisions not acceptable to the executive.

The status of the court must be given effective recognition. As part of that, the facilities provided to the judges with which to carry out their onerous duties must be improved, as must their remuneration. Proper libraries and equipment and a sensible working environment are essential prerequisites for the efficient performance of judicial functions. One cannot expect judges to discharge their duties with maximum efficiency if they lack what can only be regarded as essential tools of trade.

As to remuneration, the Victorian Supreme Court judges are amongst the lowest paid superior court judges in Australia, the United Kingdom and Canada. In the latter two countries, judges of equivalent status earn over $150,000 per annum and there is no reason why judges of our Supreme Court should be paid less. It should be borne in mind that they suffer a significant reduction in income in any event by accepting judicial appointment. Those in the private sector who form part of the group often known as middle to senior management, earn substantially more than a Supreme Court judge. The head of the New South Wales Independent Commission Against Corruption will be paid $175,000 per annum. Governments have sought to tie the judges' remuneration to that of bureaucrats. Such a connection is without foundation. Not only do they perform different functions and have different responsibilities, the intangible benefits are also markedly different as between the senior bureaucrat and the judge. Moreover, the constraints of judicial office are not imposed on the bureaucrat.

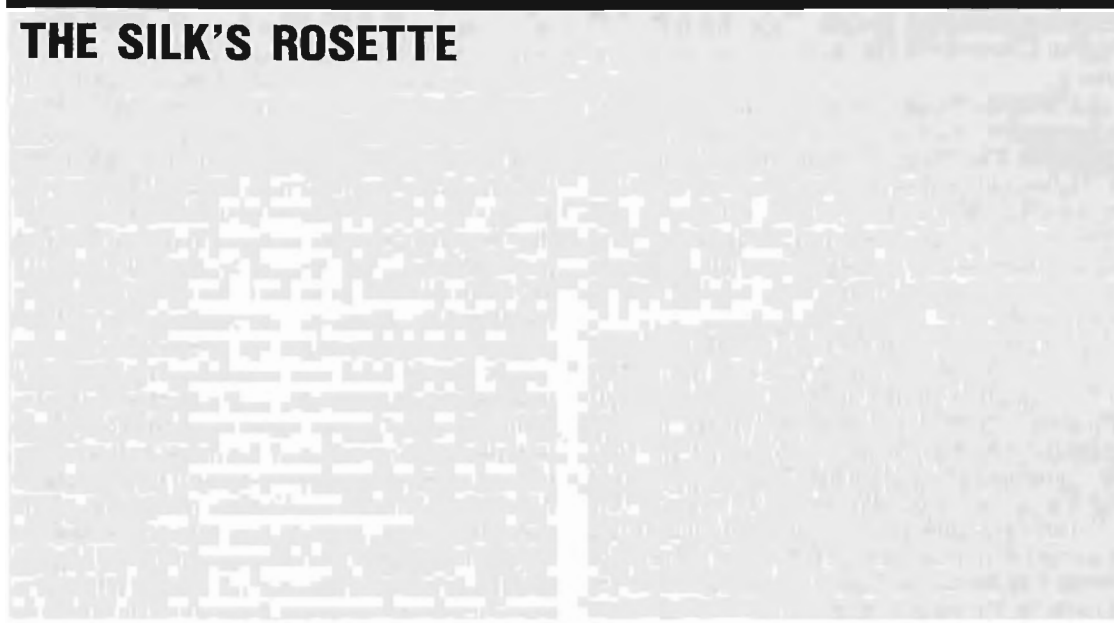
It should also be borne in mind that an improvement in the morale of the court is likely also to have a positive impact upon the problem of judicial recruiting. The prospect of recruiting judges of the highest calibre will no doubt increase if the government demonstrates that it has a proper recognition of the status of the court, a commitment to improving judicial salaries, the facilities in which judges are asked to work and the structure of the court.

The present government boasts of its efforts in carpeting and repainting the Supreme Court, constructing a first aid room, installing word processors and computers, of appointing more magistrates and County Court judges, etc. See, for example, the various Ministerial Statements of the Attorney General between mid 1983 and November 1987. Those efforts are commendable, but they are no more than essential steps which should have been taken years ago and in any event, they do no more than scratch the surface of the problem. They do very little to meet the problems discussed earlier.

Viewed in isolation, the cost of implementing what has been suggested here will be substantial, but will amount to no more than an insignificant fraction of the overall Victorian budget. Victorians are entitled to have a Supreme Court which has the appropriate standing and authority. They have paid taxes on the basis that an appropriate amount will be spent to achieve this. Regrettably, this has not happened. For decades, the Victorian governments have spent less on this essential facility than have all other States. The recent paper of Dr. Alan Barnard and Professor Glenn Withers presented at the Seventh Annual AIJA Seminar in Canberra on 3rd September 1988, shows that on a per capita basis, since the late 1950's, the Victorian governments have spent less on courts than any other government. In 1985, for example, they say that Victoria has spent 50% less than Australia per capita average on courts.

Small wonder that the position of its courts, particularly the Supreme Court, has fallen behind comparable courts during the past quarter of a century. Surely the time has come when this situation is redressed quickly and political rhetoric is replaced by swift action. If it is not, we run the risk of losing the only effective bulwark we have against abuse of government and bureaucratic power.

THE SILK'S ROSETTE



The rosette worn by Victorian silks was long thought to be a custom of Irish origin. This theory having been convincingly disproved (see Bar News No. 62 Spring 1987, p.26), Bar News asked *Dr. P.H.N. Opas Q.C.* for the answer.

THE ONLY BARELY CONVINCING ARGUMENT that I have heard in favour of the retention of the wig is that it lends solemnity and dignity to the conduct of the court. The judge on a raised dais clad in ceremonial robes and wearing a full-bottomed wig looks superhuman if not supernatural. Some may be awe-struck by his appearance, but the quality of justice dispensed in the court is not in the least affected by the trapping and accoutrements of the judge.

Priestly robes may convey to the impressionable that they are present in God's house and that the wearer represents the deity. Yet many a church has discarded sacerdotal robes so that the clergy are seen as normal humans, life-size but not superhuman.

In USA, judges wear academic robes but wigs have long ago disappeared from the courts. Is it not high time to question the origin of wig, and perhaps the gown to determine their present roles in the administration of justice, and see whether they can be left off without loss of efficiency, dignity or even tradition? I can see no validity for my having to wear a fig-leaf just because Adam was supposed to have worn one. O tempora; o mores!

In Victoria, a silk wears attached to the back of the robe a rosette made of gathered black silk ribbon mounted on an oblong backing of black silk. The attachment in turn is a black ribbon which buttons on to the back of the robe. This rosette is not worn in any other State or in England, where silks wear an unadorned black collar. I set out to discover the meaning and origin of this rosette. One suggestion made to me on enquiry from Ede & Ravenscroft, the most famous English robe makers who have enjoyed royal patronage for more than two hundred years, was that the rosette might have been used to store powder in order to combat head lice caused by the wearing of the wig. That seems hardly satisfactory as a reason to continue to wear this rosette in the twentieth century. I felt there had to be a more appropriate raison d'etre.

The stuff-gownsmen do not wear rosettes on their robes even in Victoria. It can hardly be because the juniors are expected to be lousy, but their seniors and consequently betters must be provided with a remedy against head lice.

In Victoria the privileges of Letters Patent appointing one of Her Majesty's Counsel are directly related to those enjoyed by silks in England.

Tracing back, King's Counsel were first created by Letters Patent in the reign of James I. Prior to this historical event, senior counsel were known as serjeants-at-law. Retracing our steps even further back in time we discover the Brothers of the Coif.

Up to the time of the Norman Conquest, it was difficult to find much learning outside the monasteries. It has been said that it was then difficult to find a rich man who was not a usurer, or a churchman who did not meddle in lawsuits.

The Brothers of the Coif were members of a monastic order bound by a solemn oath to give counsel

and legal aid to the King's people. These lawyers in holy orders were to be consulted at St. Paul's Cathedral, and their clients consulted them in the Temple, the Inner Temple and the Middle Temple — the origin of Inns of Court retained today. They wore a distinctive costume — the robe and the coif.

The coif was a circle of white silk which fitted neatly over the tonsure of the monks. The coif was attached to the robe by a tassel. The coif was intended to represent the membrane of skin over the fontanelle (the so-called "hole in the head"). This covering is sometimes referred to as a caul. Some babies are born with a caul, and, of course, Jesus was reputed to have been born with a caul. The wearing of the coif was a dignity and an honour, so much so that members of the Order were not even required to remove the coif in the presence of royalty. On elevation to the Bench, the coif was worn by the Judge, and this white coif was exchanged for the dreaded black coif (the black cap), when sentence of death had to be pronounced. The black cap signified the sorrow which such sentence caused, but judging by the frequency with which such sentence was passed in those days, judges had a sorry time.

Serjeants-at-law came from the Order. They were well-known by Chaucer's time, and references can be found to Serjeants in the Canterbury Tales. In the middle of the 13th century, churchmen ceased appearing in lay courts.

Apart from the coif, the Order had a distinctive robe. When laymen took over the practice of law, a similarly distinctive robe evolved. During the Middle Ages, this robe was quite gorgeous, being scarlet, minever and green cloth. The death of Queen Mary, the wife of William III, on 28th December 1684 was to change all that. On her death, all members of the legislature and lawyers attended wearing full mourning. The lawyers have never since emerged from their mourning and their robes remain black to this day.

For the origin of the legal wig, we go to the Court of Louis XIV of France. The Sun-King had a fine head of curls of which he was inordinately proud. To curry favour, his sycophantic courtiers cut off their own hair and wore instead wigs made to resemble the King's hair.

The future Charles II of England having been brought up in the French Court after the death of his father, approved the custom. When recalled to England, he brought with him courtiers who continued the fashion of wearing wigs, which thus became the mark of a gentleman. Lawyers were not immune from this tag, and perhaps they remain today as the last of that class to whom the wearing of a wig denotes quality.

The judge's wig has a distinction from the barrister's wig. In the centre of the judge's wig, is an indentation about the size of a twenty-cent piece. This is surely meant to represent the baby's fontanelle — or, more particularly, the fontanelle of Jesus. There is no reason for this unless it is related to the coif denoting the caul.

This coif would appear to have turned permanently black since the demise of Queen Mary.

Dr. P. H. N. Opas

In all probability it is the rosette affixed to robes of Victorian silks who exercise the power and authority in the same manner and form as Queen's Counsel have had held or enjoyed in England through their predecessors the serjeants-at-law and the Brothers of the Coif. The transition from the Order of the Coif to King's Counsel took about 500 years.

There seems no reason in logic to translate to Australia the wearing of a wig adopted to flatter a pompous and vain French King. The wearing of the wig performs no useful function except as a perpetual source of income to those who sell dandruff cures.

The wearing of the rosette would serve no purpose as a container of head lice powder in the absence of a wig — if that was its original purpose. On the other hand, if it represents the coif — as I believe it does — in the absence of the fontanelle or the tonsure, the silken membrane is left with no hole in the head to cover.

Customs and traditions should be both meaningful and appropriate to retain respect. What may once have had relevance in England, may not necessarily be sensible in twentieth century Australia — or even modern England. The retention of the law's drooping spaniel ears may eventually lead to their pointing upright in an asinine fashion.

Reference The Order of the Coif — Alexander Pulling Serjeant-at-Law, published by Clowes (London) 1884.

WOMEN AT THE BAR

TWENTY YEARS AGO WHEN THERE WERE about 300 practising barristers in Victoria there was only one woman in active practice. Now there would be close to 1,200 in active practice of whom about 100 would be women. As the then Chairman of the Bar Council noted at the opening of Owen Dixon Chambers West, there are now more women than silks.

As well as the increase in the proportion of women at the Bar, there has been a broadening of the areas in which women practice. Probably in the 1970's there was a fairly widespread tendency to typecast women as family law practitioners, but those attitudes are fast disappearing. One can readily think of women who carry on substantial practices in areas such as crime, town planning, intellectual property and general commercial law. With the possible exception of common law personal injuries, there are women practising actively and successfully across the whole spectrum of the Bar's work.

So, fairly obviously, a change. But has the change been fast enough, and do women still encounter suspicion, prejudice or patronising attitudes from their male colleagues, solicitors, clients or the Bench?

To see if there was what sociologists refer to as "anecdotal" evidence on the subject, the Editors and the Editorial Committee hosted a small gathering at which six women members of the Bar tossed around some ideas on the subject.

Those invited covered a range of seniority and areas of practice, but were not chosen on any representational or statistical basis.

Since the gathering was intended to be light-hearted and relaxed, if not completely effervescent, but nevertheless with an underlying note of seriousness, a 1987 Pewsey Vale rhine riesling was considered appropriate. There was no adverse comment on this choice from among those present.

Probably the major point that emerged was that younger women had found things considerably easier. The twenty year period referred to above was of course one in which there has been fundamental shifts in society's attitude towards women, and in particular women in the workplace. It is not surprising that these changing attitudes should be reflected in the experience of women in that microcosm of society which the Bar constitutes.

One of the more senior women present related the experience of a client turning up to her chambers for a conference and saying "I'm sorry I didn't realise a woman was being briefed. I want to talk to the solicitor". Another experience occurred at a stage at which she was trying to broaden her practice. She had been briefed for a criminal case in the Magistrates Court but her clerk swapped it with another barrister and gave her a family law case.

Another related a comment made by a judge referring to her as "the photogenic Miss X".

The complaint was also voiced that men have "a network" which works to provide them with briefs and that women do not.

The view was also expressed that there was prejudice at the Bar but that it was a male problem. The comment might be made that if this is so, it is a problem which affects women and the more men that know about it, the better.

One of the younger women remarked "The sheer number of men creates a problem. That's to say outside court there's prejudice, but when one is in court, it's all the same. You stand and fall on your own talents".

That seemed to us to be a very perceptive comment. The position of women at the Bar is affected not only by the change in society's attitudes but by the increasing competitiveness of the legal profession. A few decades ago for example some Melbourne legal firms regarded religion as a relevant factor for admission to partnership. Today this has disappeared, one suspects not so much for any particularly high-minded principle but for the very pragmatic reason that big firms simply cannot afford to exclude talented people because they are Catholics, Jews, women etc. The Bar is certainly no less competitive.

Solicitors who brief counsel on some old school tie network basis are simply not going to get the best counsel and the best results in the long term and their clients are going to be dissatisfied.

Even the most successful barristers have in the course of their careers occasionally felt pangs of disappointment as they see what they regard to be less talented colleagues advancing beyond their merits. Over the long term, these apparent inequalities tend to disappear because the Bar remains one of the most pure market places in economic terms. Nevertheless, in a quiet period there is a natural tendency for the barrister to seek some explanation for this perplexing lack of advancement, be it the clerk, solicitors, colleagues, judges or magistrates — anything in fact other than his or her own ability. Being a woman might understandably be considered as one such "weight in the saddle bag" — and often such a feeling might be prompted by very real examples of discourtesy or stupidity by males.

But there is no doubt that things are changing and that the rate of change is increasing. The younger women spoke particularly of the total lack of discrimination in the Readers Course as between their male and female contemporaries. In the law schools now the ratio of men to women is approximately 50-50.

The meeting ended on a reasonably optimistic note. We hope we do not get into trouble with the Equal Opportunities Board for saying this, but Bar News has conducted a number of functions over the years and this is the first experience we have had of our guests helping to clean up the glasses and dishes. Vive la difference!

The Editors

THE FAMILY COURT AT THE CROSSROADS

An edited version of the David Opas Memorial Lecture given on 13th August 1988 by *Paul Guest Q.C.*

INTRODUCTION

THE EARLY 1970's SAW A WAVE OF CHANGE sweep over Australia, and the political, social and legal institutions of the day underwent such fundamental alteration that they are, in many cases, hardly recognisable when compared today with their predecessors. Family Law, and its administration, are two prime examples.

Both the establishment of a specialised court to deal with problems arising from marriage breakdown and the reform of the substantive law for determining the legal consequences arising therefrom seemed particularly timely for a number of reasons including —

(a) The State Supreme Courts which dealt with matrimonial causes were perceived as unwilling, and in many cases, inappropriate dispensers of justice in matrimonial causes. Although many of you will recall those supreme Court Judges who strove to achieve a humane and compassionate application of the law, they were, regrettably, the exceptions and not the rule.
(b) The relevance of conduct of matrimonial fault, not only as grounds for divorce, but also in the determination of disputes arising out of marriage breakdown made the law appear repugnant to a great many in our community.
(c) The courtroom atmosphere in which matrimonial disputes were 'fought out' in the same way as any other contested litigation was seen as abrasively confrontational and capable of being ameliorated by change to the physical premises of the court, the robing conventions of Bench and Bar, and the procedural directives governing the court.

After much debate and discussion both within government circles and the profession, and a good deal of exchange between them, two major decisions emerged:

(a) the law was to be completely re-enacted so that matrimonial fault was excluded not only as a basis for divorce, but also from the determination of financial disputes; and
(b) unless the States individually established Family Courts to administrate the new Act, a new Federal Court was to be established for that purpose. As we know, Western Australia alone took up the proposal and established a State Family Court.

Some of the features of the new court which were thought particularly suitable to the achievement of change of the type to which I have alrady made reference, were:

(a) the new court was to be in premises separate and removed from any other court premises. It would be finished, furnished and decorated to achieve an atmosphere much less intimidating than, in particular, State Supreme Courts;
(b) physical separation from other courts, the absence of robes and the greatly reduced formality of appearance would isolate Family Law litigants from the more depressing associations of the general court system and particularly its involvement in the administration of Criminal Law;

(c) the court was to be provided with professional staff who would be available to help parties attempt to resolve their differences in matters relating to children and of a financial nature. Conciliation was to replace confrontation and the court itself was to provide the means, the manpower and the premises in which this could take place;
(d) the court was to be manned, in judicial terms, by men and women drawn from the front ranks of a legal profession which had, by then, a well-established body of practitioners specialising in matrimonial causes who would bring to every case the accumulated wisdom of their experience in practise and their ever widening experience of deciding Family Law cases, there being no other types of case to decide.

Some of the assumptions which accompanied these decisions were:

(a) that the accent on conciliation rather than confrontation combined with the removal of fault would leave a very small number of cases which required full hearing and determination by the court;
(b) that the 'commonsense' approach of this new law in its recognition of the realities of marriage and the contributions of the parties to it, together with the specialist nature of the appointees to the Bench would ensure that both the law and the court were held in high esteem by the community generally and by the litigants in particular; and
(c) that a relatively small body of highly specialised judges applying a 'commonsense' law would, in those rare cases where an appeal ensued, formulate a cohesive and consistent body of case law, illuminating from on high those few corners of the new legislation which could be said to be shadowy or unclear as to their substance.

By the end of its second year of operation, the Family court found itself, despite increased strength struggling to cope with a workload which wildly exceeded the initial expectations.

It flowed from the propositions and assumptions which I have just outlined that there would be little if any need or for that matter desire for public scrutiny or supervision of the operations of this new court and, that being the case, why not prohibit publication of proceedings, close the court, and let the rich and famous divorce and divide the spoils in private?

My paper proceeds, therefore, from a crossroads at which Australian society found itself in the early 1970's and which saw it take, in the context of Family Law and its administration, a completely new route. I will examine some of the events of the last 12 years which have shown that the way along this new route was by no means smooth, that many of the assumptions and expectations which were fundamental to this new direction were, if not false, then certainly over-optimistic. It will, in conclusion, be suggested that the present day crossroads confronting the Family Court raises not so much the question of *whether* the Family Court should now become a part of the Federal Court structure, but a question of *when* this re-integration into the judicial mainstream shall take place. It will be suggested that some of the changes which have taken place in the last 12 months indicate that the Federal Government, the only body with the power to make this change of direction, is unclear in its own mind about the answers to these questions. For the moment, however, I want to return to the early days of the Act and the court and observe some of the milestones.

EARLY MILESTONES

On the 5th January 1976 the Family Court of Australia began administering the Act in the new court premises, with new court staff, newly engaged court personnel such as counsellors and registrars and 16 recently appointed judges to look after those few cases which would remain contested after the conciliation processes of counselling and conferences with registrars had taken their toll. That number was to prove so inadequate to cope with the workload which quickly found its way into the lists that in the second half of 1976, the judicial strength of the court was increased by 50% and by the end of 1977, it had been more than doubled.

By the end of its second year of operation, the Family Court found itself, despite increased strength struggling to cope with a workload which wildly exceeded the initial expectations. It was demonstrated that however effective counsellors and registrars might be in settling a proportion of cases, a

significant number of people simply wanted their day in court. Secondly, it had been shown that the creation of a separate, specialist court operating in different premises and free from many of the trappings of the traditional court system had created uncertainty within the court itself as to the nature of its role and function. Thirdly, it had become clear that constititional limitations might well circumscribe what was intended to be a comprehensive Federal code for the resolution of all disputes arising out of the breakdown of a marriage.

EARLY PUBLIC AWARENESS OF THE FAMILY COURT AND THE FAMILY LAW ACT 1975

I have already referred to the restrictions which the Act imposed on publication of proceedings in the Family Court and upon the right of the public to attend at the court premises itself. One effect of these restrictions was that only the immediate family and friends of divorcing couples and the legal profession knew what was happening behind the closed doors of the court. Many disaffected litigants would subsequently cry 'Star Chamber'. Those who wanted to criticise the court could do so, safe in the knowledge that the public was not in a position to judge for itself whether there was any basis in truth for these criticisms. The court, for reasons which are implicit in the independence of the judiciary, could rarely, if ever, speak out in its own defence. Thus it was that in the court's first five years, a good deal of the publicity it received was in the form of the publicisation of the criticisms of disgruntled litigants, or of groups formed to represent particular interest groups among Family Law litigants. The profession and the vast majority of Family Law litigants knew that the court was functioning with great enthusiasm, considerable efficiency and a great deal of humane and just application of the law.

THE COURT UNDER ATTACK

It was in this climate of public unawareness of the work and function of the court that the first acts of irrational violence, unprecedented in the Australian legal context, were perpetrated against the Family Court. The legal profession rallied strongly in support of the court. The vast majority of the population were simply stunned at the savagery of these events. A major social institution was under attack. However the lack of public awareness of the value to the community of the Family court meant that the ground-swell of support for the court, which should logically have followed, was lacking amongst the population at large.

Those, therefore, who were critics of the court could take the opportunity to portray these horrific events as in some way brought upon itself by the court. The media, through lack of information and knowledge, cannot, in retrospect, be blamed for allowing those views to be expressed publicly. Again, the court was in a position of relative powerlessness.

No one who recalls those dark days can fail to recall and admire afresh the valiant efforts of the then Chief Judge, Elizabeth Evatt to put the matter in its proper context. These were the aberrational acts of a demented mind against an institution which had, in the face of constitutional, logistic and identity crises, put its heart into the task which society through the Parliament, had given it. It is with much sadness that I pause to note at this stage that one of these heinous acts of violence against the court, the murder of the Honourable Justice David Opas on the 23rd June 1980, was the event which gave rise to the establishment of the annual Memorial lecture which I am privileged to deliver this year.

Despite the loss of one of its most loved and respected judges however, the work of the Family Court did not abate. Nor did the ever increasing need for expansion of the court, both in numbers and premises, nor the need for continuing review and amendment of the Act in the continuing search for a comprehensive and just code of Family Law on a Federal basis.

The next major step towards the present crossroads, however, came from quite an unexpected source. In an address entitled *'The State of the Australian Judicature'* delivered at the 23rd Australian Legal Convention in Melbourne in August 1985, the then Chief Justice of the High Court of Australia, Sir Harry Gibbs voiced for the first time of which I am aware the suggestion that the creation of a separate and specialist court might have been an error. He stated:

> *"The work of the Family Court has lately been subject to a considerable amount of criticism. That is not necessarily due to any failure on the part of the judges. The nature of the*

questions which that court has to decide is such as to excite violent and irrational emotion on the part of some litigants . . . It may have been a mistake to establish a separate court to administer the Family Law Act 1975 . . . it would be hypocritical to pretend that the jurisdiction of that court, which is limited in scope and likely to be emotionally exhausting, is such as to attract many of those lawyers who might be expected to be appointed to the Supreme Courts or the Federal Court."

While this may have been one of the earlier public expressions from a highly respected Australian jurist on the questionable desirability of a separate identity for the Family Court, it was to be followed, relatively quickly, by the preliminary views of the *Australian Judicial System Advisory Committee* (widely referred to as 'the Jackson Committee') to which I now wish to refer in some detail. If the Family Court is now at a crossroads, it has been propelled there, at least in substantial part, by Sir Harry Gibbs and the Jackson Committee.

THE JACKSON COMMITEE'S PRELIMINARY VIEWS

Having examined the jurisdictional problems confronting the Family Court and the extent to which the reference of powers in relation to children and the cross vesting legislation might alleviate those problems, the Jackson Committee turned to 'Organisational and other issues concerning the Family Court'. In terms of the court structure, the Jackson Committee expressed a preference (para 98) for:

"Creation, now or at some time in the future, of a Family Law Division of the Federal Court."

(para 89(c))

The report is quick to qualify its preference for this option by stressing that it is not considered feasible ". . . immediately to transfer the jurisdiction and structure of the Family Court, look, stock and barrel, to the Federal Court through making the former a division of the latter. The difficulties being experienced require specific action to be taken, *as part of a program of renovation of the Family Court,* before any decision to make the Family Court into a division of the Federal Court". (emphasis added) (para. 95)

The Committee then turned to the process of 'renovation' expressing the view ". . . that the Commonwealth should commit itself to the renovation of the Family Court, by equipping it with staff and conditions appropriate to a Federal Superior Court, while taking steps to limit its workload to the major contested cases . . . Measures which have been suggested include:

(a) equivalent salaries for Federal Court and Family Court judges;
(b) greatly increased use of federal registrars and of State and perhaps federal magistrates to do the more routine family law work, thereby reducing the need for further judicial appointments . . .;
(c) improved premises;
(d) consideration to giving Family Court judges additional commissions so as to increase the variety of their judicial work;
(e) appointment of existing and/or future Federal Court judges to the Family Court by way of joint commissions (and similarly the appointment of some Family Court judges to the Federal Court with joint commissions);
(f) If a sufficient number of such joint commissions be conferred, consideration be given to the creation of an Appellate Division of the Federal Court to which Family Law and other appeals would go (at least one Family Court judge should sit on any Family Law Appeal)." (para. 96)

The Committee also identified some areas requiring consideration which would also require amendment to the Act, including:

(a) the appropriate level of formality in the court; and
(b) the extent to which publication of court proceedings should be permitted. (para. 97(d) and (e)).

IMPLEMENTATION OF THE JACKSON COMMITTEE'S RECOMMENDATIONS

With these recommendations in mind I now turn to an examination of what has taken place in the last two years or so and how the process of renovation with a view to integration may be seen to be proceeding.

JUDICIAL SALARIES

The first of the Jackson Committee's recommendations was perhaps the most easily implemented, and yet has not been achieved. I refer to the recommendation that salaries

for Federal Court and Family Court judges be brought into line. The irony of this recommendation is that it should never have had to be made because when the Family Court was first established, as I understand it, it was intended that judges' salaries would be exactly the same as and keep pace with Federal Court salaries.

There is no doubt that the salary level of a Family Court judge should be appropriate to a superior court such as the Federal Court.

A review of Federal Court salaries which led to a substantial increase took place at a time when the Family Court was legislatively established, but not yet tied to the Federal Court award. Thus a disparity was created which no Government from that day to this has had the political will to redress. Whatever the rhetoric, this disparity will remain a major obstacle in the path of integration of the Family Court into the judicial mainstream. The fact that the disparity remains must cast real doubt on the true depth of the Government's commitment to that process.

The question of judicial salaries is a subject that has been topical, but never resolved. It is directly related to the recruitment of appropriately qualified practitioners as judges. In a paper delivered at the Bicentenary Family Law Conference on the 19th March 1988 — *Family Law — Some Constitutional and Appellate Perspectives,* the Chief Justice of the High Court, Sir Anthony Mason concluded —

> *"It is often said that a judge in family law needs to understand families and their problems. But he also needs to understand property law and to be experienced in the resolution of property law. So we are looking for judges with a unique range of qualities. The present level of judicial salaries is no incentive to the successful practitioner to join the Family Court. There is no doubt that the salary level of a Family Court judge should be appropriate to a superior court such as the Federal Court."*

Sir Anthony Mason went on to say that even a continuation of the present trend in judicial salaries will fail to attract the best practitioners, consequently giving rise to an inevitable deterioration in the quality of judicial performance. The clear fact remains that much has been said, but nothing whatsoever done to cure this obvious problem.

DEVOLUTION OF POWERS

You will recall that after the salaries issue, the second Jackson Committee recommendation was for "greatly increased use of Federal Registrars and of State . . . Magistrates to do the more routine Family Law work . . ." (para. 96(b)). We have seen change in this area in terms which I will broadly outline:

(a) magistrates now have increased property jurisdiction from $1,000 to $20,000;
(b) they will be able to dissolve marriages just as soon as they have sorted out the administrative nightmares of where files commence, where they end up and where they are on the day of hearing;
(c) the judges may, by rule, give power to Registrars to deal with a much wider range of matters than has previously been possible;
(c) judicial registrars, who may deal with nearly all matters which a judge can deal with — contested custody proceedings being an exception — will soon be among, or should I say, upon us.

I pause at this juncture and examine some of the ramifications of these changes. True it is that these steps will achieve the objective of dividing the workload. It will take some pressure off the judges enabling them to concentrate their time and effort on those defended cases which require judicial determination after a defended hearing. A true move towards renovation as a precursor to integration. I want to reflect for a moment however on just what is happening to the rest of the workload.

I can say little about the judicial registrars. They have appeared in the legislation, but not yet in person. We do not know who they are going to be. I want to say that if they are to command the respect and perform a role comparable to that of the Masters of the Supreme Courts of the States, then they must be appointed from amongst those wise and experienced members of the profession who are known to and respected by their peers as men and women of balance and probity. I see the creation of this office as one of the most important opportunities for the renovation of the court, but also an

opportunity for the standing of the court to suffer a serious setback if, for example, long and loyal service in the essentially administrative role of Registrar or Deputy Registrar is rewarded by an appointment to this new office.

When first introduced, s.37A of the Act successfully removed much of the administrative minutiae of case management from the judges' list and placed it in the hands of registrars. But now, the judges may, by Rule, delegate to registrars all powers of the court except:

(a) Defended Dissolution Proceedings;
(b) Nullity Proceedings;
(c) Declaration of Validity; and
(d) Defended Custody hearings.

(s.37A(2))

It can only be fervently hoped that when the judges are exercising their rule-making function to delegate further powers to registrars, they will remember that when the great majority of registrars were appointed to office there was no thought that they might exercise judicial powers. Their capacity to exercise such powers was certainly not one of the criteria upon which they were appointed.

I believe that magistrates are largely ill-equipped to deal with Family Law cases beyond the levels of jurisdiction originally granted by the Act. And may I say that there has always, in my view, been one very serious anomaly in that original grant. I refer to the approval of s.87 agreements. It is quite beyond my comprehension how a magistrate who had no experience in applying the principles of ss.72, 75 and 79, under the constraining philosophy of s.81, can be expected to determine that a settlement is within the range of what might have been awarded had the matter gone to trial.

Unlike the salaries issue, the Jackson Committee's second recommendation that more use be made of judicial officers below the status of judge has been embraced with alacrity. Why should this be so? Can it be that mere budgetary considerations have prevailed? Will a government, faced with numerous retirements from the Family Court Bench in the foreseeable future avoid an appropriate level of replacement appointees by pointing out to the remaining judges that if they are finding the workload oppressive, the answer lies in their own hands. They can simply delegate more powers to those below them. I do not suggest that this is the present government's intention. I do say, however, that just the existence of this possibility is a very worrying facet of what might otherwise be viewed as a genuine attempt to follow the Jackson Committee's recommendations.

ADDITIONAL COMMISSIONS

Another recommended step of the Jackson Committee in the process of renovation was:

> *"consideration to giving Family Court judges additional commissions so as to increase the variety of their judicial work." (para. 96(d)).*

The rationale behind this step is self evident. There are courts and tribunals other than the Federal Court to which the appointment of a particular Family Court judge may seem particularly appropriate. It is difficult, however, to envisage many appropriate joint commissions to the Family Court and other courts and tribunals although no doubt other appropriate examples will present themselves. This renovation is unlikely to produce any real change in judicial diet for the vast majority of Family Court judges, and it was variety of diet which was seen as such an important aspect.

JOINT COMMISSIONS

A further recommendation was the —

> *"appointment of existing and/or future Federal Court judges to the Family Court by way of joint commissions (and similarly the appointment of some Family court judges to the Federal Court with joint commissions)."*

This suggestion presented perhaps the best opportunity to lay the groundwork for future integration. Clearly, the appointment of Federal Court judges to joint commissions in the Federal and Family Courts might have done much to create an awareness that Family law involves the consideration of legal and factual issues of great complexity, requiring both legal erudition and forensic acuity. How many such appointments have we seen? Only one.

I now turn to the second limb of this recommendation, namely, that Family Court judges appointed to the Federal Court with joint commissions. In this instance we have seen only one, the appointment of The Honourable Justice Alistair Nicholson as Chief Justice of the Family Court and Justice of the Federal Court. This particular joint commission is the only such appointment to

be made as between the Family Court and the Federal Court since the Jackson Committee expressed its preliminary views despite the fact that several other single appointments have since been made to the Family Court. Does this point to the conclusion that in respect of this recommendation, superficial compliance rather than any fundamental commitment is all that can be expected?

Absolutely nothing has been done to break that stressful diet of Family Law work and give the Family Court judges wider horizons of judicial endeavour.

Lest it be thought, from these remarks, that absolutely nothing has been done to break that stressful diet of Family Law work and give the Family Court judges wider horizons of judicial endeavour, I pause to acknowledge the terms of the *Family Court of Australia (Additional Jurisdiction and Exercise of Powers) Act* 1988, which permits but does not require the transfer of certain proceedings from the Federal Court to the Family Court. The areas of litigation eligible for transfer relate to the parts of the *Administrative Decisions (Judicial Review) Act* 1977; the *Bankruptcy Act* 1966; the *Income Tax Assessment Act* 1936, and the *Trade Practices Act* 1974.

Is this a genuine attempt at renovation or merely the creation of a conduit along which the Federal Court may pass work which is by no means the most challenging or demanding work available to that Federal Court?

FORMALITY

The Jackson Committee drew attention to ". . . the appropriate level of formality in the court" (para. 96(d)). This was directed at Section 97(4) of the Act which provided ". . . neither the judge hearing proceedings under the Act nor counsel shall robe".

In this instance the government acted with reasonable alacrity and repealed the relevant provisions so that the judges of the court, and those practitioners appearing before it are obliged to be fully robed. There was a mixed response to this by elements of both the Bench and the Practitioners. It is my impression that the public saw it as a long leap back to Victoriana.

I do not resist the arguments put forward in favour of robing, particularly in the event of the Family Court becoming part of the judicial mainstream as a division of the Federal Court. There is a need of formality. The question that must be asked is whether this response by the government is part of a genuine and real desire to integrate the Family Court, or merely a "window dressing" acoutrement in order to give the appearance of readiness for an integration which may never take place. By itself the reality is that robing amounts to nought.

PUBLICATION

The Jackson Committee suggested that consideration be given to ". . . the extent to which publication of court proceedings should be permitted" (para. 97(e)). I have already noted the general public and media reaction to s.97(1) of the Act as originally enacted.

The position now is that all proceedings in the Family Court shall be heard in open court. Whilst there remains a discretion vested in the court to specifically exclude certain persons (s.97(2)(a) to (c)) the fact remains that this legislative action is a quantum leap in creating the opportunity for public awareness of the court's activities. The doors were opened, yet significantly, the court room did not swell with public attendance. Nothing has changed in this regard.

In my view, the veil of mystique that surrounded the court has opened, but insufficiently to permit public awareness of the consequences of marriage breakdown, and to minimise criticism of the court. There yet remains a restriction on the publication of any account of proceedings (s.121) that identifies (in effect) a party or a witness to the proceedings. Historically, publication of proceedings arising out of a marriage has been regarded as extremely intrusive into personal privacy. However, save for salacious references arising from fault finding exercises under the *Matrimonial Causes Act* 1959 there were never a flood of media coverage of proceedings under the Act. In my view there needs to be a public awareness of the Family Court, its procedures and its administration of the law which can only be achieved by unfettered, the unrestricted publication. The public may then view the Family Court as an institution serving the community. There may still be criticism, but at least it will take place against a background of public understanding

of the effect and ramifications of marriage breakdown and how the court functions.

CONCLUSIONS

The Family court is at the crossroads. The vision of its progenitors has, through the prism of time, proved itself to be myopic and that which they could see clearly was viewed through rose coloured spectacles. The future direction of the court and its role in the Federal Court system is a matter for urgent and critical debate. The Jackson Committee has made recommendations and suggestions for its renovation and integration into the main stream of that system. The question now is whether the legal establishment is ready to accept this process. The Federal Court has lobbied strongly against it. Shall resistance be maintained so as to frustrate the court being created as a division of the Federal Court?

I have tried in this paper to identify some of the features of the Family Court and the Act which it was set up to administrate. Taking the Act, whatever else may be said about it, I do not believe that there is any basis for suggesting that the introduction of system of no-fault divorce was inappropriate. Nor do I believe there to be any basis for suggesting that matrimonal conduct should be reintroduced as a matter of relevance in financial disputes. I am confident that the Australian community generally has accepted this regime as part of our social structure and will continue to do so.

The court has not fared quite so well. Through lack of public awareness of the value of the community of its work, through years of uninformed criticism and through comments from the then Chief Justice of the High Court it has reached a position where the body appointed to review the Australian judicial system has found that the court is experiencing serious problems which have to be addressed. That body has expressed a preliminary view in favour of the establishment of a division of the Federal Court, following a process of renovation of the Family Court in preparation for integration.

I have taken the renovative steps discussed by the Jackson Committee and some of the matters arising from the Act which they identified, and then looked for indications of what direction the court may be expected to take from this current crossroads. Let me recapitulate shortly:

(a) **Judicial salaries:** Nothings has been done to cure this long-standing and obvious inequity.
(b) **Devolution of Powers:** Unless this is most carefully administered, the potential for loss of status to the Family Court is alarming.
(c) **Improved premises:** Despite progress in the Melbourne and Brisbane registries, a major problem still faces Sydney in respect of which there is much talk, but little action.
(d) **Additional Commissions:** To date there has been only one appointment with an additional commission. Although it is believed there may be some further development in this direction, this avenue does not in any event offer the scope for any major change.
(e) **Joint Commissions:** Despite this ready opportunity for move towards integration, there have only been two appointments with a joint commission.
(f) **Formality:** The introduction of robing alone will not lift the status of the Family Court.
(g) **Publication of Proceedings:** Whilst publication is fettered and restricted the Family Court will remain the target of uninformed criticism and the public shall remain unaware of its value to the community.

Finally, there is the possibility of some break in the judicial diet of Family Law created by recent amendments. However, the reality is that on present indications it remains to be seen whether this will be brought into effect.

POST SCRIPT OR EPILOGUE?

In his paper delivered at the Bicentenary Family Law Conference (supra), Sir Anthony Mason paid homage to the Family Court and those practising within it. He said:

> *". . . there is no more important and no more difficult area of practise than Family Law. It demands of judges and practitioners dedication to a task which in my estimation is certainly as onerous as that confronting judges and practitioners in the Federal Court and the Supreme Courts . . . Family Law affects every family and nearly every citizen, many of them being parties in legal proceedings. The Family Court has, accordingly, a large role in shaping the popular impression of the profession, the courts and the judiciary."*

This paper was delivered at a time when the controversy relating to the status of the Family Court was very much in issue. The clear preference of the Jackson Committee after having considered a number of options was for the creation of a Family Law Division of the Federal Court. This was well-known and was the epi-centre of the debate that raged throughout the legal world.

The Family court is at the crossroads. The vision of its progenitors has, through the prism of time, proved itself to be myopic and that which they could see clearly was viewed through rose coloured spectacles.

In his paper Sir Anthony Mason expressed doubt that the proposed merger would achieve anything of substance. He said:

> *"Nor has there been any marked enthusiasm for a merger of the two courts. Such a merger would fundamentally alter the character of the Federal Court which was established as a high-levl specialist court in the traditional mould with an expertise in commercial and administrative law. The merger would bring about an apparent union of courts and judges with little in common for reasons which are cosmetic, rather than compelling. . . . Although the merger would help to create an impression that the Family Court was part of the mainstream court system, I doubt that it would achieve anything of substance."*

This was regrettable and has served only to highlight the critical fact that the Family Court currently stands very clearly at the crossroads. Its future direction is speculative and very much in issue. When one goes on to examine more closely the views of the Chief Justice, it reveals a disinclination to support the Jackson Committee's recommendations. He concludes that to ensure the public had confidence in the Family Court it must be treated and equipped in all respects as a mainstream superior court. My concern is that this is merely directed towards a cosmetic face lift, and not to the substance of renovation with the goal of integration. As a personal view I am particularly concerned at the following statement of the Chief Justice, when he said:

> *"There may be more substance in the suggestion that Family Court judges who wish to do so should have the opportunity to undertake work of a kind undertaken by the Federal Court. Even this proposal has its limitations. The specialist nature of Family Law work, with its distinctive emphasis on the exercise of discretionary power, may not be an ideal introduction to the class of work undertaken by the Federal Court. And most Family Court judges, though not all, are appointed because they are experienced in Family Law, rather than Commercial Law or Administrative Law. The proposal is that Family Court judges might undertake bankruptcy, taxation, consumer protection, trade practices and administrative review work. As I understand it, jurisdiction in these matters will not be conferred on the Family Court as such. It remains to be seen whether the proposal will result in Family Court judges undertaking a significant proportion of important work. If the proposal does not produce this result, it will do little for the status and reputation of the Family Court, though it may provide relief from an exclusive diet of Family Law."*

There are and will be obstructions to the future passage of the Family Court in achieving its rightful place in the mainstream of the judicial system. Rather than close ranks and defend its position, the court should move to strongly urge those in government to act upon the preliminary view of the Jackson Committee. To this extent we should all recognise and applaud the immense support given to the proposal by the Attorney-General for the Commonwealth, the Honourable Lionel Bowen.

It is my strong belief that the future and the status of the Family Court is at the crossroads. It should not settle its rightful claim by the acceptance of cosmetic renovation and the hope of future involvement in the mainstream of the Federal system. The only acceptable adjustment is to be created as a Family Law Division of the Federal Court. On that question there can be no compromise.

WOODS LLOYD ON LIFE AT THE BAR

An interview recorded with *Garry Sturgess* in 1984.

Sturgess What do you know of the social origins of barristers?

Lloyd Well I don't myself have a great deal of knowledge about it but my impression is that the ones who go onto the bench are very largely people of what used to be called humble origins. That is to say they have been from families that weren't well off and have got scholarships and worked hard and that sort of thing. I know that that doesn't tell you anything about their sociological bent because that might make them more right wing than the general run of the community in the sense that they believe that everyone's got available to them the opportunities open to them and can't be heard to complain if they don't do so well. But I would believe that at least half of the Bar would be Labor voters.

Sturgess What's the story that you were telling me about Sir Henry Winneke's family?

Lloyd Well Sir Henry's grandfather was a peasant from Hamburg and by that I understand not really someone with quite a substantial holding but literally a peasant — someone owning no land of their own. And they came out here and in Sir Henry's father's generation that father was the only one in the family that showed any real promise. The others became tradesmen at best but he was very bright and he became a successful barrister and a County Court Judge. He was a man who was always seen to have his head on the bench. Up at the County Court at Sale when they used to sit at night by candlelight and he was thought to be asleep, a young barrister called Campbell said to him "Your Honour's not listening to me". Without taking his head off the bench Judge Winneke said, "I'm listening to you", and Campbell said "Well your Honour's not looking at me", to which the Judge said "I'm not paid to look at you".

Sturgess What about your own background?

Lloyd My father was a professional soldier who came from a poor family in the West. His father died when he was very young and, although he got scholarships, there was no possibility of going on to University. Duntroon offered tertiary education for free, which is what took him into the Army. I think quite early in his career he would have liked to have come out of the Army as did many of his contemporaries including Clive Evatt who was then at Duntroon. But at that stage the Army wanted its money back. They thought that they had spent a lot of money on educating you and you weren't allowed to leave without paying the money back and it was some hundreds of pounds at the time and he didn't have hundreds of pennies and there was a depression on and he was married. Although he had done a law degree in his spare time at night he never managed to practice law and stayed in the Army. So I went into the law really to please him, I think. I didn't have any strong views. I couldn't see any way of supporting myself by doing the things which I was really interested in — fishing and drinking beer and girls and I thought you had to do something. Going to the University to do an Arts course seemed a bit silly and so, if it would please him, I thought I would do law and I didn't ever think I'd practice.

Sturgess Were you brought up in Melbourne?

Lloyd Army family — brought up all over the world. But spent most of our time in Melbourne.

Sturgess What countries?

Lloyd In Britain for a couple of years and in various States in Australia and short periods in other countries. What I think interesting is that I first got the taste for the law when I was doing articles. It just seemd to me that suddenly this (law) solved real problems and people had to acquire houses and pay for them and they got run over and the police arrested them and husbands beat up wives and there were all sorts of problems which in some sort of way the law seemed to solve them. The man I was articled to was an admirable man who had a very mixed practice. Everything from guns to companies.

Sturgess Who was it?

Lloyd A fellow called F. L. Birch — Frank Birch, now retired. I think he made a great impression on me. The law actually had some sense to it. There was some social purpose for it and it could be interesting and worrying and you were unlikely to be bored by it, whatever else you may say about it. I stayed in the solicitors' branch for just the necessary period, 12 months, and then I came to the Bar.

Sturgess Why did you not stay a solicitor?

Lloyd I don't think I was tidy enough to run an office and to employ a considerable staff of people and have overheads and it seemed to me it was much better to deal with one thing at a time so far as you could and deal with it in a more detailed way — which is crudely the difference between being a barrister and a solicitor. For solicitors it's not so much the size of the responsibility, it's the number of individual responsibilities. Some people are much better and suited, I suppose it's basically an administrative gift, to keep all these balls in the air at the same time without having final responsibility for any of them. And other people prefer to have one for which they have pretty well total responsibility. I had been to sea for two years before I came to the Bar. I got a job as a mess boy on a ship travelling to America and then back here and then to England where I worked in the film industry for a while and then in the coal mines for about six months in Wales and then travelling in the North Sea and then in Lapland in the Arctic Circle as a timber cutter and I did various things like that for two years. I was the first of the dropouts.

Sturgess Was it an acceptable thing at that time for people to pack up and go somewhere?

Lloyd Not really, it was regarded as being irresponsible, that you should, as I suppose parents say now, you should get some qualification first. But anyway my own children did very similar things. My moral position to oppose them was somewhat eroded because they were able to say "Well that's what you did and that's what we're doing".

Sturgess Did that period settle you and get whatever adverturism there was out of your system?

Lloyd You'll never know will you because you don't have a control experiment.

The late E. D. Lloyd Q.C.

Sturgess Why did you come back?

Lloyd Well I'd promised that I would and I didn't want to be a coal miner all my life. It was too hard. And I didn't want to be a sailor all my life because I thought that was a rather lonely life, although I was tempted. I still think that's a terrific life until you're about 30 or 35.

Sturgess You came to the Bar directly from articles. Was that considered foolhardy?

Lloyd Oh sure, and the tradition was that you didn't get any briefs for the first years you were in practice. But it was changing you know. You had the early beginnings after the War of what's now become just a giant Bar. Mostly because of the beginnings of Legal Aid systems and the notion that everyone was entitled to be legally represented so you had a swelling Bar and it became possible for fellows to make a living much more quickly and it also became possible for fellows to make a living who in the old days just wouldn't have survived. They're not good enough as barristers and in fact there are a lot of barristers at this Bar now who wouldn't survive but for Legal Aid. One gets the impression that with a smaller Bar there were a few stars and a substantial number of very competent people and a few sort of people that were no good. I think the mediocre middle is much larger now. Because a lot of people come to the Bar because they can't get a good offer of employment from a solicitor and it doesn't cost anything. They've

got nothing to lose so they might as well give it a go. But they're not very highly motivated people — they don't particularly want to be barristers and I don't think they're very good or will ever be very good.

Sturgess Tell me some more about you?

Lloyd The sort of practice you get into is largely an accident. I read with John Nimmo who was in Equity Chambers and, in those days in the minds of the solicitors, if you were in Equity you were a Catholic and if you were in Selbourne you were a Protestant. It had nothing to do with your baptism or anything like that, it was just the chambers you were in and the Equity Chambers people all did crime because they were Catholics and if you were in Selbourne and you wanted to do crime you often found it very difficult. We used to get briefs from all the Irish solicitors. Although I'm in fact a Protestant my fee-book back in the early days looks like a casualty list from the battle of the Boyne. And so I did crime for the first few years. Did very little else. Just because I was at that postal address and in a very short space of time I was doing quite serious crime. I did a lot of murders but it seemed to me that you couldn't go on doing that for ever either. You'd finish up either as a prosecutor or an alcoholic or both. So I moved out of crime and into civil juries and eventually took silk where you do everything. Particularly things you know very little about.

Sturgess What was your problem with crime?

Lloyd Well it was back in the days of capital punishment and, although they in fact hanged very few, there was always, in a certain class of case, a real risk that they would. We used to classify them into hanging murders and non-hanging murders. In the ordinary case of a woman who had taken the axe to her husband — well no-one was going to hang her, of course, but if you'd get someone performing an unpopular crime, one which would be politically worthwhile to hang the person, as showing that the government was strong and determined to protect the community and so on, then there was a reasonable chance of being hanged. I had two or three of those. One of them went within one vote in cabinet of actually being executed and I found that enormously worrying. I used to get up in the morning when those trials were on and vomit. Then come into chambers and vomit again and then I'd go over to court for my third vomit of the day and then I'd get up to defend these terrible murderers, or anyway people who were charged with committing terrible murders like shooting old pensioners for their pension cheque and throwing their body down a well and that sort of thing. And I thought there were easier ways of earning a living than doing that for ever.

Sturgess What was it that weighed on your mind most at that stage?

Lloyd I think it was the enormous sense of responsibility that if I made one wrong step I might deprive this man who in more competent hands might be acquitted of that charge.

Sturgess Did you find it difficult to remain personally detached?

Lloyd I felt terribly sorry for most of the people charged with violent crimes, especally the young ones.

Sturgess What was the concentration involved in handling a murder trial?

Lloyd Absolute. From the time the thing lands on your desk until you've finally either got him acquitted or all appeals are over. It's very difficult to think about anything else. Domestic things and family things let alone questions of money, I don't think they even occurred to you. I think they were all Public Solicitor murders. I don't think I ever met a rich murderer in my life.

Sturgess And the effect upon your health — you were vomiting from nervous tension and the pressure you carried — did that tell in any way?

Lloyd I don't think that would have done any long-term physical harm. Probably kept my weight down but it was an enormously heavy burden. I don't think unless you've done it — it's too late for you to do it — that you could possibly appreciate it. The entire community was organised, as I suppose it was, to hang your client and only you stood in the way. It was as if every person walking the streets was against you, that they all sought and desired a result which it was your duty to prevent.

Sturgess Did you feel the weight of public criticism on you — defending a murderer?

Lloyd Oh no, very little, because I'd read all the right books and had it explained to me that this was a duty that everyone was entitled to be defended. I didn't get worried about the fact that there was a hostile crowd who disapproved of me — that didn't worry

me. There were some where they used to ring up and threaten to kill you and kill your family and so on which was upsetting.

Sturgess Well you've got a reputation here as a raconteur and as having had a madcap youth. That reputation doesn't fit very neatly with someone who was really staggering under great responsibility?

Lloyd I say that's a very Protestant remark because this is the Irish picture isn't it. People who were raconteurs and loved stores and romancing a bit but nevertheless are capable of very deep feelings.

Sturgess And you have got an Irish background?

Lloyd Yes. An Irish grandfather who married a Presbyterian, saying, as he did so, that he very much admired Presbyterians because they kept the Sabbath and everything else they could lay their hands on.

Sturgess When you weren't doing murder trials, what else were you doing in your early life at the Bar? What was the society of the Bar like in that period? When was that period?

Lloyd 1954 on. 30 years ago. The internal life? It was very much smaller and it was largely Selbourne all on one floor and they used to see each other from day to day and we had a robing room and those sort of things which Sir Ninian Stephen mentioned in his oration for the Centenary. You ought to read it, it's very good stuff. Sir Ninian discusses simple facts, such as this — that 100 years ago the Judges were paid 3000 pounds a year and, interestingly enough, went on being paid 3000 pounds a year until after the Second World War. But 100 years ago in 1884 a labourer would be paid 100 pounds and a skilled tradesman 200 pounds a year. So the ratio between the Supreme Court Judge's salary and, of course, status, lifestyle, was 30 to 1. Now, after tax, the ratio of available income of a Supreme Court Judge to that of a tradesman is what — 3 to 1, 4 to 1, at best, and it examines the consequences of that sort of thing. It was a fantastic thing to be a Supreme Court Judge until quite recently. I don't think it's any longer regarded as such a great thing.

Sturgess You would have been offered a Judgeship?

Lloyd Well, we never comment about that because it denigrates the people who accepted the judgeships and it's not the practice.

Sturgess Why would you not accept an appointment?

Lloyd It's not too late perhaps, but — well, I suppose it's getting a bit late. Partly for financial reasons, I think. I have a small farm which I thought I may have difficulty running on a judge's salary. Partly, I think, because there is a great deal more freedom at the Bar. The work can be hard and demanding but there is a certain attraction in the fact that you don't actually have to work 52 weeks and make an enormous income, most of which will go in tax. If you finish a long heavy case it is often possible to take some time off and go and work in the open air. That's attractive.

Sturgess What would your typical year be? How many short breaks would you have?

Lloyd I would suppose I would spend something like 60 days, apart from the long 'vac', not in court or actually working on papers. There is another thing about the Bar. Some of the important part of it is thinking about cases and I'm sure that's not merely self indulgence. If you think about a thing, if you get time to think about it, often the mental processes come up with the answer.

Sturgess I've been reading Gowans. The ethical restrictions are very severe. They are good values but I wonder how many barristers go by their strict letter?

Lloyd I think a lot of them, I think a lot of them, and I think that someone who persistently breaches them runs into trouble because they forfeit the confidence of the judges. A situation often arises where either there is no admissible evidence of the fact or the admissible evidence would be time consuming to assemble but a barrister knows what the fact is. In other words he believes something to be a fact. In nearly every case I wouldn't object to a barrister saying that, because I believe that he'd be careful. He wouldn't have to let you down more than once, you know, and you'd put his name in a black book, either mentally or physically, and after that you don't believe anything he says. Now that's very time consuming. So it's very very important from your own selfish point of view that you don't tell fibs. I have never had more than four names in my black book.

Sturgess There is a black book?

Lloyd And two of them are no longer with us. No, I don't physically keep it because it's a small list isn't it. Two of them are no longer with us, two of them are.

Someone says to you in a particular action we're going to call Dr. X who will say this. Dr. X is called and he doesn't say this nor is he asked this. That was a lie. He doesn't have to tell me what evidence he is going to call. He is entitled to say: "Well you'll hear it when you hear it". But if he does do that and lies to me, well that's the end of him, I'll never accept anything he says. Which means it's going to be very difficult for him to settle a case with me, isn't it? Whereas if someone candidly tells me the strength of his case and, to the extent he thinks it worthwhile, its weaknesses and that turns out to be right, well the assumption is that that's the sort of fellow he is. Saying — well, you could be hearing this next Thursday and you'll then have to form some view as to how much you should pay us but why not hear it now and pay it now so then we can go off and do something else or go fishing. The fact that some barristers do tell fibs is merely a reflection on the fraility of institutions and it crops up all the time. English barristers are supposed to be very very ethical and very proper and in order to preserve that situation they very rarely have a conference with a criminal client. Very rarely, traditionally, because otherwise it might be suggested that the barrister had suggested the defence to the accused. What that led to was a special class of clerks who are utterly without inhibition and did nothing else but cook up defences and teach them to the client. As long as the barrister wasn't involved, you see. It can be blamed on someone who was a social inferior and came from the wrong side of the tracks and spoke with a cockney accent. That was all different because they weren't gentlemen. It was a barristers' world. It's the same thing isn't it. You open one door and another one closes.

Sturgess What sort of extra curricular things do you do. You like trout fishing and you've got a farm?

Lloyd Yes, a small farm, little beef stuff. Down the Peninsula.

Sturgess How many barristers would have farms?

Lloyd Not too many. I would think less than one in twenty. Probably one in thirty or forty. Because most of the tax advantages have now departed and merely to do it for financial reasons wouldn't be worthwhile — there's got to be something else in it. You've got to enjoy it or have families that are insanely attached to the farm.

Sturgess And you're married with how many children?

Lloyd Three children. One of them is writing the children's novel of the century and in the meantime supporting himself with his wife penning a cartoon strip called Tales of Wombat Creek which is published in "The Sun". The next one is a female who is a great chef and the third one is a drop out from the SEC engineering section, he is an agricultural contractor, drives tractors. None of them in the law.

Sturgess Are you disappointed?

Lloyd I think it would be great fun to have a child in law because it would give you another thing to talk to them about but I don't think anyone should be required to go to law unless they're pretty keen so I've been very loath to influence them.

Sturgess And yet your father influenced you?

Lloyd Well not really. He, wanting to have been a lawyer himself, would have loved to have a son as a lawyer, and I didn't care. There was nothing else I really wanted to do. But all he asked me to do really was to do the course and I did and it was just a bonus that he was delighted when I came to the Bar.

Sturgess OK, you didn't care, you developed an enthusiasm for the law when you were in articles. But did you still shy this side of a full commitment?

Lloyd Oh, a fellow who is fully committed to arguing in court would probably have question marks about his mental health wouldn't he. This is a zany part of life. It's all unreal in a way. It represents the failure of reason and sense and compromise and adjustment.

Sturgess By saying all of that you are undermining the very thing that you are spending your life doing. That's healthy. I'm not saying it isn't, but there would be people here that wouldn't undermine what they were doing in the same way. They would be much more stolid and serious about it and they might work harder, they might've gone further?

Lloyd But they are commonly people of great narrowness aren't they? I mean there are some lawyers, and especially equity lawyers, who think that the precise form of the probate rules is far more important than the New Testament and of comparable importance to the Old Testament. Well that's all nonsense isn't it?

Sturgess Would you be a better barrister if you were more single minded?

Lloyd It's like saying, would Hamlet be better off with a happy ending. It wouldn't be Hamlet then would it? I can only say with some, perhaps not much, insight that I'm as good as this, or as bad as this, and you ought at my age to have some insights into your strengths and weaknesses. But if you propose a significant shift so that I was more narrowly or obsessively involved with the technical side of law then it wouldn't be me would it and I've seen some dreadful mistakes made by people who knew nothing outside the law.

Sturgess Because of that fact?

Lloyd Oh yes, I mean it is all about people finally isn't it? Take, and there are some examples of them, a junior who has got an absolutely compendious knowledge of the whole of the law of libel and reads the cases from all over the world as they come out — they are a tremendous assistance in the actual preparation of a case but you can never trust them with a witness, that is to say, ask them to lead the evidence of a witness, because their minds are not used to swerving and jumping and following the development of the thing. They are used to having it all set out in orderly cases, and this is the hallmark of the equity lawyer, you can see them when they are going to address the jury, they've got their speech all written out, typewritten, underlined in various coloured pencils, and they are incapable of swerving in order to change it to meet an attack that you make. Well now they are very good opponents because you can kill them. Most cases win or lose themselves, I think, but in the marginal case those people are very, very vulnerable. And yet they're methodical and they're conscientious and so on.

Sturgess What are some of the highlights of your career in court?

Lloyd Oh, I think the Tait case was one. Tait was probably mad and some twenty barristers and solicitors were determined that he wouldn't be hanged and we had application after application going. We'd lose one and we'd appeal and while we were losing the appeal we'd start off another one and it went on night and day for weeks, months.

Sturgess You didn't defend Tait?

Lloyd No, I appeared against him. I appeared for the petitioner in insanity when we were trying to have him declared insane. Not that he resisted very much, I must say, but no, technically I was appearing against him. I was part of the exercise to prevent him from being hanged and we knew if we held out long enough the law was going to change and the new formula under the Mental Health Act would be one where even the Crown psychiatrist would have to agree that he was mentally disturbed and if we could keep it going long enough then we'd win.

Sturgess There wasn't much time in it, was there? Until midnight?

Lloyd Oh, several midnights. They had the hanging arranged on four separate occasions. And everywhere we went all the Judges abused us and said that we were destroying the system and we were responsible. Until we got to the High Court and the High Court told us we were all good fellows and we should be patted on the back and we were a credit to the profession and we all got a quiet cheer and all our opponents got told they were bastards. I thought that was marvellous. That was enormously rewarding.

Sturgess Any other high points?

Lloyd I suppose going to jail for contempt has to be regarded as a high point.

Sturgess Can you tell me that story?

Lloyd Well it's in the Victorian Reports whenever it happened. It was a hell of a long time ago. When I was young and pigheaded I got into a collision course with a Magistrate who was old and pigheaded and neither of us would back down and he put me in the cells for three hours.

Sturgess You just simply asked to be heard didn't you?

Lloyd Oh no. I was cross-examining a policeman and very close to striking oil and that offended the Magistrate because a policeman represents power in a country town and this power was being attacked, the Magistrate thought improperly, and I persisted in this cross-examination. And the day before there had been another brush between us. He was pretty keen on contempt this Magistrate. It was a carnal knowledge case and there was a little girl there who was the girl involved and she gamely put my fellow in but in relation to one particular incident she said she couldn't remember. The Magistrate conceived the idea that she was prevaricating and he told her that if she didn't tell the Court the truth she would be put in the cells. She was about 15 and about

8 months pregnant and that antagonised me and I told him that his conduct wasn't that of a gentleman, which I perhaps shouldn't have said. That, I think, rankled with him and everything blew up the following day over my persistence in the cross-examination of this policeman. It's unfortunate, you know. I think if I'd been a bit older or he'd been a bit younger it could have been avoided and should have been avoided. But it's quite an exclusive at the Bar — fellows who have been dealt with for contempt.

Sturgess How many?

Lloyd About half a dozen of us still alive.

Sturgess And who are they?

Lloyd There's Lewis who was acquitted in the High Court. Brian Nettlefold got dealt with for contempt for criticising a questioning, in the course of, I think, a murder trial, by the Judge and complained that that was cross-examination and said it was a very clever cross-examination and he was convicted of contempt for saying that. George Lush went very close but I think escaped in the long run and that's it.

Sturgess You gained tremendous notoriety out of that didn't you?

Lloyd Yes, but not a desirable sort. I think to some extent the reputation of a stormy petrel dates from that. But as a matter of fact I'm quite a courteous advocate. I don't believe in insulting Judges and raising their blood pressure. I prefer to con them I think if I could and I think that publicity was unfortunate.

Sturgess And did it have a detrimental effect on your career at the time?

Lloyd Yes. I think the Magistrates all took the view that this fellow is due for a "comeuppance" that he got off in the Supreme Court for technical reasons but that's just the Judges looking after their mates and the Magistrate was in the right and there you are. It created a certain amount of self doubt too. You wonder — was I a bit cheeky? Did I go too far?

Sturgess Were you good from the start? Did you have it from the beginning?

Lloyd I got a lot of work from the beginning. It may well be that because I was older than most of my contemporaries, I had been to sea for a couple of years, you see, and a touch of the blarney, I suppose. Most Irishmen are better than most Englishmen at this game.

Sturgess Why?

Lloyd Well I think they're more imaginative. They are more colourful. I think that most criminal defences are, really you know, they're so fanciful. It's literally true that most people in the dock are guilty. Whether or not it can be proved. And I think the Englishmen have a great deal of difficulty running them with a straight face but the Irish don't because they don't regard two and two as always making four, they are more poetic people. I always had plenty of work from the word go.

OBITUARY

E. D. LLOYD Q.C. (1928-1988)

Edward Drummond Lloyd Q.C., whom we knew as Woods, died on 5th August 1988 aged 60. He was one of the great members of this Bar. He was one of its leaders and, unquestionably, one of its finest advocates. Woods read in the Chambers of John Nimmo, later Mr. Justice Nimmo of the Australian Industrial Court. After an oustanding career as a junior, he took silk in 1970 and demonstrated his formidable skills in many celebrated cases in many different areas of the law.

Many facets of his make-up contributed to his superb qualities as an advocate. He had a deep love and knowledge of the English language and of its literature. He had a sparkling wit and an unerring instinct for the appropriate occasion for its exercise. Above all, Woods was a man who had a compassionate understanding of people. He was admired by people in all walks of life; he was equally at home advising the victim of an accident in a factory as he was giving wise counsel to those who held high office.

Lloyd's enthusiasms and the stories by him, and about him, are part of this Bar. This is not the place to repeat them — everyone will have his or her favourite.

Underlying the wit, and the elegance, and the power of the advocacy, lay instinctive and true understanding of the principles of the common law, and of the way in which the Bar functions to uphold and develop those principles. He exemplified the independence of the Bar. Lloyd's influence upon the Bar in this country, and through it upon the law, was profound and enduring.

Michael Black

AFTER LUNCH IN MYTILINI

A legendary forensic clash is recounted by *Cliff Pannam Q.C.*

ONE AFTERNOON I WAS SITTING IN A street restaurant down by the harbour in Mytilini. It was hot; very hot. The Sec Epom was cold and I had drunk more than a few glasses. I was looking out to sea; to the misty blue hills of Turkey across the strait. Names came to mind. Remembered from classical studies of long ago — Paches; Salaethus; Creon; Diodotus. Sun mixed with wine fuels the imagination. Is that a trireme being rowed furiously to the mole? It was this very harbour; or, more accurately, the old one just to the north, that provided the setting for one of ancient history's most exciting tales. The didactic and scholarly Thucydides tells it in the third book of his History of the Peloponnesian War. The cranky and eccentric noises of motor bikes and motor vehicles distract. Not so the timeless calls of the melon and peach vendors.

At all events some 2400 years ago, in 428 B.C., the Mytilinaens decided to revolt against Athens. Up until then they had been members of the Delian League — an association of island and mainland states; led by Athens, and linked by the threat of domination by the Peloponnesians. Lesvos was important. She had a large and powerful fleet. Whoever controlled the island controlled the Hellespont and thus the route through the Sea of Marmara to the Black Sea and the trade with Southern Russia and the countries between. The Mytilinaens, or at least their leaders, decided that it was in their interest to change allegiances and to go over to the Peloponnesian side. The Athenians were furious. They sent Paches in command of a military and naval force to take the town. By the winter it was besieged; completely cut off by sea and land. Salaethus, the Spartan, was sent to Mytilini with news for the people that forty ships were coming to their aid. He slipped into the city. But the ships were too late.

> *". . . the Mytilinaens, seeing that the fleet had not arrived from the Peloponnesus but was loitering on the way, and that their food was exhausted, were compelled to make terms with the Athenians by the following circumstances. Salaethus, who himself no longer expected the fleet to come, equipped the commons with heavy armour . . . intending to attack the Athenians; but the commons, as soon as they had got arms, would no longer obey their commanders, but gathered in groups and ordered the aristocrats to bring out whatever food there was and to distribute it to all; otherwise, they said, they would come to terms with the Athenians independently and deliver up the city. Thereupon the men in authority, realising that they would be in peril if excluded from the capitulation, joined the commons in making an agreement with Paches and his army".*

The agreement was that the Athenian Assembly would "have the power to decide as they pleased about the fate of the Mytilinaens"; the army was to be admitted into the city; the Mytilinaens would send envoys to Athens to treat for terms; and, in the meantime Paches agreed "not to imprison or enslave or put to death any Mytilinaens". Paches however first sent the ringleaders to a nearby island — Tenedos — in close confinement. Later he sent them and Salaethus, who had been caught hiding in the town, to Athens.

The mood in Athens in 427 B.C. was ugly. The city had been ravaged by plague. The Peloponnesian war was not going well. Taxes had been increased and were crushing the Athenians and allies alike. Most citizens had been pressed into military or naval service. The Delian League was cracking. The largest fleet ever put together by the Athenians was at sea. The Spartans were gathering their forces at Corinth. They were building "isthmus hauling machines" to carry their ships across from the Mediterranean to the Aegean. In the Assembly the demagogue Cleon who was "the most violent of the citizens" at this time "had by far the greatest influence with the people".

It was in this atmosphere that the leaders of the Mytilinaen revolt arrived in Athens to be dealt with by the Assembly. The debate was short. The attempts of the envoys were to no avail. On Cleon's motion and "under the impulse of anger" it was determined not only to put the ringleaders to death but also all the men on Mytilini "who were of adult age, and to enslave their women and children". A dreadful decree.

> *"Accordingly they sent a trireme to Paches to announce what had been determined upon, and bidding him to despatch the Mytilinaens with all haste; but on the very next day a feeling of repentance came over them and they began to reflect that the design which they had formed was cruel and monstrous, to destroy a whole city instead of merely those who were guilty."*

And so the citizens decided to consider the matter again in the Assembly. Cleon was at his snarling,

sarcastic, sneering best. A change of mind would show weakness. Other restless allies in the League would be encouraged to revolt. The Mytilinaens had been well treated. Their treachery at a time of crisis for Athens demanded nothing less than the penalty which had been imposed. He warned against being "led into error by pity, delight in eloquence, or clemency, the three influences most prejudicial to a ruling state".

But in arguing an almost unanswerable case he made a grave error of advocacy. Cleon suggested that anyone who put forward a contrary view must necessarily have been bribed to do so by the envoys of the Mytilinaens.

Diodotus rose to argue the rival case. You can imagine the hush; the latent opposition. What followed was one of the great speeches of recorded history. Diodotus went straight to the weak point. Something is wrong with a cause when its proponents:

> *"... charge a speaker beforehand with being bribed to make a display of rhetoric. For if they merely imputed ignorance, the speaker who failed to carry his audience might go his way with the repute of being dull but not dishonest; when, however, the charge is dishonesty, the speaker who succeeds becomes an object of suspicion, whereas if he fails he is regarded as not only dull but dishonest as well. And all this is a detriment to the state, which is thus robbed of its counsellors through fear."*

After developing this argument Diodotus turned to formulate the critical question which he did with great skill. The question:

> *"for us to consider, if we are sensible, is not what wrong they have done, but what is the wise course for us. For no matter how guilty I show them to be, I shall not on that account bid you to put them to death; unless it is to our advantage; and if I show that they have some claim for fogiveness, I shall*

not on that account advise you to spare their lives, if this should prove clearly not to be for the good of the state."

He next despatched Cleon's point that unless all of the Mytilinaens were killed other allies would rebel. Severe penalties by themselves never prevented crime and it was foolish to think that they did.

"In a word, it is impossible, and a mark of extreme simplicity, for anyone to imagine that when human nature is wholeheartedly bent on any undertaking it can be diverted from it by rigorous laws or by any other terror. We must not, therefore, so pin our faith to the penalty of death as a guarantee against revolt as to make the wrong decision, or lead our rebellious subjects to believe that there will be no chance for them to repent and in the briefest time possible put an end to their error."

Indeed the facts were that the common people of Mytilini had forced their leaders to surrender. Diodotus pointed to the advantages of leaving hope for mercy in such circumstances. It would be wrong to destroy the populace "which took no part in the revolt, and which voluntarily put the city into your hands as soon as it got hold of arms". Long sieges would be avoided because the people would not be compelled to fight to the last man. Revenues could be still derived from the vanquished populace.

"We must not, therefore, be such rigorous judges of the delinquents as to suffer harm ourselves, but we must rather see how for the time to come, by punishing moderately, we may have at our service dependent cities that are strong in material resources; and we must deem it proper to protect ourselves against revolts, not by the terror of our laws, but rather by the vigilance of our administration."

He ended with the following peroration:

"Do you, then, recognise that mine is the better course, and without being unduly swayed by either pity or clemency — for neither would I have you influenced by such motives — but simply weighing the considerations I have urged, accede to my proposal: pass sentence at your leisure upon the Mytilinaens whom Paches sent here as guilty, but let the rest dwell in peace. Such a course will be best for the future, and will cause alarm among our enemies at once; for he who is wise in counsel is stronger against the foe than he who recklessly rushes on with brute force."

Others spoke. The debate was a very close one. On the show of hands however "they were about equally divided; but the view of Diodotus prevailed".

"They then immediately despatched a second trireme with all haste, hoping that the first trireme, which had the start by about a day and a night, might not arrive first and the city be found destroyed. The Mytilinaen envoys provided wine and barley for the crew and promised a large reward if they should arrive in time; and such was their haste on the voyage that they kept on rowing as they ate their barley-cakes, kneaded with wine and oil, and took turns at sleeping and rowing. And since by good fortune no contrary wind arose, and the earlier ship was sailing in no hurry on so horrible a business, while the second pressed on in the manner described, although the former did in fact arrive first, so that Paches had just time enough to read the decree and was about to execute the orders, the second put in close after it and prevented the destruction of the city. By just so such did Mytilini escape its peril."

Cliff Pannam Q.C.

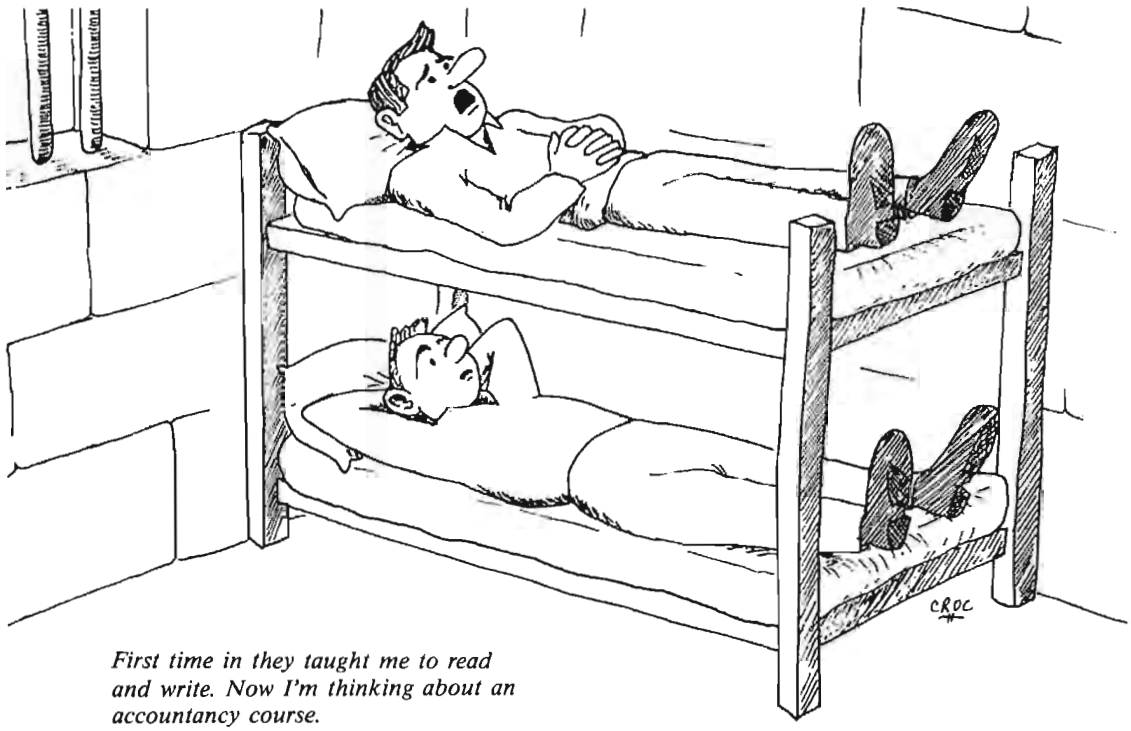
It is an exciting tale but one with not an entirely happy ending. Cleon had his day. On his motion the Athenians put to death the thousand rebels sent to Athens by Paches. All of the land in Lesvos, other than that held by the Methymnaens, was divided into 3000 lots:

". . . and reserving three hundred of these as sacred to the gods they sent Athenian colonists chosen by lot, to occupy the rest. With these the Lesbians made an arrangement to pay a rental of two minas a year for each lot, they themselves to cultivate the land. The Athenians also took possession of the towns on the mainland which the Mytilinaens controlled . . . such was the course of events at Lesvos."

The seasons have come and gone. Karpouzi. Peponi. Rodakino. They are sold each summer. It is still Lesvos. On hot summer afternoons the triremes sail into the harbour. In the mind; and, aided not a little by the Sec Epom; or, perhaps, if you like it, a little ouzo.

HUMOUR

Case flow management opens the floodgates

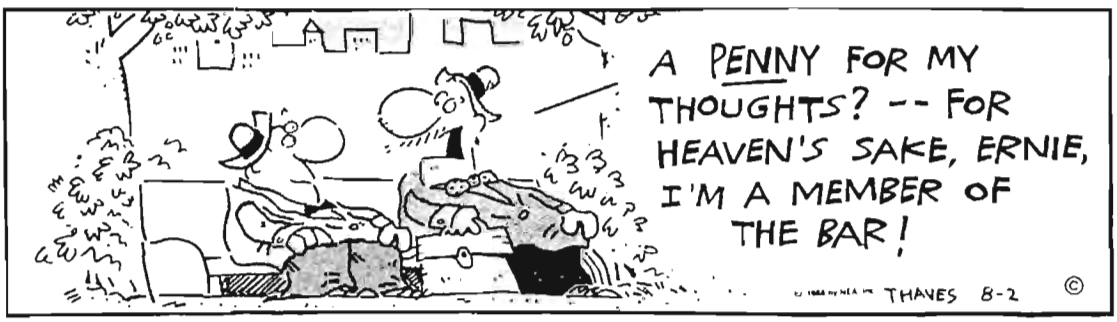


First time in they taught me to read and write. Now I'm thinking about an accountancy course.

Equal opportunity at the Bar

A quick single before the jury returns

Keeping up appearances



NEW RULES OF PROCEDURE IN MISCELLANEOUS CIVIL PROCEEDINGS

An explanatory memorandum by *Mr. Justice Ormiston*, Acting Chairman of the Supreme Court Rules Committee

THE JUDGES OF THE SUPREME COURT HAVE recently made rules (No. 334 of 1988) which will bring into operation from 1st January 1989 a fully revised Chapter II of the Rules of the Supreme Court. Members of the profession ought to become familiar with the new rules by that time, although it is emphasised that many of the present procedures for miscellaneous civil matters are retained in substance. In particular the rules relating to the Commercial and Building Cases Lists (Orders 2 and 3) are effectively unaltered, as are those relating to Family Provision applications, other than the rules relating to the preparation of final orders and their attachment to the probate or letters of administration (Order 16).

The overall effect of the new rules is, it is hoped, to simplify and reorganise the present rules. Their length has been nearly halved, so that the substance of some 34 orders in the present Chapter II is contained in only 21 orders in the new rules. The content of most of the orders relating to the Supreme Court's supervisory jurisdictions is now revised in the new orders 4 to 6, which deal with appeals, cases stated and references of questions of law from tribunals: compare the present Orders 2, 3, 5, 6, 16, 25, 26 [part (I)], 29, 31, 32 and 33, together with Rule 58.02 of Chapter I, which in turn will be revised. The principal exception to the procedures in Orders 4 to 6 is the new Order 7 (Victorian Taxation Appeals) which covers appeals, cases stated, etc., relating to all taxes, duties and levies presently the subject of Order 8, although it will be seen that the procedures are in general terms but not substantially different from those contained in the new Orders 4 to 6. Further, appeals under the Valuation of Land Act 1960 and the Legal Profession Practice Act 1958 are still dealt with separately: see Orders 8, 14 and 15.

Some applications under statute, presently the subject of specific Orders in Chapter II, namely Orders 9, 10, 23, 26 (part II) and 28 must in future be brought by Originating Motion pursuant to the general provision in Rule 4.05 (b) of Chapter I.

Perhaps the major changes to Chapter II, other than structural changes, are contained in the new Orders 1, 11 and 14. The preliminary Order 1 now makes more detailed reference to the residual application of Chapter I of the Rules and introduces a new requirement in *all* proceedings commenced under Chapter II, namely that, whenever an appearance is not filed in accordance with Rule 8.05 of Chapter I, a respondent *must* file and serve an address for service before taking any step in the proceeding (Rule 1.07). Secondly, under Order 11, somewhat greater detail must be supplied on applications to the Master relating to the registration of judgments and for certificates under the Foreign Judgments Act 1962. Thirdly, in Order 9 detailed provision is now made, pursuant to s.34(5A) of the Commercial Arbitration Act 1984, for offers of compromise and costs orders (see Rules 9.09 to 9.16) in arbitrations which will first, by separate rules amending the present Chapter II, come into operation on 1st October 1988. It should be noted that these particular rules affect the conduct of arbitrations and only incidentally the conduct of proceedings in the court.

Those concerned should read the new rules carefully, for this memorandum is an attempt to deal only with some of the more significant alterations.

CREDIT TRIBUNAL REPORTS

Dear Mr. Francis,

I have been handed a copy of a decision in Plaint No. 87000331 of 1987 between Equity Margins Limited v Helmut Placzek *(the name of the Judge not being disclosed from the judgment).*

The action was heard on 7, 8 and 11 April 1988 and at page 5 of that judgment the learned Judge states —

> "The two Acts referred to are relatively new Acts and neither Counsel was able to refer me to any decided case in which the provisions of either Act have been considered."

The Acts to which the learned Judge referred were the Credit Act 1984 and the Credit (Administration) Act 1984. Most proceedings in respect of disputes arising under such Acts take place before the Credit Tribunal.

I should advise that all major decisions of the Tribunal are reported in CCH Australian Consumer Sales & Credit Law Reporter and that the Tribunal has heard in excess of 200 cases.

I trust this information may be of some assistance to your members.

Yours sincerely,
MICHAEL LEVINE
Chairman, Residential Tenancies Tribunal and Senior Referee, Small Claims & Credit Tribunals

CAPITAL GAINS TAX ON SETTLEMENTS

JONATHAN BEACH HAS WRITTEN TO MAKE several valuable points concerning the application of capital gains tax to judgments and compromises. It is heartening to see that CGT is attracting the widespread interest which its sexy characteristics undoubtedly deserve.

The most important argument put forward by Beach is that the chose in action, which is satisfied, surrendered or extinguished by a compromise, will not have any "cost base" because sub-section 160M(7) will apply.

This sub-section is probably the most puzzling and difficult of all the provisions of Part 111A. It has been the subject of numerous papers and articles, mainly querulous and complaining in tone, by practitioners; and even a recognition by the ATO that it needs re-vamping. Until that is done, there is room for much debate as to its meaning and operation. But in our opinion it is reasonably clear that it will be interpreted so as to apply only to situations which are not dealt with by more specific and "ordinary" provisions of the legislation. The very fact that where sub-section 160M(7) applies there is deemed to be no cost base makes it a very arbitrary and sweeping taxing measure (in a scheme which is said to be concerned only with taxing "profits"). Furthermore, it comes at the end of a number of sub-sections which deal first with what might be said to be the more-or-less ordinary meaning of "disposal", and then go on to spell out a number of different special situations which are deemed to be, or deemed not to constitute, a "disposal". These include, in para. 160M(3) (b), the quite precise inclusion of:

> *"In the case of an asset being a . . . chose in action . . . — the cancellation, release, discharge, satisfaction, surrender, forfeiture, expiry of abandonment, at law or in equity, of the asset . . .".*

It seems to us that where a transaction falls clearly within this paragraph (as the satisfaction of a cause of action by judgment, or the release etc. of a cause of action by way of compromise, would do), there is no room for sub-section 160(7) to operate over again. General principles of interpretation would suggest that; so do the opening words of sub-section (7) ("subject to the other provisions of this Part"); and so does basic fairness (to avoid double-counting, and to prevent sub-section (7) being used as a "back door" way of cancelling the benefit of a cost base, and indeed the benefit of having an asset acquired before 20 September 1985.

It is understood that the Commissioner accepts in practice the view that where there is an actual disposal of an actual asset, to which one of the earlier provisions of section 160M applies, and nothing more, then sub-section (7) — which speaks of the deemed disposal of an asset deemed to be created by the disposal — does not apply.

If that is so, then CGT will not be a concern where the cause of action arose before 20 September 1985; and where there is a "cost base" of the cause of action, that may be deducted from the consideration receivable (from the judgment or compromise). It remains true, however, that in very many cases — probably a large majority — it will not be possible to establish a substantial cost base except for the expenses of the litigation itself (as to which see para. 160ZH(1) (c) and (d), and also 160ZH(7) (a)).

In other cases, specific provisions of Part 111A may operate to provide a cost base equal to the consideration received. For example, where the taxpayer did not pay or give any consideration, or where the consideration cannot be valued, sub-section 160ZH(9) could operate to deem consideration equal to market value to have been given. In such a case no assessable capital gain could arise.

Further, if the cause of action arises from the loss or destruction of an asset, the time of disposal may be deemed to be the time the amount is received in respect of the disposal, for example, by way of compensation or settlement (section 160U(9)). If, in turn, the compensation (plus up to 20%) is expended to replace the original asset within one year from the date of disposal (i.e. the date of receipt of the compensation, sub-section 160U(9)), the taxpayer may be entitled to roll-over relief under section 160ZZK. A capital gain would not arise in such a case.

Apart from this type of statutory exception, prima facie there is a capital gain of an amount equal to the consideration received less the cost base, even where the "disposal" is an involuntary one which arises as a result of the loss or destruction of the asset.

A useful article in the July 1988 issue of The Law Institute Journal (p.624) by Gerard Bean discusses in some detail problems to which we have referred and we commend it to members of the Bar.

Jonathan Beach also points out that tortious and other causes of action which are not assignable may not constitute an "asset" within the meaning of Part 111A at all because they are not sufficiently proprietary in character, and we agree that such an argument is well open. Presumably it will be a successful plaintiff, rather than an unsuccessful defendant, that first raises this issue with the Commissioner.

N.H.M. Forsyth
Peter Searle

LEO CUSSEN GRADUATES' ASSOCIATION

THE GRADUATES' ASSOCIATION WAS incorporated in 1985, and since that time has endeavoured to maintain links with past students of Leo Cussen Institute.

The Association organises informal social sessions throughout the year which provide past students with contacts that prove beneficial to social and career prospects.

In addition to the Annual Dinner which this year was held on Friday September 30, and which is open to friends as well as graduates, the Committee has arranged for Sir Daryl Dawson to give the Leo Cussen Lecture on Friday November 11.

If you are a graduate, no matter how long ago, the Committee is anxious for you to support the Association. Please write to the Hon. Secretary, DX 460 Melbourrne.

Anthea MacTiernan

TED HILL MEMORIAL SERVICE

Dear Sir,

In February of this year, I chaired a Memorial meeting held as a tribute to the life and work of the well known Victorian Barrister E. F. (Ted) Hill who died on 1st February 1988.

A number of people have enquired whether any record of the meeting is available. The proceedings were tape recorded and arrangements have now been made for copies of the tape to be run off.

The speakers at the meeting were Mr. Hubert Frederico Q.C., a retired County Court Judge; Senator Barney Cooney; Ms. Irene Bolger, Royal Australian Nursing Federation Victorian Secretary; Mr. Justice Cummins, then Australian Bar Council Vice President; Dr. John Sullivan, Consultant Physician, formerly head of the Royal Melbourne Hospital's Department of Oncology; and Mr. A. E. (Ted) Bull, retired Victorian Secretary of the Waterside Workers' Federation. Messages of condolence from within Australia and overseas were read to the meeting.

Anyone wishing to obtain a copy of the tape may do so by writing to me care of 562 Little Bourke Street, Melbourne, 3000. The price will be $10.00 each including postage and cheques should be payable to myself. A few weeks should be allowed for delivery.

Yours faithfully,
G. L. Jones
Retired Senior Partner,
Slater & Gordon, Solicitors.

JUDICIAL PIQUE

In 1893 Sir John Madden was appointed Chief Justice of the Supreme Court. The senior puisne judge *Sir Hartley Williams*, was passed over and expressed his displeasure in this letter to the Editor of the Argus.

SIR, DR. MADDEN HAS NOT FOR MANY YEARS been engaged in politics, nor can he be regarded as a supporter of the present Government. The reason, therefore, why he has been selected to be Chief Justice, as successor to Sir William Stawell and Mr. George Higinbotham, can only be because as an *advocate* he, conjointly with Mr. Purves, Q.C., occupies the foremost position at the Bar as it is *now* constituted.

Let me briefly examine the weight and cogency of this reason. Firstly, in what capacity does Dr. Madden occupy this foremost position, and, secondly, how came he to fill it? As *lawyers,* Mr. Mitchell, Mr. Box, Mr. Isaacs, Mr. Topp, and Mr. Higgins are undoubtedly sounder and superior. As *advocates*, they are equally clearly his inferiors. It is therefore, as an advocate, and not as a lawyer, that Dr. Madden holds at the Bar the position he now does. But I apprehend that an essential qualification for those sought to fill vacancies on the Supreme Court Bench is that they should be sound lawyers, and not brilliant or effective advocates.

Then how came Dr. Madden to fill the position he now holds at the Bar?

It is only within the last 11 years that he has done so. When the late Chief Justice, Mr. Justice Holroyd, and I were at the Bar, Dr. Madden's practice was of a very insignificant description. The best practising solicitors of those days will readily substantiate this. It was only the rapidly-succeeding elevation to the Bench of the three whom I have just mentioned which enabled Dr. Madden to push his way to the front rank and into a better class of business. Though Dr. Madden started at the Bar before me I was "standing counsel" for nearly every bank in Melbourne, for many of the insurance offices, leading mercantile firms, the Corporation of Melbourne, The Argus and the Age newspapers, and for many private individuals, and was making thousands a year when Dr. Madden did not, I venture to say, hold one "general retainer", and was making hundreds.

When the late Chief Justice, Mr. Justice Holroyd, and I were rapidly, the one after the other, elevated to the Bench, the great gap so caused was filled by men who hitherto had occupied comparatively obscure positions. Amongst these I do not, of course, include Mr. Purves Q.C., as he had been before the time I mention in the front rank with Mr. Higinbotham, Mr. Holroyd, and myself.

As regards large pecuniary sacrifices, every one of my colleagues and I have, for the honour of the position, made very large pecuniary sacrifices. Every present occupant of the Supreme Court Bench is nothing if not a *lawyer.* Each of us has in turn been elevated because each in his turn was supposed to be, not the best advocate, but the best lawyer, at the Bar. Dr. Madden has never been regarded as a sound lawyer, though he has justly been regarded as a successful and brilliant advocate; but I take it that we do not require forensic powers on the Bench. I have now been nearly 12 years on the Bench, doing considerably more than my duty, and taking a keen interest in expediting the work of the court. The treatment which I have just received is not such as to encourage me for the future to do more than my bare duty. I have felt constrained to depart from my usual custom, and to write to the press upon this subject, for the purpose of reminding the public that, because Dr. Madden happens to hold a prominent position at the Bar as at *present* constituted, it does not follow that the present five occupants of the Supreme Court Bench are not at any rate his equals in point of legal knowledge and attainments. In conclusion, so keenly do I feel the injustice of this latest appointment, and the insult cast by it upon the present occupants of the Bench, that had I left the Bar only five years instead of twelve I should unhesitatingly have resigned my judgeship and returned to the Bar. — I am, & c.,

HARTLEY WILLIAMS
Gracedale-house, Healsville, Jan. 7.
[Copy kindly supplied by Cliff Pannam Q.C.]

THE BAR ALL STARS XVIII

Backs:

Dean Ross
170 senior games Fitzroy, St. Kilda, Dandenong, Highett VFA 1978
Federal League All Stars 1977

Peter Galbally
Uni. Blacks Capt.
Capt. Aust. Uni. Carnival side
Vic. Amateurs 61-62
Collingwood Snr. List 61

Edward Power
300 Games+
Parkdale and Mordialloc, St. Bedes
OC 2B & F, 3 Leading Goalkickers.

Half-backs:

Geoff Flatman
APS '62, Wesley 2 Prem.
Collegians Queens College 2 Prem.

Ian Hayden
Uni Blues, Richmond

Russell Lewis
100+ Old Paradians
B & F, 3 Prem. 2 conseq "A" Grade Vic. Amateurs

Centres:

John Dee
UHSOB 200 games
Collingwood Snr. list
B & F u21 Sunday Amateur Football League

Les Ross Q.C.
North Melb. '53-54
2nd Semi '53
Moorabbin

John Lewisohn
100+ Capt. Old Geelong Grammarians, Uni Blues Capt./Coach Trinity

Half-forwards:

Dyson Hore-Lacey
100+ Ivanhoe

Craig Porter
100+ Uni. Blacks & Collegians
Essendon Snr. list
Vic. Amateurs & All Aust. Amateur

Richard Stanley Q.C.
250 games Old Xavs. 1959-74, Vic. Amateur 1962-4

Forwards:

Damien Maguire
260 games North Old Boys
4 consecutive "A" Grade Finals President 1982
A grade Premiership year

John Jordan
Collingwood, Old Paradians Horsham, North Old Boys 300+ games, 1000+ senr. goals, Vic. Amateurs 3 occasions 2 "A" Amateur Premierships
1 Wimmera League Prem.
10 Leading goalkicker awards.

Peter Fox
100+ Collegians

RUCK

John Winneke Q.C.
Uni. Blacks, Hawthorn V.F.L. Premiership 1961.

Mordy Bromberg
St. Kilda 40+ games
Ajax Premiership 1979
B Grade

David Kendall Q.C.
100+ Caulfield Grammarians

COACH

Simon Cooper
U19's Old Melbourians 1988
(Contract renewed 1989)

SECRETARY

Peter Condliffe
Triple Premiership Secretary — Kangaroo Flat.

BOUNDARY UMPIRE

Bill Pinner
Old Scotch 300+
Pres. 1985-6

RUNNER

Clive Penman
Nar Nar Goon Primary School Thirds

INTERCHANGE

Lyneton Lethlean
Martin Shannon
Michael Croyle

Jack Rush
Peter Rattray
Ian McIvor

Denis Smith
Gerard Hardy
Terry Forrest

SELECTOR'S COMMENTS

1. As the side is uncoachable, it was decided Cooper should have the job. His efforts in organising the shortest snow season in living memory in 1988 to enable him to field a side stands out. His system of communication (as with John Northey whereby Cooper waves his arm vigorously to "Swooper" and thinks "move Jim Stynes to the backline") once learned must also surely assist the side. Cooper claims Northey named his father, Dr. Edelstein then Cooper as major influences.
2. Each of the distinguished players were asked for comments. There was surprising similarity in the reasons for retirement. Kendall, Ross, Galbally and Fox all listed broken bones. No player listed the real reason namely that their respective wives refused to continue washing the gear.
4. Dee's highlight was being assaulted by Senator Barney Cooney who played full back for St. Pat's Old Collegians. Dee was falsely accused of whacking Senator Cooney behind the ear. He reports that up until the moment of being assaulted he did not know Senator Cooney was the current light-heavyweight inter varsity boxing champ.
5. Stanley Q.C. highlighted a broken jaw he received against Ivanhoe Amateurs. Hore-Lacy was in close proximity and aiding and abetting on any view.
7. Jordan displayed the outlook that took him to 1000+ goals. He simply retorted that he had kicked goals in "hungrier" sides than this one. It appears that he is the sole reason why the side is not made up of ex-players. He still plays superules, and holds the goal kicking record of 10 goals in a match.
8. Galbally nominated a surprising highlight in such a distinquished career. It was running down "Legs Magee" on the wing in a semi-final in 1962. A number of other players in fact referred obliquely to Galbally's speed.
9. Bromberg expressed concern with his ruck partners. As both are silks, he thought he alone would be required to get his shorts dirty. It has been explained that when they played football they were juniors.
10. Finally, strong administration is essential for this team. Is it possible to imagine a team meeting after a few losses? Condliffe as secretary guided Kangaroo Flat to three premierships, and claims anything this team could dream up has been tried in the Bendigo League. In any event Pinner in running the boundary doubles as President.
11. The side is selected from knowledge, information and belief of the selector who wishes to remain anonymous.

LAWYER'S BOOKSHELF

SPORT AND THE LAW

G.M. Kelly, The Law Book Company Limited 1987, pages (i) — (xlviii), 1-572, RRP $55

SPORT HAS BECOME A VERY PROMINENT feature of our national culture. As a result, sport has raised important legal issues.

These issues range widely. They include the application of the doctrine or restraint of trade and the *Trade Practices Act* (1974) (Cth) to the rules of sport associations, claims by participants and spectators for personal injuries sustained at sporting events and claims against racing stewards on the grounds of breaches of rules of natural justice. Is sport a "trade"? If so, does the need to maintain sporting equality justify the restraints on a player's trade passed by the rules of the sporting association governing the sport in which the player participates? Do spectators or participants assume the risk of injury at sporting events? If so, to what extent? To what extent should the courts require racing stewards to comply with the rules of natural justice?

Sports law has been a serious academic study in North America and is taught at many universities in the United States and Canada. Thus, a number of comprehensive texts are available on the subject of sports law including L.S. Sobel *Professional Sports and the Law* (Law Arts Publishers, New York 1977), J.A. Weisart & C.H. Lowell, *The Law of Sports* (Bobbs-Merrill, Indianapolis 1979) and J. Barnes, *Sports and the Law in Canada* (Butterworths, Canada 1983). In Australia there has been a good deal of legal writing relating to sport scattered through various law journals and essays. The time is ripe for the book under review, which is the first comprehensive text on sports law in Australia. The author, a New Zealander, first focussed his attention on sports law some twenty years ago in an article "The Errant Golf Ball; A Legal Hazard" (1968) NZLJ 301, 322, 346.

The work deals with all aspects of sport including sponsorship, discrimination in sport, the conduct of sporting tribunals, restraint of trade in sport and liability for injuries arising from sporting activities.

A number of very recent but important cases are considered in the text including *Watson v Haines* (unreported NSW Supreme Court decision 10 April 1987) in which the plaintiff, a schoolboy, suffered injury and became a paraplegic while playing hooker in the school rugby team and *Hughes v West Australian Cricket Association* (1986) 69 ALR 660 in which Toohey J discusses the application of the doctrine of restraint of trade and the *Trade Practices Act* 1974 (Cth) to the rules of the defendant association and to sporting associations generally.

The text is aimed principally at the adviser to the sportsman, sports administrators and practitioners with an interest in sport. However, the text does not address the fundamental question whether different legal principles apply or ought to be applied to the conduct and organisation of sporting articles.

Marcus Clarke

SUPPLEMENT TO THE LAW OF CONTRACT

by D. W. Greig and J. L. R. Davis, The Law Book Company Limited 1988, pp. i-xiv, 1-114, RRP $12.50

THE LAW OF CONTRACT BY GREIG & DAVIS WAS published in 1987 and its excellence achieved immediate recognition. It was favourably reviewed in Bar News 1987 and indeed excerpts from that review have been included in the publisher's promotional material. At an even more elevated level, the work has received the attention of the High Court: *Waltons Stores (Interstate) Limited v Maher* (1988) 62 ALJR 110, 115 per Mason CJ and Wilson J.

The supplement under review brings the original work up to date as at 1st January 1988, the original work having ruled off the ledger as at the end of 1985. Two years does not seem a period long enough for much new law to accumulate in such a basic common law field as contract. Yet the most cursory examination of the supplement shows just how much development there has in fact been, particularly in such topical and fluid areas as promissory estoppel and constructive trusts. The chapter on misrepresentation also contains a most useful discussion of recent authorities under the Trade Practices Act.

The high standard of the original work has been maintained. The supplement is completely integrated into

the original work in the sense that the particular page and line of the original work is indicated and there then follows text and authorities with discussions and exposition in the same style as the principal work. In other words, it is not simply a noter up of recent cases.

Finally, the authors and publishers are to be congratulated on a return to the format of principal work with supplements as opposed to the modern fashion of loose-leaf services. The latter have their use, but they are extremely expensive and often the need to push out updating material on a very frequent basis has an adverse affect on the quality. The supplement to Greig and Davis on the other hand covers the two year period since 1985 with the thoughtfulness and clarity which distinguished the principal work.

PCH

ESSAYS ON CONTRACT

by P. D. Finn, The Law Book Company Limited 1987 pages i-xxx, 1-261, RRP $49.50 (cloth)

IN OCTOBER 1986 THE AUSTRALIAN NATIONAL University convened a special seminar for the purpose of considering various developments to and controversies in the law of contract. At that seminar, papers were delivered by Sir Anthony Mason, Chief Justice of the High Court, Mr. Justice Rogers of the Supreme Court of New South Wales, Sir Robin Cooke, President of the New Zealand Court of Appeal along with several other eminent lawyers.

The result is a collection of essays compiled by Dr. P. D. Finn. In large measure, this book is akin to the successful "Essays in Equity" by the same author. The approach adopted by the essayists in this work is not so much a textbook explanation of the component elements of the different areas of contract law but, rather, an analytical study of contract law's development in selected areas such as good faith, damages, discharge by breach and contracts with government. A representative extract is contained in Sir Anthony Mason's paper. In the context of the law of mistake, the Chief Justice traces its evolution in Australia to the point of the High Court's current statement in *Taylor v Johnson*, indicating areas in which it will fall to future courts to explain various doctrines. Equally, a full discourse is given by Professor Sutton on the English origins and current Australian position in relation to promissory estoppel citing High Court authority and decisions of the Full Courts of most States.

Because of the high standard at which the essays are written, this book would have slightly less application to most than would a standard text on the law of contract. The book is intended to be read at a more sophisticated level. There is a minor error in the table of contents, in that two chapters of the text are not to be found were indicated, but otherwise the work is complete with an elaborate index, table of cases and of statutes.

If for no other reason than the books list of essayists and participants reading like a Who's Who of the legal world of contract equity and commerce, the book is worthwhile.

J. D. Wilson

ORDER IN THE COURT — The Lighter Side of the Law

Lothian Publishing Company; pages 1-110, RRP $12.95

THE RECENTLY PUBLISHED BOOK OF LEGAL humour, **Order in the Court — The Lighter Side of the Law,** is a collection of items from the "Verbatim" columns of the Victorian Bar News, which have regaled and entertained members of the Victorian Bar and many others almost since the first edition of the Bar News in 1971, with a selection of amusing and reportable incidents in court, the humour of which is often heightened by the fact that the incidents are unrehearsed, and by often unintended comments, excuses and apologies which come straight from the heart, without regard to syntax.

Of its very nature, "Order in the Court" would not rank high in the annals of literature, but its deficiency in that quality is more than compensated for by its entertainment value, for the stories are so often real, alive and spontaneous; they are sufficient in themselves and do not admit or need embellishments. Much of the tradition of the law is oral; a story develops around an incident and with the passing of time the story mellows, is added to, modified and eventually may bear little resemblance to the incident which gave it birth. Of course, it may still be a good story and a little embellishment may help, but often it finishes up as a different, not so good a story, illustrating a different point, and its source and spontaneity may well be lost in the mists of time. "Order in the Court", however, ensures that its source and spontaneity will be preserved.

I think the law, rather than other professions, lends itself more to humour in the practice of a profession. The practice of the law is more vocal — in court it is entirely vocal — and, while aptly turned phrases may commonly command polite acknowledgement, it is the unplanned, unintended and often accidental quality of the incident which produces and preserves the essence of the gaffe. The consciously and elegantly composed passage — these are rare in "Verbatim" — may occasionally seem slightly pompous in the context of its companions, but it has been worthily included in "Order in the Court" to indicate that the law is not illiterate, and the humour of the book is not impaired.

Of course, some anecdotes are peculiarly legal, and the humour may be lost on outsiders, as when Clive Harris (now Judge Harris) in the Workers' Compensation Board many years ago announced that his case related to a Greek inguinal hernia, and two doctors waiting in another case became quite interested and discussed amongst themselves what a Greek inguinal hernia could be; they naturally knew what a hernia was, but a "Greek" one was all Greek to them. In those early days, possibly they did not know what a Mediterranean back was, either.

Some of the incidents related in "Verbatim" may be dated by contemporary circumstance, as when a judge thoughtlessly adjourned a case to the next day, which happened to be the Melbourne Cup Day, or when reference is made to some currently notable person or ephemeral event presently in the news. But the point is made in the story, and the permitted degree of levity illustrates that, however solemn and serious the litigation may be, practitioners are sufficiently human to recognise and appreciate a solecism — even their own. The humour is often instant, though unintended, as when, many years ago, a common law barrister, but on this occasion appearing in an equity case, hoping to get some comfort from an old Law Report, read out, "The plaintiff then suffered a recover." He paused, looked up at the judge, and said, "He must have had an accident, your Honour." I have sometimes wondered whether the barrister, who was somewhat mischievous, was seeking to provoke the provokable judge. At all events, this time he did not.

The selection of the "Verbatim" tales for the first volume of "Order in the Court" is representative, but has been necessarily limited, for the column has been running for many years, and most of the issues of the Bar News have abounded with several mirthful incidents. But, within the necessary restraints, "Order in the Court" provides a convenient permanent and worthy collection of stories with which to regale your friends.

I read "Order in the Court" with relish, and my memory was stirred by the stories, and by many more I have read in "Verbatim". One hopes that further editions of "Order in Court" will recount to their eager readers some more of the wit of the courts to be found already in "Verbatim" columns of the past and yet to come.

Kevin Anderson

JUST WHAT WAS SAID

THE WHEELS OF JUSTICE DON'T ALWAYS GRIND slowly; occasionally they spin. The following excerpt is taken from the official court transcript of a preliminary hearing held earlier this year in Ontario provincial court, criminal division. The defence counsel had been asking a constable about his use of binoculars during surveillance of a suspect, and the judge eventually asked him to explain the line of questioning:

Counsel: Well, I like to think, Your Honour . . . particularly in a Canadian court of law, that there is in fact a genuine presumption of innocence.

Judge: There's which?

Counsel: I'd like to think that there is in fact a genuine presumption of innocence in a case —

Judge: Well what's that got to do with the binoculars? . . .

Counsel: I'm answering Your Honour's questions. The questions, in my respectful submission, are very, very, very strange in a court of law where there is a presumption of innocence. (The defendant) is presumed innocent in this court whether you like it or whether you don't like it, that's a matter —

Judge: Well I do, I accept that fact. I accept that fact, but I don't like you, that's what I don't like.

Counsel: Well I —

Judge: If you want to know what I don't like, it isn't the presumption of innocence, it's you.

Counsel: Well I don't care whether you like me or not.

Judge: I know you don't care.

Counsel: I frankly don't care.

Judge: Nobody likes you.

Counsel: I don't care a hoot whether anyone likes me, that doesn't bother me.

Judge: Well —

Counsel: I'm not here for cheap popularity. Cheap popularity I've had contempt for from day one.

Judge: Well, you have contempt for everybody, obviously — (At this point, the prosecutor interjects: "I can't stand this. May I retire and have a cigarette?")

Judge: — and everybody has a contempt for you.

Counsel: Well it's mutual.

Judge: It's a mutual contempt.

Counsel: That's fine . . .

(And the hearing continues. There are a million stories in the halls of justice . . .)

From a Canadian source

NITTES v VICTORIAN TAXPAYERS ASSOCIATION

Full Court (Clutchpenny, CJ; Haughty and Grumpy JJ.) December 6, 1987

Angst QC, S-G and Toady for the Appellant (Defendant).
Duesburys for the Respondent (Informant).

CLUTCHPENNY, CJ IN THIS CASE THE appellant was charged with committing an offence under s.10(1) of the Vagrancy Act 1966. Having been convicted in a Magistrates' Court and sentenced to two years imprisonment he appealed therefrom to the County Court. The matter now comes before this Court as a Case Stated.

Section 10 provides, so far as is relevant for the purposes of the present appeal, that any person who knowingly lives wholly or in part on the earnings of prostitution shall be guilty of an offence.

The facts found by the learned County Court Judge are set out in the Stated Case. The appellant, on 4 April 1987, the date of the alleged offence, was in fact working and receiving substantial remuneration from honest and lucrative employment as an officer of the Commonwealth Department of Taxation. Prior to this date in April the appellant had on various occasions spent periods varying from four hours to eight hours between midday and midnight at the business establishment of a man called Styffe. He was

seen by visitors to the establishment to be taking notes as to the method in which the business was conducted. On the evening in question he drove with Styffe and two women to Puckapunyal Military Camp, arriving there some time after 7.00 p.m. The women in question were prostitutes within the meaning of the relevant section of the Vagrancy Act. The purpose of the visit was to sell the services of those women to soldiers in the camp and also to sell liquor which had been carried in the car. The appellant was evidently there for the purpose of keeping records of the quantity of beer sold and the price received and the services provided by the women and the price received by each woman on each occasion. Those documents were found in his possesion at the time that he was arrested. It is clear therefore that the appellant must have been well aware of what was happening on the evening in question, that the women were earning money by prostitution and that liquor was being sold without a licence. There was, however, no evidence to associate the appellant with any previous expeditions of that nature or to suggest that he had ever visited the camp before for the purpose of aiding prostitution.

The question of law submitted for the opinion of this Court is as follows: On the facts as found, having regard to the fact that the charge is in respect of one isolated occasion, can it be said that the appellant "lived in part on the earnings of prostitution"?

The answer to that question depends on the proper construction of the language used in the Vagrancy Act. The words would appear to suggest that what the legislature had in mind was some continuous association with the industry and some habitual receipt of money from the earnings of prostitution.

If we were limited to the facts stated, the appeal would have to be decided in favour of the appellant. However, despite an attractive argument to the contrary by counsel for the appellant, in a case which involves public morality we must, I think, also consider those matters of which we may take judicial notice.

It is notorious that the appellant's employer, the Commissioner of Taxation, regularly receives from the two women in question and from others in the industry 49 per cent of their nett annual income. It is objected for the appellant that such payments are made to the Commissioner not voluntarily but under compulsion. The fact that the Commissioner's share of this disgusting trade is extorted from these unfortunate women does not, in my opinion, serve to distinguish him from souteneurs of a humbler type.

Any innocent explanation that there might otherwise be for those payments is convincingly displaced by the fact that the appellant, as the Commissioner's servant and agent, was present on the occasion in question aiding the prostitution by keeping a financial record of its transactions. It follows that the Commissioner and the appellant were engaged in a common enterprise and both were undoubtedly guilty of an offence under s.10 of the Vagrancy Act.

The question in the case stated will be answered "yes". I cannot regret that an example has been made of those who, under a cloak of fiscal respectability, encourage this shameful trade. They do so nationwide and, I am reluctantly obliged to say, not only with women but also with men. In those circumstances the maximum penalty is manifestly inadequate.

The appeal must be dismissed. A warrant may issue for the arrest of the appellant.

Haughty J. There is nothing I can usefully add.

Grumpy J. I agree.

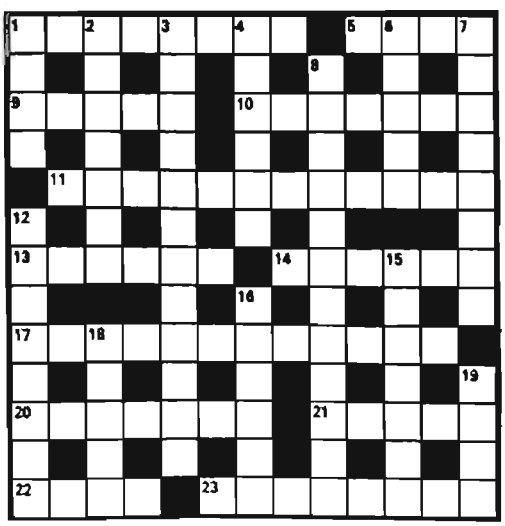
Appeal dismissed.

Solicitor for the appellant: Australian Government Solicitor.

Solicitor for the respondent: Testy and Nasty.

HCB

CAPTAIN'S CRYPTIC No. 63



ACROSS

1. Prevention by law (8)
5. Song for one voice (4)
9. The general meaning of male singer (5)
10. Faculty of reason (7)
11. In the middle of latin things (2,5,5)
13. A fine collection as of lies or absurdities (6)
14. Against latin (5)
17. Rightful claims (12)
20. Collects (7)
21. More unusual (5)
22. Chapeaux (4)
23. Debased (8)

DOWN

1. Consumes (4)
2. Land holders (7)
3. Rule against this to allow property to rest (12)
4. To A and the heirs of his body (6)
6. Gillard minor a member (5)
7. Past the prime of life (8)
8. A court of appeal (5,2,5)
12. Robur (8)
15. Taught (7)
16 The Loch Ness monster (6)
18. Cards for fortune telling (5)
19. Generated (4)

MOUTHPIECE

Two Magistrates Court Regional Co-ordinators are whiling away a few hours over endless cups of Harris Vending Machine Blend Coffee during a Magistrates' conference:

Gordon: How are you enjoying being a Co-ordinator?

Philip: It's great!

Gordon: I wouldn't've thought you enjoyed it that much. You always appear to have a pained expression on your face.

Philip: You have to hide your true feelings.

Gordon: Why?

Philip: It's the only way to keep on top.

Gordon: Of whom?

Philip: Everyone!

Gordon: Everyone?

Philip: Yep, everyone, Magistrates, clerks, police, lawyers and parties.

Gordon: But why?

Philip: It's the only way.

Gordon: I find that a little. . .

Philip: I reckon it's a great life having all those people coming to you.

Gordon: But . . .

Philip: Yeh. There is nothing I know to match being able to dispatch any question or request with a blunt response.

Gordon: You don't really think so?

Philip: Too right! There's nothing better than when a barrister has lined up for 15 minutes or so to enter an appearance and you turn your back on him, start reading a file and appear not to notice or hear him. They know they can't afford to get angry.

Gordon: I really do not think . . .

Philip: But it gets better. If the barro does start to give me a hard time I write his appearance on the file and toss it aside for a while. Nothing beats the thrill of watching them come up to the counter every hour or so with various pretexts to try and find out what has happened to the file. The look on their faces when they see it still sitting there unattended is a sight to behold.

Gordon: Surely . . .

Philip: Or there's the shrug of apparent disinterest when they come to ask when their straightforward consent adjournment is going to be called. Of course, if it can be held off until after 3.30 p.m. all the better.

Gordon: 3.30 p.m.! Why 3.30 p.m.?

Philip: I reckon that 3.30 p.m. is the best time of the day.

Gordon: 3.30?

Philip: Too bloody right! That's when I tell the people who've been waiting all day to get their 2 hour matter on that they are not going to be reached. It's even better if I've managed to tell them earlier in the day that they would definitely get on and it's best of all if they have been silly enough to ask to be sent away just before lunch.

Gordon: But that's my deadline.

Philip: What, and miss the pleasure of bringing them back after lunch and making them wait another hour or more?

Gordon: But it gets you no where.

Philip: Oh it does. The pained expressions. The bottled up vitriol. Their inability to say what they really feel in case I force them to wait even later next time before sending their 10 minute applications away. I've done that a few times I can tell you.

Gordon: It doesn't win any friends.

Philip: They're not friends. They're all enemies. Look if they have nothing better to do than hang around my court all day, cluttering up my foyer, bothering me with their incessant questions, expecting me to provide an information service, they deserve everything they get. Look why should I have to put up with it on my salary.

Gordon: I still feel that common courtesy gets courtesy back.

Philip: You're too weak. Give them a bloody inch and they'll take a mile. Next thing they'll expect you to pass the time of day with them, to give them forecasts of their prospects before lunch, to smile.

Gordon: Look! I still think we are all in this game to help each other. You scratch their backs and they'll scratch yours. I know that there will always be a few who take advantage of you.

Philip: They all will. And miss out on all the fun, not bloody likely.

Gordon: I suppose you go home and kick the cat.

Philip: Nope. Don't need to.

(In the interest of all junior barristers who may have to front a Magistrates' Court Co-ordinator in the future who may have read this item we should point out that any resemblance of Gordon or Philip to any person living or dead is purely coincidental and even if there is a perceived resemblance both Philip and Gordon retired and/or were elevated to the Bench years ago.)

VERBATIM

L.U. Simon Builders Pty. Ltd. v G.J.M. Nominees Pty. Ltd.

Coram Nathan J 1.8.88

Nathan J: I propose to set this matter down for hearing in September 1988.

J. D. Hammond: As September contains a number of Jewish holidays and my client is Jewish, I have been requested to seek to have the matter set down for any month other than September.

Nathan J: I certainly would not wish to trespass on those Jewish holy days.

Hammond: Even if you did, your Honour, I am sure you would be forgiven your trespasses.

Bath v Alston Holdings Pty. Ltd.

Coram High Court 5.6.87

Wilson J: Have you overlooked *Coarse Grains?*

Mr. Berkeley QC: No, your Honour, I do not think so.

Wilson J: Well, leave it if you are coming to it.

Mr. Berkeley QC: Yes, your Honour, I have overlooked *Coarse Grains,* I will ask my junior hurriedly to find out something to say about it.

Later in the same case:

Mr. Berkeley QC: For those reasons the second question — well I forget what it says, but it ought to be answered yes or no, as the case may be.

Police v. C. Mikkessen

Coram G. Johnston M. 5.10.87

E. Delaney cross-examining witness:

You stayed in the flat for three nights? Yes.

Do you recall how many of the three nights you had stayed in the flat at that stage? . . . Can you rephrase that?

Fraser Cabinets Pty. Ltd. v Fraser

Coram Beach J 21.6.88

P. R. Hayes cross-examing witness:

He has admitted he got the $80,000, the evidence is the asset was sold for $89,000 and there is $6,000 credited in this account? — So what you're saying is there's a $30,000 profit.

What I am saying is, at the moment, that there is another $80,000 that was actually received, not entered in the ledger, first of all? — I think you're not correct there.

Well? — The way you're going about it, you won't get back to your correct result. You could — what you say — if you wish to say —

Well, do not try and pre-empt me. I might be a lousy accountant, but I do know how to cross-examine.

His Honour: Mr. Hayes would like to struggle through unaided.

Hayes: I want my ignorance to be revealed for the whole world to see.

Coroner's Court

Coram H. Hallenstein 13.7.88

Murley: Then the deceased went down in a fuselage of bullets.

David Ross: Is this the new plane English?

OUTRAGEOUS RUBBISH

"Outrageous rubbish", his
Honour intoned
As I struggled with my Plea,
On a Burg, and Theft, and Assault Police,
"With intent to do injury".

You must be naive, to think that a jury,
of twelve souls good and true,
would accept the version that you advanced,
about the whole hullaballoo".

"That the gun could misfire by mistake as you said,
is too much for one to imagine.
In my wildest dreams, one can only say,
your attempt, was but a sad one".

"We heard Constable Plod, in his earnest manner,
describe how the gun was fired,
with murderous intent, and straight at this heart,
he's luckly to be alive".

"With the shock, and the trauma,
induced by your client's,
malice and evil intention.
He's a very brave fellow to be here today,
and his courage deserves special mention.
The further I look, the worse it becomes,
the house he was in was no friends.
And he wasn't there to show him his gun,
Your story, my senses offends".

"No, you've wasted our time, and the Public Purse,
has been strained beyond all comprehension.
You should have pleaded and saved us all time,
it is all just too blatant to mention".

"But, your Honour", I'd say,
it if wasn't my duty,
to stick by my client forever,
that he hadn't a hope, right from the start,
and I told him this straight from the outset.

"We'd better plead, and forget our defence,
to do otherwise, would be quite foolish".

But he ordered me into the valley of death
despite my most fervent entreaty.

And though I feel a fool, I can't let you know,
that I agree with you completely,
but I'll never let on,
and shall stick by my client,
totally, and absolutely.

Peter Cash