

## COMMENTS

### THE FIGHTING DEAN

*Professor Edward Jenks, Second Dean of the Faculty of Law, University of Melbourne, and its first Professor of Law, 1889-92.*

Professor Jenks hated Salvation Army Bands, land booms, jerry-building and smoke pollution. He loathed talk of football all the winter, racing all the summer and shares all the year round.

He admired Thoreau, who found he need work only six weeks a year to subsist. He revered Charles Kingsley, the Christian Socialist.

He abhorred the top hat, favoured dress reform and even had doubts about exams.<sup>1</sup> Brilliant, but disturbing: and he always seemed to be 'in the midst of a "shindy" '.

Take, for instance, his feud with Dr Thomas Patrick McInerney, graduate and post-graduate of our Faculty of Law,<sup>2</sup> barrister, active member of the University Senate, and, apparently (and quite irrelevantly) something of a 'lady-killer'.<sup>3</sup>

The surrounding circumstances seemed peculiarly unlikely to end in acrimony: Faculty's wish for curriculum changes, including the reduction of International Law to Conflict of Laws,<sup>4</sup> Council's acquiescence<sup>5</sup> and ultimately Senate's support for the individual changes proposed.<sup>6</sup> Formal approval of them as a whole and of Council's projected legislation was a foregone conclusion and was, presumably, to be quickly given at a Senate meeting on 20 May 1890, less than two weeks ahead.<sup>7</sup>

<sup>1</sup> His views were set out in 'Modern Progress', a lecture to The Bankers' Institute of Australasia, on 9 April 1890, Victoria, *The Argus* printed the text in full on 12 April. For his comment on exams, see his special lecture he gave on 26 February 1890, to students proposing to attend his classes. This was printed as 'Legal Forewords', in *Melbourne University Review*, Volume VI, No. 1, March 1890.

<sup>2</sup> He headed the Class List with his Second Class Honours Degree in 1878-9 and was awarded his LL.D. in 1882. See Law School Archives, 'Final Honour Exam Results, 1864-1965'—a most helpful list compiled by Miss Florence Scholes—and *Melbourne University Calendar*, 1882, 278.

<sup>3</sup> Victoria, *Melbourne Punch*, 23 October 1890.

<sup>4</sup> *Law Faculty Minutes*, 5 September 1889, 103.

<sup>5</sup> *Melbourne University Council Minutes*, 3 February 1890; 10 February 1890, 8.

<sup>6</sup> *Melbourne University Senate Minutes*, 8; 9 May 1890, 387-91. These were contained in the *Report of The (Senate) Select Committee* as amended in Committee, *ibid.* At this time, all legislative proposals by Council had to be approved by the Senate. See Victorian 2 *Parliamentary Papers*, 1904, No. 13: *Royal Commission on the University of Melbourne*, (Final Report) 10, for a discussion of the Senate (and the Council). The situation had not changed since May 1890.

<sup>7</sup> See the reported speech of Mr L. F. B. Cussen at the Senate Meeting of 20 May 1890. Victoria, *The Argus*, 21 May 1890 (hereinafter cited as *The Argus*).

At that point, Dr McInerney girded his loins, determined to save International Law, come what might. He seems to have moved fast and to have rallied enough supporters to pack the next meeting of the Senate. He then had the future of the subject recommitted for further consideration and won the day. International Law should remain. Mr Leo Cussen considered Dr McInerney's machinations reprehensible: 'a whip up had been undertaken, and a very undesirable proceeding put into force . . . if members who held his views chose to resort to similar tactics, they might stonewall until half-past 6 o'clock and whip up adherents before the next meeting'.<sup>8</sup> His feelings of outrage were shared by Mr Henry Bourne Higgins.<sup>9</sup>

But if they were disgusted with Dr McInerney, Professor Jenks was aghast.<sup>10</sup> *The Argus*, the next morning, informed him that, according to Dr McInerney, Victoria 'was a State in spite of what people said who did not understand the question' and that 'the only reason that had been offered for the exclusion of the subject was one which was an insult to every Australian, namely, that Australia was not a nation'.<sup>11</sup>

Now, one argument for the pruning of International Law was that Public International Law matters were still far more the concern of the Imperial Government than of the Government of the Colony of Victoria and this had been advanced, along with many other reasons, by Professor Jenks.<sup>12</sup> So it is not surprising that he felt that Dr McInerney's reported remarks constituted a personal attack on him, especially as *The Argus* version had Dr McInerney also declaring that 'the mere liking or disliking of the professor of the subject of International Law had nothing to do with the case'.<sup>13</sup>

Professor Jenks, immediately, in his truly beautiful hand, wrote to Dr McInerney, suggested the possibility of inaccurate reporting, asked for a disavowal or a withdrawal of the offensive remarks and indicated forebodingly, that, otherwise, they would henceforth meet as strangers.<sup>14</sup>

The reply was provocative and galling: '[w]ill you be good enough to inform me what is the deliberately abusive language towards yourself of which you complain?'<sup>15</sup>

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> He was not a member of the Senate—see his letter to *The Argus*, 20 May 1890—and so had not been present at the meeting.

<sup>11</sup> *The Argus*, 21 May 1890.

<sup>12</sup> He opened up this particular point in the Senate, to which he was specially invited (uniquely so it seems—see letter Dr McInerney to Professor Jenks, 2 June 1890, Central Registry Archives, University of Melbourne) to present his case on 8 May 1890. See *Senate Minutes*, 7 May 1890, 385 ff. and see W. E. Johnston's letter to *The Argus*, 12 May 1890.

<sup>13</sup> Other factors, too, which we cannot consider here, would have impelled Professor Jenks to construe Dr McInerney's purported comments in this way.

<sup>14</sup> Letter, Professor Jenks to Dr McInerney, 21 May 1890, Central Registry Archives, University of Melbourne.

<sup>15</sup> Letter, Dr McInerney to Professor Jenks, 26 May 1890, Central Registry Archives, University of Melbourne.

From this distance, it is difficult to gauge if Professor Jenks was unduly sensitive. Dr McInerney's subsequent letters to him<sup>16</sup> throw little light on the substance of the matter.

The letters do show, however, that Dr McInerney was a verbose man, able to 'discourse fluently and at great length on trivial matters', as a commentator has it.<sup>17</sup> Mr Henry Bourne Higgins became quite waspish on one occasion about Dr McInerney's discursive tendencies.<sup>18</sup>

So it is at least possible that Dr McInerney's last-ditch stand in the Senate, in defence of International Law, did stir him to say precisely what *The Argus* reported, with the personal and insulting thrust which Professor Jenks suspected.

Dr McInerney's letters are revealing too in that they do give an impression of his patriotic fervour. It is, therefore, quite likely that Professor Jenks' argument for the reduction of International Law, based on the existing state of Imperial relations, roused his 'bias, offensively Australian', for which he was well-known. Later in 1890, when Dr McInerney became Warden of the Senate, *Melbourne Punch* ribbed his strident colonialism and that of the times: 'the natives of Victoria . . .' would look to him 'to lead them on to death or to victory . . . to make the kangaroo and the emu an emblem to be feared and respected of men . . . to . . . make the Melbourne Alma Mater rub herself with eucalyptus oil to make her joints supple and shout "Advance Australia" . . .'. Victorians would 'back him for all they are worth against the imported article'.<sup>19</sup>

The situation was never resolved and the enmity of the two men was abiding. The victory of International Law,<sup>20</sup> under the banner of Dr McInerney, was to have serious repercussions for the Faculty, and the power of the Senate, to be criticized in 1904, in the Final Report of the Royal Commission on the University of Melbourne,<sup>21</sup> was underlined.

Plenty of material for gossip here, anyway, and no sooner had this particular 'shindy' lost its novelty, than Professor Jenks was involved in another. This time he engaged in a passage of arms with no less than Dr John Madden who, in 1893, was to be appointed Chief Justice of the Supreme Court of Victoria.

<sup>16</sup> 2 June 1890, 9 June 1890, Central Registry Archives, University of Melbourne.

<sup>17</sup> Cleary, *Australia's Debt to the Irish Nation-Builders* (1933) 206.

<sup>18</sup> Concerning the Roman Law Paper controversy between Dr McInerney and Professor Jenks. From *Council Letter Book* No. 18, 2 November 1891, Central Registry Archives, University of Melbourne.

<sup>19</sup> 23 October 1890.

<sup>20</sup> Professor Jenks was thus expected to teach International Law as well as Roman Law, Jurisprudence and the newly proposed Constitutional and Legal History. The last-mentioned, about which Jenks was very enthusiastic represented an extension and a revision of the old subject, Constitutional Law, with the additional element of Legal History. See his letter to *The Argus*, 20 May 1890.

<sup>21</sup> Victorian 2 *Parliamentary Papers*, 1904, No. 13.

Now, *The Age*, in 1875,<sup>22</sup> had dismissed Dr Madden as 'boneless and brainless', and the *Catholic Advocate*<sup>23</sup> had written him off as a 'pretentious prig' and a snob.

But Dr Madden, in 1890, was a man of the utmost influence: his practice at the Bar was enormous,<sup>24</sup> he had friends in high places, he was one of the Law School's oldest 'old boys'<sup>25</sup> and he also happened to be, in 1890, the unpaid Vice-Chancellor of the University of Melbourne.

Professor Jenks was as David to this Goliath; nevertheless he tackled him fiercely in June 1890, on a matter of principle. This clash was part of a much wider battle between large numbers of the teachers of the University and the Council and centred on the nature of University government.

All were agreed that reforms were needed within the University; but the solutions proposed were different. Professor Jenks, for example, like Professor Masson,<sup>26</sup> ascribed many of the University's short-comings to the autocratic nature of the Council, on which the teaching staff, at that time, had no representation at all, and his piece 'The Government of Universities'<sup>27</sup> was a trenchant and carefully documented indictment of the Council and the way it governed. A measure of teacher-participation, he felt, was one urgent requirement.

At least one half of the Council of twenty must have been stung by Professor Jenks' invective—the ten legal members:

[a] middle-aged barrister who has risen by plodding industry . . . will confidently conclude that because he can cross-examine witnesses and befog juries he can therefore govern a University . . . He naturally brings the spirit of the average barrister, with its many defects, to bear upon University concerns. He treats teachers and students as witnesses who will tell lies if they can, whose statements are all made with some underhand motive.

Fighting words; but feeling was high, for it seemed as though a paid Vice-Chancellor was imminent, Council's long-favoured remedy<sup>28</sup> for the University's ills. Many of the teaching-staff, however, agreed with Professor Halford, who had no 'wish to see introduced into our peaceful academic state such a "boss" as the "Yankee at the Court of King Arthur" . . .'<sup>29</sup>

<sup>22</sup> 27 October 1875.

<sup>23</sup> 23 October 1875.

<sup>24</sup> Victoria, *Table Talk*, 30 October 1891, estimated that his income may have reached five figures.

<sup>25</sup> John Madden was one of the first four students to begin the LL.B. course, when this was first offered in 1861. See his card from Students' Records.

<sup>26</sup> Professor Masson's views are expressed in a letter to Council, appended to the *Council Minutes*, 15 July 1889, 362: 'the business of the University will never be as well conducted as it ought to be so long as direct representatives of the teaching staff are excluded from the Council'.

<sup>27</sup> Written in April 1890 and printed in *The Centennial Magazine*, Vol. II, May 1890.

<sup>28</sup> See Victoria, *Parliamentary Debates*, 1882, Vol. 41, 1921 ff. See also *Council Minutes*, 17 June 1889, 329-30, for a history of the proposals from 1884.

<sup>29</sup> *The Argus*, 13 June 1890. Professor Halford originally supported Council in its

Forces were arrayed on both sides and we next meet Professor Jenks presenting a statement on this issue, on behalf of a large deputation of University teachers, to the Minister of Public Instruction.<sup>30</sup> Also in attendance from the Faculty of Law were Dr F. S. Dobson Q.C., Mr J. Warrington-Rogers Q.C. and Mr J. B. Gregory—three of the Faculty's four part-time lecturers.<sup>31</sup>

The teachers' statement resisted the notion of diminished autonomy for the teaching-staff, which they felt inherent in the scheme for a paid Vice-Chancellor and listed a series of other objections. They disliked the Council's 'revolutionary measure' and insisted that simple and easily-effected reforms were all that were needed. A Royal Commission was advocated. Indeed, Mr Warrington-Rogers Q.C., who spoke, went as far as to suggest that a Royal Commission would find that anything amiss in the University was not the fault of the teaching body, but of the governing body.<sup>32</sup>

The Council's deputation to the Minister followed a day after that of the teachers,<sup>33</sup> with Dr Madden and Council Members, Mr R. Ellery and Mr A. Harper, pushing Council's case for a paid Vice-Chancellor, in an effort to wring his salary from a cheese-paring Government.<sup>34</sup> The Minister was placatory, but hardly encouraging.<sup>35</sup>

Mr Harper's arguments were taken up by the Faculty of Law at a Special Meeting on 18 June 1890. The cryptic Minutes, unfortunately, give us no picture of the discussion, merely recording that no resolution was proposed. They really tell us only that '[p]resent were Messrs Rogers, Hodges, Dobson, Gregory, Cussen, Higgins and the Dean'.<sup>36</sup>

The Vice-Chancellor's statements at the Council's deputation, however, were dealt with in a letter to *The Argus* on 16 June 1890, by Professor Jenks, no respecter of persons when driven by conviction. He felt bound to answer 'some utterances which are reported to have fallen from Dr Madden'.

The current administrative difficulties of the University, which the Council hoped to cure with a paid Vice-Chancellor, he placed squarely on the

proposals for a paid Vice-Chancellor. See *Council Minutes*, 1 July 1889, 340, and 17 July 1889, 351. He decided, ultimately, however, to throw in his lot with the Professorial Board and the bulk of his colleagues, who opposed the scheme.

<sup>30</sup> Charles Pearson, among other things a former University Council Member, 1875-80, and former critic of Council's composition. See Blainey, *The Centenary History of the University of Melbourne* (1957) 59-61.

<sup>31</sup> *The Argus*, 12 June 1890. Mr L. F. B. Cussen, Lecturer in Obligations, was the only teacher from the Law School who was not present.

<sup>32</sup> *Ibid.*

<sup>33</sup> *The Argus*, 13 June 1890.

<sup>34</sup> See *Council Minutes*, 3 March 1890, 24; 26 May 1890, 68-70.

<sup>35</sup> *Ibid.* 23 June 1890, 87-8.

<sup>36</sup> *Law Faculty Minutes*, 18 June 1890, 111.

shoulders of Dr Madden, criticizing his absenteeism: 'we have rarely had the advantage of his personal attendance at the University<sup>37</sup> . . . Surely if things are as he alleges, he should have been constantly on the spot making personal investigation'.

Professor Jenks went on to uphold forcefully the right of University teachers to concern themselves actively in the matter of the proposed paid Vice-Chancellor, Dr Madden's astonishment notwithstanding: '[i]f Dr Madden had urged that the members of the Council, to whom University affairs are of secondary consideration, and some of whom rarely visit it, should hesitate before supporting a revolutionary measure, opposed by three quarters of those whose daily lives are spent in University work, his view would have been intelligible'.

Adverting, too, to the University's mysterious scandals, noted but tantalizingly unspecified, by both sides: 'we desire that those scandals shall be fully investigated, not stifled by the appointment of a nominee official'.

Professor Jenks' letter to *The Argus* also voiced what was probably the real fear lurking behind a deal of the opposition to a paid Vice-Chancellor. He charged that Dr Madden, in his presence, had described 'the contemplated official as a policeman to keep the professors in order'. (Dr Madden, naturally enough, denied ever having said any such thing.<sup>38</sup>)

Furthermore, emphasizing the tensions and lack of communication existing between the University teachers and the Council, Professor Jenks raised:

one very serious matter. Dr Madden is reported, in an evening paper, to have suggested that under the present system students dare not inform against the professors for fear the latter would take their revenge. Such a suggestion would be so deep an insult to the teachers and students alike, and so degrading to its utterer, that I sincerely trust it never was made. If it were, Dr Madden has proved himself to be wholly unfit for his office and indeed for any companionship with men of honour and spirit.

Professor Jenks believed passionately in the dignity and status of the University teacher. Council (and the community) upheld no such creed and Council's attitude was mocked later in the year, in another context, by *Melbourne Punch*.<sup>39</sup> A cartoon showed a professor, garbed in cap and gown, and bent on all fours, with a top-hatted gentleman seated on his back and holding a whip. The caption read: 'A Melbourne University Professor: As he will be when he has been thoroughly taught his position'.

<sup>37</sup> Even Council Meetings were held at the Law Courts. See Professor Jenks' letter to *The Law Times*, 5 March 1892. Council Minutes for the period confirm this.

<sup>38</sup> See his letter to *The Argus*, 18 June 1890, replying to Professor Jenks, *infra*.

<sup>39</sup> 24 October 1890.

Dr Madden replied promptly and in kind<sup>40</sup> to Professor Jenks' angry letter of 16 June: 'I am not unhappily a professor with so much spare time on my hands as to enable me to be always in the midst of a "shindy" . . .' He patronizingly advised Jenks to get back to his books 'and teach a little Jurisprudence for which he is said to have some reputation.' Dr Madden did not give an inch.

Further, one of his admirers, calling himself 'University', similarly attempted to cut Professor Jenks down to size,<sup>41</sup> offering him King David's advice 'to tarry at Jericho until his beard be grown', and recommending that he 'leave this field open to those who understand the question better than himself'.

In the event, of course, Professor Jenks had the last laugh; for Melbourne University did not get a paid Vice-Chancellor till 1935. Government parsimony probably spiked Council's guns in 1890.<sup>42</sup> But, immediately, Dr Madden was a formidable enemy for Professor Jenks to have made.

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In March 1890, the editors of *The Melbourne University Review* wrote this of Professor Jenks: '[y]ou are the latest come of all the Professorial Board, yet short as is the time you have been in the colony, everyone knows a good deal about the Professor of Law and Dean of the Law Faculty'.

Everyone probably knew a good deal more about him by mid-June 1890 and Council, by then, must have feared that it had appointed an alarmingly vocal and vexatious young man as second Dean of the Faculty of Law and as its first Professor of Law.

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As time went by, there would be more 'shindies', for Professor Jenks would again 'invite quarrels with the governing body',<sup>43</sup> would perplex and puzzle Council 'by his ever-wakeful strategy',<sup>44</sup> and, in Council's view, would fail to behave 'with becoming modesty'.<sup>45</sup> He would come to be regarded as a Grave Mistake and ultimately the Agent-General for Victoria, in a grand outburst, would query Professor Jenks' fitness 'to mix on an equality with councillors of State and judges of the land . . .'.<sup>46</sup>

<sup>40</sup> In a letter to *The Argus*, 18 June 1890.

<sup>41</sup> *The Argus*, 17 June 1890.

<sup>42</sup> See *supra* n. 34.

<sup>43</sup> Letter of W. A. C. A'Beckett, Agent-General for Victoria, in *The Law Times*, 26 March 1892, Central Registry Archives, University of Melbourne.

<sup>44</sup> Council's Statement to the Agent-General for Victoria, 15 February 1892, Central Registry Archives, University of Melbourne.

<sup>45</sup> Letter of W. A. C. A'Beckett, *op. cit.* <sup>46</sup> *Ibid.*

The 'shindies' are the things best remembered about Professor Jenks, though the issues involved are not. Forgotten, too, are his ideals,<sup>47</sup> his advanced views on education,<sup>48</sup> his practical concern for students,<sup>49</sup> his establishment of the Moots,<sup>50</sup> his public lectures<sup>51</sup> and his work for the University Extension Board<sup>52</sup>—his research, too, which was specifically mentioned by the Royal Commission on the University of Melbourne, along with that of Professor Hearn.<sup>53</sup>

And when Professor Jenks resigned, on 31 January 1892,<sup>54</sup> the University of Melbourne and the Colony of Victoria, robbed of their colourful critic, were so much the poorer.<sup>55</sup>

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<sup>47</sup> See, *inter alia*, his *Modern Progress*, *op. cit.* See also his Inaugural Lecture, probably given in June 1889, 'The Future of British Law'.

<sup>48</sup> See especially his 'Legal Forewords', *op. cit.*

<sup>49</sup> *Ibid.* and see also *The Argus*, 15 June 1889, in which he informed students that he would be available to discuss their work with them, every Saturday, at 11.15 a.m.

<sup>50</sup> *Law Faculty Minutes*, 1 May 1890, 109.

<sup>51</sup> See *Council Minutes*, 5 May 1890, 64, where he asked permission to deliver three public lectures—one at Bairnsdale!—in the next few months. Council granted permission (which had to be sought), in the customary formula: 'provided that no religious or political subjects be introduced'.

<sup>52</sup> He was its first Secretary in 1891 and its mainstay. The Second Annual Report of the University Extension Board, November 1892, mourned the loss of Professor Jenks, 'to whom in the main the successful establishment of the movement in Victoria was due'. 1 *Melbourne University Extension Journal*, No. 1, December 1892, 5.

<sup>53</sup> *Royal Commission on the University of Melbourne*, Final Report (1904) 101. Professor Jenks' book, *The Government of Victoria*, subsequently used extensively in the Law School, was published in 1891.

<sup>54</sup> Letter, Professor Jenks to Vice-Chancellor, 7 November 1891, Central Registry Archives, University of Melbourne and *Melbourne University Calendar* 1895-6, 16-7.

<sup>55</sup> Subsequently he 'held a Chair at Manchester, the Readership in English Law at Oxford, and from 1903 to 1924 was Principal of the Law Society's School in London. In that year, he took a Chair in the University of London which he held to his retirement'. (From Dr Robin Sharwood's 'Short History of the Law School', (1973) *Faculty of Law Handbook* 14.) Professor Jenks died only in 1939.

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