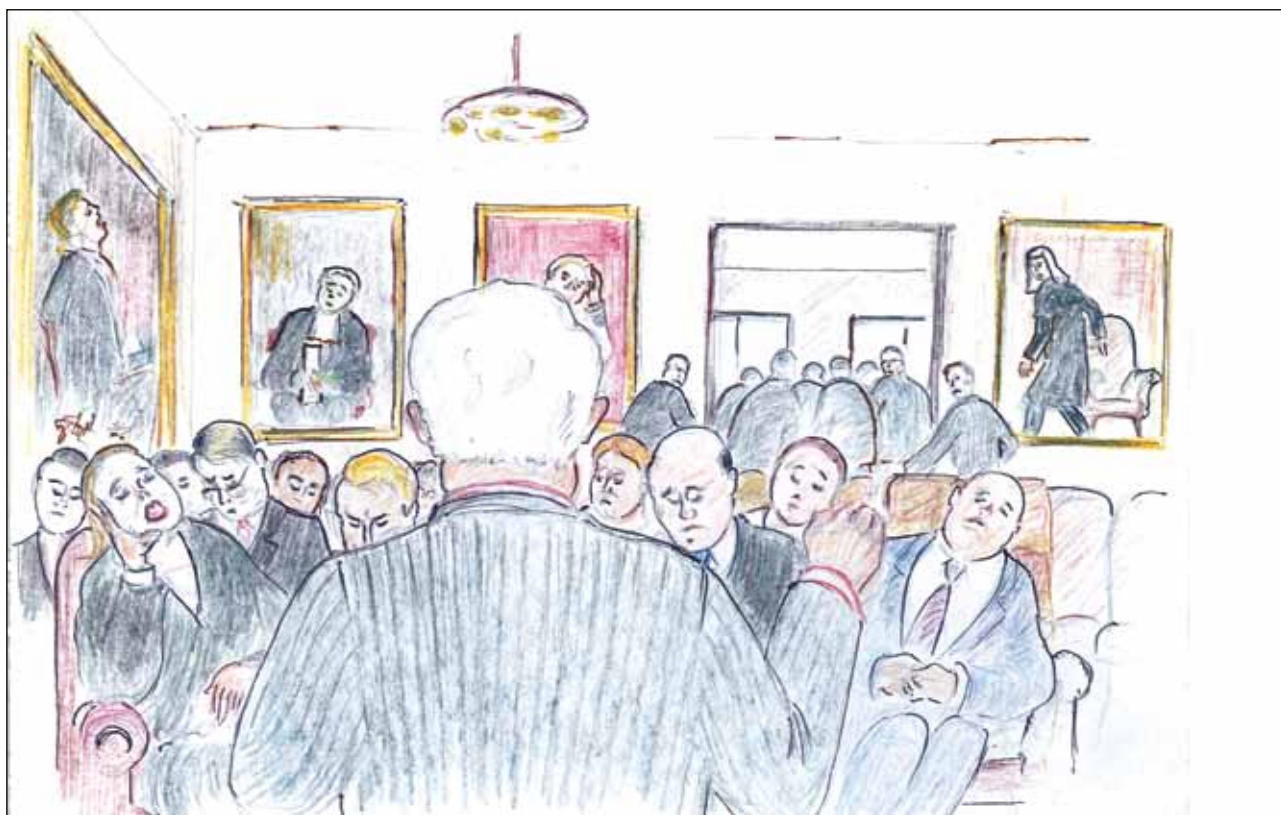


Bullfry on the mysteries of jurisprudence

By Lee Aitken (illustrated by Poulos QC)



'Perhaps it is not too late for me to begin lecturing – A select and illustrated seminar series by Jack Bullfry'.

'I was a 'top down' man early on, as every young man must be', said Bullfry in a lascivious, confessional tone.

'Metaphysically, I could not resist feasting on the sustenance represented by the writing of the savants – Austin, Hohfeld, Pound – more lately Dworkin and Posner - the constant search for a system, and a lodestar, by which all might be explained – I have been searching still, but now find my solace in more earthly and less ethereal pleasures'.

'Ezra or Roscoe?' asked Ms Blatly, under-clad in an outfit that gave more than a hint of summer décolletage.

'There is no need to be facetious' said Bullfry, as he refilled his

glass. He was in an expansive post-prandial mood – the sun was shining in, and giving a halo effect to the skull to which he now addressed his remarks, as to an attentive and devoted listener.

'Of course, when you are young you are entranced by the theory – for many years prior to his untimely death the great Professor Birks had almost convinced me on the verity of 'subtractive interception'. But then he underwent his own Damascene conversion – he recanted and completely changed the focus of his attack – still there is nothing more pleasant than watching a man attempting forlornly to schematize the entire common law – indeed, has not the federal attorney proposed just such a thing in relation to the entire

law of contract – she already has the Indian Act as her guide – but sadly we no longer have Frederick Pollock, or McKenzie Chalmers to transmute 2,500 cases into 75 salacious sections for eighty five pounds by way of payment – they don't make them like that anymore – I put it down to the fact that ancient Greek is now only taught to a handful of students, and then mainly by way of some ersatz translation.'

'But then the needs of practice intervene – you move irresistibly from the beneficence of a 'top down' theorist to a relationship with the facts – you have to get down and dirty – get to the bottom of things – read all the documents – scrutinize the witnesses and their proofs – scrabble about in the mire

and often for days on end in terms of cross-examination and the like. If you are to succeed at the Sydney Bar, being 'top down' will provide you with endless opportunities for CLE, but real success depends in the end on being entirely 'bottom up'.

'What do you mean by that?'

'I mean quite simply that virtually no case is won at nisi prius by your invocation of some refined notion of *assumpsit*, or an appeal to Equity's auxiliary jurisdiction. You win by grappling with the facts in a Gradgrindian sense and demonstrating that the theory of the case propounded by the other side is completely flawed – then you catch their chief witness in two or three lies in his affidavit – a good District Court judge will put any judgment beyond hope of appeal by damning their witness on credit in the first six paragraphs of the judgment – 'I heard Ms X in the witness box for two days; I observed her demeanour; I regret to say that I cannot accept any statement which she made unless it is corroborated by an independent contemporaneous document'. The game is over'.

'It is for that very reason that one of the most famous silks, when leading me in my youth, used to say, 'Bullfry, never forget that you can know too much about a case before it commences'. At first I wondered what he meant – surely that could not be true – but of course it is – the turn of events, the change in evidence – all require a fluid appreciation so that unexpected events may be assimilated into the general discourse – a little like General Model when in charge of Army Group Centre during Germany's last unsuccessful global tour on the Eastern Front'.

'But surely the whole of the legal Academy is in the thrall of the 'top down' approach?'

'Indeed it is – and that is its great failing. Have you ever wondered why until very recently law was not taught as an academic subject at all? Rather, one learnt on the job under the tutelage of an expert instructor, in much the same way as any other journeyman apprentice learning his trade – indeed, our Victorian brothers take that process to its logical conclusion – down south, where they do things differently (the bar owns much of chambers; there is room for any newcomer to begin at a modest cost) you must perforce sit with your pupil-master in his room and accompany him everywhere for at least six months. In the very old days the members in training to the Utter Bar sat in a 'crib' and listened to and argued the cases in court – Brian CJ on one celebrated occasion remonstrates with them for interrupting proceedings'.

'The modern Academy, on the other hand, is all 'top down'! Every one strives to make up her own theory on something – and it doesn't really matter what. Very little of the Priestley Eleven is examined in any detail – you might pretend to cover the entire law of real property in ten short weeks – you may never reach mortgages – this has to be the case so that more relevant areas of jurisprudential interest can have full play and the 'insiders' can get access to government funding which contributes to the institution's prestige – and to their own sabbatical leave – yet most of it involves answering questions my mother could resolve in a monosyllable – Should you be permitted to line up fellow countrymen who differ from you in ethnicity, or headgear, and shoot them with a machine gun? Should countries settle their differences amicably? If things were better ordered, would everyone have enough to eat, and drink? No, yes,

and yes!

I suppose (which God forbid) that I suffer a terrible knife wound while out carousing at the end of the Bench and Bar dinner – whom do I want to operate? I want the top surgeon in vascular surgery at a large public teaching hospital who is the associate professor in veins et al at the university – I want theoretical expertise and an expert hand with the scalpel – if on the other hand I need an urgent injunction, is there any point in ringing the law faculty? Need I say more?

'And yet, of course, the 'bottom up' requirements take a terrible toll – the endless sunny weekends wasted in chambers reading 2,000 pages of a bank file to find the cross-examining gold – the endless fights over discovery and privilege – there is no end to facts – as Lord Alverstone once said, "you must have a mind that can remember and a mind that can forget". Without the latter attribute you will quickly go mad – that is why there is a big temptation at a certain age to seek the calm and solitude of the bench.

'Perhaps it is not too late for me to begin lecturing – *A Select and Illustrated Seminar Series by Jack Bullfry* – topics drawn from his sacred and profane memories of jurists past and present'.

'Well, I would certainly come to hear that – indeed, it is an area in which I think a PhD might be appropriate'.

'You must be careful on that last point – we have a lot of spurious 'doctors' floating around these days – in olden times the only 'Drs' were 'Evatt' and 'Louatt' and 'Coppel' – it is time perhaps that the old criterion for that nomenclature was reintroduced'.