the NSW AAT in *Re Adam Boyd Munro and Collector of Customs* (NSW) (1984)

> (The draftsman) has used the three words 'costs, charges and expenses'. As they are used in an Act of Parliament, we cannot assume that each is synonymous for the other. Taken together they appear to indicate that the area of money involved should be widened rather than narrowed and that a broad view should be taken of the diminution of the wealth of the importer if that is brought about with, or is in any way related to the transportation of the goods. Together the three words form a pleonasm put together for the sake of emphasis. Looked at another way, they could be regarded as a statutory heniadys (sic).

The tribunal no doubt intended *hendiadys:* 'A figure of speech in which a single complex idea is expressed by two words connected by a conjunction; e.g., by two substantives with and instead of an adjective and substantive.' *Hendiadys* is obscure enough that it does not rate a mention in the first edition of *Fowler's Modern English Usage* (1926), but it does appear in the second edition (1968) and the third (1996). It is a literary device, mostly poetic, in which several words are joined by 'and' instead of subordinating one to the other. Fowler gives as an example: *nice and cool* instead of nicely cool. By this device, a single idea is being expressed in two words, one of which could sensibly have been used to qualify the other in order to convey the same idea. *Hendiadys* is not apt to describe expressions such as might and main or whisky and soda, where the parts are of equal value (well, linguistically at least. I would argue that whisky is the greater part of whisky and soda). Much less is it available to describe a repetitive concatenation of words, which is just a *pleonasm*.

The true meaning of *hendiadys* was recognised by Beaumont, Wilcox and Lindgren JJ in *Airservices Australia v Monarch Airlines* (1998):

> … even if s 67 is treated as analogous to a 'hendiadys' (i.e., a single idea expressed in two sets of words with the conjunction 'and') …

And it was even more accurately explained, and illustrated, by Heydon J in *Victims Compensation Fund Corporation v Brown* (2003):

> …hendiadys – an expression in which a single idea is conveyed by two words connected by a conjunction, like 'law and heraldry' to mean 'heraldic law'.

Forsooth.

Mason's miscellany - continued from back page

reported of the consequences:[7]

> Mr Darvall then struck Mr Windeyer forcibly with the brief which he held in his hand, on the neck or face. Mr Windeyer instantly started to the floor with his fists clenched and his arms squared at Mr Darvall; when – as he was striking, but before he struck, a blow – an officer in attendance placed himself between the parties.

Aghast at such behaviour, Stephen committed the two counsel to the custody of the sheriff and adjourned for two hours while he consulted his colleagues. When he returned, the two combatants did not dispute his account of what had happened in the face of the court, but they tendered apologies. Unmoved, Stephen sentenced Darvall to 14 days imprisonment, Windeyer to 20; and each was placed on a good behaviour bond for two years. The two lawyers spent Christmas behind bars.

Endnotes

1. The Hon J J Spigelman AC, 'Bicentenary of the coup of 1808' (2008) 30 Aust Bar Rev 129 at 138.
2. *R v Robert Atkins, Thomas Chambers and Henry Milton* (1828) *Dowling's Select Cases*, 306.
3. Antony E Simpson, 'Dandelions on the Field of Honor: Dueling, the Middle Classes, and the Law in Nineteenth-Century England' (1988) *Criminal Justice History* 99 discusses how the rules of honour were observed more than those of law. Convictions were very rare and, when they happened, capital punishment was reserved for the foreigner or the man who broke the conventions of honour in some heinous way.
4. L Robson, *A History of Tasmania*, OUP, 1983, vol 1, pp 296–7, 468-9; McLaren, *Dewigged, Bothered and Bewildered*, p 161.
5. *Penton v Calwell* (1945) 70 CLR 219 at 248.
6. Darvall later took silk and served as attorney-general for New South Wales before resigning from politics and returning to England.
7. See Bennett, *Sir Alfred Stephen*, pp 157–8.

Mason's miscellany

Duellers and brawlers in the law

Duelling was a popular and sometimes fatal diversion for 'gentlemen' until the mid nineteenth century. Spigelman CJ described it as 'the principal form of alternative dispute resolution' of the Rum Corps.[1] Those who participated, including the seconds, were liable as principals to murder if death resulted[2] although convictions were rare and death sentences rarer.[3] Sir John Jeffcott was the founding judge of the South Australian Supreme Court. His involvement in a fatal duel saw him prosecuted for murder but acquitted when no evidence was tendered, all this in between colonial judicial appointments. Australian society aped yet lagged behind England in this felonious practice. Duelling came to an abrupt end around the 1840s in England but lingered on later here.

There are several recorded instances of Australian lawyers getting involved in duels. The former attorney-general, Saxe Bannister's parting shot before sailing to England in 1826 was at the leading barrister Wardell in a duel from which both men emerged uninjured. William Charles Wentworth challenged Commissioner Bigge to a duel over the latter's suggestion that he, Wentworth, had written an anonymous poem defaming Lieutenant-Governor Molle. Indeed, Wentworth became so dangerously agitated that the under-secretary of state had to place him under police restraint.

William Lyttleton was the police magistrate of Norfolk Plains in Van Diemen's Land in the 1820s. A wealthy settler, William Bryan, was angered at Lyttleton's conviction of one of his servants for cattle stealing. Bryan challenged Lyttleton to a duel, sending the challenge through a man named Lewis. Montagu J fined Lewis £150 and sent him to gaol for 18 months.[4] Hugh Cokeley practised for a time as a barrister in Hobart Town. He became crown solicitor in the 1830s. He was always in financial difficulties and narrowly escaped conviction for embezzlement in 1842. He sailed to New Zealand to take up private practice in Wellington. In 1844, after a legal dispute, he mortally wounded a fellow lawyer in a duel.

One of the earliest lawyers to practise in the Swan River Colony (later Perth) was William Nairn Clark. He got into a dispute with a merchant named Johnson whom he alleged to have defrauded a client. Clark approached him and his associates in a Fremantle street, stating: 'you are a scoundrel and a blackguard, and if it were not for motives of prudence, I would give you a sound drubbing.' Johnson challenged him to a duel which took place the following day. Both duellists fired a single shot. Johnson was struck near the hipbone and died the next day, declaring that he had no complaint at what had happened. Clark and the two seconds were charged with murder with Clark being kept in prison until his trial. At that trial he represented himself and was able to obtain acquittals for all the accused.

Charles Kingston QC was at various times attorney-general and premier of South Australia around the turn of the twentieth century and he played a leading part in the federation movement. When he was first elected premier, he was on a good behaviour bond for organising a duel in Victoria Square, Adelaide. It was his response to being called 'a coward, a bully and a disgrace to the legal profession' by Sir Richard Baker, a conservative member of the Legislative Council.

Although duelling was stamped out in the nineteenth century its code was still being advocated by Rich J in the 1940s when he described a libeller's invitation that the victim sue him as 'an invitation to the adversary to substitute for methods of unregulated and desultory combat a duel to be fought in legal form with every weapon which the law allows, and as involving no promise that if it is accepted the challenger will fire in the air'.[5]

Actual violence was threatened from the bench in an episode involving Montagu J and Alfred Stephen, then the attorney-general in Van Diemen's Land and later to become chief justice of New South Wales. Montagu commenced hearing a case whose prosecution by information lay under the law officer's control. Stephen ambled into court to be greeted with a judicial tirade probably unequalled in Australian legal history. It culminated:

> Sir, in your official capacity I shall always treat you with the courtesy and respect due to you. Were you elsewhere I should treat you after your conduct with even less courtesy than a dog or a cur as your conduct richly deserves. I say this, Sir, as an English gentleman, and only as such – perhaps in the capacity of a Judge I had better be silent.

Perhaps indeed!

In 1846 two prominent Sydney barristers were committed to prison for punching each other in court. In an otherwise pedestrian debt action before Stephen CJ, Richard Windeyer took umbrage at his opponent, John Darvall,[6] calling his client 'a fellow'. Windeyer protested that his client was at least an honest fellow – more than could be said for Darvall's client. As the judge tried to hose things down Windeyer repeated his assertion, adding that Darvall was a liar. As Stephen

Continued on page 107