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Weekly Criminal Law Review

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A Weekly Bulletin listing Decisions of Superior Courts of Australia covering criminal

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Executive Summary

Chedwyn Evans v R (EWCA - Crim) - criminal law - right to fair trial (Article 6 *European Convention)* - evidence of complainant's prior sexual history - whether evidence admissible - evidence sufficiently similar to appellant's account - right to fair trial compromised if evidence excluded - appeal allowed, retrial ordered

The Queen v Kilic (HCA) - criminal law - sentencing - 'worst category' - application of current sentencing practices - respondent poured petrol over his partner and set her alight - sentenced to 15 years, NPP 11 years - Court of Appeal found sentence to be manifestly excessive - High Court disagreed and reinstated original sentence

Moore v R (NSWCCA) - criminal law - conviction appeal - deception - causing a computer to advance funds electronically - convicted of obtaining a financial advantage by deception - whether any act of 'deception' - expanded definition considered - terms of bank account relevant - no deception - appeal allowed, verdicts quashed

DPP v SL (VSC) - criminal law - criminal procedure - rights of children charged with serious offences in superior courts - relevance of Victorian Charter and International Conventions on Rights of the Child - obligation to ensure child defendants segregated from adults and protected from intimidation and distress - obligation to enable effective participation in proceedings - directions issued

Daniels (a pseudonym) v The Queen (VSCA) - criminal law - conviction appeal - evidence - s137 *Evidence Act 2008* (Vic) - complaint evidence - SMS messages relied on by Crown -

whether evidence improperly admitted (s137) - whether probative value outweighed by unfair prejudice - evidence properly admitted - appeal dismissed

Nicholls v The Queen (VSCA) - criminal law - sentence appeal - dishonest use of position as director - utilitarian value of plea - use of comparable decisions and sentencing range - sentence 4 years 6 months - whether sentence manifestly excessive - appeal allowed, resentenced to 3 years 6 months, NPP 2 years 6 months

R v MCI (QCA) - criminal law - conviction appeal - jury discharge - admission of prejudicial material - failure to request directions - material suggested prior offence - whether failure to discharge jury occasioned miscarriage - authorities considered - appeal allowed, retrial ordered

Roland v Tasmania (TASCCA) - criminal law - conviction appeal & leniency appeal - particulars - duplicity - trafficking - indictment pleaded on *Giretti* basis - no requirement for particulars - indictment not duplicitous - sentence not manifestly lenient - appeals dismissed

R v NS (ACTSC) - criminal law - evidence - protected confidences - disclosure - applicant charged with historical sex offences - whether a legitimate forensic purpose disclosed - credibility and reliability of complainant a relevant matter - public interest in ensuring a fair trial outweighed public interest in preserving protected confidences - disclosure ordered

Summaries With Link (Five Minute Read)

Chedwyn Evans v R [2016] 4 WLR 169
England and Wales Court of Appeal (Criminal Division)
Lady Justice Hallett DBE VP, Flaux J, Sir David Maddison
Criminal law - right to fair trial - Article 6 *European Convention on Human Rights* ('Convention') - evidence of complainant's prior sexual history - in 2011 appellant, a professional footballer, and a friend (McDonald) each had sexual intercourse with a woman in a hotel room - each of them had been drinking - two males were seen outside the hotel room filming - the appellant and McDonald left the complainant in the hotel and the next morning she claimed to have no memory of what had occurred - at no time did she allege she was raped or had been incapable of consenting - the appellant and McDonald admitted that they had had sex with the complainant and they were charged with rape on the basis that she was incapable of consenting - the jury convicted the appellant, but acquitted McDonald - the appellant was sentenced to 5 years, a term he had served by the time of this appeal - two earlier applications for leave to appeal were refused in 2012 - this appeal was brought upon a refence by the Criminal Cases Review Commission under s9 *Criminal Appeal Act 1995* - appellant sought leave to adduce fresh evidence (s23 *Criminal Appeal Act 1968*), being testimony from 3 witnesses relating to the complainant's prior sexual conduct and her asserted amnesia - this evidence was capable of supporting the appellant's account and his contention that the

complainant was capable of consenting and did consent - a primary issue was whether such evidence would have been admissible at trial (s41 *Youth Justice and Criminal Evidence Act 1999* (the 'YJCEA')) - held: history of s41 considered - intention of section to counter the twin myths that 'unchaste women are more likely to consent and are less worthy of belief' referred to - importance of providing complainant's in sexual offences with protection from unnecessary and intrusive questioning about their private lives must be balanced by the accused's right to a fair trial (see Article 6; *R v A (No 2)* [2001] 2 Cr App R 21 (HL)) - the test of admissibility is whether the evidence (and questioning in relation to it) is so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under Article 6 of the Convention - if this test is satisfied, the evidence should not be excluded - here, if the jury rejected the appellant's account of the complainant's behaviour he had no defence - the evidence of two of the witnesses would have been relevant and admissible at trial, being arguably sufficiently similar and thus capable of supporting the appellant's account - the requirements of s41 must give way to the requirements of fair trial - appeal allowed and retrial ordered [Editor's note: see [2012] EWCA Crim 2559 for the earlier substantive appeal decision and a summary of the evidence called at trial. Cf Right to a fair trial: s24(1) *Charter of Human Rights and Responsibilities Act 2006* (Vic); s21(1) *Human Rights Act 2004* (ACT). Australian jurisdictions have enacted provisions in similar form to s41 *YJCEA*: cf s293 *Criminal Procedure Act 1986* (NSW); ss48-53 *Evidence (Miscellaneous Provisions) Act 1991* (ACT); ss 36B, 36BA, 36C *Evidence Act 1906* (WA); ss341-346 *Criminal Procedure Act 2009* (Vic)].
Chedwyn Evans

The Queen v Kilic [2016] HCA 48
High Court of Australia
Bell, Gageler, Keane, Nettle & Gordon JJ
Criminal law - sentencing - 'worst category' - application of current sentencing practices - Crown appeal - during a domestic dispute the respondent poured petrol over his partner and set fire to her - she was 12 weeks pregnant at the time and sustained significant serious burns requiring multiple surgeries over a prolonged period - her pregnancy was terminated - the respondent pleaded guilty to one charge of intentionally causing serious injury (s16 *Crimes Act 1958* (Vic)) - respondent also pleaded guilty to two summary uplift charges and was sentenced to an effective term of 15 years, NPP 11 years - on appeal, the Court of Appeal quashed the sentences and resentenced the respondent to an effective term of 10 years, 10 months, NPP 7 years 6 months - the Crown appealed, arguing the Court of Appeal erred in having regard to sentences imposed in other cases and in its use of the term 'worst case' - held: an offence falls within the 'worst category' where it is an example of the offence which is so grave that it warrants the imposition of the maximum prescribed penalty (*Ibbs v The Queen* (1987) 163 CLR 447, 451-452; *Veen v The Queen [No 2]* (1988) 164 CLR 465, 478) - both the nature of the crime and the circumstances of the criminal are considered in determining whether it is of the worst type (*R v Tait* (1979) 24 ALR 473, 485) - whether an even worse offence can be conceived is irrelevant once an offence falls within the worst category (*Veen v The Queen [No 2]*, supra) - where an offence is not so grave as to warrant the imposition of the maximum

penalty, it does not fall within the worst category and the sentencing judge must consider where the facts of the offence and offender lie on the 'spectrum' that extends from the least serious to the worst category (cf *Wong v The Queen* (2001) 207 CLR 584, 591-593) - use of the term 'worst category' should be avoided where the offence does not fall within that category properly so called - s5(2)(b) *Sentencing Act 1991* (Vic) required the sentencing judge and the Court of Appeal to have regard to 'current sentencing practices' - the evident purpose of the section is to promote consistency of approach in sentencing - considerations of 'current sentencing practices' will include the proper use of information about sentencing patterns - such patterns may change over time reflecting changes in community attitude to some forms of offending - the Court of Appeal erred in concluding that there was such a material disparity between the sentence imposed and the current sentencing practice - there were too few cases identified to demonstrate a sentencing pattern (cf *Johnson v The Queen* [2011] VSCA 348, [23]-[24]) - the question for the Court of Appeal was why a sentence of 14 years for an offence at the upper end of the range of seriousness should be regarded as manifestly excessive - plainly it was not - appeal allowed - appeal to Court of Appeal dismissed.
Kilic

Moore v R [2016] NSWCCA 260
Court of Criminal Appeal of New South Wales
Leeming JA, Fagan & N Adams JJ
Criminal law - conviction appeal - deception - appellant convicted of dishonestly obtaining a financial advantage by deception (s192E(1)(b) *Crimes Act 1900* (NSW)) and dealing with the proceeds of crime (s193B(2) *Crimes Act 1900*) - appellant had opened an account with St George Bank which permitted him to request funds to be advanced to him - during the operation of the account, advances in excess of $2.1 million were made by electronic transfer - these advances were made despite the account having insufficient funds and occurred as the result of an internal bank error - the appellant dissipated the advances and was unable to repay them - the issue at trial was whether the appellant's conduct constituted a deception within the expanded statutory definition of 'deception' (s192B(1)(b) *Crimes Act 1900*), being 'conduct by [him] that cause[d] a computer, a machine or any electronic device to make a response that [he was] not authorised to cause it to make' - appellant was convicted and sentenced to wholly concurrent terms of 4 years 6 months & 3 years, with a NPP 2 years 3 months - the appellant was granted conditional bail and appealed, arguing that the verdicts were unreasonable - held: it was 'perfectly plain' that the bank had made a mistake - that mistake was not in paying the appellant, but in continuing to lend him money on an account that did not have an overdraft facility and which in any event exceeded any limit which could rationally have been applied to it - at all times the appellant was required to prepay the advances to the bank as a simple matter of debt - the appellant behaved dishonesty, but the element of the offence charged was deception - the appeal was to be resolved upon the issue of whether the appellant was authorised within s192B(1)(b) and that turned upon the terms and conditions of the account - under those terms and conditions the appellant was permitted to request funds to be lent to him in excess of the balance of the account and the bank expressly reserved to itself the right to allow him to

overdraw the account in that way - the appellant's actions in overdrawing the account did not bring the contact to an end - the issue was simply whether the expanded definition of 'deception' in s192B, which goes beyond the ordinary notions of deceit, was satisfied by the appellant's conduct - *R v Evenett* (1987) 24 A Crim R 330 considered - the appellant acted dishonestly, but, in addition to that dishonesty, some act of deception was required and here there was none - there was nothing at all covert about the appellant's actions and no representation was made by him which was relatively causative of the advances being made to him - count 2 being wholly dependent upon count 1, verdicts on both counts quashed and verdicts of acquittal entered.
Moore

DPP v SL [2016] VSC 714
Supreme Court of Victoria
Bell J
Criminal law - criminal procedure - human rights of children charged with serious offences in superior courts - SL, a biological female aged 15 who identifies as a male, pleaded guilty to charges of attempted murder, burglary, committing an indicatable offence while on bail - the Supreme Court having jurisdiction over these offences (s516(1)(b) *Children, Youth and Families Act 2005* (Vic)), the sentence hearing was to be conducted under the *Sentencing Act 1991* (Vic) - held: the *Charter of Human Rights and Responsibilities Act 2006* (Vic) recognises and protects the human rights of persons, including children - see ss8(3), 10(b), 13(a), 22(1) - s8(3) equality before the law is especially apposite here - the protection of human rights applying specifically to children is based upon the principle of the best interests of the child (s17(2)) - the rights of children in relation to the criminal process are protected (s23) - it is thus mandatory to segregate detained children from detained adults and children have a positive right to age-appropriate and rehabilitation focused procedures in criminal cases - the Charter binds this Court - the human rights in the Charter generally and specifically reflect the provisions of international treaties to which Australia is a party, including the *International Covenant on Civil and Political Rights* and the *Convention on the Rights of the Child* - as this court does not have cells that permit the segregation of child defendants from adult defendants, a direction is required to ensure that SL is segregated from adult defendants - it is also necessary to take steps to ensure that the trial process does not expose SL to avoidable intimidation, humiliation and distress and to assist him to effectively participate in the proceedings (see *SC v United Kingdom* (2005) 40 EHRR 10; UK *Practice Direction* [2000] 1 WLR 659) - *CL (a minor) v Lee* (2010) 29 VR 570, [86] referred to - SL has a human right to procedures of this kind and the court has a legal obligation to ensure fulfilment of that right - directions issued.
SL

Daniels (a pseudonym) v The Queen [2016] VSCA 291
Court of Appeal of Victoria
Beach, Kaye & McLeish JJA
Criminal law - conviction appeal - evidence - s136 & 137 *Evidence Act 2008* (Vic) - applicant

convicted after 2 separate trials of 5 charges of sexual penetration of a child under 16 (s45(1) *Crimes Act 1958* (Vic)) - each trial concerned a different complainant, each being a step-granddaughter of the applicant - applicant was sentenced to a effective term of 7 years, NPP 4 years 6 months - at each trial evidence of SMS messages between the complainants was admitted as complaint evidence - in seeking leave to appeal, the applicant relied upon one ground, namely, that the trial judge erred in refusing to exclude the SMS messages pursuant to s137 *Evidence Act 2008* - held: the question for the trial judge under s137 was whether the probative value of the text message exchange was outweighed by the danger of unfair prejudice to the applicant - the potential for unfair prejudice was real - that danger was the risk that the jury might resort, perhaps unconsciously, to impermissible tendency or coincidence reasoning - the jury must be taken to have understood and followed the judge's directions (s136 *Evidence Act 2008*; *Gilbert v The Queen* (2000) 201 CLR 414, [31]-[32]; *Dupas v The Queen* (2010) 241 CLR 237, [26]-[29]) - the directions were clear and direct and capable of being easily understood and followed by a jury evaluating the whole of the evidence against the applicant in each trial - some danger however remained which had to be weighed against the probative value of the evidence - that probative value was considerable and without it the explanation for making the complaint at the time each complainant did would have been significantly weakened - in the circumstances, the trial judge was correct to hold that in each case the probative value of the evidence was considerable and outweighed the danger of unfair prejudice - leave granted, each appeal dismissed.
Daniel (a pseudonym)

Nicholls v The Queen [2016] VSCA 300
Court of Appeal of Victoria
Redlich, McLeish JJA & Beale AJA
Criminal law - sentence appeal - dishonest use of position as director - Commonwealth offences - applicant pleaded guilty to 3 charges of using his position as a director dishonestly with the intention of gaining an advantage (s184(2)(a) *Corporations Act 2001* (Cth)) - applicant, with assistance from an associate, used two companies to raise funds from investors in relation to two proposed property developments in Ballarat, Victoria - $756,908.31 of the investor's funds was re-directed for the applicant's personal use - applicant, who was 63 years old and without prior convictions, had been subjected to sustained and unlawful pressure and anger from the investors and had been declared bankrupt - sentenced to an effective term of 4 years 6 months, with a recognizance release order after serving 3 years (s20(1)(b) *Crimes Act 1914* (Cth)) - applicant argued that (1) the sentencing judge erred in failing to recognise the utilitarian value of his plea; (2) erred in finding that the offending was towards the higher end of the range; (3) the sentence was manifestly excessive - held: (1) the sentencing judge did not advert in her sentencing remarks to the utilitarian value of the applicant's plea - considering the application of *DPP (Cth) v Thomas* [2016] VSCA 237 ('Thomas'), it is not generally necessary for sentencing judges to differentiate between allowing a discount as reflecting the willingness of the offender to facilitate the course of justice or for reflecting that willingness together with the utilitarian benefit derived from the plea - here the judge indicated during the plea hearing that

the plea had great utilitarian benefit - no error identified - ground rejected - (2) to establish manifest excess, the applicant is required to show that something has gone obviously, plainly or baldly wrong - the sentence imposed must be wholly outside the range of sentencing options available (see *Clarkson v The Queen* (2011) 32 VR 361 [89]; *Binse v The Queen* [2016] VSCA 145, [57]) - the use of comparable cases was considered in *Thomas* (supra, [174]-[176]) - the cases referred to in argument provided, at best, a rough guide and did not provide the kind of yardstick which may be derived from comparable cases in the manner explained by the High Court (*Hili v The Queen; Jones v The Queen* (2010) 242 CLR, 520, [56]; *The Queen v Pham* (2015) 325 ALR 400, [27]) - 2 decisions referred to: *R v Donald* [2013] NSWCCA 238; *DPP (Cth) v Northcote* (2014) 99 ACSR 1 - in assessing whether the sentences are manifestly excessive, the observations of the Court in *DPP (Cth) v Gregory* (2011) 34 VR 1 [53]-[55] are pertinent - when considering sentences for crimes of dishonesty by those discharging duties under the *Corporations Act,* it is necessary to be mindful of the relative ease with which person occupying positions of control and responsibility can gain substantial financial advantages and the likely harm done to multiple victims - here, the offending was doubtless serious - but it was necessary to commence by considering the sentence of 3 years' imprisonment imposed as the base sentence - when regard was had to the plea and to the mitigating considerations of the applicant's age, his good prospects for rehabilitation, the delay in sentencing of around 5 years, the sentence imposed on charge 3 was manifestly excessive - resentenced to effective term of 3 years 6 months, NPP 2 years, 6 months.
Nicholls

R v MCI [2016] QCA 312
Court of Appeal of Queensland
Margaret McMurdo P, Gotterson JA, McMeekin J
Criminal law - conviction appeal - failure to discharge jury - admission of prejudicial material - applicant convicted of rape and 3 counts of indecent treatment of child under 12, under care - primary ground of appeal was a miscarriage of justice occasioned by the trial judge's failure to discharge the jury after evidence of an alleged prior incident adduced - other grounds of appeal dismissed as lacking merit - held: the inadmissible prejudicial material was likely to have been understood by the jury as relating to an earlier allegation of an uncharged sexual abuse of a child, possibly the complainant - the reception of that evidence raised the question of whether the accused was deprived of a fair trial (*R v Glennon* (1992) 173 CLR 592, 604) - the judge sensibly interrupted defence counsel's cross examination and sent the jury outside, where they remained for about one hour - during the time the jury was outside it is likely that they discussed the inadmissible aspects of the witness's evidence - while the inadmissible prejudicial evidence was not of a prior conviction, it was of that character (see *R v Glennon*, supra) - the failure of defence counsel to seek additional warnings/directions did not support the contention that the judge's directions were adequate, as to request further directions would have highlighted the prejudicial nature of the evidence - the question was whether a substantial miscarriage of justice resulted from the admission of the evidence, which involved a consideration of whether it caused the appellant to lose a fair chance of an acquittal - allegations of sexual abuse of

children are 'peculiarly likely to arouse prejudice, against which a direction to the jury is unlikely to guard' (*De Jesus v The Queen* (1986) 61 ALJR 1) - the prosecution case was not overwhelming and different juries could have reasonably reached different verdicts - the concern that an innocent person may have been convicted could not be dismissed - ground 1 allowed - convictions set aside, retrial ordered [Editor's note: McMeekin J dissented on the question of whether a miscarriage was occasioned by the failure to discharge the jury].
MCI

Roland v Tasmania [2016] TASCCA 20
Tasmanian Court of Criminal Appeal
Blow CJ, Estcourt & Brett JJ
Criminal law - conviction appeal & leniency appeal - appellant convicted on 4 counts of trafficking in methylamphetamine, cannabis, alprazolam and possession of a document, 'Secrets of Methamphetamine Manufacture' - appellant sentenced to 3 years, eligible for parole after 18 months - conviction appeal: 6 grounds of appeal alleging trial judge erred by permitting the Crown to plead counts on a *Giretti* basis (*Giretti & Giretti* (1986) 24 A Crim R 112), in failing to require the Crown to provide particulars, in failing to reject the indictment as duplicitous, in permitting Crown to rely upon inadmissible evidence - leniency appeal: ground relied upon manifest inadequacy - held: if the crime of trafficking in a controlled substance contrary to s12 *Misuse of Drugs Act 2001* (Tas) is a 'continuous' or 'continuing' offence, it is a recognised exception to the rule against duplicity and particulars are not required (*Giretti*, supra; *Walsh v Tattersall* (1996) 188 CLR 77) - all that is required is that the accused know the case he or she is required to meet (see *Giretti,* 124) - considering the definition of 'traffic' (s3 *Misuse of Drugs Act 2001*), trafficking in a drug is the process by which it runs from the manufacture to the ultimate consumer - it is a process of movement for commercial gain - commonly, there is a chain of distribution stretching from the manufacturer to the ultimate retail sale to a consumer - it embraces a continuing activity over a period of time involving commercial dealings - a jury needs only to be satisfied that the alleged commercial activity extended over a period of time which *broadly corresponds* with the period specified in the count - here, the appellant clearly understood the circumstantial case against him and no objection was taken to the indictment on the ground of duplicity - considering the trial judge's ruling on admissibility: the evidence did not need to go beyond mere possession in order to be capable of establishing that the appellant was engaged in the business of selling the drugs as part of an overall business and trade in drug trafficking in order for it to be 'influential in the context of fact finding' in a circumstantial case such as here (applying *IMM v The Queen* (2016) 90 ALJR 529) - the judge's conclusion that evidence of possession and sale of drugs, not the subject of the indictment, can show a continuing trade in drugs was unimpeachable (see also *R v Komljenovic* (2006) 163 A Crim R 298) - the argument that the trial judge erred by admitting evidence of firearms found at the appellant's home because that evidence amounted to a contravention of the appellant's acquittal on a family violence charge was misconceived - the admission of the evidence did not deprive him of the benefit of the acquittal (*R v Carroll* (2002) 213 CLR 635, [50]; *Ulutui v The Queen* (2014) VSCA 110) - the jury was not required to come to any conclusion with respect to

any element of the trafficking charges that was inconsistent with any element of the appellant's acquittal for the family violence offence and the jury was not required to determine whether he had committed an offence in relation to the family violence offence - evidence of his possession of the firearms was not adduced to prove he was guilty of the family violence offence, but as circumstantial evidence in relation to the trafficking charges - appellant's appeal dismissed - leniency appeal: a sentence of more than 3 years was not required - appeal dismissed.
Roland

R v NS [2016] ACTSC 346
Supreme Court of the Australian Capital Territory
Burns J
Criminal law - evidence - protected confidences - disclosure - applicant pleaded not guilty to 2 counts of committing an act of indecency on a child under 10 years - offences alleged to have occurred in 2004, 12 years earlier - complainant suffering significant mental health issues since 2004 - complainant did not disclose any sexual abuse to police in an interview with them in 2004 - applicant sough orders pursuant to s58 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ('*EMPA*') for leave to issue subpoenas compelling the disclosure of protected confidences to named individuals and organisations that had provided treatment to the complainant - the Crown did not oppose the application, which was granted - a preliminary examination of the protected confidence material was then conducted in the judge's chambers (s61 *EMPA)* to determine whether any material should be disclosed to the parties - on the issue of whether a legitimate forensic purpose was required to be demonstrated in order for a disclosure order to be made - held: referring to decisions concerning the provisions of the *EMPA* (*In the matter of an application by Donald Francis McInnes* (2009) 194 A Crim R 377; *R v O'Rafferty* [2016] ACTSC 141; *R v Basham* [2009] ACTSC 142) - the documents contained protected confidences (s55 *EMPA*) - s60 of the *EMPA* requires, as a threshold test for disclosure, that the application identify a legitimate forensic purpose for the required disclosure - South Australian, New South Wales, Victorian and Western Australian provisions and authorities considered - s60 is a gateway provision: once that section is satisfied, the identification of the protected confidence material which may be subject to disclosure is based upon the application of the test in s62, taking into account those matters set out in s62(3) - in applying the test, the court must determine the potential importance of a document containing a protected confidence to the proceedings, determined by reference to the nature of the charges, the material before the court and reasonable inferences and assumptions - material produced upon subpoena and not containing protected confidences falls outside the provisions of the legislation - here, the significant issue at trial will be whether the Crown can establish, to the requisite standard, that the alleged events actually occurred - evidence of the complainant as to the events and identifying the applicant as the person who abused her will be crucial to the Crown case - the credibility and reliability of the complainant and her evidence is likely to be crucial at the applicant's trial - the public interest in ensuring a fair trial outweighs the public interest in preserving the confidentiality of the protected confidences - disclosure ordered.
NS

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The Sea and the Skylark
By Gerard Manley Hopkins

On ear and ear two noises too old to end
Trench—right, the tide that ramps against the shore;
With a flood or a fall, low lull-off or all roar,
Frequenting there while moon shall wear and wend.
Left hand, off land, I hear the lark ascend,
His rash-fresh re-winded new-skeinèd score
In crisps of curl off wild winch whirl, and pour
And pelt music, till none 's to spill nor spend.
How these two shame this shallow and frail town!
How ring right out our sordid turbid time,
Being pure! We, life's pride and cared-for crown,
Have lost that cheer and charm of earth's past prime:
Our make and making break, are breaking, down
To man's last dust, drain fast towards man's first slime.

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