The New Zealand
LAW JOURNAL

23 OCTOBER 1973 No. 19

ABORTION ETHICS AND SOCIAL POLICY

In discussing the moral problem of abortion two considerations can be dealt with initially:

First, David Hume in *A Treatise of Human Nature* made the famous observation (termed the naturalistic fallacy) that it is impossible to logically derive moral conclusions from factual premises. The gap between descriptive statements of fact and moral prescriptions is unbridgeable since the conclusion of an argument can contain nothing which is not in the premises, and there are no moral prescriptions in factual premises.

This observation is important insofar as many arguments concerning abortion are based on reasoning from purely biological facts directly to moral values and thus involve the naturalistic fallacy. Biological facts as such do not imply moral prescriptions. This does not mean though that descriptive data cannot be used in making moral judgments, all relevant data should be considered, but decisions ought to be reached by moral reasoning.

Secondly, the common argument that as a foetus is a member of the biological species *homo sapiens* it necessarily follows that the foetus is a human being, should be critically examined. This question is analagous to that of whether or not an acorn is an oak tree. If an acorn is destroyed, has a tree been killed? While it is true that the living seed of an oak tree has been killed, it is misleading to suggest that this is the same as destroying a tree. The seed and the tree are both members of the same growth form. But the seed is a member of the class of unborn progeny; the tree is not. So to say that a seed of an oak tree is an oak tree is to say, in part, that unborn progeny are born progeny. And this is clearly untrue.

Kohl in "The Term 'Human Being' and the Problem of Abortion" (*Names,* September, 1971, 221) provides an explanation why some people indulge in this error. He says that a mistaken assumption is made "that the meaning of a compound noun is always the result of a simple combination of nonambiguous components and that this combination never involves a shift in meaning." But in fact the word "being" is ambiguous. It can mean "that which has existence" or it can mean "an individual that has or has had an independent nature capable of sustaining and regulating its own metabolic pattern." So when the compound noun "human being" is used to refer to the foetus the word "being" is used ambiguously and involves a shift in meaning from the first to the second definition.

One of the most frequent arguments advanced for the compulsory continuation of pregnancy is this: The foetus is a person from the moment of conception; every person has a right to life; so the foetus has a right to life and may not be killed by abortion. This argument allows no exception for abortion in any situation as the right to life is claimed as an absolute. (The proponents of the argument frequently express as their social policy that the present law is satisfactory as it allows therapeutic abortion for the few "needy" or "deserving" cases. This of course means their social policy is inconsistent with their moral principles.)

This sounds like a plausible argument, and accepting it for the purposes of discussion, Judith Thomson in "A Defence of Abortion", ([1971] *Philosophy & Public Affairs, 1,* 1, 47-66) has suggested that we imagine the following situation: one morning you find yourself in bed with a famous musician; this musician is suffering from a fatal kidney ailment and by searching the medical records it has been found

that you alone have the right blood type to help. Last night you were therefore plugged into the musician's circulatory system in order to keep him alive. The hospital superintendent says he is sorry this has happened to you and even though you have a right to decide what happens in and to your body a person's right to life outweighs your right to decide what happens to your body, so he cannot unplug you. Anyway it's only for nine months. (It matters little how you got into this situation, whether by coercion, trickery, e.g. after being given alcohol, or by mischance, e.g. realised this could happen to you and took unsuccessful evasive action. Perhaps you even freely agreed at the time but have now changed your mind.)

Thomson asks: "Is it morally incumbent on you to accede to this situation?" It would be a great kindness if you did but do you *have* to accede to it? If, as I imagine most people would react, you regard this suggestion as outrageous, then there is something seriously wrong with the plausible-sounding argument mentioned above.

The gap in the argument is this: "having a right to life does not guarantee having either a right to be given the use of or a right to be allowed continued use of another person's body —even if one needs it for life itself. So the right to life will not serve the opponents of abortion in the very simple and clear way in which they seem to have thought it would." Furthermore, Thomson argues "the right to life consists not in the right not to be killed, but rather in the right not to be killed unjustly." This means the musician's right to life is compatible with the fact that you unplug yourself and kill him, since this is not unjust as he has no claim on the use of your body.

The implications of affirming that the right to life entails a right to use another person's body against their wishes are very far-reaching. It would mean, for example, that hospitals could compel people to submit to the removal of spare organs or pints of blood and when the unwilling donors protested, their objections could be swept aside on the grounds that certain persons needed these organs etc. and as the right to life was stronger than the individual's right to control his body, they must be given.

From this it is clear that abortion is a unique moral event which requires its own ethical analysis. Such a position is contrary to that held by the conservatives who wish to place abortion in the same category as homicide, unconcerned by the ethical differences between the two acts.

One way of attributing value to the foetus places primary importance at conception when the genetic code is fixed. The fixation of a chromosomal code soon after fertilisation will partly determine the gross characteristics of the individual for the rest of his life and establishes human potentiality. However, the posssion of a set of chromosomes raises other questions. The number of chromosomes proper to the human species is 46, which precludes the possibility of chromosomal variation. But there are some individuals who carry a variant number of chromosomes and they would be excluded from any definition of "human being" or "person" (or rights so attributed) if genetic endowment is the sole criteria. Further, there are two opposing ways of interpreting this biological data (these differences in interpretation are moral and not scientific).

Conservatives advocating an ethical stance at conception which prohibits abortion view humanness as an endowment, laid down by the chemical composition of the fertilised egg. On the other hand liberals view humanness as an achievement, which cannot be realised until the human socialisation process can be undertaken, beginning with the mother-child relationship.

The conservative may urge that every conceptus be ascribed a right to life because of its potential to develop into a human being (although this would not prohibit abortion for the reasons given in the Thomson argument above). The weakness of an argument based on potentiality can be shown thus: if each conceptus is a potential person with a right to life we should do everything possible to ensure it continues to develop. A conceptus has a 50/50 chance of naturally aborting, mainly due to genetic abnormality. If a new drug is discovered which suppresses the natural abortion mechanism, are we morally obligated to give this new drug to all women at risk? The outcome of such a drug would mean that 1 in 10 to 1 in 5 of the population would be abnormal, suffering from gross and incapacitating defects. How much value should we place on potential?

An alternative way of viewing the foetus is not as a human being or homunculus (miniature man) as the conservative would urge, nor as a mere maternal appendage. A human foetus has its own separate moral status; it is not an object we can treat any way we like, but neither is it a person whom we must treat as we would wish to be treated in return.

Discrete human life develops gradually from a background of general human life. The sperm and egg are unique cells qualitatively

different from other human cells. When the zygote is formed after fertilisation the statistical chance of a new human being eventuating from the continuum is increased. But the germ cells and the zygote are of no moral significance. As embryonic development continues there are many points, such as implantation, formation of essential organs, development of the nervous system, brain functioning, and viability, at which increasing moral rights could be attributed *pari passu*.

This means that the foetus will have different values at different points in its development and its destruction is not to be undertaken capriciously. And while the human foetus has a unique ethical claim we are nevertheless dealing with values which are penultimate and so it is legitimate to set off developing feotal rights against competing claims. There is obviously no non-arbitrary way of deciding the exact point at which the developing rights of the foetus equal the claims of the mother. It is also obvious that the circumstances of each individual case must be fully and compassionately considered before the question of abortion is decided.

This approach of gradually developing foetal rights has been criticised on the grounds that there is no non-arbitrary way of deciding when the right of a woman to abort the foetus stops, that is, the existence of some morally significant point in foetal development which prevents the weighing of competing claims. Trying to determine a cut-off point from this perspective is mistaken. As was argued earlier, any individual's right to life is limited so that it does not always entail the use of another person's body without their consent. The right of a woman to determine the use of her body does not, however, entail a right to ensure the death of the foetus presently using it. While aborting a pre-viable foetus will result in foetal death this is not true of a viable foetus. When a foetus reaches viability its continued life-support is a matter of geography—the biological incubator versus the technological incubator. A woman may request that a viable foetus be delivered before term but she cannot request that a live-born foetus be killed. Further, because of the increased risk to the viable foetus being artificially delivered, it is incumbent on the mother to show substantial reasons why this increased risk should be undertaken (such as a threat to her life or grave impairment of health).

One of the few statements with which both conservatives and liberals are likely to agree is that the abortion controversy will continue for some time to come. Despite the on-going nature of the debate, abortion is an issue which requires the formulation of a social policy which will be expressed in law. In formulating such a policy I would urge the following considerations: First, that it is undemocratic to impose one metaphysical theory of life onto the whole of society through the criminal law. Although this was not the original intent of statutory restrictions on abortion, it has become a practical effect of the present law. Secondly, religious toleration must be observed. Roman Catholicism opposes abortion without exception while various main-stream Protestant Churches advocate a more liberal abortion law. A policy should be adopted which is permissive only, allowing for individual choice and must not compel any person to act contrary to his religious beliefs. Further, those whose religious beliefs dictate an implacable opposition to abortion would do well to remember the tolerance expressed in the Second Vatican Council's Declaration on Religious Freedom:

> "In spreading religious faith and in introducing religious practices, everyone ought at all times to refrain from any manner of action which might seem to carry a hint of coercion or a kind of persuasion that would be dishonourable or unworthy . . . such a manner of action would have to be considered an abuse of one's own right and a violation of the right of others."

Thirdly, a reformed law must allow for moral decision-making to take place by the person who can make the choice—the woman concerned. Any law which evades this matter by having committee decisions or ethical judgments masquerading as medical judgments is unacceptable. The decision rests ultimately with the pregnant woman, and as many or few advisors as she chooses to consult, coupled with the clinical judgment of her physician.

Finally, legal restrictions should be based on two criteria: protection of maternal health by specifying the qualifications of the person who is to perform the abortion and the type of medical premise in which it may be performed; protection of the viable foetus which can live outside the mother's womb.

W. A. P. FACER

Recent Admission—On 31 July 1973 at Dunedin Judith Mayhew was admitted as a barrister and solicitor of the Supreme Court. The application was heard before the Honourable Mr Justice Quilliam.

BILLS BEFORE PARLIAMENT

Accident Compensation Amendment
Accident Compensation Amendment (No. 2)
Admiralty
Agricultural Pests Destruction Amendment
Agriculture Workers' Amendment
Air Services Licensing Amendment
Animals Amendment
Animals Protection Amendment
Appropriation
Broadcasting
Broadcasting Authority Amendment
Commonwealth Games Boycott Indemnity
Counties Amendment
Crimes Amendment
Customs Amendment
Dangerous Goods
Department of Social Welfare Amendment
Development Finance Corporation
Domestic Purposes Benefit
Door to Door Sales Amendment
Door to Door Sales Amendment (No. 2)
Equal Pay Amendment
Explosives Amendment
Fire Services Amendment
Health Amendment
Hospitals Amendment
Lake Wanaka Preservation
Licensing Amendment
Licensing Trusts Amendment
Local Elections and Polls Amendment
Maori Purposes (No. 2)
Marine Pollution
Ministry of Energy Resources Amendment
Motor Vehicle Dealers Amendment
Municipal Corporations Amendment
Municipal Corporations Amendment (No. 2)
New Zealand Constitution Amendment
New Zealand Day
New Zealand Export-Import Corporation
Physiotherapy Amendment
Plant Varieties
Portage Licensing Trust
Public Works Amendment
Recreation and Sport
Rent Appeal
Sale of Liquor Amendment
Sales Tax
Scientific and Industrial Amendment
Shipping Corporation of New Zealand
Social Security Amendment
Soil Conservation and Rivers Control Amendment
Summary Proceedings Amendment
Transport Amendment
Trustee Amendment
Volunteers Employment Protection
Waitakere Licensing Trust
Water and Soil Conservation Amendment
Wheat Research Levy
Women's Rights of Employment
Wool Marketing Corporation Amendment

STATUTES ENACTED

Companies Amendment
Imprest Supply
Imprest Supply (No. 2)
Industrial Relations
Judicature Amendment
Land and Income Tax (Annual)
Maori Purposes
Ministry of Transport Amendment
Moneylenders Amendment
National Roads Amendment
Niue Amendment
Overseas Investment
Payroll Tax Repeal
Post Office Amendment
Property Speculation Tax
Rates Rebate
Reserve Bank of New Zealand Amendment
State Services Amendment
Syndicates
Trade and Industry Amendment
Trustee Savings Banks Amendment
University of Albany Amendment

REGULATIONS

Regulations Gazetted 20 September to 27 September 1973 are as follows:

Board of Trade (Meat Grading) Regulations 1943, Amendment No. 4 (S.R. 1973/231)
Customs Tariff Amendment Order (No. 8) 1973 (S.R. 1973/232)
Customs Tariff Amendment Order (No. 14) 1973 (1973/233)
Customs Tariff Amendment Order (No. 15) 1973 (S.R. 1973/234)
Customs Tariff Amendment Order (No. 18) 1973 (S.R. 1973/222)
Customs Tariff Amendment Order (No. 19) 1973 (S.R. 1973/235)
Electricity Control Order 1948, Amendment No. 5 (S.R. 1973/228)
Electricity Control Order 1948, Amendment No. 6 (S.R. 1973/240)
Freshwater Fisheries Regulations 1951, Amendment No. 12 (S.R. 1973/230)
Life Insurance Companies Investments Order 1973 (S.R. 1973/236)
Milk Marketing Order 1968, Amendment No. 1 (S.R. 1973/237)
Post Office Savings Bank Regulations 1944, Amendment No. 13 (S.R. 1973/223)
Revocation of Customs Import Prohibition (Coffee) Order 1967 (S.R. 1973/238)
Revocation of Price Freeze Regulations (No. 3) 1973 (S.R. 1973/224)
Secondary School Academic Bursaries Regulations (1973 (S.R. 1973/225)
Stabilisation of Prices Regulations 1972, Amendment No. 7 (S.R. 1973/239)
State Services Salary Order (No. 5) 1973 (S.R. 1973/226)
State Services Salary Order (No. 6) 1973 (S.R. 1973/227)
Wool Prices Stabilisation Regulations 1973, Amendment No. 1 (S.R. 1973/241)
Work Centre (Wellington) Notice 1973 (S.R. 1973/229)

SUMMARY OF RECENT LAW

CRIMINAL LAW—ASSAULTS AND INJURIES TO THE PERSON

Threatening to kill—Threat not addressed to person threatened—Offence—Crimes Act 1961, s. 306 (a). The respondent was charged under s. 306 (a) of the Crimes Act 1961 with threatening to kill his daughter aged 15 months. He was standing armed with knives at the top of stairs adjacent to a room in which his daughter was in bed and said to a policeman—"If you put a foot on the stair I will kill myself and the child at the same time." The respondent contended that as the threat was not addressed to the child there was no case to answer. *Held,* 1. Paragraphs (a) and (b) of s. 306 of the Crimes Act 1961 must be construed in the same way. 2. An offence is committed under para. (b) if a letter is sent threatening to kill a third person. (*R.* v. *Syme* (1911) 6 Cr. App. R. 257, and *R.* v. *Solanke* [1970] 1 W.L.R. 1, [1969] 3 All E.R. 1383, referred to.) 3. It is not necessary for a threat under s. 306 to be addressed to the person whose life or health would be endangered. (*R.* v. *Hillhouse* [1965] N.Z.L.R. 893, overruled.) *Police* v. *Lloyd* (Court of Appeal, Wellington. 11, 22 May 1973. Wild C.J., McCarthy and White JJ.).

CRIMINAL LAW—EVIDENCE AND PROOF

Evidentiary value of interview with accused—Accomplice—Test to be applied—Accomplices cannot corroborate each other—Directions to jury—Crimes Act 1961, ss. 24, 66. Evidence—Admissibility of statement of police officer interviewing accused—Corroboration—Evidence of accomplice. The appellant was convicted on two separate charges: (1) That he assaulted a girl with intent to injure her. The complainant was not available as a witness but a police officer gave evidence of an interview with the accused. (2) That he knowingly lived on the earnings of a prostitute. Evidence given by the prostitute was supported by another girl who said that the appellant had also asked her to prostitute herself, that she had not done so, but that she had accompanied and assisted the prostitute when soliciting. *Held,* 1. A direction should have been given to the jury that the matters put by the police officer to the accused had no evidentiary value except to the extent that the jury was satisfied that the accused had accepted their truth. (*R.* v. *Spring* [1958] N.Z.L.R. 468, 475, and *R.* v. *Campbell* [1960] N.Z.L.R. 884, 888, referred to.) 2. Whether the prostitute (or the other girl) was an accomplice depended on whether or not she was a party to the offence with which the accused was charged. (*R.* v. *Terry* (unreported, Wellington, 21 December 1972, Court of Appeal, C.A. 122/72), referred to.) 3. The two witnesses had rendered active assistance to the accused and it was not a case of mere "submission". (*R.* v. *Dimes* (1911) 7 Cr. App. R. 43, and *R.* v. *McAllister* [1952] N.Z.L.R. 443; [1952] G.L.R. 279, referred to.) 4. A person cannot escape liability for an offence because of threats made not falling within s. 24 of the Crimes Act 1961. (*R.* v. *Joyce* [1968] N.Z.L.R. 1070, referred to.) 5. Whether a prostitute is a party to the offence of a person living on her earnings depends on the facts judged by reference to s. 66 of the Crimes Act 1961. (*R.* v. *King* (1914) 10 Cr. App. R. 117, *R.* v. *Pickford* (1914) 10 Cr. App. R. 269, and *R.* v. *Fleming* (1960) 34 C.R. (Can.) 137, referred to.) 6. The two witnesses being accomplices could not corroborate one another and an accomplice warning was required in respect of the evidence of both witnesses. *R.* v. *Pollock* (Court of Appeal, Wellington. 9, 22 May 1973. McCarthy, Richmond and White JJ.).

Identification of accused—No evidence by prosecution of identity—Counsel for accused closed case—Magistrate recalled witness to identify and convicted accused. In the Magistrate's Court the prosecution had called one witness who did not identify the appellant. At the close of the witness's evidence the appellant's counsel had submitted that there was no case to answer on two grounds, viz (1) the identity of the appellant had not been proved, and (2) there was no prima facie case to answer. The Magistrate ruled against this submission. The appellant's counsel then elected to call no evidence and closed his case. The Magistrate then recalled the witness who gave formal evidence of identity. The appellant was then convicted. *Held,* The recalling of evidence after the defence was closed was wrong. It would have been in order to recall the witness immediately after the submission of no case had been made and before the defence elected to call no evidence. (*Saunders* v. *Johns* [1965] Crim. L. Rev. 49, applied.) The conviction was quashed. *Transport Ministry* v. *Smith* (Supreme Court, Welllington. 28 March 1973. Wild C.J.).

CRIMINAL LAW—OFFENCES AGAINST DECENCY

"Indecent" performance—Crimes Act 1961, s. 124 (1) (c). Statutes—Interpretation—Words construed in their ordinary meaning. These were appeals against convictions for the offence under s. 124 (1) (c) of the Crimes Act 1961 of presenting in the presence of any person in consideration of payment an indecent performance. *Held,* 1. The word "indecent" should be construed in its ordinary and popular meaning. (*Police* v. *Drummond* [1973] 2 N.Z.L.R. 263, applied. *R.* v. *Hicklin* (1868) L.R. 3 Q.B. 360, distinguished.) 2. "Indecency" must always be judged in the light of time, place and circumstance. 3. In construing a statute the Court must not substitute other words for the words of the statute. (*Brutus* v. *Cozens* [1972] 3 W.L.R. 521, 525; [1972] 2 All E.R. 1297, 1299, referred to.) *R.* v. *Dunn and Others* (Court of Appeal, Wellington. 5 April; 4 May 1973. Turner P., McCarthy and Richmond JJ.).

CRIMINAL LAW—SENTENCE

Disparity of sentence where two or more are jointly charged with the same offence. This case deals with the question of disparity of sentences where two or more persons are jointly charged with the same offence. *Held,* 1. Little help is gained in imposing sentence by considering other sentences in respect of the same offence. (*R.* v. *Radich* [1954] N.Z.L.R. 86, referred to.) 2. The fact that one of two prisoners jointly indicted has received too short a sentence is not a ground for necessarily reducing a longer sentence on the other. It has to be shown that the longer sentence is more than is justified taking all the surrounding circumstances into account. (*R.* v.

Richards [1955] 35 Cr. App. R. 191, referred to.) *R.* v. *Rameka* (Court of Appeal, Wellington. 6, 13 June 1973. McCarthy, Richmond and White JJ.).

DAMAGES—RULES AND PRINCIPLES IN AWARDING DAMAGES

Partner incapacitated from working in partnership—Damages limited to financial consequences to injured partner—Loss to remaining partner damnum sine injuria—*Methods of assessment.* The respondent, a farmer, who was in partnership with his wife, was injured in a motor accident and could no longer carry on the farm even with the assistance of his wife. The method of assessment of general damages for economic loss was in issue. *Held,* 1. In the circumstances such damages should be assessed on the financial consequences likely to befall the respondent from the premature termination of the partnership. 2. The financial consequences to his partner must be *damnum sine injuria.* 3. In some cases damages may be assessed by reference to the cost of employing additional labour. *Allen* v. *Dixon* (Court of Appeal, Wellington. 12, 13 April; 29 May 1973. Turner P., McCarthy and Richmond JJ.).

ELECTIONS AND POLLS—PARLIAMENTARY ELECTIONS

Petitions—Non-joinder of officials as respondents an irregularity—Amendment of petition alleging new grounds—Petition struck out—Electoral Act 1956, ss. 156, 157, 158—Election Petition Rules 1957 (SR 1957/265), r. 19. An election petition was presented by the unsuccessful candidate on 8 January 1973, the last day for so doing, naming the successful candidate only as respondent, and praying that it be determined that the respondent was not duly elected and that the petitioner was duly elected. On 1 February 1973 the petitioner filed a motion for the joinder of the Returning Officer and the Registrar of Electors as respondents, and for an order that publication of "the amended petition" be excused. A form of amended petition annexed to the affidavit in support showed apparently extensive changes in the grounds upon which the petition had originally been presented, and at the hearing the motion was enlarged to include an application for leave to amend the petition. The respondent moved for an order striking out the petition. *Held,* 1. The phrase "the conduct of a Returning Officer or Registrar" in s. 156 (2) of the Electoral Act 1956 should be construed in a broad and natural sense and not limited to some impropriety or something reprehensible. (*Harmon* v. *Park* (1880) 6 Q.B.D. 323, 328-329, not followed. *Islington, West Division, Case* (1901) 5 O'M. & H. 120, 132-133, referred to.) 2. The ordinary rules of the Supreme Court apply to the adding of parties and curing irregularities in an Election petition. 3. The non-joinder of the Returning Officer and the Registrar was an irregularity and the petition was not a nullity. 4. If the justice of the case so requires, the Court has power to cure an irregularity. 5. It is in the interest of the public and the House of Representatives that election petitions should be dealt with speedily (*Nair* v. *Teik* [1967] 2 A.C. 31, 38, 44-45; [1967] 2 All E.R. 34, 36, 40, applied.) 6. In seeking an indulgence the petitioner should be required to persuade the Court that if it be allowed he will have a reasonable chance of success. (*Bearman* v. *Hardie Boys* [1973] 2 N.Z.L.R. 204, 206, referred to.) 7. It would be quite contrary to the scheme and purpose of the Electoral Act 1956 to allow a new case to be set up by an amendment out of time. (*Re Patea Election* (1900) 4 G.L.R. 173, 177, referred to.) 8. The petitioner's application was dismissed and the election petition was struck out on the respondent's motion. *Re Wellington Central Election Petition, Shand* v. *Comber* (Full Court, Wellington. 29 March; 19 April 1973. Wild, CJ., Roper and Cooke JJ.).

EVIDENCE—ADMISSION UNDER EVIDENCE AMENDMENT ACT 1945

Admissibility of written statements concerning an accident made contemporaneously recorded by a person not present at the accident—Personal knowledge of maker of statement—Evidence Amendment Act 1945, s. 3 (1) (a) (ii). Practice—Evidence—Objection to admissibility of evidence at the trial—Code of Civil Procedure, R. 278. The question in this case was concerned with the admissibility of evidence. The ship's purser T prepared an accident report as a result of what he had been told by the appellant plaintiff, including that the appellant 'had caught his foot on a step'. T was called as a witness. K, a fellow employee, also made a statement that the appellant 'caught his foot on a step' to T, which was written down and signed by K, but in the witness box K under cross-examination said he did not see the appellant trip or slip. It was contended that neither statement was admissible. *Held,* 1. T's statement was not produced as direct evidence of the way the accident happened, but as tending to establish the making by the appellant of a statement that he had "caught his foot on a step" and was admissible under s. 3 (1) (a) (i) of the Evidence Amendment Act 1945 as being within the personal knowledge of T. (*Brinkley* v. *Brinkley* [1963] 1 All E.R. 493, applied.) 2. The requirement of the said sub-section 3 (1) (a) (i) is that the maker had personal knowledge at the time of the making of the statement, not at the later point of time when the maker gives evidence. (*Bearmans Ltd.* v. *Metropolitan Police District Receiver* [1961] 1 All E.R. 384, 392, referred to.) 3. Contemporaneous documents may be produced, notwithstanding the hearsay rule, providing always that the criteria laid down by the subsection are satisfied. (*Harvey* v. *Smith-Wood* [1963] 2 All E.R. 127, and *Hilton* v. *Lancashire Dynamo Nevelin Ltd.* [1964] 2 All E.R. 769, followed. *Cartwright* v. *W. Richardson & Co. Ltd.* [1955] 1 All E.R. 742, not followed.) The judgment of Roper J., [1973] 1 N.Z.L.R. 675, affirmed. *North* v. *Union Steam Ship Co. of New Zealand Ltd.* (Court of Appeal, Wellington. 28 June 1973. McCarthy, Richmond and White JJ.).

INCOME TAX—ASSESSABLE INCOME

United Kingdom stock purchased with sterling and immediately re-sold in New Zealand for New Zealand currency—Calculation of profit on transactions—Land and Income Tax Act 1954, s. 88 (1) (c). The appellant objectors having sterling funds in England instructed their sharebrokers to take steps to transmit those funds to New Zealand. The sharebrokers purchased United Kingdom stock for the objectors with the sterling funds and such stock was immediately sold in New Zealand for New Zealand currency. The Commissioner assessed the objectors for income tax on the profit derived from these transactions. *Held,* 1. The United Kingdom stock was "acquired for the

purpose of selling" within s. 88 (1) (c) of the Land and Income Tax Act 1954. (*Commissioner of Inland Revenue* v. *Hunter* [1970] N.Z.L.R. 116, applied.) 2. By Wild C.J. and Richmond J., Turner P. dissenting. In order to calculate the profit (if any) the purchase price paid by the objector for the United Kingdom stock must be converted into New Zealand currency at the rate that the bank would exchange sterling for New Zealand currency at the date of the purchase. That sum must be subtracted from the amount of New Zealand currency which the objector received for the sale of such stock in New Zealand. (*Commissioner of Inland Revenue* v. *Hunter* (*supra*), explained and followed.) *Holden* v. *Commissioner of Inland Revenue* (Court of Appeal, Wellington. 4, 5, 29 September 1972. Wild C.J., Turner P. and Richmond J.).

INCOME TAX—INTERPRETATION

Motel company subletting motel units carrying on its own business not acting as agent for individual shareholders—Land and Income Tax Act 1954, s. 88 (1). The appellant was a motel owning company which comprised twenty-three motel units. The shares were divided into 23 groups. The holder of each group of shares had the right to use and occupy a particular motel unit but when not being so used the unit could only be sublet by the company under delegation agreements entered into between each shareholder and the company. The income received from subletting all the units was pooled and the expenses paid thereout and the balance was divisible equally among the shareholders. Quilliam J. held that the company itself was carrying on the business and not acting as agent for each of the shareholders, and accordingly was assessable for income tax on the business of operating motels. *Held,* By McCarthy and Richmond JJ., Turner P. dissenting, that on the true construction of the documents the business of operating motels belonged to the company which was assessable for income tax thereon. Judgment of Quilliam J. affirmed. *Trailways Motel (P.N.) Ltd.* v. *Commissioner of Inland Revenue* (Court of Appeal, Wellington. 16, 17 April; 12 June 1973. Turner P., McCarthy and Richmond JJ.).

Objection to assessments—Double taxation relief—U.K. company having subsidiary New Zealand company—Taxed pursuant to cl. 4 (1) (b) of Part A and Part C of First Schedule and not cl. 4 (1) (a) of Part A and Part B of First Schedule—Proprietary tax properly assessed on U.K. company—Land and Income Tax Act 1954, ss. 138, 172, First Schedule, Part A, cl. 4 (1) (a) and (b)—Double Taxation Relief (United Kingdom) Order 1966 (S.R. 1966/119, Schedule, Articles III (1), XIX (1). This was an appeal and cross-appeal from the judgment of Haslam J. reported [1973] 2 N.Z.L.R. 180, where the facts are set out in the headnote, on a case stated raising for determination questions as to the effect, in the circumstances, of the Double Taxation Relief Agreement given effect to by the Double Taxation Relief (United Kingdom) Order 1966. *Held,* 1. In construing an international agreement its interpretation should not be rigidly controlled by domestic precedents but on broad principles, taking into account its object and purpose. (*Stag Line Ltd.* v. *Foscolo, Mango and Co. Ltd.* [1932] A.C. 328, 350, referred to.) 2. The expression in Article XIX (1) "in the same circumstances" means "in substantially identical circumstances" (except nationality). 3. The additional taxation imposed on the respondent was based on "residence" not "nationality" and was not contrary to Article XIX (1) and accordingly was validly imposed. 4. As regards assessment of proprietary tax pursuant to s. 138 of the Land and Income Tax Act 1954 the respondent's situation must be compared with that of a New Zealand shareholder in a proprietary company resident in New Zealand who also has to pay proprietary tax. 5. The proprietary income only notionally attributed to the respondent could not be "industrial or commercial profits" exempt from New Zealand tax under Article III (1). Judgment of Haslam J. reversed on point 3 and affirmed on points 4 and 5. *Commissioner of Inland Revenue* v. *United Dominions Trust Ltd.* (Court of Appeal, Wellington. 21, 22, 23 May; 16 July 1973. McCarthy, Richmond and White JJ.).

MASTER AND SERVANT—INDUSTRIAL INJURIES AND WORKERS' COMPENSATION

Personal injury by accident—Professional man killed in road accident returning in own car from social item in conference programme—Accident arising out of and in the course of employment—Workers' Compensation Act 1956, ss. 3, 5 (b). The plaintiff's husband was a geologist employed by the D.S.I.R. in the Geological Survey Department. A geological survey conference was set up and held with the approval of the Director of the department. The husband played an important part in the preparation and running of the conference. The husband attended the conference and used his own car for that purpose and his car expenses would have been properly payable by the department. One of the items on the conference programme was a barbecue evening. The husband when returning from the barbecue was killed in an accident on the highway. The primary question was whether the accident arose out of and in the course of the employment of the deceased. *Held,* 1. The guiding principles to determine whether an accident arose "out of and in the course of the employment" are: (a) The true ground upon which the test should be based is a duty to the employer arising out of the contract of employment. (*St Helens Colliery Co.* v. *Hewitson* [1924] A.C. 59, 71.) (b) Was it part of the injured person's employment to hazard, suffer or do that which caused the injury? (*Lancashire and Yorkshire Railway Co.* v. *Highley* [1917] A.C. 352, 372.) (c) "In the course of employment" is a different thing from "during the period of employment". It must be work or the natural incidents connected with the class of work; something which is part of the worker's service to his employer. (*Davidson and Co.* v. *Officer* [1918] A.C. 304, 321.) (d) It is not necessary that the worker should be under a particular duty to do the thing which he is doing at the time of the accident, nor that he should be actively working at that time. It depends on the particular circumstances and regard must be had to the terms of employment and to its incidents. (*Public Trustee* v. *Henderson and Pollard Ltd.* [1956] N.Z.L.R. 180, 186.) 2. As a professional man the attending of a learned conference was incidental to his duty to his employer. 3. Although the barbecue evening was a social occasion, in all the circumstances it was sufficiently associated with his employment to make it incidental thereto. (*Clancy* v. *Department of Public Health* [1962] N.S.W.R. 2, 5 (F.C.), and *Davidson* v. *Mould* (1943) 44 S.R. N.S.W. 113, 116,

applied. *Scott* v. *Sims Cooper and Co. New Zealand Ltd.* [1960] N.Z.L.R. 481, 484, *Meredith* v. *Wright Stephenson and Co. Ltd.* [1967] N.Z.L.R. 626, *Commonwealth* v. *Oliver* (1962) 107 C.L.R. 353, and *Clancy* v. *Department of Public Health* [1959] W.C.R. (N.S.W.) 59 (Comp. Comm.), referred to.) *Rishworth* v. *Attorney-General* (Compensation Court, Hamilton. 23 March; 19 April 1973. Blair J.).

PRACTICE—EXTRAORDINARY REMEDIES

New procedure pursuant to Part I of Judicature Amendment Act 1972. New Zealand Engineering (etc.) Industrial Union of Workers v. *Court of Arbitration and Others* (Supreme Court, Auckland. 19 July 1973. Wilson J.).

PRACTICE—JUDGMENTS AND ORDERS

Judgments—Application to register a judgment of the District Court of Western Australia in the Supreme Court of New Zealand—District Court not a "superior Court" and judgment not registrable—Reciprocal Enforcement of Judgments Act 1934, s. 3 (2). The judgment creditor sought to register a judgment of the District Court of Western Australia in the Supreme Court of New Zealand. *Held,* Since the Australian Court was not named in the Order in Council made in respect of Western Australia pursuant to s. 3 (2) of the Reciprocal Enforcement of Judgments Act 1934, it was not a "superior Court" to which Part I of the Act applied. *Belmont Finance Ltd.* v. *Fitzpatrick* (Supreme Court, Auckland. 4 May 1973. Wilson J.).

PUBLIC SERVICE—APPOINTMENT, DISMISSAL AND PROMOTION

Appointment of Post Office engineer—Relevant merits of applicants must be considered at the time of appointment notwithstanding such appointment was to be backdated—Post Office Act 1959, s. 190. The first respondent was unsuccessful in obtaining the position of District Engineer, Palmerston North, Class Special 10, to which position Mr O'Donnell had been appointed. In the first instance the appointment had been made by the appellant on the recommendation of the Promotion Board, and on appeal to the Post Office Appeal Board, the appointment had been upheld. The Promotion Board's recommendation was made in August 1971, and the appointment was backdated to 1st October 1969. The Appeal Board pursuant to s. 190 of the Post Office Act 1959 considered the relevant merits of the applicants as at 1st October 1969, and gave great weight to the contents of Staff 34 reports, which are reports on the merits of individual members of the staff. As at 31 March 1971 the relative merits of the first respondent and Mr O'D. were equal, and had the Board considered the relevant merits as at August 1971 instead of as at October 1969, in all probability the first respondent would have been appointed instead of Mr O'D. The appellant appealed against an order for the issue of a writ of certiorari made by Wilson J. The case turned upon the interpretation of s. 190 of the Post Office Act 1959. *Held,* 1. The word "is" in s. 190 of the Post Office Act 1959 must be construed as meaning "is" and not "was" when an appointment is made retrospective. (*Public Trustee* v. *McKay* [1969] N.Z.L.R. 995, referred to.) 2. The expression "is best merited" must be construed as meaning best merited at the time when the appointment is made. (*Gill* v. *Donald Humberstone and Co. Ltd.* [1963] 1 W.L.R. 929, referred to.) *Sewell* v. *Sandle* (Court of Appeal, Wellington. 7, 28 June 1973. McCarthy, Richmond and White JJ.).

WORK AND LABOUR—INDUSTRIAL DISPUTES

Dispute between unions as to "butting-up" logs on wharves—Jurisdiction of Waterfront Industrial Tribunal to make order—Waterfront Industry Act 1953, s. 11 (2) and (2A) (Waterfront Industry Amendment Act 1964, s. 6), s. 27. A dispute had arisen between the appellant waterside workers' union and the respondent harbour boards employees' union as to the right of their respective members to do the work of "butting-up" logs with tractors at Port Chalmers. The tractors were owned by the harbour board. The matter first came before the Port Chalmers Conciliation Committee which decided in favour of the watersiders. On appeal to the Waterfront Industrial Tribunal the decision of the committee was upheld on the ground that there was a "long-standing agreement" to that effect, which fell within the exceptions of agreement between the parties to the limitations on the Tribunal's jurisdiction imposed by s. 11 (2) and (2A) of the Waterfront Industry Act 1953 as substituted by the Waterfront Industry Agreement Act 1964. The harbour boards employees' union successfully sought a writ of *certiorari* to quash the Tribunal's decision, the Supreme Court holding that there was no evidence establishing such an agreement and summing that the limitation mposed by s. 11 were applicable in the absence of an agreement. On appeal against the granting of the writ of *certiorari, Held,* 1. An agreement within the exceptions to s. 11 (2) and (2A) of the Waterfront Industry Act 1953 must be an agreement in the proceedings, that is, a consent order. 2. The expression "not customarily performed by waterside workers" in s. 11 (2) (a) of the Act is to be decided by what is shown to have been customarily done in New Zealand ports as a whole and not only at a particular port or ports. (*Re an alleged Application by the South Island (N.Z.) Waterside Workers' Federation Industrial Association of Workers* (unreported, Wellington, 19 December 1963. Full Court, M. 196/63), followed.) 3. Since the work in question was not being done by harbour board employees, albeit the tractors were owned by the harbour board, the limitation provided by s. 11 (2A) of the Act had no application. 4. By Turner P. Section 27 of the said Act does not take away the jurisdiction of the Supreme Court where a writ of *certiorari* is sought. Judgment of White J. reversed. *Port Chalmers Waterfront Workers Industrial Union of Workers* v. *New Zealand Harbour Board Employees Industrial Union of Workers* (Court of Appeal, Wellington. 3, 4 April; 1 June 1973. Turner P., McCarthy and Richmond JJ.).

Noblesse Oblige—*The Otago Daily Times* reports Mr J. D. Murray S.M. as telling a defendant: "Kicking a man when he is down, has always been regarded as poor behaviour".

CATCHLINES OF RECENT JUDGMENTS

Land valuation proceedings—Land Valuation Committee extending *ex parte* time for applying for consent to option to purchase rural land—Right of vendor to be heard—Whether appeal to Administrative Division or certiorari appropriate remedy—Land Settlement Promotion and Land Acquisition Act 1952—Land Valuation Proceedings Act 1948—Judicature Amendment Act 1972. *Tauhara Properties Ltd.* v. *Mercantile Developments Ltd.* (Supreme Court (Administrative Division), Hamilton. 1973. 24 August. Cooke J.).

Transport—Licensing Authority granting licence against opposition of Railways—Reversal by Appeal Authority—Errors of approach going to root of appellate determination—Lack of jurisdiction—Admission of new evidence on question of remission or quashing—Transport Act 1962—Judicature Amendment Act 1972. *Car Haulaways (N.Z.) Ltd.* v. *Transport Licensing Appeal Authority* and *Attorney-General* (Supreme Court, Auckland. 1973. 9 August. Cooke J.).

Trespass to Land—Exemplary damages claim—Franchise builder excluding head contractor from site—Revocation of licence—Entry for unauthorised purposes. *Superior Homes Ltd.* v. *Upjohn* (Supreme Court, Welllington. 1973. 27 July. Cooke J.).

Transport—Minimum period of disqualification, in absence of special reasons, not a norm—Circumstances in which it should be increased—Transport Act 1962, s. 57 (b). *Winter* v. *Ministry of Transport* (Supreme Court, Wellington. 1973. 18 July. Cooke J.).

Town Planning—*Locus standi* in change of use applications—Persons affected economically—Town and Country Planning Act 1953. *Blencraft Manufacturing Co. Ltd.* v. *Fletcher Development Co. Ltd. and Another* (Supreme Court (Administrative Division), Wellington. 1973. 27 July. Cooke J.).

CASE AND COMMENT

New Zealand Cases Contributed by the Faculty of Law, University of Auckland

Tort—Detinue—Assessment of Damages

Cases relating to the assessment of damages for an action in detinue are rare, and there is very little authority on the subject; for this reason the judgment of Mahon J. in *Mrs Eaton's Car Sales Ltd.* v. *Thomasen* (the unreported judgment was delivered on 1 May 1973) should be of considerable interest.

The facts of this case are somewhat complicated, but the salient points are that the plaintiff company, which is a car dealer in Auckland, purchased a Mercedes Benz motor car through the instrumentality of a commission agent. After the purchase the plaintiff told the commission agent that any subsequent sale of the car would have to take place at the premises of the plaintiff company. In spite of these specific instructions the commission agent took the car and purported to sell it to the defendant who was also a car dealer. The plaintiff company very quickly (the next day) demanded the return of the vehicle, but, when the demand was refused, instituted the proceedings in detinue. The defendant alleged that the agent either had actual or implied authority, but the learned judge was unable to find that that was so, and accordingly he found that the tort of detinue had been committed.

The difficult question then arose as to how the damages were to be assessed. In detinue it is said that the normal measure of damages is made up of two parts; firstly, the market value of the goods where they are not ordered to be returned to the plaintiff, and secondly, whether or not the goods are returned, such sum as represents the normal loss through the detention of the goods. *McGregor on Damages* (13th ed.) at para. 1033 says that this second sum should be the market rate at which the goods could have been hired during the period of detention. That sum may not, however, be altogether appropriate in a case such as the present one where the normal loss was in fact the sums lost by way of recurring profits from the plaintiff's having been deprived of the use of an item of stock in trade. The principles applied in cases of conversion do not really help as the bases of the two forms of action are very different, and it could be argued that although in conversion such damage might be too remote (see *McGregor on Damages* (13th ed.), para. 1023), this will not necessarily be the case in detinue. In the instant case the defendant was well aware from the day after the events occurred that he was, in fact, withholding (perhaps wrongfully) a valuable part of the plaintiff's

stock in trade, and that it was very likely that the result would be a considerable loss of recurring trading profits, and the learned judge accordingly assessed damages under this head. It does seem, in spite of the lack of authority, that such a sum falls within the second head of damages in detinue, and, although the facts are rather different, is in accordance with the view of the English Court of Appeal in *Strand Electric Co.* v. *Brisford Entertainments Ltd.* [1952] 2 Q.B. 246 (see in particular Somervell and Denning L.JJ. at 252, 253-254, respectively). As Denning L.J. pointed out in that case the action in detinue resembles an action for restitution rather than an action for tort, and certainly there is confusion in relation to the various available tort actions for wrongs to goods. In the present writer's opinion, however, even to allow a claim for loss of profits in circumstances such as arose in the present case is in accordance with the rules of remoteness of damage in tort (as laid down in the *Wagon Mound* cases).

M.A.V.

ARTHUR ALLAN THOMAS

I have read carefully through the series of articles in the *Auckland Star* on the multiple Thomas hearings by Mr Pat Booth and freely acknowledge that they have deeply disturbed me. They are described as an objective analysis but I think a better description would be crusading journalism of a very high standard. An objective analysis would call for a dispassionate examination of all available material, but Mr Booth does not set out to do this. He has clearly come to a firm conclusion himself and set out the material that led him to it.

By pointing to inconsistencies and loose ends which are not hard to find in any but the most straight-forward jury cases, he has raised certain doubts and in a truly objective analysis of this procedure itself, one must recall the purpose of a Court of law. It is not to attain mathematical certainty. Indeed, such a satisfactory situation is rarely attainable. Few people would doubt that the sun will rise tomorrow but it is impossible to be one hundred percent certain about it. When, as is normally the case, a Court of law is concerned to determine responsibility for acts done by humans at some time in the past, we must be satisfied with an even lesser degree of certainty, namely what is colloquially described as a "moral certainty" or, as a Judge always puts it to a jury in a criminal case, "that they must be satisfied beyond all reasonable doubt". Scots law specifically provides for a verdict of "not proven" but if a jury in New Zealand came to the conclusion that a case was not proven it would be their duty to acquit.

Their duty in turn must be seen and understood in the light of the trial proceedings itself. Mr Booth quotes certain passages from the evidence given at the two trials and to the Court of Appeal, some of which was not presented to the jury but was available to counsel for both parties and could have been drawn on by the defence in cross-examination had it wanted. In so far as it failed to do so, this was no doubt for what counsel for the defence determined to be good reason. Mr Booth also cites certain personal recollections which I presume were known to defence counsel but again not put in evidence by them. He is rather critical of this omission, likewise of the failure of the defence to follow certain lines of cross-examination and to tender certain other evidence.

All this derives from a searching and minute examination of the records of the one Magistrate's Court, one judicial, two Supreme Court and three Court of Appeal hearings, supplemented by personal observations of part of the last trial. Now the first thing to be said about this exercise is to paraphrase what has been said again and again by appellate Courts throughout

The Minister of Justice, the Hon. Dr Martyn Finlay Q.C., issued the accompanying statement on 5 September 1973, before it was discovered that the cartridge cases referred to had been disposed of by the Police.

As the Minister points out, any questions raised by the Retrial Committee are essentially legal questions. They are therefore to be dealt with in a properly constituted manner. He might well have added that the holding of public meetings to pass bizarre resolutions—such as that at Christchurch, when a second retrial before an "overseas jury" was called for—can only have the effect of injecting the issue with a political flavour, so to undermine public confidence in the Courts and their administration of justice.

the world, namely that it is easy when sitting quietly at a desk armed with a magnifying glass and a meticulous cross-index to pick holes and flaws in the written words of the evidence and summing up and demonstrate inconsistencies and contradictions. To do so, however, provides no substitute for what a jury actually experiences, sitting through the whole of a trial, seeing and hearing every witness and sensing its whole atmosphere. Moreover, in the particular circumstances of this case, Mr Booth's critical task was made easier by the fact that three years separated the two trials, with inevitable resulting variations, not only in the way witnesses gave their evidence but also to some extent what they said—including, it may be added, the accused himself. Mr Booth was also unhampered by the rules of evidence and able to draw on sundry observations that would have been legally inadmissible.

In both trials the defence was led by counsel of eminence, both noted for their persistence and tenacity. No doubt they considered carefully each step they took and equally importantly each step they refrained from taking; each objection they took as well as every remark by Crown counsel they allowed to pass unchallenged or uncriticised. No doubt also, looking back on events and considered in retrospect, there are certain things they might have done differently if they had the opportunity all over again but this is true of virtually every human activity. The fact is that each of them had the full opportunity the law offers to put the case for the defence as cogently and as fully as the facts warranted and as far as I am aware no impediment or even discouragement was put in their way of following any line of inquiry they chose to open. In particular I am informed that in the second trial a defence request to be supplied not only with the names of persons interviewed by the Police but not called by them (as is the usual practice) but also for access to certain statements made by them was granted.

At both trials what might be called affirmative defences were put forward (different ones in each case, incidentally) but in both it was also strongly urged that the Crown had not proved its case, leaving the issue in doubt to the benefit of which the accused was entitled, without requiring the jury even to consider the affirmative defence. Both juries, having heard all the evidence, both counsel's addresses and the Judge's summing up—an advantage that neither Mr Booth nor I have—declined to accept this; but it is plain that doubt still lingers on in many peoples' minds.

They want me to *do* something about it. But what can be done? There is talk of a "full investigation", but what is there to investigate, beyond what two teams of experienced and able criminal lawyers have already investigated as completely as they thought necessary? There is no certainty, it is said. Of course there is not. As I have already pointed out, complete certainty is an impossible objective and the law does its best to meet this practical problem by saying that where there is doubt that is just more than fanciful, the accused is entitled to the benefit of it.

There is a sound rule of law that there must be an end to litigation and I adhere to this even though I was one who publicly urged that the Thomas case be re-opened after the first unsuccessful appeal and that the Court of Appeal should examine the case for a new trial which, of course, it subsequently granted. If still further litigation goes ahead how could one in future deny a right of review to any person who continued to protest his innocence after conviction or complained that his defence should have been presented differently?

Nonetheless, despite long thought and deep searching of conscience, and remembering that I am sworn to uphold the due processes of the law, what practical courses are open to me? Can I, for instance, (and on the assumption that there is proper authority for it to agree) urge upon the Government:

(1) that it sets up yet another trial before a third jury? None of my many correspondents have urged this and I doubt whether it would be possible to find twelve men and women who could bring to such an event the open and unbiased minds that are expected of jurors;

(2) that it provide for an "investigation" such as I have already referred to? What would this yield but a third-hand scrutiny of familiar material and a further opinion upon the many opinions already expressed? As I have mentioned, Mr Booth has introduced material that would be inadmissible as evidence and has not been tested by cross-examination. There may well be—indeed probably is—much other inadmissible material that is suggestive of other conclusions than those drawn by Mr Booth. Could—and should—an "investigator" rely on this? And if he did would this not be a dangerous interference with trusted legal machinery?

(3) that it override the unanimous decision of twenty-four citizens selected at random who are more fully informed than any arm-chair

critic and substitute for their verdict of "guilty" one of "not guilty" by pardoning Thomas? I know of no case where this course has been followed just because a doubt has been raised and without fresh evidence sufficient to discredit the jury's verdict.

There remains one further possibility. Only in one article, his eighth, does Mr Booth challenge the Crown's factual evidence on a material point, when he asserts that two cartridge cases said by Crown witnesses to be "identical" or "indistinguishable" are in fact significantly and demonstrably different. Unlike differences of opinion, this factual assertion can be tested and proved to be right or wrong. This may well warrant further investigation and I would be prepared to recommend to Government that this be done by some independent agency such as perhaps one of the University Engineering Departments if Mr Booth or those in the possession of the necessary information are prepared to make it available. The outcome of such an examination may well make some final decision easier to make.

LAW CO-OP STAFF SUPERANNUATION FUND

The Law Practitioners Co-operative Society Ltd. advises that a trust deed and rules for the Legal Staff Superannuation Fund was executed on 23 March 1973 and has been approved by the Commissioner of Inland Revenue as an approved fund in terms of ss. 2, 85 and 128 of the Land and Income Tax Act 1954.

Whilst the trust deed and rules are naturally open to inspection the salient features are:

1. **Membership**—Membership of the fund is open to any employee of

(i) Trustee, i.e. The Law Practitioners Co-op Soc. Ltd.

(ii) Any member of the trustee, i.e. law firms who are members of the Law Practitioners Co-op Soc. Ltd.—all practitioners of a firm must be members of the trustee.

(iii) New Zealand Law Society.

(iv) Any District Law Society.

2. **Normal Retirement Date**—The date upon which an employee member permanently leaves employment or the date upon which the member being a male attains his 60th birthday or female attains her 55th birthday whichever date is the later.

3. **Contributions**—(i) Each employee admitted to the fund may contribute such amount as he may from time to time agree on with his employer.

(ii) Employers may contribute to the fund by way of subsidy to an employee's contribution an amount not less than $2\frac{1}{2}$ percent of the employee's annual salary.

(iii) The aggregate annual contributions under clauses (i) and (ii) above in respect of any member should not be less than 5 percent of annual salary.

(iv) Contributions may be payable by equal monthly instalments on the last day of each month.

4. **Entrance Fee**—The initial entrance fee payable by the employer is 10 percent of the combined annual contribution. Subsequent increases in the combined contribution rate shall likewise be subject to the 10 percent entrance fee in respect of the amount of such increase.

5. **Benefits at Normal Retirement Date**—During an employee's membership of the fund the combined contributions will be invested in accordance with the investment provisions in the deed. At normal retirement date the employee will be entitled to the following options.

(i) The employee's assessed interest used to purchase a life annuity with or without a minimum guaranteed term of payment.

(ii) The employee's assessed interest used to purchase a life annuity based on the member's and dependant's joint lives. In the event of the member's death there will be a continuing income to the surviving spouse.

(iii) The trust deed does allow for a retiring member to take in cash tax free 25 percent of his assessed interest or the capital value of an annuity of $104 per annum whichever is the greater. Annuities of $312 per annum or less may be commuted for cash.

6. **Death in Service Benefit**—In the event of an employee's death before normal retirement date, his estate will receive his assessed interest as at his date of death. There is no death benefit built into the scheme. However an employee can elect to effect death cover under the group life assurance scheme for an amount not less than $2,000.

7. **Re-employment**—The deed provides on re-employment with a new employer for an

employee to refund his original withdrawal benefit plus interest to the fund so as to maintain his original membership of the fund. This can only be accepted provided it occurs within 12 months of his having left the fund.

8. **Withdrawal**—(i) *Redundancy or Incapacity*—If an employee's service is terminated due to redundance or incapacity prior to his normal retirement date then he is entitled to the assessed interest standing to his credit as at the date of withdrawal. He is automatically entitled to the employer's portion. If this occurs within 10 years of a male member's 60th birthday or a female member's 55th birthday then the assessed interest attributable to the employer's contribution must be taken in pension form as provided in s. 5. Otherwise the benefit could be taken in cash.

(ii) *Marriage*—In the event of a female member leaving for the purpose of marriage she will be entitled to her assessed interest as at the date of withdrawal. This is in respect of her own contribution and her employer's contribution.

(iii) *Entry into Partnership*—In the event of an employee being admitted to partnership, then that member's assessed interest shall be transferred to the Law Practitioners Superannuation Fund.

(iv) *Vested Rights*—(a) In the event of an employee leaving employment within 2 years of joining the fund then he will only be entitled to a return of the credit in his contribution account.

(b) If an employee leaves employment after 2 years but less than 5 years then he will be entitled to 15 percent of the credit of the employer's contribution account plus the credit in his contribution account.

(c) Leaving employment after 5 years but less than 10 years—entitled to 30 percent of the credit of the employer's contribution account plus the credit in his contribution account.

(d) Leaving employment after 10 years but less than 20 years—entitled to 50 percent of the credit of the employer's contribution account plus the credit in his contribution account.

(e) Leaving employment after 20 years—entitled to 75 percent of the credit of the employer's contribution account plus the credit in his contribution account.

Any balance not granted to the withdrawing employee would be transferred to the reserve fund.

Once again if withdrawal takes place within 10 years of a male member's 60th birthday or a female member's 55th birthday any vested benefit attributable to the employer's position is subject to the provisions of s. 5.

The manager of the Law Co-operative, Mr J. M. Foster, recently issued the following statement concerning the co-operative's superannuation funds.

Whilst the whole future of private superannuation schemes are under review following Government's proposals to make superannuation compulsory, it is now obvious that existing schemes, provided they meet minimum Government criteria, will be permitted to continue. It also seems quite clear that ample opportunity will be afforded to amend schemes to comply with Government policy. Every week has seen a continual watering down of Government's first sweeping policy decision.

The Law Practitioners' Superannuation Fund and the Legal Staff Superannuation Fund, even now, appear to comply fairly closely with Government's modified thinking. Both schemes are portable within the profession and both are pension schemes. It should not prove too difficult to amend the trust deeds to give effect to any machinery requirements that may subsequently be necessary.

The one important fact yet to emerge is when the Government's scheme is to become operative, and when the compulsion to join becomes effective. One thing is certain however, the individual will have to belong to either the Government's scheme or to an existing private scheme. There can be no question of which fund will offer the better investment; rather how much longer to make the decision.

The Practitioners' Fund is primarily for the self employed and two years' growth has put the fund on a very sound basis. The new fund for employees, in view of Government proposals, should receive immediate support as it seems unreasonable to leave the employees' benefit to the very last minute.

For further information contact:
The Manager,
Law Practitioners Co-operative Society Ltd.,
P.O. Box 58,
Auckland. Phone 31-036.

On dit—*Nova* reports the following true-life exchange. Women's liberationist to local candidate for Council: "What are you doing to encourage women to participate in local politics?" Local candidate: "We are making the electoral forms simpler so that women can understand them."

"THE GAIR REPORT — ADVANCE OR RETREAT"

The second instalment of Mr D. J. White's commentary on the Wellington District Law Society's Seminar on the Accident Compensation Bill.

The second address of the first session was delivered by Mr J. D. Dalgety on "The Gair Report—an Advance or Retreat on the Woodhouse Report". Mr Dalgety said that there was a need to consider the implications of the Gair Committee's report in relation to the Woodhouse Report as a further preliminary to a consideration of the Bill. There were four reasons for this. First, the Bill did not adopt the Woodhouse Report in several significant respects. Secondly, the Bill was still the subject of debate in the House. It was a matter where the Opposition had joined issue with the Government on a fundamental issue. Thirdly, it was a Bill and the date of the seminar was chosen with deliberation.

Mr Dalgety said that the Law Society had made lengthy submissions on the merits of the Woodhouse Report and the Bill. Whilst most of its recommendations were accepted by the Gair Committee the Society was less successful with the Select Committee. Mr Dalgety hoped that some suggestions and recommendations for amendment and improvement to the Bill would come from the seminar. Fourthly, he was sceptical about the number who had read both reports.

Mr Dalgety considered the historical background to the Gair report. On 4 September 1962 the Minister of Justice appointed a committee to report on the desirability of introducing some form of absolute liability in road accident cases. The committee reported back on 2 July 1963 and the majority of the committee recommended no change to the present system of compensating motor accident victims. On 4 September 1966 a Royal Commission was appointed to report on the system of compensating employees for work accident. On 31 December 1967 the Commission reported recommending an all-embracing scheme which "would entitle that person to compensation both for permanent and physical disability and also for income losses on an income-related basis". In April 1969 the then Minister of Labour announced that a paper would be prepared "covering the form in which the scheme envisaged by the Royal Commission would operate, if adopted, and dealing with various alternatives which might be preferred, and especially the question of cost". This task was undertaken by a group of officials; their report was presented in October 1969. On 23 October 1969 the Government appointed a Select Committee to consider and report on the report of the Woodhouse Commission. The committee reported by 31 October 1970 and this committee's report has become known as "The Gair Report".

After naming the members of the Gair Committee, Mr Dalgety said that the Gair Committee adopted the main premise of the Woodhouse Report, namely that the present system of compensating accident victims was "a fragmented and capricious response to a social problem which cries out for co-ordinated and comprehensive treatment".

The Woodhouse Commission's objectives were spelt out as follows:

"278. *Objectives*

"(a) The overall purpose is to provide a unified and comprehensive scheme of accident prevention, rehabilitation, and compensation which will avoid the disadvantages of the present processes and will itself operate on a basis of consistent principle.

"(b) The scheme must meet the requirements of the five principles outlined in paragraph 55: community responsibility, comprehensive entitlement, complete rehabilitation, real compensation, and administrative efficiency.

"(c) It must meet the requirement of cost."

Subparagraph (c) required some additional comment. As cost clearly became one of the paramount issues which concerned the officials in preparing their Commentary, the Gair Committee and all those who took an intelligent interest in the pros and cons of the Woodhouse Commission's Report, Mr Dalgety detailed the Commission's views on cost in full as contained in their summary of the Report:

"9. *The Cost*

"It will be asked, we do not doubt, whether we have kept in mind the need to balance the ideal with the practical. Even if the country were entirely free from current economic pressures, the money argument

would weigh heavily upon an inquiry concerned, as this is, with systems of social insurance. The proopsals we make for unifying and widening the scope of present arrangements must, of course, pass the economic test. And although difficulty has arisen from a dearth of statistical information, our proposals do this. In fact it seems that in overall terms the rationalisation put forward avoids new large expenditures and yet permits at the same time greatly increased relief where it is needed most—for the losses which are greatest. That such a result is possible may seem surprising. The reason has been hidden in the past by its very simplicity. The great number of minor claims have absorbed the great part of the funds at the expense of those whose injuries and needs have been most pressing. The various calculations are contained in Appendix 9."

There were two phrases in this summary which were likely to arouse forbodings in the minds of officials and politicians when talking of the cost of the scheme, viz. "a dearth of statistical information" and "the reason has been hidden in the past by its very simplicity". In Mr Dalgety's view, lack of statistics and doubts about costs influenced the Gair Committee in retreating from the fundamental principle of the Woodhouse Report, yet did not deter it in significantly upgrading the level of real compensation.

There were three simple truths which must be borne in mind from the outset in judging whether the Gair Committee's Report was a retreat or advance on the Woodhouse Report:

1. The Report incorporated three major recommendations for change in the system of absolute liability recommended in the Woodhouse Report. In other areas it contained recommendations which were of importance if the new system was to be acceptable to the important "pressure groups".
2. It was a politician's report.
3. The committee members were unanimous in their recommendations.

Mr Dalgety pointed out that non-earners were excluded from the scheme. In the main, these comprised the non-working housewife, children and the retired, unless their injuries resulted from road accidents.

The Woodhouse Report advanced five guiding principles for a modern system of compensation for injured persons. The first and second principles could be conveniently coupled together. The two principles gave cover to non-earners as well as earners. They read:

"First, in the national interest, and as a matter of national obligation, the community must protect all citizens (including the self-employed) and the housewives who sustain them from the burden of sudden individual losses when their ability to contribute to the general welfare by their work has been interrupted by physical incapacity. Secondly, all injured persons should receive compensation from any community financed scheme on the same uniform method of assessment, regardless of the causes which gave rise to their injuries."

The detailed justification for the principle of comprehensive entitlement is detailed in para. 282 (b) and (c) of the Report (p. 109), which reads as follows:

"(b) There could not be unequal community treatment of identical losses simply because one man was injured at work and a second on the road. Nor could the system provide for the second man and ignore his injured wife or child. What is more, each one of these persons is the chance victim of a necessary or an acceptable social activity. Nor could a fund maintained by the whole community provide for the road injury victims and fail other groups in the community so helping to maintain that fund such as the housewife, or her husband injured in some domestic accident. And clearly the self-employed must be included. Once the essential principle of community responsibility is recognised in respect of any one of these groups it must be accepted for all.

"(c) The elderly and the young must be included on a basis which recognises their past or potential contribution to the productive effort of the nation; and the housewife because of her direct and continuing contribution to that effort."

No upper age limit was recommended as a restriction to the payment of compensation. A lower age limit of 18 was recommended as the starting point of the payment of compensation.

Mr Dalgety considered that the argument was a *non sequitur* in a society where there was nothing particularly equal about the treatment of individuals' accident losses under the present system and inequalities could be found at virtually any point one might care to choose in the fabric of our society. However, the desirability of the objective of consistent treatment would be accepted by all; on the other hand, it did not follow automatically that restrictions in the application of the principle nullified the good

to be obtained from a form of limited implimentation, provided the limits of the initial coverage were both extensive and logical and the levels of compensation were suitably generous. Many of those opposed to the Woodhouse Report simply said why limit the system to accidents. It was a nice, simple, easy argument. It was reassuring too, as to put it forward did not brand one with the badge of self-interest. What is more, the contention was true —losses from constitutional causes were no less real than those stemming from accidents. In logic there was no answer to this argument and this was recognised in the Woodhouse Report. The answer to this "simple argument" *is equally simple,* i.e. "if the basic aim is sound then the fact that all categories of misadventure cannot be provided for at once is not a ground for doing nothing".

Where cost is always an issue, practical considerations rather than principles must govern the extent to which reform would be implemented within the community. The thinking of the Gair Committee on this issue is to be found in para. 35 (p. 21) of the Report. It reads:

> "The one field covered by the Royal Commission's scheme but not included under our proposals is that of other accidents to non-earners apart from vehicle accidents. We felt doubtful as to the practicality of covering this field. The costs of compensation for the estimated number of accidents in this sphere are not particularly high. But we were influenced to some extent by the warnings of the Manager of the State Insurance Office and of the representatives of the insurance industry that costs would not be easy to control in this field. Medical witnesses also pointed to the difficulties of drawing the line between accidental injuries and sickness with elderly people. Thus, after considering the difficulty of raising finance for this field, the doubts about the control of costs, and the demarcation problems, we concluded that progress in this field should await the report of the Royal Commission on Social Security but it should not eventually be left unresolved."

Undoubtedly, the final recommendation of the Gair Committee was a significant retreat from the main principle in the Woodhouse Report. Was the retreat justified?

Mr Dalgety then examined the reasons advanced for excluding non-earners.

1. Cost, as such, was not said to be the significant factor. The extra cost was estimated to be $3.1 million. It was a significant sum of money, and yet, as in other areas the Committee was prepared to expend greater sums in compensation than recommended in the Woodhouse Report.

Cost was a more significant factor than was, perhaps, spelt out in the report—consciously or unconsciously, the Committee was greatly influenced by the warnings "that costs would not be easy to control", and "difficulties of drawing the line between accidental injuries and sickness with elderly people".

However, the worry about cost went deeper and was more broadly based than the references in the report. The committee was bombarded by the anti-Woodhouse lobby with submissions that the estimate of the cost of the scheme of $41.8 million was a gross underestimate. One had heard figures, some allegedly supported by actuaries, as high as $100 million plus. In fact, the Gair Committee found that the Woodhouse Commission's estimate of $41.8 million was remarkably accurate—its own estimate of cost (taken out three years later) was $45 million. However, the seeds of doubt as to the actual overall costs of the scheme were sown, and this general worry about costs was the single most important factor in the Committee's decision to restrict the principle of comprehensive entitlement.

2. There was a lack of helpful statistics on which one could base reliable estimates of costs. In the absence of any statistics on this issue no forthright assertion could be made as to the impact the inclusion of these accidents would have on any system of absolute liability, but it must be quite considerable. In 1963 there were 10,508 domestic accidents (4,248 from falls) and there were 312 fatal accidents (169 from falls; 149 of these individuals were 65 and over).

3. It was said there would be difficulties in drawing a line between accidental injuries and sickness with elderly people. This was true, but it was true in the case of the young as well as the old. It was a fundamental which showed itself in two ways; an issue of definition—what was an accident and what was sickness in the grey areas — and control — had the disability been brought about by an accident or constitutional causes? Whilst Mr Dalgety accepted that the problem was more difficult in the case of the elderly, he did not regard this reason as having much weight.

4. "Progress in this field should await the report of the Royal Commission on Social Security, but it should not eventually be left unresolved."

Presumably, the representatives of both parties must have hoped that the Commission would recommend some form of earnings-related compensation in the case of sickness. The Royal Commission on Social Security had reported. It did not recommend income-related benefits for sickness. Paragraph 98 of that Report (in part) reads as follows:

> "Providing social security benefit levels are raised to the extent we suggest in this report, the *institution of earnings-related sickness payments is not urgent.* That could be postponed until the accident compensation scheme is operating and has been tested, and until sufficient time has elapsed to enable better material to be gathered from employers on sickness, absences and other relevant matters. It should not be too difficult to set up machinery to gather sufficient information to enable a better estimate of cost than we have been able to make."

It went on to make the following specific recommendation at p. 184 of its report:

> "Favourable consideration be given by the Government to the future introduction of earnings-related 'compensation' for limited periods during incapacity caused by illness, to be administered separately from the social security system as an addition to the scheme for accident compensation proposed as a consequence of the 1967 Royal Commission on Compensation for Personal Injury, and that discussions with this end in view be held between the Government and organisations likely to be affected."

It is easy to be wise in retrospect on this issue. However, in retrospect nothing was achieved by leaving this issue to stand over, and in principle the Gair Committee should have excluded what the Royal Commission on Social Security may or may not do in the future, and reached a decision on the merits as they saw it in 1970.

The New Zealand Law Society took the view that the retreat was not justified, and in making its recommendations to the Select Committee on the Bill it urged strongly that non-earners be covered; it was the first of its five major objections to the present Bill. Was the retreat justified? The Society thought not. The Society considered that a decision should be taken then to extend the scheme provided by the Bill to cover non-earners, as the Woodhouse Commission intended. Mr Dalgety said that at present the Bill withheld the cover of the scheme from those who probably needed it most and left them to the "erratic and capricious" operation of the common law remedy. In doing so the Bill substituted a new set of ill-defined discriminations for those that existed theretofore. In truth, there were no discriminations at common law, and the principle on which the remedy depended was at least consistent: if you could prove fault on someone else's part you could recover: if not (apart from workers' compensation and a few instances of absolute liability, as in coalmines), nothing could be recovered. The difficulties simply arose from the fact that in many cases accidents arose without fault and in others without provable fault to persons to whom modern social ideas require that compensation should be paid. That was the evil that the Woodhouse Report aimed to remedy. This Bill remedied it in part, but because it did so in part only, it set up discriminations that were equally arbitrary and fortuitous. It would result in many cases in unequal treatment of victims of the same accident—some typical examples had been given and they could be endlessly multiplied—and this would give rise to great dissatisfaction when the public became fully aware of it from the operation of the scheme. At the same time this partial implementation of a reform widely agreed to be desirable was being purchased at the cost of greatly increasing the administrative difficulties compared with those involved in a universal scheme covering all accident victims, and an almost certain spate of litigation over the interpretation of the unnecessarily complicated provisions of the legislation. The Society recognised, however, that the question of extending the scheme to all non-earners was essentially one of social policy for the Government and Parliament to determine. It was desired to add, therefore, that, if this Committee felt unable to recommend this extension, then it should at least ensure that the Bill made it clear that it was Parliament's ultimate wish that the system of absolute liability should be a comprehensive one. We did not mean to suggest the inclusion of some recital which, however high-sounding, was likely to be ineffective; we suggested that if the extension was not to be made the Bill should contain a provision expressly requiring the Accident Compensation Commission to report to Parliament as to the practicability of such an extension by, say, 30 June 1973.

The Society was firmly of the opinion that the Bill should contain a provision under which the compensation payments were automatically increased (or decreased) to keep them in line with changes in the value of money. In para. 127 of its report the Woodhouse Commission

said that "the risks of inflation should be provided against by the automatic adjustment at two-yearly intervals of the regular periodic payments to accord with changes in the cost of living". It confirmed that view in para. 293 (c). This principle had now been recognised and given effect in relation to other monetary payments, notably government superannuation payments and government salaries, which were at present adjusted six-monthly.

The Society considered that it was equally important that these payments should be automatically kept in line with the value of money at reasonably short intervals, particularly when it is remembered that in many cases the periodical payment would replace the weekly workers' compensation payments at present made to injured workers. These had been the subject of periodic adjustments for inflation, but had at times lagged far behind the value of money.

The Gair Committee endorsed the view of the Woodhouse Commission and, in line with the view just expressed, suggested that the automatic adjustments should be made annually. The importance it attached to the matter can be seen from the relevant paragraphs of its report at p. 50, which we reproduce:

> "Adjustment of Compensation Rates No. 25. There should be automatic adjustment of periodic payments at frequent intervals—perhaps annually—in order to keep pace with changes in the cost of living. Preferably the adjustments should be made on movements in some index more closely linked to movements in wage levels than the consumers price index."

Mr Dalgety then discussed the opportunity given to the insurance companies of participating in the scheme. The Woodhouse Commission recommended that the insurance companies be excluded from the scheme for three major reasons:

1. A comprehensive and compulsory scheme of social insurance could not be handed over to private enterprise.

2. The assessment of benefits and administration generally should be free from dispute and contention.

3. The cost of administration would be reduced substantially if the work was handled by a single independent authority.

Without doubt there was some substance to each of the points made by the Commission, although opinions would differ as to the weight to be given each point or as to their collective weight. The Commission's arguments for excluding the insurance companies from the scheme were to be found at paras. 205-217 of the Woodhouse Report.

Mr Dalgety examined each of the reasons in turn:

1. If private enterprise could handle the administration of the Scheme, or a section of the administration, as efficiently (or more efficiently) than a Government Department or a Public Body, why should we be restricted in making a decision on the merits by the fact that other community services were run by Government Departments or Public Bodies. The rationalisation was not complex; historically, as the insurance industry had handled the business in the past let it carry on handling it provided it accepted there were new ground rules.

2. The administration should be free from dispute and contention.

It was certainly to be hoped that the golden thread of the Woodhouse Commission's Report was never lost sight of by the members of the Commission and their staff and agents:

> ". . . the system will always be operated to avoid under-compensation or the ungenerous treatment of any individual claimant."

It was necessary to recognise two things:

(a) Contention was an ingredient of the common law system and the Workers' Compensation legislation. It was that way, and would be that way, with or without insurance companies. Insurance companies were not the bogey-men of the system—whilst one could find examples of harsh treatment in some cases—one could also find examples of companies meeting claims on an *ex gratia* basis or paying more than was strictly required in a given case—by and large the companies dealt with claims realistically and, in recent years in the combined field of motor and employer's liability, prayed hard they would make a profit. The present system was its own bogey-man.

(b) There would still be a need to assess whether a claim fell within the Act, and if so, what was appropriate compensation at various stages of a claim. This work would need to be done in a businesslike way—if there was a doubt the claimant should get the benefit—claims would still be properly investigated and assessed by traditional methods.

3. The Commission relied heavily on the experience of the Ontario Board (only workers' accidents were covered by the Ontario Act) that only 10 percent of levies made on employers were required for all the costs of administration and this included a significant

amount for education in the prevention of accidents. This percentage of 10 percent had been constant over the years 1960-65. The Commission compared this result with the position in New Zealand in workers' accidents where almost $15 million was collected in premiums for the year ended 31st March 1967 of which $10.25 million was required to meet claims or provide for outstanding claims. On this basis $4.75 million was available for administration expenses and profit. On the basis of the Ontario experience only about $1.25 million (10 percent of the amount paid out in claims) would have been required for administration, leaving a saving of approximately $3.75 million. Whilst, no doubt, there could be a challenge to the figures resulting from such a method of comparison it was clear that significant savings should be made if the duplication of services inherent in the present system plus legal costs were replaced by a centralised system. At no stage in its Report did the Commission consider the desirability or practicality of retaining all or part of the insurance industry for the limited purposes of receiving claims, some involvement in the processing of claims and in the payment of compensation on the basis that they received some agreed fixed fee for these limited but important services.

Mr Dalgety then considered the practical implications for the 62 insurance companies who were handling the present business. In their commentary on the Report the officials reached the following conclusions at p. 41:

"81. *Effect on Insurance Companies*

"The implementation of the report would probably mean that insurance offices would lose premium income of something of the order of $30 million a year, a little less than half of their accident insurance business. This would be a loss of about one-sixth of their total premium income. Some small companies may go out of business and some staff readjustments may be required. A number of amalgamations might take place. The ability of some insurance companies to subscribe to Government loans might be affected, although this would seem to be compensated for by the need of the new Authority recommended by the Commission to invest substantial portions of its funds".

Not surprisingly, the insurance industry had lobbied hard against the implementation of the Scheme and the Commission's recommendation that it be entirely excluded from its administration. The insurance industry's estimate of the loss of premium income was considerably higher than one-sixth. One had heard of estimates as high as 30 percent. Further, they might well ask if this section of their business could be swept away so unceremoniously where might the State strike next? Quite understandably, once again, the Gair Committee found themselves debating principle *v.* practicalities.

After all there was no provision in the Woodhouse Report for income-related benefits for employees in the insurance industry who lost their jobs or for compensation for loss of premium income.

In their submissions to the Gair Committee the insurance industry suggested alternative schemes for work injuries and road accidents—their submissions were rejected. There was to be no retreat on the fundamentals of the proposed Scheme.

However, the Gair Committee concluded that the insurance companies should be given the opportunity to perform administrative functions in respect of the receipt of claims and the payment of compensation as agents of the Commission. The exact relationship of the insurance companies to the Commission and the nature of their duties were not spelt out in the Bill. It was understood that negotiations were still proceeding with the insurance companies as to their proposed involvement in the new system.

From a purist's point of view, perhaps the decision to utilise "the expertise and facilities within the insurance industry" should be regarded as a realistic advance. It is equally important to know what was recommended. The Commission recommended that an independent authority be set up by Government which would operate within the general responsibility of the Minister of Social Security and be attached to his Department for administrative purposes.

It should be remembered that the Social Security Department was seized with the responsibility of administering a system of benefits arising from sickness and death; in its submissions to the Commission it proposed a similar level of benefits for those injured by accidents. So that no-one was under any misapprehension as to what this Department proposed as compared with the present status quo Paragraph 254 of the Report was recorded without comment:

"254. In essence the proposal is that a weekly basic flat rate payment of $11.80 should be paid for total incapacity regardless of financial circumstances, and that there should be supplements in the form of eco-

nomic and dependants' allowances paid at the rate and generally subject to the same conditions applicable to present social security benefits. The income-related means test in regard to these supplements would permit an exemption of income amounting to $8 per week. For a single man the maximum economic supplement would be $11.75, and for a married man $10.75 together with an allowance for a wife dependent upon him amounting to a further $10.75. Certain cases of severe or multiple disablement would become entitled to an additional benefit amounting to $7."

Against the foregoing background the Social Security Department could hardly be regarded as the best protector of the rights of individuals injured in accidents; fundamentally, its philosophy and its experience would be to equate the economic consequences of injuries with the other benefits it administered.

The Labour Department would not have the personnel and offices throughout New Zealand, to administer the whole Scheme. The insurance industry had the facilities and experience—already made—if the Accident Compensation Commission were to provide similar offices and personnel there would be expensive and unnecessary duplication for relatively routine functions. The Social Security Department estimated that if it were to administer the compensation claims an additional 400 odd trained staff would be required as well as new facilities.

The Woodhouse Commission recommended that the Scheme "be brought to life and set upon its course by an independent authority whose whole responsibility it would be to ensure the successful application in every respect of that general philosophy".

This principle of independence was accepted by the Gair Committee. In para. 55 (p. 28) of its report it had this to say in the sphere of parliamentary responsibility:

"55. The authority should be independent of Government and Parliament, both as to day-to-day aspects of its administration and of policy matters which are clearly within its province. It should, however, report annually to Parliament on the general performance of its statutory functions and be required to obtain the approval of a Minister of the Crown—perhaps the Minister of Labour rather than the Minister of Social Security—for its budget. The Government should prescribe the premium charges on the recommendation of the Commissioners".

There can be no doubt that the success of the Scheme would largely depend on the levels of compensation provided, and these had to bear some reasonable relationship to the level of common law damages.

The fourth of the five guiding principles related to the level of benefits. It said:

"Fourth, real compensation demands for the whole period of incapacity the provision of income-related benefits for lost income and recognition of the plain fact that any permanent bodily impairment is a loss in itself regardless of its effect on earning capacity".

At p. 179 of the Report—para. 488 (4)—this was said:

"The object must be compensation for all injuries, irrespective of fault and regardless of cause. Accordingly the level of compensation must be entirely adequate and it must be assessed fairly as between groups and as between individuals within those groups".

The issue was simple. Did the Commission recommend benefits which met this criteria? Did it provide compensation "both for permanent physical disability and also for income losses on on income-related basis"?

The Commission recommended that during any period of incapacity which was less than four weeks the level of compensation be fixed at a flat rate of $25 a week (there was no provision for dependants' allowances) thereafter at 80 percent of the net loss of earnings with an upper limit of $120.

The Commission justified its approach in paras. 301 (b) and (c)—p. 120—where it said:

"(b) in the past the total amount absorbed for short-term cases has kept the level of compensation payable under the Workers' Compensation Act for all injured workers down to virtually the same level; and the duration of payments to only six years. This distribution of funds is inequitable.

"(c) no man facing some short-term incapacity would wish such a situation to continue: moreover for short periods he is able to carry some strain himself. Nor would it be possible to deal adequately with more serious cases of incapacity if the same approach were to be followed under the new scheme".

The Gair Committee rejected this arbitrary limitation on compensation during the first four weeks. The officials estimated the increased cost to the scheme at $1 million: see para. 126-127 of the Commentary.

Had the Gair Committee not rejected this

recommendation many people on low incomes would have received less compensation than they would have under the Workers' Compensation Act 1956.

Payments for permanent disability were to be based on a schedule. For "minor permanent disabilities" the compensation would be in the form of a lump sum—for "serious disabilities" compensation would be in the form of a periodic payment fixed in relation to table of disabilities rates at 10 percent or more.

The justification for this recommendation was to be found at para. 200 of the Report—p. 85:

> "There are great advantages in using some broad schedule method of assessing these cases in order to achieve a fair and reasonably predetermined level of compensation. It should be accepted that while the method will not enable absolute justice to be achieved, nevertheless the speed and certainty of assessment must far outweigh the expense and effort which would be associated with attempting to make the most meticulous adjustments in every case. In any event we think it unlikely that assessments of such delicacy are possible if broad uniformity is to be realised up and down the country. Indeed, if each case had to be separately evaluated without the advantage of clear and general guide lines then many of the advantages of a scheme of comprehensive insurance would disappear".

Whilst the Commission stated the schedule should "be used as a general guide as in Ontario rather than an inflexible measure" and "there must be some area for discretion to deal with the unusual case", it accepted that the schedule approach would result in anomalies. It was said the anomalies should be accepted "for the great advantage provided by the system as a whole and on the basis that the system would always be operated to avoid under-compensation or the ungenerous treatment of any individual claimant". With respect, the recommendation left much to be desired. As far as the individual was concerned there would be no necessary relationship between compensation paid and the permanent consequences of the injury.

The loss of a forefinger was included among "Minor Disabilities" for which an arbitrary sum of $1,200 was to be paid.

As a schedule dictated the amount of the payment there was no distinction between sedentary workers on the one hand and manual workers on the other. There was nothing to differentiate between the left-handed individuals and right handed individuals. For certain occupations, e.g. musicians, typists, the loss of a forefinger could mean a complete change in occupation resulting in substantial future economic loss.

The loss of an arm was rated by the Commission in its sample schedule at 70 percent. The surgeon and the barrister, the clerk and the shunter, provided they were earning comparable incomes would receive the same periodic payment for their permanent incapacity. Mr Dalgety said that in his view the inadequacy of the schedule approach spoke for itself. It was not a question of the unusual case —where there was a reasonably significant future economic loss all cases would be "unusual". He asked whether it would be safe to rely on the injunction "that the system will be operated to avoid under-compensation or the ungenerous treatment of any individual claimant" when such injunctions might never find expression in the final Act?

The Gair Committee rejected this approach. It took the view that there should be periodic payments for future economic loss which would be earnings-related, i.e. 80 percent of the estimated net loss. Once fixed these payments could not be amended in a downward direction.

In addition, it recommended that there should be lump sum payments for non economic losses, i.e. loss of physical integrity, loss of amenities and pain and suffering. The Law Society and the Railway Unions contended for an upper level of $20,000 for such lump sum payments—the Committee recommended a sum "of the order of $10,000 or so" —the Bill provided for a maximum of $12,500.

In dealing with these matters the Gair Committee said a p. 38 of its report:

> "81. It may be that approximate estimates of loss should sometimes be accepted in the interests of overall administrative efficiency. This was the reasoning that led the Royal Commission to use a "broad schedule approach" for partial disability. However, we think our approach is sounder than that in the report for it will be quite certain that the greater economic losses to, say, a fitter and turner who loses an arm as compared with a bank clerk who loses his non-writing arm, will be properly recognised. The Royal Commission's approach would certainly have made allowance for such differences by discretionary additions to the compensation available. But as this must involve some

estimate of actual loss, the initial reason advanced by the Royal Commission for the use of a schedule is undermined".

And again at p. 48 in dealing with lump sum payments for non economic losses it said:

"111. We think this head of compensation important but not so important that compensation should be available at the levels sometimes awarded in common law claims. In particular very little weight, if any, should be given to temporary pain and suffering".

It was contended that the Gair Committee's acceptance that there must be clear cut provision for both economic losses on the one hand and non economic losses on the other was a very considerable advance on the Commission's schedule approach.

On the question of lump sum payments for widows the Commission recommended $300 irrespective of the widow's circumstances.

The Gair Committee noted that the Railway Unions recommended $1,000 minimum with a maximum of $4,000 to meet differing circumstances.

The Bill provided for a minimum of $1,000 and a maximum of $2,500.

The increases were substantial, and accordingly, represented a significant advance on the Commission's recommendation.

Whilst, no doubt, there were other areas where it could be claimed that the Gair Report represented a retreat or advance on the Woodhouse Report, Mr Dalgety said that he believed that he had dealt with the areas which were most important in judging the acceptability of the new scheme from the point of view of the community it was intended to serve. The evaluation of the Gair Committee's report as either an advance or retreat on the Woodhouse Report allowed of no simple answer.

The Woodhouse Report was a document of world significance in the field of law reform for accident victims. Already its implications had been very clearly felt across the Tasman. It would be a source document for any endeavour in other countries to improve the lot of the injured in a consistent and humanitarian way.

The Gair Report, on the other hand, was primarily a document for New Zealanders.

It was a classic example of our parliamentary committee system at its best. It adopted the principles of the Woodhouse Report where it felt it should and could. On one major issue, i.e. comprehensive entitlement, it balked for reasons with which Mr Dalgety disagreed, but which he found understandable. On several major issues relating to the levels of compensation and the methods of assessment it came forward with recommendations which significantly improved the monetary content of the scheme for those it was intended to benefit. It represented the Committee's careful assessment of what was necessary, desirable and practical to make the Woodhouse Report an acceptable piece of legislation for New Zealanders who were required to move out of one system with which they were familiar into a new system which must be funded with reasonable certainty. The two documents should be read together—on balance, Mr Dalgety considered the Gair Report represented an advance on the Woodhouse Report because he did not believe the Report could have become law had the proposed level of benefits remained unchanged.

TAX IMPLICATIONS OF REAL PROPERTY SALES AFTER THE 1973 BUDGET LEGISLATION

A talk given to the Auckland Law Graduates Association on 22 August 1973
by A. P. Molloy

The legislation

One recent piece of legislation, and one proposed piece, each the result of a Budget promise made by the Hon. W. E. Rowling on 15 June 1973, are of intense practical interest. These are the Property Speculation Tax Act 1973 and the Land and Income Tax Amendment Bill 1973, s. 8.

As is known, by now, fairly widely, the former imposes a new tax of up to ninety percent on any "assessable profit" made on the disposition, after 15 June 1973 (s. 60), and within two years of acquisition, of any interest, other than as mortgage (s. 2 (1)), in land, or, in some circumstances, in company shares principally backed by land (s. 15). Once it has been caught for this tax, the profit, or what is left of it, is immune from income tax (s. 56).

The latter enactment potentially is applicable to any dispositions, made on or after 10 August 1973, to which the tax imposed by the former is inapplicable—for example, because more than two years came between acquisition and disposition. It makes the notorious Land and Income

Tax Act 1954, s. 88 (1) (c) inapplicable to real property transactions, and replaces it with an entirely new provision, s. 88AA, which is discussed in more detail shortly.

Exemptions common to both taxes

Before leaving it for the moment, however, one exemption which this new income tax provision shares with the property speculation tax must be mentioned. This is that land acquired and occupied "primarily and principally" as a domestic residence or as business premises, or acquired "primarily and principally" for the purpose of erecting such a residence or such premises, does not, in general, attract either tax(*a*). If, at the time the interest in the land was acquired, there was any purpose or intention of reselling, or otherwise disposing of it, the exemption is not available for the purposes of property speculation tax(*b*). It is not available for income tax purposes where there has been a "regular pattern" of past sales and purchases(*c*).

Land acquired compulsorily

Also common to both statutes, although in a broader sense this time, is an exemption where the property is acquired by the Crown or by a local authority.

The exemption applies for the purposes of property speculation tax, provided the land had not been acquired for the purpose, or with the intention, of disposing of it at a profit, because of a specific provision in the statute imposing that tax(*d*).

It applies for the purposes of income tax because s. 88AA applies only to a "sale or other disposition" of the interest in the land. It has been held that the expression "for the purpose of", in an analogous enactment, connoted a freedom of choice; and that it followed that the expression "sale or other disposition" bore a corresponding meaning. Accordingly a non-voluntary disposition to the Crown, or to a local authority, was not within the ambit of the provision(*e*). Since these expressions appear also in the first three limbs of s. 88AA, the principle remains applicable.

In order to obtain the benefit of this exemption, for the purposes of either tax, the landowner would be well advised to display no signs of willingness to sell at the price offered by the acquiring authority. If he does, he could lose either by virtue of Property Speculation Tax Act 1973, s. 21 (1) (d)(*f*), or for the purposes of income tax, by virtue of the decision in *Coburg Investment Company Proprietary Ltd.* v. *C. of T.*(*g*). In that case Windeyer J. held that it was "impossible to say whether the taxpayer really regretted that the land had been resumed"(*h*), and he found that the parties had reached agreement on the *quantum* of compensation. Accordingly, the fact that the land would have been taken anyway had not entered into the case, and the necessary element of willingness was present.

So much for the exemptions common to both types of tax.

Exemption from property speculation tax where land has been improved by disponor

An important one, which applies only for the purposes of property speculation tax(*i*), is the exemption that arises where a disponer is able to satisfy the Commissioner that he has effected improvements, between the date of acquisition and the date of disposition, the cost of which amounts to a specified percentage of the total of the costs of the land and of the improvements effected prior to the disposition of the land (Property Speculation Tax Act 1973, s. 20).

In calculating the cost of these improvements the taxpayer who is a natural person is entitled to include the value of his own labour (*ibid.*, s. 20 (1), (2) (c)), which the Commissioner is empowered to determine in whatever manner he considers fair and equitable (*ibid.*, s. 20 (3)

(*a*) Property Speculation Tax Act 1973, ss. 18 (1) (residence), 19 (1) (business premises); Land and Income Tax Act 1954, s. 88AA (2).

(*b*) Property Speculation Tax Act 1973, ss. 18 (2), 19 (2).

(*c*) Land and Income Tax Act 1954, s. 88AA (2).

(*d*) Property Speculation Tax Act 1973, s. 21.

(*e*) *Public Trustee* v. *C.I.R.* [1961] N.Z.L.R. 1034 (Hutchison J.). Noted (1961) 37 N.Z.L.J. 325 (G.W.H.). This whole question is discussed at length in *Molloy on the Law of Income Tax* Butterworths of New Zealand Ltd. (In course of publication) Chapter Five *Isolated Transactions and Schemes Involving Real Property* under *First three limbs applicable only to profits from a "sale or other disposition"* and the subsequent heading.

(*f*) Enacting that the exemption applies only where the disponer "had not taken any steps, by advertisement or otherwise, to dispose of the land, whether to the Crown or the local authority or to any other person".

(*g*) (1960) 104 C.L.R. 650; (1960) 8 A.I.T.R. 136 (Windeyer J.).

(*h*) Ibid., 662; 143 lines 22-23.

(*i*) In fact, in some circumstances, it could have the very opposite effect for income tax purposes. See Land and Income Tax Act 1954, s. 88AA (1) (c).

(a)). That cost also includes any reserve fund contribution paid by the disponer to a local authority pursuant to the Municipal Corporations Act 1954, s. 351c or the Counties Amendment Act 1961, s. 28 (s. 20 (3) (b)).

Professional building renovators

The most favoured person, so far as this particular exemption is concerned, is one who "is wholly or principally engaged in a business of renovating buildings, or in a business of erecting buildings, the activities of which include renovating buildings" (s. 20 (2) (b)). Where at least half of the initial cost of the land to him was in respect of improvements already there when he acquired it (s. 20 (2) (a)), any profit he makes on disposition will be exempt, provided he can satisfy the Commissioner that the cost of any further improvements, which he added while he owned the property, was at least twenty percent of the total of the original cost plus the costs of those subsequent improvements (s. 20 (2) (c)).

For example, an individual in the house renovation business acquires an improved property on which the house is worth at least as much as the unimproved value of the land on which it stands: say the property costs him $30,000, and the house is worth two thirds of that figure. He then strips the interior walls; thermally insulates them; relines them; rewires the house; instals new plumbing and a new roof; builds new ceilings; repaints inside and out; and wallpapers and carpets throughout: at a total cost of $8,000. If he then sells the property, within two years of having acquired it, no part of the proceeds will attract property speculation tax, because that $8,000 is 21.05 percent of the sum of itself and the $30,000 which the land and house originally cost.

If instead of making the particular improvements just mentioned, this person had jacked the house up, and added an additional storey, at the same $8,000 cost, the position would have been different. This is so because the twenty percent test applies only where the post-acquisition improvements are by way of *renovation,* and not where they are by way of *additions.*

Improvements other than renovations by professional renovators

Where improvements by a professional renovator are by way of addition; or where post-acquisition improvements of any sort, including renovations, are effected by any person other than a professional renovator: the test is stricter, and requires that the cost of post-acquisition improvements is at least forty percent of the sum of the cost of those improvements, plus the initial cost of the land.

For example, a person acquires an unimproved section for $10,000, and erects a house on it, on "spec", costing $30,000. If he then sells the property, within two years of having acquired it, no part of the proceeds will attract property speculation tax, because that $30,000 is seventy-five percent of the sum of itself and the $10,000 which the property cost to acquire in the first place.

The ambit of "improvements"

While the type of improvements that qualify for the twenty percent test is confined to renovation, there is no restriction on those which qualify for the forty percent test. Although the statute contains no definition, the expression, in principle, appears to be a broad one. For example, it was held recently that

> "an operation on land which has the effect of enhancing its value, in particular by adapting the land to a new or more efficient use, constitutes "making improvements . . . on land." Just as the clearing of land may be an improvement so also is the alteration of the surface contour of land by levelling or dredging. Consequently the dredging of land intended to form a canal or navigation channel may constitute an improvement of that land"(*j*).

However, although the term has considerable breadth, it is difficult to envisage, except, perhaps where the land was very cheap indeed, what form of improvement other than building could be sufficiently costly to satisfy the test.

Income tax effect of making improvements on land disposed of

So the making of improvements, sufficiently costly to satisfy the appropriate formula, can have the effect that any profit, on a disposition within two years of acquisition, is exempt from property speculation tax. However they will be an immediate cause of an income-tax headache for any taxpayer in, or connected with, the business of erecting buildings. The profit on disposition is caught for this tax, where, before or after the land was acquired by the taxpayer, he or an associated person (defined in Land and Income Tax Act 1954, s. 88AA (4), (5)), carried out major improvements on the pro-

(*j*) *Goldsworthy Mining Ltd.* v. *F.C.T.* (1973) 47 A.L.J.R. 175, 182F left-hand column/A right-hand column, per Mason J.

perty, and the taxpayer either had purchased the property for the purpose of that business of erecting buildings, or sold it within ten years of the date on which the improvements were completed (*ibid.*, s. 88AA (1) (c)).

This is the effect of the third limb of s. 88AA (1), and it is appropriate now to consider the other four.

Where purpose or intention of acquisition was disposal

The first is where any purpose or intention of the acquisition of the real property was to sell or otherwise dispose of it (s. 88AA (1) (a)).

Disposition by taxpayer in business of dealing

Secondly, where at the time the real property was acquired, the taxpayer, or any person "associated" with the taxpayer, "carried on" the business of dealing in real property, and either the property disposed of was acquired for the purpose of that business, or the disposition of the property, or any interest in it, occurred within ten years of the acquisition (s. 88AA (1) (b)).

The third limb has been mentioned already.

Where property acquired as business premises or dwelling house is outside the first three limbs

Any profit, otherwise declared to be assessable income as falling within one of these first three limbs, is immune if it is derived from the disposition of

> "(a) Any property, being premises acquired and occupied, or erected and occupied, as the case may be, by the taxpayer primarily and principally as premises from which substantial business was carried on by the taxpayer, together with any land reserved for the use of that business with those premises, being an area of land not exceeding such area as, in the opinion of the Commissioner, is required for the reasonable occupation of those premises and the carrying on of that business; or
>
> "(b) Any property being a dwellinghouse acquired and occupied, or erected and occupied, as the case may be, by the taxpayer primarily and principally as a residence for himself and any member of his family living with him, together with any land reserved for the occupation and enjoyment of the taxpayer with that dwellinghouse, being an area of land not exceeding 4000 square metres or such larger area as, in the opinion of the Commissioner is required for the reasonable occupation and enjoyment of that dwellinghouse—
>
> unless, in either case, the taxpayer has engaged in the acquisition or erection of such business premises or dwellinghouses, as the case may be, and the subsequent sale or disposition thereof, to the extent that, in the opinion of the Commissioner, a regular pattern of such transactions has emerged and, in any case where the Commissioner is of that opinion, any profits or gains arising from any such transaction or transactions shall be deemed to be profits or gains"

assessable as falling within one of the three situations discussed earlier (s. 88AA (2)).

Property developed or subdivided and disposed of, within ten years of acquisition, by the taxpayer

The fourth situation to which s. 88AA can apply is where the real property—or any interest in it—having been disposed of within ten years of the date of its acquisition (s. 88AA (1) (d) (ii)), it had been the subject of "An undertaking or scheme involving the development or division into lots of that real property for residential, commercial, or industrial use or uses." It does not matter by whom, or on whose behalf, such development or division was carried out. This part of the paragraph is applicable whether the relevant person was the taxpayer, or was a prior owner. If it was the latter, however, and the taxpayer had done no such work himself, or had no such work done on his behalf, the fourth limb cannot apply—for lack of satisfaction of the further condition, enacted in the paragraph, that the Commissioner must be "satisfied that development or division work, not being work of a minor nature, has been carried out by or on behalf of the taxpayer, on or in relation to that real property . . ." s. 88AA (1) (d) (i)).

Profits derived on disposition, or division of property not within the first four limbs

Finally, s. 88AA is applicable on any occasion, outside of the four situations discussed earlier, *to the extent that* the profits on disposition have been "derived from the carrying out of any undertaking or scheme involving the development or division into lots of that real property for residential, commercial, or industrial use or uses, and the Commissioner is satisfied that development or division work, not being work of a minor nature, has been carried out by or on behalf of the taxpayer on or in relation to that real property" (s. 88AA (1) (e)).

In order to make an assessment in this fifth situation, the Commissioner is empowered to *ascertain* the value of the property, and the date of the commencement of the undertaking or scheme, in whatever manner he thinks fit (s. 88AA (3)). The italicised word is important. The Commissioner is not empowered to *guess* a value, or fix one arbitrarily or unreasonably.

Concluding remark

This discussion has been very abbreviated, and more complete treatments, both of the property speculation tax, and of the new income tax provisions, no doubt will be available soon(*k*). Finally, I have referred to the proposed amendments to the Land and Income Tax Act 1954 as though they had been enacted. In fact, the Bill has only just been introduced, and has yet to have a second reading(*l*). Accordingly, the final form of the amendments may not be exactly as the matter has been put for the purposes of this discussion.

(*k*) As to the property speculation tax, see Anthony P. Molloy, *Guide to Property Speculation Tax* (1973) Butterworths of New Zealand Ltd. As to income tax, see Anthony P. Molloy, *Molloy on the Law of Income Tax* due, from the same publisher early in 1974 (about 600 pages).

(*l*) Since Mr Molloy's article was submitted, the Bill has had its second reading.

REMARKS BY SIR RICHARD WILD, CHIEF JUSTICE ON CALLING OF DR A. M. FINLAY

"The rank and title of Queen's Counsel which you assume today is an honourable one and an ancient one—a fact that is graphically reflected in the quaint but still apposite language of the declaration you have just made. Like other honours, it is conferred in the name of the Queen by the Governor-General on the advice of the Executive Council. But, unlike other honours, it is reserved for lawyers, and in this country for those only who have risen to the foremost rank among advocates in the Courts. That is why the grant of the patent requires the concurrence of the Chief Justice whose practice it is to consult the other Judges, so as to ensure that it is not lightly granted, and that the high status of Queen's Counsel, which the legal profession regards with proper jealousy, is maintained.

"Not every Attorney-General in New Zealand has become a Queen's Counsel but in your case, if I may say so, the volume and content of your work as a barrister in private practice, added to your attainment to the office of Attorney-General, qualifies you for this distinction. The Judges have therefore been happy to endorse your appointment and on their behalf I congratulate you warmly.

"The first Queen's Counsel was Sir Francis Bacon who was appointed to that rank over 400 years ago by the first Queen Elizabeth. History records that it was regarded as a flagrant act of nepotism by the Queen. There was a great fuss, and for a long time afterwards any Member of Parliament who became a Queen's Counsel was required to give up his seat. I am happy to say, Mr Attorney, that the Judges do not propose to exact that forfeiture from you. Certainly in the Middle Ages the patent of Queen's Counsel was the mark of Royal favour in recognition of service to the Sovereign personally. No doubt that is why the emphasis in the declaration that you have just made is on service to the Queen, whose name is mentioned as many as six times in that short form of words.

"But today the Queen stands for the whole community, and service to the Queen is service to the community, just as service to the community is service to the Queen. The causes and issues that you will have to undertake as her counsel are different from earlier times but that element and that duty of service remains the same.

"It is strange to reflect that the first counselling you are to do for the present Queen Elizabeth is, to use the words of your declaration, to "sue her process" and to "minister her matters" in a Court of Justice of a kind which was beyond any possibility of conception in the days of the first Elizabeth, and that you will be seeking an injunction to restrain deeds which must have exceeded the highest imagination of even as wise and far-seeing a man as the great Francis Bacon. In undertaking your brief to the International Court the Judges of this Court, and I believe our whole community, are confident that you will suffer no 'tracting or tarrying' and that you will be 'attendant to the Queen's matters' to the full extent of your keenest 'cunning'. In that task we wish you well."

SALARIED PARTNERS

The opening words of the judgment of Megarry J. in *Stekel* v. *Ellice*(*a*) are as follows: "This is an unusual dispute between two chartered accountants which raises questions on the nature of what are usually called 'salaried partnerships', a subject on which there is little direct authority"(*b*). *Lindley on the Law of Partnership* has little of a conclusive nature to say on this matter(*c*) and it therefore seems worth while to analyse this decision.

The facts were as follows: the parties were chartered accountants, the defendant having formerly been in partnership under an oral agreement for life with a man called Jennison. This man became ill and, when about to come back to work, died suddenly. The result of this, and of the departure of some members of the staff, was that the firm's work, especially the costing and billing of the work done, fell into arrears and the defendant was unable to keep abreast of the work or make up the arrears. He therefore answered an advertisement inserted in a professional journal by the plaintiff, a much younger man who was anxious to cease being a mere employee in a firm of accountants. The parties met in September 1967 and the defendant explained his position to the plaintiff, who had with him his father, an experienced man of business who gave the plaintiff advice from time to time when he sought it. It was then agreed that the defendant should employ the plaintiff for a probationary period of about three months at an annual salary of £2,000, an increase of about one-third over his existing salary. The employment was to be with a view to partnership. Pursuant to this arrangement, the plaintiff began to work for the defendant late in October 1967.

About January 1968 the plaintiff, being naturally anxious to progress to the contemplated partnership, had a discussion with the defendant; although things had gone well between them and the plaintiff had made inroads into the arrears, the defendant considered that there was a difficulty about the money which was due to Mr Jennison's executors. Eventually this was quantified at about £5,500 but the sum could not, at that stage, be ascertained until the books were written up. The defendant therefore suggested that the partnership question be left over for about another six months, when the sum due to the executors should be clear and their agreement could be made on the footing of an ascertained state of affairs. It was clear that the position as to the executors, together with the defendant's expectation that the plaintiff would put £1,500-£2,000 capital into the business on becoming a partner, had been put to the plaintiff at their first discussion. In the late summer of 1968, the plaintiff again raised the question of his partnership, saying he had potential clients for the firm but that these clients wanted him as a partner and not just as a mere employee.

As the figures for the executors had still not been finally agreed, a further meeting took place between the parties and the plaintiff's father. He suggested a salaried partnership for his son as a kind of *modus vivendi*. This was accepted, 5 April 1969 being ultimately agreed on as the date on which it should terminate. A written agreement, dated 1 October 1968, was drafted, both parties having had legal advice. It provided *inter alia* for the above-mentioned termination date and that the parties would enter into a deed of agreemnt on or before that date, whereby the plaintiff would become a full partner; that the plaintiff should be paid a salary of £2,000 a year and that the capital was to be provided by, and belong solely to, the defendant

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(*a*) [1973] 1 All E.R. 465.

(*b*) At p. 467.

(*c*) 13th ed., 1971. See especially at pp. 13-14 where it is suggested that, in the case of *Watson* v. *Haggitt* [1928] A.C. 127 (P.C.), Haggitt and Watson were partners during the two years when the former was receiving a salary and the latter was drawing all the net profits of the business. It is also suggested that the junior partner in *Marsh* v. *Stacey* (1963) 107 Sol. Jo. 512 (C.A.), who was to receive a fixed salary of £1,200 per annum, as a first charge on the profits, plus a third of the profits of one branch of the firm would undoubtedly have been liable as a partner. The latter case was considered at pp. 472-473 by Megarry J., but the former was not.

See also Lindley, *op. cit., supra,* at p. 17, where *Burnell* v. *Hunt* (1841) 5 Jur. 650 (Q.B.) is discussed; this case was briefly referred to (at p. 472) by Megarry J., and at p. 18, where *Re Young, Ex parte Jones* [1896] 2 Q.B. 484, is discussed; this, too, was briefly referred to by Megarry J. at p. 472. See also at p. 26, referring to *Ellis* v. *Joseph Ellis & Co.* [1905] 1 K.B. 324 (C.A.), also considered by Megarry J.: see at pp. 472-473.

As to the distinction between profit-sharing servants and salaried partners, see Lindley, *op. cit., supra,* p. 79, and the cases there cited, and *Walker* v. *Hirsch* (1884) 27 Ch. D. 460 (C.A.), referred to by Megarry J. at p. 472.

with an exception as to the furniture of the plaintiff and that all profits should belong to the defendant and that he should bear all losses. Provision was also made for either partner to determine the partnership by notice on breach of certain terms of the agreement. On the expiration of the partnership or determination under the last-mentioned provision, the defendant was to be entitled to all capital except the plaintiff's furniture and to all clients save those introduced by the plaintiff. If either party died the other was to be entitled, without payment, to all the deceased's clients and, if the defendant died, the plaintiff was to have the practice—subject, however, to paying the defendant's executors by instalments the amount of the capital that the defendant had in the firm. After signature of this agreement, the parties carried on as before, except that the plaintiff was now being held out as a partner, e.g., by his name appearing as such on the notepaper of the firm. He also acted as a partner within the firm and he received, with the defendant's assent, his salary without deduction of tax.

April 5 1969 came and went without the contemplated deed or agreement being entered into. Indeed no deed or agreement was ever entered into, so that, in the events which happened, no step was ever taken towards the full partnership agreement. At any rate, after various vicissitudes, the middle of 1970 saw a deterioration in the parties' relations and in August 1970 there were discussions, in the plaintiff's father's presence, on the footing that the partnership should cease. The defendant was to pay the plaintiff £2,000, but, if a valuation of the firm was less than £10,000, the £2,000 was to be reducible *pro rata;* the plaintiff was to take a holiday and was not to return to the firm; he was, however, to take with him the clients he had introduced. In addition the partnership was to be deemed to have ceased after 5 April 1969 and thereafter the plaintiff was to receive a fifth of the profits and bear a fifth of the losses. The defendant alleged, and the plaintiff denied, that they had agreed that the plaintiff should repay the salary he had received since that date. In the end, apparently, the parties never finally agreed on these matters and the plaintiff left, taking his clients with him. He then commenced an action alleging that a partnership at will had existed between the parties since 6 April 1969 and that, as no terms relating to the partners' interests or duties had been agreed, s. 24 of the Partnership Act 1890 (U.K.) applied(*d*). He also claimed an order that the affairs of the partnership be wound up and all necessary accounts and inquiries be taken and made.

One question which had to be considered was whether, aside from the relationship established by the 1968 agreement, the plaintiff had shown that there ever was any partnership between the parties. Megarry J. held that the plaintiff could point to nothing which could be said to have amounted to such an agreement, adding that: "In any case, in the circumstances of the case the probabilities are heavily against the defendant having knowingly created a partnership at will in place of the partnership for life that he had had with Mr Jennison, particularly a partnership at will under which the plaintiff could at any time dissolve the partnership and claim a partner's share of the partnership property"(*e*). His Lordship then proceeded to ask whether there was a partnership established by conduct, especially after 5 April 1969. He found that there was not, there being nothing of any significance in the evidence to show that at, or after, that date there was any change in the conduct of affairs or in the relationship between the parties as compared with the previous state of affairs(*f*). "If what happened," continued Megarry J., "after 5 April 1969 is the same as what happened before, at a time when there plainly was a salaried partnership, then there are manifest difficulties in saying that what happened after that date shows that a new and different relationship had been entered into. Quite apart from statute, a continuance of a state of affairs or relationship after the date fixed for its expiration points more towards a tacit continuance of the same state of affairs or relationship than towards the establishment of a new and significantly different state of affairs or relationship"(*g*). The learned Judge also pointed to the clause in the 1968 agreement stating that the position should last to 5 April 1969 and that the parties would enter into a deed or agree-

(*d*) The section corresponds with s. 27 of the New Zealand Act of 1908, which is discussed in Webb & Webb, *Principles of the Law of Partnership* (1972) at pp. 126-134.

(*e*) [1973] 1 All E.R. at p. 470.

(*f*) [1973] 1 All E.R. at p. 470; it is also pointed out that, had the plaintiff's salary been paid subject to deduction of tax before 5 April 1969 and without deduction afterwards, it might well have been at least a straw pointing to the establishment of a full partnership, but this change in the mode of payment had already been effected when the first payment of the plaintiff's salary was made after 1 October 1968: see at pp. 470-471.

(*g*) At p. 471.

ment on or before then whereby the plaintiff should become a full partner. "As a matter of construction," he stated, "this provision plainly provides for the parties to enter into some new transaction, and for that to be a transaction 'whereby' the plaintiff becomes something different from what the 1968 agreement made him; instead of being a salaried partner, he is to become a full partner"(*h*). While he was prepared to accept that an agreement to enter into a partnership on certain terms, or terms left to be found in the Act, might constitute a partnership forthwith or from any agreed date—even though the agreement contemplates or provides some formal agreement which is never executed —this proposition did not apply to the present case(*i*). It could not apply because on 5 April 1969 there was some pre-existing relationship between the parties under the 1968 agreement; the case was not one of parties who were then linked by no agreement other than an agreement for a partnership to commence on that date. Thus, when 5 April came and no agreement for a full partnership had been entered into, it was equally open to the parties to agree either for the existing relationship to be carried on—in other words, that the plaintiff should continue to be a salaried partner—or for the plaintiff to become a full partner, notwithstanding the parties "failure" to enter into the deed or agreement by that date in accordance with the 1968 agreement. "The question was," concluded his Lordship, "what they did in place of what they had agreed to do; and the answer seems to me to be that they continued just as before"(*j*). Hence no new partnership had arisen incorporating the terms of s. 24 of the United Kingdom Act.

With the foregoing in mind, Megarry J. considered s. 27 of the Partnership Act 1890 (U.K.). This section corresponds with s. 30 of the New Zealand Act of 1908 and reads as follows:

> "(1) Where a partnership entered into for a fixed term is continued after the term has expired, and without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, so far as is consistent with the incidents of a partnership at will.
>
> "(2) A continuance of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is presumed to be a continuance of the partnership"(*k*).

It was, as will be appreciated, an important question which arose for decision—did the 1968 agreement for a salaried partnership bring into being a partnership for the purposes of s. 27 (1), i.e., one which would continue until August 1970 on the existing terms without any new agreement? This naturally required a consideration of the nature of a salaried partner. It is of value to consider the learned Judge's definition: "The term 'salaried partner' is not a term of art, and to some extent it may be said to be a contradiction in terms. However, it is a convenient expression which is widely used to denote a person who is held out to the world as being a partner, with his name appearing as partner on the notepaper of the firm, and so on. At the same time, he receives a salary as remuneration, rather than a share of the profits, though he may, in addition to his salary, receive some bonus or other sum of money dependent on the profits. *Quoad* the outside world it often

(*h*) *Ibid.*

(*i*) *Ibid.*

(*j*) *Ibid.*

(*k*) For a fuller discussion of this section, see Webb & Webb, *op. cit., supra,* at pp. 50-51, 90-92.

(*l*) [1973] 1 All E.R. at p. 472, going on to point out that Lindley, *op. cit., supra,* at pp. 13-14, seemed to lean towards saying that a salaried partner was not a true partner, for although the division of profits was not a concept written into the statutory definition of partnership, the provisions of s. 39 of the 1890 Act (corresponding with s. 42 of the New Zealand Act) relating to dissolution imported by implication some requirement of this sort.

Pollock, *The Law of Partnership* (15th ed., 1952), at p. 11, suggests that a salaried partner "is a true partner notwithstanding that he is paid a fixed salary irrespective of profits and that as between himself and his co-partner he is not liable for the partnership debts. The question will rarely be of importance, since he is clearly held out as a partner and will be liable accordingly . . . but unless a true partner he would not be liable to a creditor who was aware of his position when the debt was contracted, so that the question is not purely academic". As Megarry J. points out, however, at p. 472, this passage assumes the only questions of importance in this context are those between the firm and the outside world, whereas, as the case under review shows, there can be internal questions of importance between the partners.

(*m*) *Ex parte Watson* (1815) 19 Ves. 459; *Walker* v. *Hirsch* (1884) 27 Ch. D. 460 (C.A.); *Re Hill* [1934] Ch. 623 (C.A.); *Burnell* v. *Hunt* (1841) 5 Jur. 650 (Q.B.); *Price* v. *Groom* (1848) 2 Exch. 542; *Re Young, Ex parte Jones* [1896] 1 Q.B. 484; *Marsh* v. *Stacey* (1963) 107 Sol. Jo. 512 (C.A.) (which drew forth the comment, at p. 473, that "perhaps 'salaried partner' is not really an apt term for someone who is entitled not to a fixed salary but to the profits (if any) up to a fixed limit"); *Ellis* v. *Joseph Ellis & Co.* [1905] 1 K.B. 324 (C.A.).

will matter little whether a man is a full partner or a salaried partner; for a salaried partner is held out as being a partner, and the partners will be liable for his acts accordingly. But within the partnership it may be important to know whether a salaried partner is truly to be classified as a mere employee or as a partner"(*l*).

Megarry J. considered a wealth of authority(*m*) and concluded that, as he could deduce no real rule from the cases he must look at the matter on principle. "It seems to me impossible to say," he observed, "that as a matter of law a salaried partner is or is not necessarily a partner in the true sense. He may or may not be a partner, depending on the facts. What must be done, I think, is to look at the substance of the relationship between the parties; and there is ample authority for saying that the question whether or not there is a partnership depends on what the true relationship is and not on any mere label attached to that relationship. A relationship that is plainly not a partnership is no more made into a partnership by calling it one than a relationship which is plainly a partnership is prevented from being one by a clause negativing partnership. . . .

"If then, there is a plain contract for master and servant, and the only qualification of that relationship is that the servant is being held out as being a partner, the name 'salaried partner' seems perfectly apt for him; and yet he will be no partner in relation to the members of the firm. At the other extreme, there may be a full partnership deed under which all the partners save one take a share of the profits, with that one being paid a fixed salary not dependent on profits. Again, 'salaried partner' seems to me an apt description of that one: yet I do not see why he should not be a true partner, at all events if he is entitled to share in the profits on a winding up, thereby satisfying the point made by Lindley(*n*) on s. 39. However, I do not think it could be said it would be impossible to exclude or vary s. 39 by the terms of the partnership agreement, or even by subsequent variation (see s. 19(*o*)), and so I think that there could well be cases in which a salaried partner will be a true partner even though he would not benefit from s. 39. It may be that most salaried partners are persons whose only title to partnership is that they are held out as being partners; but even if 'salaried partners' who are true partners, though at a salary, are in a minority, that does not mean that they are non-existent"(*p*).

His Lordship then thoroughly scrutinised the 1968 agreement(*q*) and expressed the view that, if it were merely a contract for employment, it was one of the most remarkable employment contracts he had seen. While certainly the provisions for a salary and the ownership of capital (the defendant was entitled to it all, save the plaintiff's furniture, it will be recalled) were not the usual provisions to be found in a partnership agreement, neither they nor the others deprived the agreement of its nature as one for partnership. In particular they were carrying on a business in common with a view of profit and the parties' actual conduct since 1 October 1968 accorded with the concept of partnership as recorded in the 1968 agreement(*r*).

His Lordship therefore held that there was a partnership entered into for a fixed term for the purposes of s. 27, and that it had been continued, without any express new agreement, after 5 April 1969. That partnership had, furthermore, been determined by mutual agreement in August 1970(*s*).

An interesting subsidiary point also arose: did it follow from the fact that the relationship was a partnership for the purposes of s. 27 of the Act of 1890 that the Court was now obliged to make an order to wind up at the plaintiff's suit? It will be recalled that, under the 1968 agreement, the plaintiff had no interest in the firm's capital or in the clients other than those he took with him. Moreover also, though goodwill had not been expressly mentioned, the intention of the agreement was to exclude the plaintiff from any proprietary interest in the partnership. Megarry J. considered that the plaintiff had not shown any grounds on which a winding-up order should be made and that there was no real practical utility in making one, adding that it "would not surprise me if the majority of salaried partners had no real claims to an order for the winding-up of a partnership"(*t*).

It is undoubtedly very satisfactory to have had these moot points so well clarified.

P. R. H. WEBB.

(*n*) *Op. cit., supra,* pp. 12 and 14 and adverted to in n. (*l*), *supra.*

(*o*) Corresponding with s. 2 of the Act of 1908.

(*p*) [1973] 1 All E.R. at p. 473.

(*q*) They are set out in considerable detail at p. 474.

(*r*) [1973] 1 All E.R. at p. 474.

(*s*) *Ibid.* When, that is, the plaintiff, with the defendant's consent, left with all the papers relating to his clients.

(*t*) *Ibid.* Since both parties were in agreement that the relationship between them, whatever it was, had ended in August 1970, there was little practical point in the Court's declaring that the partnership was then dissolved. A declaration was thus refused.

CORRESPONDENCE

Land Transfer System

Sir,

At [1973] N.Z.L.J. 193 appeared an article by Mr E. K. Phillips entitled "Land Transfer System in Need of Overhaul". There are statements and conclusions in the article upon which I would like to comment.

Let me say at the outset that I agree wholeheartedly with Mr Phillips' central comment that the system needs an overhaul. Perhaps this need has become more obvious of late but I could not accept that it is a phenomenon of this year or even last. Up until comparatively recently, mainly for reasons of tradition and history, the day-to-day administration of the system and the development and implementation of new procedures, whether these be statutory (e.g. easement certificates) or substantially administrative (e.g. loose leaf register) have been left with successive Registrars-General of Land. I am rather surprised then at the inference in the article that "the Department" has been the mire in which the cause of progress has perished.

I think Mr Phillips may have stated the real situation in his opening comment when he refers to what has been written over the years in various legal textbooks regarding the system and its operation. No doubt we are all wont to do this, but could it be that those who have had the responsibility have been too involved with the legal ramifications to spend time or thought in the development or initiation of a new or original approach that could cut across the learnings of a lifetime? It is in relation to this that I take issue with Mr Phillips when he asserts that nobody other than the legal profession or land transfer officers are competent to examine the existing systems and procedures. I agree that any study must involve people who do have experience in a practical way. Nevertheless, in an investigation such as is needed into the land transfer system, the skills and experience in the broader fields of management and organisation together with expertise in the technical areas of E.D.P. and microfilm are equally essential.

Contrary to the impression given in the article the Department has appreciated the need for an examination of the system and two years ago a study group was set up to embark upon such an exercise. In November 1972 the team made a preliminary report which contained 23 recommendations. A number of these have been implemented and progress is being made with others.

In view of the opening comment made by Mr Phillips let me say that the first and probably central recommendation in this report is, "That there be a reappraisal of the purpose of the land registration system and consideration of its social and economic effects". Linked to this are two other recommendations relating to investigation into the problem of indices, land title documentation, search and retrieval and the use of E.D.P., microfilm and other automated systems. This of course is a major investigation and will take time. Anyone who has had experience in the development of a computer system, particularly one that is directed at a new and unexplored field, will appreciate that it is wise to make haste slowly. Indeed, this is sound policy in respect of any major procedural changes. We have, as an example in the land transfer area, the new loose-leaf title system. I do not reject the system—it has many advantages. It does however seem to me that its originators failed to appreciate the full extent of its effect on the searching system and of the administrative demands it would create in maintaining an effective register.

There are several other matters upon which Mr Phillips has commented that have already been recommended by the study team. One related to the creation of easements is substantially along the lines of Mr Phillips' proposal. The approval of forms and their standardisation is another matter which is the subject of a recommendation. Other proposals include the abolition of duplicate certificates of title and the retention of a diagram on titles. One recommendation that has already been implemented receives favourable comment from Mr Phillips in his article. I am aware that this scheme has not been without its critics but I am sure that it was necessary and in the longer term will provide a base for an automated system.

Mr Phillips has also advanced argument for a separate Department either to administer the land transfer system alone or as a registration department to undertake in addition such things as chattels registration and births, deaths and marriages. The Australian offices have been lauded as an example of the benefits of such a Department. I cannot profess to any personal knowledge of the operation of the Australian offices but from information available to me I understand that they too face considerable difficulties. In fact, I know that at this very time the Titles Office in Brisbane is heavily in arrears and has itself just initiated an organisation and methods investigation.

There may well be strength in an argument that consideration should be given to a Departmental rearrangement involving Land Transfer Offices. However in present day conditions I suggest that in any rationalisation it might be more appropriate to bring together all departments or divisions of departments, which deal with the ownership or usage of land.

Yours faithfully,
E. A. MISSEN,
Secretary for Justice.

Mountains, Molehills and Juggling Judges

Sir,

On reading [1973] N.Z.L.J. 305, I note that you have misstated the provisions of s. 58 (2) of the Judicature Act 1908. You state that this subsection, "allows the Chief Justice and the President *acting together* to nominate Supreme Court Judges to the Court of Appeal for a particular appeal where they certify that in that appeal 'it is expedient' that such a course be adopted".

What the subsection actually says is that both the Chief Justice and the President of the Court of Appeal must so *certify*, but that it is the Chief Justice alone who *nominates* any Judge or Judges

required. This power of nomination is obviously reposed in the Chief Justice alone for the reason that he is "the head of the Judiciary" (s. 57 (2) (a) of the Judicature Act 1908).

Yours faithfully,
R. W. EDGLEY, Q.C.,
Wellington.

Days of ivy

Sir,

The University of Auckland is planning the publication of a history of the University to appear in 1982, the centenary of its foundation, and is seeking material on which a historian can base his work. Former staff, students and others who have been connected with the University are invited to contribute written recollections of events or periods in the development of the College and the University.

The University's Librarian, Mr P. B. Durey, has pointed out that some of the most interesting aspects of the history of any institution are the anecdotes which are related of the people involved. Since it is important for the historian that these be as frank as possible, they will be accessible only to people authorised to study the history of the University. If it is considered necessary, the Librarian will accept particular contributions with the proviso that they are not to be opened until a date which may be any specified number of years hence.

As well as personal recollections the University Library will welcome old newspaper clippings, copies of correspondence, photographs and drawings. Arrangements have been made for all such material to be catalogued and stored in an air-conditioned strong-room.

Contributions should be sent to the Librarian, University of Auckland, Private Bag, Auckland.

P. S. RUSSELL,
Information Officer.

Howlers

Sir,

Today I nearly filed an affidavit of due execution of will in which the testatrix was alleged to have been in possession of unimpaired metal facultites.

Yours faithfully,
I. M. PETERSEN,
Matamata.

Lawyers in Spain—The profession is diffused. The nearest equivalent is the *abogado,* a lawyer, enrolled in his province and a graduate in law, who deals directly with the client, offers general legal advice, prepares written contracts, and appears on behalf of the client in any judicial or administrative court. Spanish law insists that an *abogado* appears in any civil action where the content is in excess of 5,000 pesetas, or in criminal cases where the penalty may be more than a month plus a day in jail or a fine of a similar sum. The *abogado* is usually a one man band, and he may even be a licensed estate agent as well, in which case his advice may not be entirely disinterested. He is deemed to have an overall knowledge of law, commercial, administrative, penal, civil, labour and constitutional, which is clearly impossible. As a result, there are now specialist *abogados* who advise specifically on their subjects. The experience of the *abogado* may very enormously. One becomes an *abogado* by being a graduate in law and, in Madrid, admision to the *Colegio* is subject to serving a year with an experienced lawyer, but in the provinces it is sometimes possible to jump right in at the deep end.

The next servant of the law is the *procurador,* who is concerned primarily with the preparation of written pleadings for the court. There is a great deal of interlocutory procedure in Spanish law, with evidence sifted prior to the hearing. The law demands that a *procurador* be employed in all cases in the civil courts where the sum or value in dispute is 10,000 pesetas, and in criminal cases where the potential fine may be 5,000 pesetas plus, or a jail sentence of a month and a day or more. The *procurador* is appointed by signing a court document, but the usual practice is to execute a power of attorney before a *notary.* This is known as *Poder General Para Pleitos,* and it is usually prepared with the assistance of the *abogado.*

Clearly, the *procurador* is not concerned with land titles, unless there is litigation, but there are also administrative classes of lawyers, *gestors administrativos,* who intervene between the citizen and the state in the management and preparation of the myriad forms around which Spanish life revolves. Many *gestors* are as well qualified legally as *abogados,* although those who are not may be limited in the scope of their practice, but one may not be an *abogado* and a *gestor* simultaneously. It is not uncommon for the *gestor* to prepare a contract.

Lastly, there is the notary. There is usually one in each town, and clearly the *notario* is not the man to give independent legal advice; his mission is to record.

There are also a number of foreign lawyers, who are not allowed to practise in the courts, unless they had the foresight to be born in a country enjoying a reciprocal agreement with Spain, but who are able to offer independent advice on a consultant basis, and who sometimes shelter under the umbrella of an *abogado.*