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THE FLAG OF THEIR COUNTRY

Public attention should be drawn to what I believe to be a widespread failure to comply with the provisions of The Ceremony of Honouring the Flag Regulations (SR 1941/209). These regulations, as is well known, require the ceremony of honouring the Flag to be observed at all public schools in commemoration of the following days, namely Waitangi Day, Anzac Day, Empire Day, the Queen's Birthday, Dominion Day, Trafalgar Day, Armistice Day and any day which in the opinion of the Minister of Education "is generally recognized as a day of national significance". The Minister may formulate a programme "for the purpose of ensuring that the ceremony will in all cases be carried out with appropriate solemnity and uniformity" (Reg 5 (1)). There is provision for alternative programmes for "when the ceremony is observed in the presence of the Flag" and "when the ceremony is observed without the Flag" (Reg 5 (2)). My understanding is that these regulations despite their mandatory terms are not in fact generally obeyed. This is for two reasons a scandalous situation. It is scarcely necessary for me to spell out the unfortunate effects on the development of a young child when (for example) Trafalgar Day passes without that child having an opportunity to take part in an appropriate patriotic exercise. And when the flouting of a particular law is permitted the Law itself falls into disrespect.

Enforcement of these regulations is the matter of primary concern but the time is surely ripe for a review of their terms. The regulations have not been amended for more than 30 years. First they apply only to public schools. But what of our pre-schools and our institutions of tertiary education? If it is appropriate and necessary for five-year-olds to take part in these ceremonies, it is equally appropriate and necessary for three and four-year-olds. Should not the regulations be amended to apply to kindergartens and play centres; and to universities teachers training colleges and technical institutes?

Then we should ask ourselves whether the list of days is adequate. No doubt the list successfully calls Britannia's glories back to view, but are there not other festivals of a sacred or semi-sacred nature that should be included? Such dates as the birthday of the Chief Justice and the wedding anniversary of Princess Anne and Captain Mark Phillips spring to mind.

And is it really satisfactory that the regulations should fail to specify the precise details of the ceremony? In matters of law reform it is often useful to look to the experience of other parts of the Commonwealth. In *Ruman v Board of Trustees of Lethbridge School District* [1944] 1 DLR 360 the Alberta Supreme Court upheld the validity of a school rule pursuant to which "the children assembled in the lower hallway and sang 'God Save the King', then the principal gave the command 'Salute the Flag by numbers' and as he said 'one' the children came to attention and saluted the flag with a military salute. On the command of 'two' they dropped their hands to their sides." It is a pretty picture. My suggestion (and I am anxious to be constructive) is that a committee should be set up comprising the Dominion President of the Returned Services Association, the Chairman of the Arts Council, the Gentleman Usher of the Black Rod, a representative of the Maori Council and the President of the Federation of Labour. Such a committee should be able without difficulty to devise a ceremony combining patriotism, aesthetic appeal, dignity, a recognition of the validity of Polynesian cultural achievements and respect for the rights of the workers.

Then there is another matter. Section 186 of the Education Act 1964 provides that before a private school may be registered it must be "efficient", and that word is so defined that before a school qualifies the Director-

General of Education must be satisfied "that suitable provision is made for the inculcation in the minds of the pupils of sentiments of patriotism and loyalty".

This provision was first enacted as s 7 of the Education Amendment Act 1921-22. It is always salutary to pause and reflect upon the wisdom of our forefathers. By that same statute provision was first made for teachers to take loyalty oaths. "The teachers of New Zealand," said the then Minister of Education, the Hon C J Parr, in the second reading debate, "have shown on the battlefield that they are prepared to do their duty; but there are black sheep in every flock, and there are some in the teaching profession, and I desire to weed them out . . . I think we have paltered too long. We have been inclined to let insistence on the matter of loyalty in teachers go by default. . . . I, for one, feel it is my duty to see—I think New Zealand expects the Education Department to see—that men and women who are openly disloyal to the Empire, who do not believe in the Empire, who would break the Empire up tomorrow if they could, shall have no part and parcel in the training of the young of this country" (191 NZPD 933, 934). These are stirring words, and many readers will regret that in the same debate Mr Peter Fraser MP permitted himself to accuse the Minister of heresy-hunting.

Yet wise though the quoted provisions of s 186 undoubtedly are, one wonders if the hard-pressed inspectors of the Education Department are really able to enforce them. My own experience of the establishment of a private school is that we received from the Department (along with such items as desks and chairs) one flag. Clearly the flag was provided so that the pupils could honour it. But no one so far as I know has ever actually honoured the flag. It has just been put in a cupboard. Nor do the inspectors ever enquire whether sentiments of loyalty and patriotism are or are not being inculcated into the minds of the pupils. This is less than satisfactory.

The solution I propose is a simple one. Here at last (or so it seems to me) is a role for Brigadier Gilbert's security service which should forthwith stop doing whatever it is it does now. Instead it should be charged with the enforcement of The Ceremony of Honouring the Flag Regulations and those provisions of s 186 of the Education Act which relate to the inculcation of patriotism. It is difficult to imagine a task that that no doubt splendid body of men is better equipped to perform.

I know that it is fashionable for the intellectuals, the long-haired lefties and all that rabble to sneer at notions of patriotism and honour. But every man, woman and child in New Zealand should be constantly reminded of the fact (unpalatable though it no doubt is) that the world is full of foreigners. It is up to the Government to do something about it.

D F DUGDALE

REGULATIONS

Regulations Gazetted 13 to 20 December 1973 are as follows:

Accident Compensation Act Commencement Order (No 2) 1973 (SR 1973/290)
Accident Compensation Earners' Scheme Levies Order 1973 (SR 1973/291)
Broarcasting Act Commencement Order 1973 (SR 1973/292)
Christchurch City (Information Centre) Regulations 1973 (SR 1973/293)
Civil Aviation Regulations 1953, Amendment No 19 (1973/301)
Civil Aviation (Royal Visit) Regulations 1973 (SR 1973/302)
Clean Air (Licensing) Regulations 1973 (SR 1973/303)
Coinage Regulations 1967, Amendment No 4 (SR 1973/294)
Criminal Injuries Compensation Order 1973 (SR 1973/304)
Customs Tariff Amendment Order (No 21) 1973 (SR 1973/305)
Customs Tariff Amendment Order (No 22) 1973 (SR 1973/306)
Customs Tariff Amendment Order (No 23) 1973 (SR 1973/307)
Dangerous Goods Order (No 2) 1973 (SR 1973/308)
Dangerous Goods (Licensing Authorities) Regulations 1958, Amendment No 15 (SR 1973/309)
Domestic Proceedings (Marriage Guidance Organisations) Order 1969, Amendment No 4 (SR 1973/310)
Economic Stabilisation (Aviation Fuel) Regulations 1973 (SR 1973/321)
Economic Stabilisation Regulations 1973, Amendment No 4 (SR 1973/322)
Electricity Control Order 1948, Amendment No 7 (SR 1973/320)
Income Tax (Withholding Payments) Regulations 1967, Amendment No 7 (SR 1973/323)
Letter Order 1973 (SR 1973/295)
Meat Regulations 1969, Amendment No 5 (SR 1973/311)
New Zealand-Australia Free Trade Agreement Order (No 7) (SR 1973/299)
New Zealand-Australia Free Trade Agreement Order (No 8) (SR 1973/300)
New Zealand-Australia Free Trade Agreement Order (No 9) (SR 1973/312)
Pork Marketing Boad Regulations (SR 1973/313)
Southland Inland Harbours Regulations 1970 Amendment No 1 (SR 1973/314)
Stabilisation of Prices Regulations 1973, Amendment No 2 (SR 1973/324)

(Continued on page 46)

SUMMARY OF RECENT LAW

AGENCY—LAND AGENTS

Appointment to sell—Ambiguous clause in option signed by both vendor and purchaser—No valid appointment. Real Estate Agents Act 1963, s 79. Cook's New Zealand Wine Co Ltd were seeking land for a vineyard and the respondent offered to assist. A salesman employed by the respondent asked the appellant if he would consider selling his property. The apppellant said he would and would want £200 per acre. Cooks visited the property with a representative of the respondent and a document containing an option to purchase dated 2 September 1968 was signed by both the appellant and Cooks. Thereafter a series of documents were drawn up and signed, culminating in an agreement signed in February 1969. The respondent claimed commission on the sale from the appellant and placed reliance on a clause in the document of 2 September 1968 which was as follows: "It is acknowledged that this sale is made through the agency of Dalgety-Loan Ltd MREINZ and commission to be paid on $80,000 at completion of agreement." There was no similar provision or reference to agency in any other document. In the Court below the respondent had successfully sued for commission on the sale. *Held,* 1 In order to obtain a right to commission a land agent must be appointed in writing by the vendor to act as his agent to find a purchaser or make a special contract with the vendor relating to payment of commission. (*Scurr v Stout* [1916] GLR 320, 322-3, referred to.) 2 By McCarthy P. The Court should be slow to *infer or imply* an authority to act as agent from letters or documents written before or after the sale. (*R H Rothbury Ltd v Gibbs* [1957] NZLR 590, 593, approved and applied.) 3 The clause in the option was too equivocal to provide a memorandum to satisfy s 79 of the Real Estate Agents Act 1963 as the document had been signed by both vendor and purchaser. *Markham v Dalgety Ltd* (Court of Appeal, Wellington. 6, 7 September; 9 October 1973. McCarthy P, Richmond and Beattie JJ).

HUSBAND AND WIFE—DOMESTIC PROCEEDINGS

Maintenance order against wife, husband having custody of six children of marriage—Domestic Proceedings Act 1968, s 35 (2). The appellant wife obtained a separation order by consent, but was refused an order against the husband for her maintenance, custody of the six children being given to the father. The wife was in good health earning $44 per week and paying $10 per week for rent. The husband was earning $55 per week gross and employed a housekeeper to look after his six children. An order was made against the wife for maintenance of the six children at the rate of 50 cents per child per week. The wife appealed against the maintenance order. *Held,* 1 Section 35 (2) of the Domestic Proceedings Act 1968 does not say what circumstances shall be "circumstances of the case" which would make it reasonable to make a maintenance order against a mother. 2 The inability of the father and the ability of the mother to provide proper maintenance for the children will in most cases justify an order for maintenance against the mother. 3 An order is not to be refused against a mother because a child is receiving "adequate" as distinct from "proper" maintenance. 4 The order for payment of 50 cents per child amounting to $3 per week was more than a nominal order. *Scott v Scott* (Supreme Court, Dunedin. 14 May; 25 June 1973. McMullin J.).

INSURANCE—MOTOR VEHICLE INSURANCE

Conditions—Exemption from liability "for loss occurring" whilst vehicle being driven in an "unsafe condition"—Worn tyres—"Unsafe condition" judged having regard to the time of and circumstances surrounding the accident. The appellant sought to avoid payment under an insurance policy for damage sustained to a motor car in an accident under an exception clause which exonerated the appellant from liability for any damage sustained whilst any vehicle in respect of which indemnity was provided was being driven in an unsafe condition. The respondent was in the course of an outward journey of about 130 miles when the accident occurred. The appellant contended that as three of the tyres were badly worn the car was being driven in an unsafe condition. On appeal from the judgment of Roper J [1973] 1 NZLR 276. *Held,* 1 The insurer does not have to establish a causal connection between the alleged unsafe condition and the loss. (*Parsons v Farmers Mutual Insurance Association* [1972] NZLR 966, followed.) 2 The proper test as to whether a vehicle is being driven whilst in an unsafe condition is to judge the safety of the vehicle having regard to the time of and circumstances surrounding the incident causing the loss. (*Bashtannyk v New India Assurance Co Ltd* [1968] VR 573, adopted and applied. *Yaxley v New Zealand Insurance Co Ltd* [1973] 2 NZLR 231, overruled in part. *Conn v Westminster Motor Insurance Assn Ltd* [1966] 1 Lloyd's Rep 123, distinguished.) *State Insurance General Manager v Harray* (Court of Appeal, Wellington. 4, 19 October 1973. McCarthy P, Richmond and Beattie JJ).

LAW PRACTITIONERS—RIGHTS AND PRIVILEGES OF LAW PRACTITIONERS

Barrister immune from an action for negligence in the conduct of a case and pre-trial matters intimately related thereto—The Law Practitioners Act 1955, s 13 (2). Negligence—Arising out of special relations—Barrister conducting a cause not liable. This was an appeal from the judgment of Mahon J reported [1973] 1 NZLR 236 dismissing an action for professional negligence brought by the appellant against the respondent. The appeal was dismissed and is reported only on the validity of a claim against a lawyer for damages for negligence in the conduct of litigation on the part of the lawyer. *Held,* 1 The administration of justice requires that a barrister should be immune from an action for negligence so that he may perform his tasks fearlessly and independently in the interests of his client, but subject to his over-riding duty to the Court, which may conflict with the interests of his client. (*Rondel v Worsley* [1969] 1 AC 191, 227, applied.) 2 Actions for negligence against barristers would make the re-trial of the original action inevitable and so prolong litigation contrary to the public interest. (*Rondel v Worsley* (supra) at pp 249 and

251, applied.) 3 By McCarthy P. Public policy necessitates that in litigation a barrister should be immune because he is bound to undertake litigation on behalf of any client who pays his fee. (*Rondel v Worsley* (supra) at p 281, applied.) 4 By McCarthy P. Unless a barrister was immune he could not be expected to prune his case of irrelevancies and cases would be prolonged, contrary to the public interest. (*Rondel v Worsley* (supra) at p 273, applied.) 5 By McCarthy P. The fact that a barrister simpliciter cannot sue for his fee is not the justification for his immunity; it exists not for his benefit but in the interests of the State. 6 In New Zealand the immunity extends to pre-trial work in so far as the particular work is so intimately connected with the conduct of the cause in Court that it can fairly be said to be a preliminary decision affecting the way the cause is to be conducted at the hearing. Judgment of Mahon J [1973] 1 NZLR 236, affirmed. *Rees v Sinclair* (Court of Appeal, Wellington. 20, 21 August; 3 October 1973. McCarthy P, Macarthur and Beattie JJ).

NEGLIGENCE—REMOTENESS OF DAMAGE

Wife suing husband's employer for negligence causing change of personality of husband—No wrong to wife herself—No cause of action—Master and servant—Liability of master to third persons in tort—No liability to wife of injured employee. The appellant's husband was severely injured during his employment when a heavy weight fell on his head. Negligence was admitted by the respondent in respect of the accident to the husband. As a result of this injury the husband suffered brain damage which affected his personality and domestic relations with the appellant. The wife's action was not based on loss of consortium by the wife because of the House of Lords decision in *Best v Samuel Fox & Co Ltd* [1952] AC 716; [1952] 2 All ER 394; that such an action would not lie at the suit of a wife but on the basis that the husband's employer owed a duty to the wife. *Held,* 1 Although foreseeability is a necessary precedent condition in negligence, it is not the determinant of duty, which is a question of law decided in many cases in accordance with contemporary judicial policy. (*McCarthy v Wellington City* [1966] NZLR 481, and *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] 1 QB 27, 37; [1972] 3 All ER 557, 562-563, referred to.) 2 The Court has to determine whether the act was negligent vis-a-vis the plaintiff. If a wife has a cause of action it is because of a wrong to herself; she cannot build on a wrong to someone else. (*Bourhill v Young* [1943] AC 92, 108; [1942] 2 All ER 396, 404, applied.) 3 The duty to take care does not extend to include the relatives of a person who is injured. (*Kirkham v Boughey* [1958] 2 QB 338, 341-342; [1957] 3 All ER 153, 155, applied.) 4 When a Court is asked to recognise a new category of negligence it must proceed with some caution. (*Weller & Co v Foot and Mouth Disease Research Institute* [1966] 1 QB 569, 577; [1965] 3 All ER 560, 563, applied.) *Marx v Attorney-General* (Court of Appeal, Wellington. 9 August; 3 October 1973. McCarthy P, Richmond and Beattie JJ).

PUBLIC SERVICE—PUBLIC SERVICE APPEAL BOARD

Any party to an appeal is entitled as of right upon application to be supplied with a transcript of all the evidence relevant to his case. Public Service Regulations 1964 (SR 1964/15), reg 60. This case stated deals with the rights of any party to an appeal before the Public Service Appeal Board to receive a transcript of the evidence pursuant to R 60 of the Public Service Regulations 1964. *Held,* Any party to an appeal before the Public Service Appeal Board (including the State Services Commission) is entitled as of right, upon due application, to be supplied with a transcript of the whole of the evidence recorded in that appeal, save and except that where there is more than one appellant in the same appeal, each appellant is entitled only to a transcript of such portion of the evidence as is relevant to his appeal. *Re Dobbs and Pinder's Application* (Supreme Court, Wellington. 19, 20 June. Cooke J).

SALE OF GOODS—CONDITIONS AND WARRANTIES

Implied condition that goods correspond with description—Reliance on skill and judgment of vendor—Implied conditions as to "merchantable quality"—Sale of secondhand engine to buyer—Buyer equally knowledgeable as vendor—Sale of Goods Act 1908, ss 16 (a) and (b). The appellant purchased a secondhand engine from the respondent for $750; the price of such engine, when new, would have been about $4,000. The appellant's employee, who was well informed in engines, saw the engine but did not inspect any part of the interior of the engine, but told the seller of the purpose for which he wanted it. After 48 hours' running the engine broke down. An examination did not show whether the engine's condition was necessarily on the point of breaking down when it was delivered. The appellant relied on s 16 (a) and (b) of the Sale of Goods Act 1908 in appealing against a judgment for $750. *Held,* 1 The mere fact that the buyer made known the purpose for which the goods were required is not sufficient if the buyer and the seller are equally knowledgeable in relation to the subject matter of the sale, for the buyer to plead under s 16 (a) of the Sale of Goods Act 1908 that he relied on the skill and judgment of the seller. (*Henry Kendall & Sons v William Lillico & Sons Ltd* [1968] 2 AC 31, applied.) 2 What s 16 (b) means by "merchantable quality" is that the goods in the form in which they were tendered would not have been used by a reasonable man for any purpose for which goods which complied with the description under which they were sold would be used, and hence were not saleable under that description. (*Henry Kendall & Sons v William Lillico & Sons Ltd* (supra); *B S Brown & Son Ltd v Craiks Ltd* [1970] 1 All ER 823; and *Taylor v Combined Buyers Ltd* [1924] NZLR 627, 647, referred to.) 3 The difference in contract price and market price, if it exists, is merely a relevant factor in the consideration of "merchantable quality". (*B S Brown & Son Ltd v Craiks Ltd* (supra), referred to.) *Feast Contractors Ltd v Ray Vincent Ltd* (Supreme Court, Auckland. 2 March; 20 June 1973. Mahon J).

TRANSPORT AND TRANSPORT LICENSING—OFFENCES

Driving without due care—Conviction—Car in shingle verge out of control—Passenger killed—No witnesses—Only inference from facts lack of care—Onus on defendant to rebut inference—Transport Act 1962, s 56. The appellant, while driving a car along

a sealed road which had shingle verges, was rounding a slight bend at 60 mph and the car got into the shingle on the left hand verge and went out of control. The passenger in the car was killed. There was evidence that there had been no mechanical failure. There were no witnesses to the mishap and the appellant was unable to offer any explanation as to how the car came to get into the shingle, nor did he give evidence when charged under s 56 of the Transport Act 1962 of causing death by careless use of a vehicle. The Magistrate, after acknowledging that the maxim *res ipsa loquitur* had no place in criminal proceedings concluded that the only inference open was that the appellant had been careless in allowing the car to get into the shingle. On appeal it was contended that the effect of such inference was to cast the onus on the appellant to show that he had not been careless. *Held,* 1 Although the maxim *res ipsa loquitur* is not applicable, unless and until something is suggested by a defendant by way of explanation, the facts may be so strong that the only inference is that there has been careless driving. (*Rex v Burdett* (1820) 4 B & Ald 95; 106 ER 874; and *Rabjohns v Burgar* [1971] RTR 234, 236 applied.) 2 It is not for the Court to conjure up some fancy or improbable explanation in favour of a defendant who himself offers no explanation, but it is for the Court to consider reasonable possibilities. (*Sanders v Hill* [1964] SASR 327, 329 followed.) 3 An "error of judgment" is no defence if a driver is driving without due care and attention. (*Simpson v Peat* [1952] 2 QB 24; and *Taylor v Rogers* (1960) 124 JP 217, 219 applied.) Conviction affirmed. *Police v Chappell* (Supreme Court, Christchurch. 7, 17 June 1973. Roper J).

CASE AND COMMENT

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

Negligence — Nuisance — Hazards on Land — Noxious Weeds

The recent decision of Mr Justice McMullin in *French v The Mayor etc of the City of Auckland* (the unreported judgment was delivered on 10 August 1973) will be of considerable interest for at least two reasons. Firstly because it illustrates the modern tendency (in some circumstances) for the boundaries of nuisance and negligence to overlap (for a detailed discussion of this theory see Milner, *Negligence in Modern Law* (1967) Butterworths). The judgment will also be of interest since it is thought to be the first time, since the Privy Council handed down its opinion in *Goldman v Hargrave* [1967] 1 AC 645 (on appeal from the High Court of Australia), that a Court in a Commonwealth country has had to consider the question of whether or not there can be liability for damage caused by the escape of seeds from the growth of noxious weeds.

The Auckland City Council owned a piece of land in the outlying suburbs of Auckland which was badly infected with a noxious weed, variegated thistle. Next door, the adjoining piece of land, which was leased by the plaintiff, was also infected with variegated thistle. The plaintiff, on the one hand, made regular sprayings and spent a not inconsiderable sum of money on weed control in an endeavour to eradicate the weeds; on the other hand, although the City Council did something about weed control, evidence was available, and accepted, that the measures taken by the Council in no way approached what was required. Evidence was also heard which showed that whilst in normal circumstances the measures which the plaintiff had taken would have been sufficient to cope with the weeds on his property, the fact that the weeds had continued to grow was evidence that seeds must have been blown from the defendant Council's property, as a result of its failure to deal with adequately and control the weed problem.

The case was largely argued in nuisance, and the learned Judge had little difficulty in finding that an actionable nuisance had been committed by the defendant Council when it allowed the weeds to grow and spread, and then had failed to take effective measures to counteract them.

Goldman v Hargrave (supra) was, of course, argued before the Board largely on the question of negligence, and it was in that area of tort liability that liability was found. (Its history before the Australian Courts had been somewhat different.) It is doubtful whether the result would have been very different had the Privy Council treated it as an action in nuisance since, as Lord Wilberforce pointed out in that case, there are nowadays many situations where a fact situation will be covered by either head of tort liability.

Prior to *Goldman v Hargrave* (supra) there had been two Commonwealth decisions (*Giles v Walker* (1890) 24 QBD 656 and *Sparke v Osborne* 7 CLR 51) which had suggested that there could be no liability for what was in effect the natural growth of the soil. In *Goldman v Hargrave* Lord Wilberforce questioned

the authority of these cases, but it was not certain whether a Court dealing with a case in the area would be able to overrule them and apply the more general principle of *Goldman v Hargrave* or not. It is interesting to note that in developing the rule that in certain circumstances an occupier of land will owe a duty to do something to prevent others being harmed as a result of hazards which have arisen on his land, the Privy Council found support in the New Zealand decision of *Boatswain v Crawford* [1943] NZLR 109. It is important to appreciate that, as seems to be the modern tendency, the principle of *Goldman v Hargrave* involves a subjective element; in the words of Lord Wilberforce: "One may say in general terms that the existence of a duty must be based on knowledge of the hazard, ability to foresee the consequences of not checking or removing it, and the ability to abate it."

In spite of the fact that therefore the question of whether liability is present or not in a given situation will depend on the resources of the defendant, in the instant case Mr Justice McMullin had no hesitation in holding the defendant Council liable. It was well within the resources of the Council to do something satisfactory to control the weeds, and it was therefore guilty of an actionable nuisance in allowing the variegated thistles to spread, and in not taking effective measures to counter them.

In another case, however, as the learned Judge was careful to stress, the resources etc of the defendant might well be different, and an application of the subjective test might result in a different conclusion.

Nevertheless the judgment is an important one, in an area where the boundaries of liability have not always been very well defined, and it gives a clear exposition of the legal principles involved in a difficult area of tort law.

MAV

Maintenance after divorce—Matrimonial Proceedings Act 1963, s 40

In *Jones v Jones,* (judgment 16 November 1973, Cooke J) the short point was whether, regard being had to the means of the petitioning husband (he was a millionaire) and the unhappy medical history of the respondent wife, the Court should order more than the $30 weekly the husband was now paying. It was doubtful whether she could carry on earning the net $25 weekly she was now earning at a hospital. She had the free use of a house, but she was letting this and the income so obtained in substance paid her rent for a flat elsewhere. Beyond this, the Court was in possession of only inadequate material upon which to make a permanent order, though it appeared that the wife was in debt, though to an unknown extent, that the marriage had lasted only four years and that the husband had made his money largely, if not wholly, after the parties' separation. The question arose whether such a short-term order could be made under s 40 of the 1963 Act, the marginal note to which reads "Permanent Maintenance". As his Honour observed, the note is not to be deemed part of the Act by virtue of s 5 (g) of the Acts Interpretation Act 1924, and there is no authority for saying a short-term order cannot be made under s 40. His Honour continued:

> "There is this difference at least between s 40 and s 39 (which deals with interim maintenance). Section 43 specifies a range of matters to which the Court is required to have regard in considering any application for an order under s 40 or s 41. No list of relevant considerations is specified for applications under s 39. The inference to be drawn, I think, is that, wide though the considerations specified in s 43 are and as the discretion of the Court under s 40 consequently is, the Court is if anything even less fettered in dealing with the subject of interim maintenance under s 39. No doubt the reason for the distinction . . . is that . . . an order under s 39 can only be made before the making of the decree absolute and is commonly replaced by an order under s 40 or by some agreement between the parties. It seems to me that the only restriction on the scope of s 40 which could be significant for present purposes is that the Court must think that the provision to be made by the order thereunder is reasonable; and that opinion as to reasonableness must be formed after having regard to the matters specified in s 43."

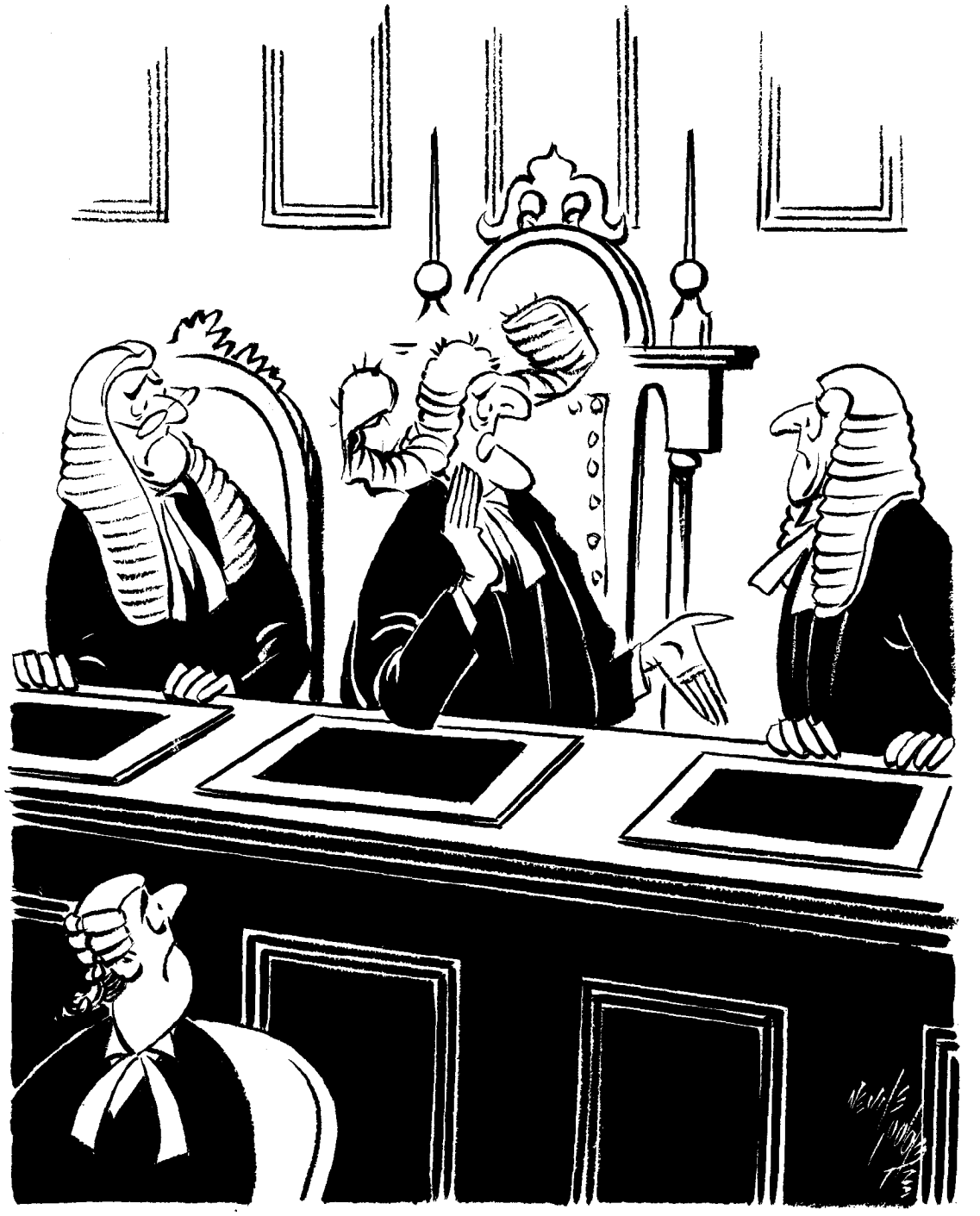
In the circumstances, the Court ordered payment of $50 weekly for three months, leaving it open either for variation proceedings to be brought later under s 47 or for a fresh application to be made under s 40.

PRHW

Man, 83, on Sex Charges—"Police arrested an 83-year-old man outside 277 Shaukiwan Road yesterday . . ." A Hong Kong news story.

"A FUNNY THING HAPPENED ON THE WAY TO COURT THIS MORNING . . .": 1

Drafted by Scilicet *Engrossed by Neville Lodge*



"I washed my hair last night and I can't do a thing with it."

THE INDUSTRIAL RELATIONS ACT 1973

This background paper to the new Act was supplied by the Department of Labour.

The new Industrial Relations Act is the first major restructuring of New Zealand industrial institutions and legislation since 1894.

Changing society has demanded that industrial attitudes be changed; the procedures in the new Act underline the concern for modern machinery to deal with the problems facing management and unions.

While the Act does represent new thinking in the industrial relations field, many provisions in the existing Industrial Conciliation and Arbitration Act 1954 that have stood the test of time have been retained and are moulded into the new system.

The Government recognises that legislation alone cannot bring about good industrial relations—the co-operation of all parties concerned is needed to contribute to its effectiveness. The machinery of the Act is designed to create that good industrial climate for co-operation and negotiation between employer and worker organisations.

The Industrial Relations Act deletes punitive clauses for unjustified strike action, measures that were written into the former National Government Bill in 1972. Penalties have been on the statute books since the Industrial Conciliation and Arbitration Amendment Act of 1905, but in recent years they have been imposed infrequently. The last prosecution undertaken by a Government was in 1955. The present Government believes that a threat of penalties would help to create industrial unrest, and would contribute to increasing work stoppages and strikes.

The new legislation has emerged in a form approximating more closely the joint submissions put to the Government by the Employers' Federation and the Federation of Labour.

Procedures

The Act lays down clearly defined procedures for dealing with disputes of interest and disputes of right. A *dispute of interest* is defined as being one created with the intent to procure a collective agreement or award settling terms and conditions of employment of workers in any industry, whether or not it be in substitution for an existing award or agreement. A *dispute of right* will cover the interpretation, application or operation of a collective agreement or award, similarly that of an enactment or contract of employment related to a collective agreement or award.

Institutions

Three new institutions come into effect under the Act: the Industrial Relations Council, the Industrial Commission and the Industrial Court.

The *Industrial Relations Council,* to be chaired by the Minister of Labour, will have 22 members, 10 representing employers' and 10 workers' organisations. The remaining member will be the Secretary of Labour, who will have full rights of discussion as a member of the Council but will not be entitled to vote on any question before the meeting. The number of representatives on the Council more closely approximates the number in the joint submission of the Employers' Federation and the Federation of Labour.

Members of the Council, appointed for a term of three years, will be eligible for reappointment. Provision is made in the Act for other Government departments to be associated with the Council from time to time on matters under the Council's jurisdiction.

The Council will be required to give advice to Government on ways to improve current industrial legislation, to accommodate "changes in the industrial environment". It will also study and make recommendations on the formulation and implementation of manpower policies; the formulation of codes of practice relating to industrial relations; ways and means of improving industrial relations, industrial organisation and industrial welfare.

The possibilities of the Council are considerable. The Government believes that regular consultation between the Government and the central organisations is essential to the development of a broad basis of understanding and co-operation. Apart from this, the research required to ensure the functioning of the Council will build a body of expertise and knowledge from which informed judgments can be made.

The *Industrial Commission* takes over the arbitral powers of the old Court of Arbitration, and will have five members, three appointed after consultation with the central organisations. They shall be persons who, in the opinion of the Minister of Labour, are qualified for appointment by reason of having appropriate qualifications and experience and shall not represent any sectional interest. The remaining two will represent workers and employers respectively and will be appointed on the recommendation of workers' and employers' organisations.

The Commission will be required to hear and settle disputes of interest, and to register all voluntary agreements arrived at under the Act.

Under the original legislation it was proposed that the Commission should have the power to delegate its functions and powers. This intention was generally unacceptable to employers' and workers' organisations. The Commission therefore is given no power in this regard.

Several submissions were made to the Parliamentary Select Committee on Industrial Relations Legislation, seeking a provision that would allow that only barristers and solicitors holding current practising certificates be barred from appearing in industrial proceedings. Provision has been made in the Act allowing young people, who have been admitted as barristers or solicitors but who do not wish to practise law, to make careers in the field of industrial relations.

The Commission may, in any matter before it, state a case for the opinion of the Industrial Court in any question of law. The decision of the Court will be final and binding on the parties to the matter.

The *Industrial Court* is established as the ultimate Court of appeal on disputes of right, personal grievances and other disputes while an instrument is in force.

The Court will be made up of three members, one of whom will be the Judge of the Court. The other members will be appointed on the recommendation of the central workers' and employers' organisations.

The Court will have the power to hear and determine any question connected with the construction of an award, collective agreement or industrial Act; to determine the rights of parties; to hear and determine applications for inquiry by the Court into disputed elections, of unions; to hear and determine enforcement and recovery actions and appeals from disputes committees; and to hear and determine union demarcation issues.

If a matter arises as to whether a dispute is one of interest or right, the Court will have the power to decide. A majority decision will be the decision of the Court.

Provision is made under the Act for persons, appointed as nominated members of the Court, to be the same persons appointed as the nominated members of the Industrial Commission. This amendment made to the original Bill is supported by the Federation of Labour and brings the Act more in line with the joint submission of the Employers' Federation and the Federation of Labour. It will allow for liaison between the Court and the Commission, and improve the understanding thereof. Nominated members of the Court will hold office for three years, and will be eligible for reappointment.

Disputes of Interest

Set procedures are laid down for the settlement of disputes of interest. The legislation in this regard is generally in line with the joint submissions of the Employers' Federation and the Federation of Labour, and recognises the right of the parties concerned to negotiate a voluntary agreement. An agreement will bind only the signatory parties. Any employer or union within the area of the agreement may, with the consent of the original parties, become a party to an agreement by filing a notice of concurrence with the Registrar of the Commission.

If parties choose to go to conciliation, but are unable to reach settlement, the dispute, with any partial settlement, will be referred to the Industrial Commission for arbitration. If fully settled then, the Commission will register the agreement as a collective agreement. By force of the Act, unless agreed otherwise, an agreement or arbitrated award will bind every union, association or employer who is connected with or engaged in the industry to which the agreement applies.

Conciliation

The *Industrial Conciliation Service* continues very much as it did under the Industrial Conciliation and Arbitration Act. The original legislation proposed that conciliators should have the power to arbitrate.

This provision was deleted from the legislation because it was felt that it cut across the three separate provinces of arbitration, conciliation and mediation, and that the effectiveness of a conciliator's efforts would be undermined if the parties knew that a conciliator could

assume the role of arbitrator. Both the Employers' Federation and the Federation of Labour opposed the original provision.

No dispute of interest may be referred to the Industrial Commission until it has first been referred to a Conciliation Council.

The Industrial Mediation Service already in existence will continue as at present, but mediators have been given discretionary powers as to whether or not they will arbitrate on any matter referred by the parties to a dispute. The Government believes that the relationship between a mediator and the parties could be harmed if the mediator was forced to give a decision that might prove unacceptable to one or both parties. The mediation service has an invaluable role to play in ensuring constant dialogue between the parties, and in facilitating prompt settlement of an industrial dispute before an unnecessary stoppage or severe deterioration in industrial relations occurs.

Sundry Provisions

The requirement, that parties give writeen notice of intent to secure a composite agreement to the central organisations, has been deleted in the Industrial Relations Act. The Commission is now, in addition to giving the parties an opportunity to be heard, required to grant the same right to the central organisations, before an order is made declaring that the composite agreement supersedes all existing awards and collective agreements that would otherwise apply.

Provisions related to voluntary collective agreements, as the Act now defines industrial agreements, will continue to operate as at present. There will, however, be a minimum term of one year for all awards and collective agreements.

A clause in the former National Government Bill, stating that workers could not be bound by more than two collective instruments, has been omitted from the Act.

The Industrial Commission has the power to amend an instrument, to remove ambiguity or remedy a defect.

The power to amend instruments has been extended, enabling the Commission to amend an award or collective agreement where it is satisfied that all the original parties to the instrument desire that it should be reviewed, or where the amendment is sought to give effect to any provision of an agreement between the central organisations of employers and workers intended to be applicable to awards or collective agreements generally.

To safeguard the 12 month rule, no provision in an award or agreement prescribing a rate of wages can be amended before the expiry of one year from the date the award or agreemnt is made. For the purpose of the preference provisions of the Act, the definition of "adult" has been amended. An adult will now be a person of 18 years or upwards, or any person of any age who is in receipt of not less than the minimum rate of wages payable to a person 18 years and up.

Under the enforcement provisions related to preference clauses, a worker to whom the unqualified preference clause applies commits a breach of award or agreement if he fails to become a member of a union, after a union official has requested him to join within the stipulated number of days after commencing work. Similarly it will be a breach of an award and an agreement for an employer to continue to employ such a worker after the union has notified him of the request to become a member of the union. An officer of the Department of Labour will have the duty of taking action to recover a penalty in respect of a breach of award only if the officer of the union to which the provision relates is prepared to give evidence necessary to prove the breach.

Provisions for the settlement of disputes of right include reference to a disputes committee and, on appeal, to the Industrial Court. A disputes committee will comprise an equal number of representatives of both the union and employer. Should a decision not be reached by the committee, the matter may be referred to the Industrial Court.

While a dispute is awaiting decision there will be no stoppage of work, nor may an employer by reason of the dispute dismiss a worker directly involved in the dispute.

Grievances

Every award and agreement will now contain effective machinery set up to deal with personal grievances, including a complaint of unjustifiable dismissal. This widens the previous provision, which referred to wrongful dismissal, thus limiting its operation solely to cases where proper notice has not been given. The procedure will provide that, if a worker has grounds for personal grievance, the matter should be taken up first with the work supervisor and in turn the union representative may take it up with the employer. Should a settlement not be reached, it will go before a disputes committee comprising a maximum of three representatives from each side.

If the committee cannot reach a decision the matter will go to the Industrial Court for decision. If the Court finds that the worker has been unjustifiably dismissed, the worker may be reimbursed as to wages lost, may be reinstated and may receive compensatory payment.

Demarcation

In the case of a union demarcation dispute, any union or employer who is a party to an award or agreement relating to the industry or industries concerned will be able to apply to the Industrial Court to determine the question. The determination of the Court will be binding on the parties. This is the first time under industrial legislation in New Zealand that such provision has been clearly provided for in legislation.

Exemption

The new legislation has provision for allowing for exemption from union membership on conscientious grounds. Any person who is required to become a member of a union or to remain a member of a union may apply on the above grounds to the Registrar of Industrial Unions for a certificate of exemption from union membership, providing he lodges with the application an amount equal to the subscription fixed by the union which he would be required to pay should he be a member of the union. The matter will be heard by a Conscientious Objections Committee, at a time to be set by the committee.

A new provision enables a worker who has been granted exemption from union membership to pay the equivalent of the union subscription into a special union welfare or charitable account, as an alternative to paying it into the Consolidated Revenue Account.

Victimisation

Under provisions relating to alleged victimisation of a worker for taking certain actions, the Industrial Relations Act provides that if an employer has dismissed a worker or has altered his position to his prejudice, in every case where a prosecution succeeds the worker shall be considered to have been unjustifiably dismissed in terms of the section relating to personal grievances. He will be entitled to the reimbursement of a sum equal to the whole of the wages lost by him.

Under the provisions for penalties for breach of an award or collective agreement, any penalty recovered will normally be paid into the Consolidated Revenue Account, but the Court may order that the whole or part of the penalty shall be paid to the plaintiff.

Special Provisions

It is in regard to special provisions for the settlement of disputes that the Government is particularly concerned. These provisions are transferred from the Industrial Relations Act 1949 with considerable modifications.

A new provision will now give the Minister of Labour power to call a compulsory conference where he has reasonable grounds for believing a strike or lockout exists or is threatened. The Minister will be able, if he thinks fit, to appoint a chairman of the conference with the power to make a decision settling the dispute, even if one of the parties does not attend the conference.

Where the Minister has conferred on a chairman the power to make a decision settling a dispute, and the parties who do attend the conference are unable to agree (or if the parties fail to attend), the chairman shall still make a decision, which will be binding.

Strikes and Lockouts

In accordance with Government policy, that the Industrial Relations Act must be a measure intended to provide processes for the amicable settlement of industrial disputes and not be part of a criminal code, penalties for unjustified strike action have been deleted.

A new definition of a strike has been included in the legislation. It will include the discontinuance of employment, whether wholly or partially, the breaking of contracts of service, or the refusal or failure after any such discontinuance to resume or return to work, and the refusal or failure to accept engagement for any work in which they are usually employed.

A strike will also have to be with the intent to compel or induce any such employer to agree to terms of employment or comply with any demands made by those or any other workers; or to incite, aid, abet, instigate or procure any other strike, or to assist workers in the employment of any other employer to compel or induce that employer to agree to terms of employment, or to comply with any demands made upon him by any workers.

In the original Bill introduced last year, stopping work in concert was automatically a strike. Now it must be with the intention of compelling the employer to agree to terms of employment.

Punitive clauses, for failure to observe dis-

putes procedures, for an offence to strike in respect of non-industrial matters and for the insertion of an uninterrupted-work clause in awards and agreements, are removed from the legislation. Similarly a clause pertaining to penalties for the failure to resume work where the public interest is affected has been struck out. The Government believes that where situations occur of public-emergency proportions they should if necessary be dealt with by special emergency legislation.

Clause 127, dealing with special penalties with respect to strikes and lockouts in certain essential industries, has been amended by deleting the penalty provisions. The new clause now provides that no person employed in an essential industry shall strike without having given to his employer, within one month before striking, not less than 14 days' notice of his intention to strike.

No employer, engaged in any of the industries to which this section applies, shall lockout without having given to his employees, within one month before so locking-out, not less than 14 days' notice in writing of his intention to lockout.

At any time during a strike, the Commission or the Registrar of Industrial Unions (at their discretion), or the Minister, the Commission or the Registrar (on the written request of at least 5 percent of those workers directly concerned in the strike) may call for a secret ballot on the issue of a return to work. A similar provision is made for lockouts.

Where there is a strike, and as a result of the strike any employer is unable to provide work for any workers who are in his employment and are not on strike, the employer may on giving them at least one week's notice suspend their employment until the strike is over.

The Minister of Labour will continue to have the power to recommend to the Governor-General in Council that a union, or a section of a union, be deregistered. This is considered to be a severe step and one only to be taken as a last resort.

Penalties

Under the enforcement provisions for offences in respect of awards and agreements every union, association of employers committing a breach will be liable to a penalty not exceeding $400.

Under the provisions for penalties for breach of award or collective agreement, any penalty recovered will normally be paid into the Consolidated Revenue Account, but the Court may order that the whole or part of the penalty shall be paid to the plaintiff.

The provision concerning the recovery of wages due to a worker provides that no action may be taken unless it is commenced within six years after the date on which the money claimed became due and payable. The present provision imposes a time limit of two years.

Wage Orders

The Industrial Relations Act will retain the General Wage Order system. It deletes a proposal by the former National Government to bring in a system of Standard Wage pronouncements. A Standard Wage pronouncement would have prescribed standard minimum rates of pay for three levels of competence, skilled, semi-skilled and unskilled. It would have been made by the Industrial Commission, either at its own motion or on the application of either central organisation, at intervals of not less than two years. It would not in itself have had operative effect, but would have applied only as new awards were made.

Both central organisations, the Employers' Federation and the Federation of Labour, were opposed to the provisions in the original Bill. The Federation of Labour was not opposed to the provision for a standard wage pronouncement but was totally opposed to having replaced the General Wage Orders Act. The Employers' Federation opposed the provision on the grounds that, while appropriate for a stable and orderly bargaining environment, it was not appropriate in the competitive conditions at present existing.

The Government has recognised that the question of what wage adjustment procedures should be adopted is a complex one. It has been decided that the whole question be referred to the Industrial Relations Council for its consideration. In the meantime the General Wage Orders Act will continue in force.

Industrial Unions and Associations

The Act contains substantial revision of existing provisions for the registration and conduct of industrial unions.

The measures have been designed specifically to strengthen union organisation, including an increase in the minimum number of members before registration is granted, improvement of amalgamation procedures, and the lifting of restrictions on union welfare activities.

The Registrar of Industrial Unions will have the power, subject to appeal, to refuse to register any society as a union if in his opinion

the members of the society could more conveniently belong to an existing union. If a society is dissatisfied by a refusal of registration, it has a right of appeal to the Industrial Court, on the grounds that it will be more convenient for the members to register separately as a union than to belong to the existing union.

An existing union also has a right of appeal if the Registrar registers the society.

Registration will be cancelled if membership falls below an absolute minimum prescribed in the legislation; up to one full industrial district the absolute minimum will be 10, up to two 20, and so on. These measures, the Government believes, will encourage the consolidation and strengthening of unions in New Zealand.

THE MOVING FINGER

There is a stanza from Fitzgerald's translation of the Rubaiyat of Omar Khayyam that every legislative draftsman either knows soon by heart or learns later by bitter experience:

> "The Moving Finger writes; and, having writ,
> Moves on: nor all thy Piety nor Wit
> Shall lure it back to cancel half a Line,
> Nor all thy Tears wash out a Word of it."

The Persian poet was speaking metaphorically; but for the legislative draftsman the greater significance lies in the actual rather than the figurative meaning of the words. This is a pity because Omar's philosophy is contained not in the first but in the second limb of the metaphor. The figurative significance of the stanza is meaningful least of all to the legislative draftsman, however, because he knows the literal meaning only too well.

What may pass for a lack of literary appreciation is much more complex. Indeed, it is because this lack of appreciation is symptomatic of a much wider and more serious insensitivity on the part of the legislative draftsman that makes me pursue the example of the Rubaiyat with such vigour. It is an insensitivity that has been induced by a preoccupation with the literal meaning of words, and by the constant pressure of a grinding routine that can be carried out often only by putting one word after the other in the way that a tired yet loyal soldier learns to move his feet. It is the insensitivity not of raw youth, therefore, but of calloused, work-hardened old age. Somewhere between these two extremes of experience there is hopefully a middle way, just as between the two limbs of the Rubaiyat's metaphor there is a fulcrum on which will balance the fullest possible appreciation of what the poet wrote.

So far in this article I have expressed myself very metaphorically, which, if the thesis of my opening paragraphs is true, must mean that the legislative draftsman can understand but little of it, and must by now be quite bemused. What is meant by the insensitivity of the legislative draftsman, which can just as accurately be called a lack of vision or a shallowness of purpose, must therefore be explained in more specific, concrete terms, so that the draftsman may see himself as many others, particularly the members of the Statute Law Society, obviously already do(*a*).

The legislative draftsman is not only content but flattered to regard himself as a craftsman. He takes a pride in his work that is not unlike the pride that must be experienced by the remaining survivors of an almost extinct but noble race. Unfortunately it is that sort of pride which under those circumstances so often turns the last possibility of a prosperous and gloriously fertile survival into certain extinction.

The craftsmanship which the legislative draftsman is proud to bring to the drafting of legislation may, to use his own terms, be described as the use of "simple, orderly and logical English"(*b*), the achievement of legislative purposes by "intelligibility—the product of simplicity plus precision"(*c*), the duty to "critically examine the policy he has been asked

(*a*) The Statute Law Society, *Statute Law Deficiencies* (1970), *Statute Law: The Key to Clarity* (1972), Sweet and Maxwell.

(*b*) George Coode, *Legislative Expression* (1845), Advertisement to the second edition (1852); reprinted in Driedger, *The Composition of Legislation* (see below).

(*c*) G C Thornton, *Legislative Drafting* (1970), Butterworths, p 48; it is noteworthy that this mathematical equation of intelligibility itself offends the rules of well-formed formulae, and therefore itself is unintelligible.

to express", the obligation to ensure that "any new law . . . be in harmony with existing law", or perhaps just the luxury of making statutes "respectably elegant" (*d*).

The traditional approach is grossly underestimated, but I must risk compounding that error by hurrying on to deal with crucial issues. These issues have become crucial because the legislative draftsman for the most part refuses to budge from his established tradition, or even to review it in the light of the immense advances made within the last half century, particularly the last few decades, in linguistics, logic, and those sciences and technologies associated with communication.

It may already be too late to find the proper answers to the many questions that on account of the naive obstinacy of legislative draftsmen now beset parliamentary democracies. The possibility that it may already be too late is no reason, however, to await the outcome of events. A constructive effort must be made, for on the answers to those questions may well depend the survival of those democracies.

The effort will require the intent co-operation of all—including parliamentarians, for there is every evidence that they too are apathetic. The Statute Law Society shortly after its inception in 1968 circulated a questionnaire in the United Kingdom soliciting opinion on statute law from six groups of people: barristers, solicitors, accountants, local authority officers, members of both Houses of Parliament, and a final group of undifferentiated users. The response from parliamentarians was 16 replies to 966 questionnaires sent. The fact that only two percent of parliamentarians replied made this by far the lowest response of any of the groups solicited (*e*). This is not all that surprising, however, when it was pointed out at least as long ago as half a century by Craies on *Statute Law* that a Bill may contain "more or less intentional obscurities, perplexities, or imperfections, inserted or permitted with a view to facilitate the passage of the Bill through Parliament" (*f*).

The first big question that besets parliamentary democracies today in their task of giving formal expression to legislative policy is whether the traditional craftsmanship of the legislative draftsman can be maintained under the intense pressure of modern legislative programmes. To tell the whole truth the draftsman must answer that question by admitting the existence of private—occasionally public—nightmares. These are nightmares that can be dispelled, if parliamentary democracies so desire, by the fairly conventional methods described in my previous article, namely, of employing more draftsmen and thereby allowing more time for the drafting process (*g*).

The second big question is whether the traditional craftsmanship of the legislative draftsman, even if it can be maintained under the intense pressure of modern legislative programmes is by itself enough to meet all the requirements of modern political, legal, and social life. To this question the draftsman is too prone to give a hasty and unqualified assent, resting there awhile on his rather wilted laurels before going on to deny that legislative drafting can be undertaken otherwise than in accordance with established tradition. Does it never occur to the legislative draftsman that there might be other alternatives to legislative drafting, at least as he knows it, and that the question might be more than just how legislative drafting is to be done? It would be a tragedy if all the experience of the legislative draftsman went for nothing, and legislative drafting were replaced with something less desirable, just because the draftsman stood on his dignity by regarding his traditional approach as indispensable, and refusing to acknowledge its present, and hopefully transient, shortcomings.

Most of those shortcomings arise out of the lack of vision, or insensitivity, of the legislative draftsman in regarding his occupation as a craft. This attitude is more pronounced among new nations where what can be mistaken for a pragmatic approach on the part of their inhabitants is really a suspicion of anything that aspires to intellectual activity. To understand the shortcomings of the traditional approach, and to appreciate what legislative drafting really could become had the draftsman the vision, the

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(*d*) Elmer A Driedger, *The Composition of Legislation* (1957), Queen's Printer, Ottawa, pp xi, xii, xxiii.

(*e*) Statute Law Deficiencies (op cit), p 44.

(*f*) Craies, *Statute Law*, 4th ed (1907), Stevens & Haynes, p 25; the criticism as made by Craies relates particularly to legislation by reference.

(*g*) N J Jamieson, *Peril Upon An Ambiguity* [1973] NZLJ 548. Since that article was written the Statutes Drafting and Compilation Amendment Act 1973 altered the name of the Law Drafting Office to the Parliamentary Counsel Office, the designation of Law Draftsman to Chief Parliamentary Counsel, and the designations of Assistant Law Draftsmen to Parliamentary Counsel. The changes are in keeping with the customary nomenclature given to legislative draftsmen of sovereign parliaments.

strength of purpose, and the intellect to make it so, it is essential first to understand what is meant by a craft.

The study of classical history is now very much out of fashion; but what constitutes a craft and what happens when crafts remain crafts and fail to become or give birth to sciences is made very clear by the decline of the Greek city states at a time of political organisation or disorganisation that is not unlike our own world scene. By 400 B.C. Greek craftsmanship in metal, glass, and stone was such that, all other things being equal, the development of sciences and technologies, including the invention of machines, was assured.

All other things were not equal, however. The development of sciences and technologies was to be prevented by the acceptance of slavery(*h*). The growing institution of slavery was to become an established part of the Greek tradition. "What we call the mechanical arts," wrote Xenophon, "carry a social stigma and are rightly dishonoured in our cities." There was little chance of changing or modifying this outlook because the mechanical arts, or crafts as we know them, were carried on by slaves.

The development of sciences and techniques (which would have made the institution of slavery redundant) could have been the salvation of the Greek city states. It was not the disturbing influence of Socratic dialogue that destroyed Greek civilisation, but a stubborn refusal to reappraise tradition. There is a moral in this for the legislative draftsman.

The moral is that having acquired all the experience and expertise that can be conveniently and economically achieved by carrying on legislative drafting as a craft, the draftsman has a duty to reappraise his work in more objective terms. For this task a scientific approach is most appropriate. The draftsman will require both vision and sensitivity, or to express those attributes less emotively, the ability to abstract from past experience what will serve as rules or principles for the future. The predictability of nature which scientists are concerned to observe is not unlike the predictability *on* nature that lawyers are concerned to enforce. Both science and law are prospective in outlook.

Legislative drafting can no longer serve its function considered as a craft. A craft is the prerogative of a closed society, is mechanical rather than intellectual, traditional rather than innovative, pragmatic rather than rational, esoteric rather than intelligible, personal rather than universal, and is taught by example to initiates and apprentices rather than by precept to students.

Towards a more scientific approach George Coode well over a century ago published his book *Legislative Expression*. The scientific approach of his work is more implicit than express—and perhaps for that reason the work achieved almost instantaneous recognition among those for whom it was written. No one since Coode has brought to legislative drafting the same genius or has been responsible for carrying the scientific approach further into practical effect. Nevertheless, it would be a shame not to mention two short articles emphasising the scientific approach that have recently been written. The first is by P C Wason, *The Drafting of Rules* (1968) NLJ 548, and the second, which is in three parts, is by P J Fitzgerald and E B Spratt, *Rule Drafting* (1969) NLJ 991, 1027, 1052.

I have clearly indicated that by studying recent advances made in linguistics, logic, and those sciences and technologies associated with communication, the legislative draftsman has the means by which to reappraise the traditions of his calling, which he regards, and thereby encourages others to regard, as the mechanical art it is not. The statement of the Statute Law Society on page 17 of its report *Statute Law Deficiencies*, that ". . . like the plumber or the electrician the draftsman provides a necessary service for the user . . ." may be noted as a typical example of the unfortunate effect of this encouragement.

For the legislative draftsman there is almost a century of lost ground to be made up. What for him may be recent advances go back at least to the writings of Russell and Whitehead with *Principia Mathematica* published in 1910, Hayakawa with *Language, Thought and Reality* in 1956, before coping with the mind-expanding advances of Wittgenstein made in his *Tractatus Logico-Philosophicus* (1922), and more recently the writings of Noam Chomsky, particularly his *Aspects of the Theory of Syntax* (1965).

Meanwhile, the legislative draftsman goes on entertaining such pre-Darwinian delusions of grandeur as that "man is the talking animal", little appreciating that whereas some human languages have as little as 11 identifiable basic

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(*h*) Benjamin Farrington, *Greek Science* (Penguin), pp 8, 18-30, and in particular the views of P M Schuhl, *Formation de la Pensée Grecque*, 2nd ed (1949), referred to therein.

(*i*) Claire and W M S Russell, *Language and Animal Signals* in *Linguistics at Large* (1973) Paladin, p 163.

(*j*) N J Jamieson, *Semantics and Jurisprudence* [1964] NZLJ 15.

vocal signals (the maximum of any human language being 67), the common dolphin has 19, the fox 36, and the Japanese monkey has 37(*i*).

There is a sense, a very rare but real enough sense, in which who Hayakawa, Wittgenstein et al, are, and even what they say, does not matter. What matters are the problems of language, logic, and communication which concern these people, which they talk and write about and which in turn, in another and much more commonly appreciated sense, make these people and what they say matter immensely. The problems they talk and write about are shared by everyone, but particularly by legislative draftsmen. If draftsmen are confident that they are aware of those problems, and can solve them, so far as the drafting process requires, without the benefit of reading Hayakawa, Wittgenstein et al, then it is true that for legislative draftsmen if for no one else who those people are and what they say—and perhaps together also with what Plato, Aristotle, Bacon, Blackstone, Hart, and Fuller say—matters nothing.

For the legislative draftsman who is disposed to read further, however, he must in linguistics take account of those theories which equate or closely relate language with world outloook so that he will learn how much he himself underestimates linguistic functions. He will be bound to decide for himself whether words have proper meanings(*j*), for he will find that legislative drafting runs counter to fashionable linguistic thought. He will be forced to plunge into the private language argument, for no one has yet dared to stand firm on the brink. He will benefit from a study of transformational grammar, including the deep (and also the very deep) structure of language. He may well end up by giving more than he takes—for by reason of his practical experience and expertise, he may well have more to give. Until he does overcome his present inertia, however, he can neither give nor take.

In logic he must have regard to symbolic or mathematical logic, for which he will discover innumerable uses. It will provide a private test procedure for ascertaining or confirming the formal correctness of linguistic statutory expression. It may be used as a method of explanation, or of definition. By the explicit use of logical operators it may be expressly employed as a means of statutory expression.

In communication he must have regard to the various lexicons of modern discourse, the vocabularies of the older sciences such as chemistry and biology—which he already uses for the most part in utter ignorance of whether what he says is right or wrong. He must then go on to cope with the languages of statistics and information retrieval systems. At the present time, however, there are enough legislative examples to show that he is still unfamiliar with the elementary Linnaean nomenclature applied to plants and animals—and Linnaeus died in 1778!

Having inquired into the recent advances in linguistics, logic, and communication, the task of reappraising the traditional approach to legislative drafting has only begun. It cannot be continued without intensive self-analysis on the part of legislative draftsmen.

"In large degree statute law is the draftsman's creation," says the Statute Law Society in *Statute Law Deficiencies* at page 17, "and insofar as it is out of hand it is his doing." It will take self-analysis, therefore, for the draftsman to appreciate that for as long as legislative drafting remains the prerogative of a closed society, is considered to be mechanical rather than intellectual, traditional rather than innovative, pragmatic rather than rational, esoteric rather than intelligible, and to be taught by example to initiates and apprentices rather than by precept to students, few lawyers are going to want to be legislative draftsmen.

Until legislative drafting is reappraised, therefore, chronic shortages of draftsmen will intensify, the training of new draftsmen will become more and more uneconomic as recruits leave—or worse still compromise their ideals, and legislation will become more and more, instead of less, confused. A change will come, there is no doubt of that; but if it is to be a change for the better it must come as much from the inside as the out. Can I therefore expect that some day soon legislative draftsmen will understand that in using the word "science" in this article, I use the word not with its obsolete Victorian connotation, but with the deeper contemporary meaning that general systems theory has enriched our language?

N J JAMIESON

Overheard: At a Law Revision Committee meeting:

"My office," explained a Justice Department Research Officer, "is a room above a Self-Help shop."

"Ah," said Professor Brown (Auckland), "obviously where you do your research into the grosser crimes."

MORE ON THE ACCIDENT BILL SEMINAR

A final report by
Mr D. J. White

Dr A. M. Finlay spoke on cls. 17A-52 and 133-164, saying that he considered cl. 17A to be "the guilty conscience" clause because it was brought in at the Committee stage.

He said that he should explain his different attitudes when he was a member of the Gair Committee and at the Committee stage of the Bill. He went along with Gair because it was considering the broad principles. At the same time the Social Security Commission was sitting and it was felt prudent to walk before galloping. Then at the Committee stage Parliament was faced with a different task. It was legislating and not considering broad principles. It was realised that in order to satisfy the smaller area excluded in Gair it would require an enormous amount of legislation with a mass of detail and a considerable amount of judicial interpretation. It was rapidly driven home that it would be just as easy to go the whole way with administrative ease.

Clause 19 was creeping into more legislation, it was of doubtful justification and difficult in meaning. There was no such clause for the Compensation Court. Dr Finlay said that he felt uneasy about cl. 20. Subparagraph (a) was all right but then the Minister and not the Commission could specify certain senior positions. There was no reason for the Minister to be involved in this and it was therefore political.

As far as the insurance companies were concerned, Parliament had no objection to their being involved in the administrative side of the scheme because they had the staff on the ground.

Prevention and rehabilitation were of prime importance. Clause 43 which covered safety was, according to the New Zealand Medical Association, a pious assertion. The search into the causes of accidents was the meat of the provision. According to the Legal Research Foundation, cl. 43 did not cast onto the Commission the duty at present on employers under the Workers' Compensation Act. It was important that anticipation and foreseeability be required from the Commission. It was inevitable that employees would be careless and negligent.

Clause 51 created a position for a medical practitioner and was given much thought. A practitioner often lost his eminence and distinction on appointment to such a position, becomng just another official after a number of years. Yet it was an extremely important position. As the Chairman was the administrative head it was felt that the medical practitioner should not be Chairman so as to avoid his becoming overburdened with administration work. However it was the intention that the head of the medical division would be the pre-eminent figure in the whole structure although he would not be involved in administration.

On the question of the procedure for appeals, Dr Finlay said that cl. 148 provided for a hearing officer who was the pivotal point of the success or failure of the scheme. Officers had to be people of sympathy and understanding. There was a strong view that the Commission should err on the side of generosity. The Commission should start with the assumption that every claim was valid. The task of the hearing officer would be to determine the outcome. He should not be too ritual and bound by rules and precedents. A written application would be sufficient in a majority of cases and the claim would be sustained. If there was a doubt there would be a hearing. Under cl. 156 the right of representation had been enlarged to laymen as well as to Counsel.

Mr H. G. Duncan of the Department of Labour then considered Parts III, IV, V and VIII of the Bill. Mr Duncan said that, apart from Part VIII which dealt with miscellaneous provisions, he would summarise the Parts dealing with the coverage of the new compensation arrangements, both as to the persons who would be covered, the periods of time during which they would be covered if they suffered accidents, and the geographical limits of their coverage.

Broadly, the arrangements provided for two schemes—an Earners Scheme under Part III and a Motor Vehicle Accident Scheme under Part IV.

As regards the Earners Scheme cls. 54 and 55 laid down the two types of cover from the time point of view—continuous cover i.e. 24 hours a day and work accident cover as existed at pre-

sent under the Workers' Compensation Act.

Clauses 56 and 57 then went on to identify the class of persons to come under each type of cover.

Clause 56 set out the personal qualifications for continuous cover. Firstly there was a residential qualification of 12 months' residence in New Zealand.

Then there was the classification of persons entitled to this type of cover. He must be either:

(a) Self-employed—by cross reference to the definitions section it would be seen that the Land and Income Tax definition was used.
(b) A worker in full-time employment for eight weeks before the accident.
(c) A regular part-time employee (10 hours per week).
(d) One of a heterogeneous group of occupations—commission agent, labour-only building contractor, company director, Member of Parliament, Judge, etc.
(e) Employee on a retainer.

A person coming within categories (c), (d), (e) must be receiving an annual rate of salary or wages of at least $500 per year.

Clause 57 provided that if an employee or self-employed person was not eligible for continuous cover he qualified for work accident cover. Because of the difficulty of proof in the determining whether self-employed persons were in fact working at their occupation at the time of the accident subcl. (5) laid down special requirements for them in lodging their claim.

Subclause (6) repeated a provision which was in the present Workers Compensation Act. In short it meant that members of working bees might in the discretion of the Commission be given work accident coverage upon payment of a special levy.

Clause 58 provided for a time or temporal extension of continuous cover after a person ceased to be qualified for it. The clause now provided for an extension of cover up to 13 weeks on two alternative bases—seven days for each complete month of uninterrupted continuous cover or extension on a graduated scale. This should enable regular casuals e.g. freezing workers, to get virtually a three months' extension of continuous cover.

Clause 59: Geographical extension of cover of earners scheme:

(1) N.Z. Seamen and Airmen.
(2) Armed Forces.
(3) Continuous cover for a person going overseas temporarily and still deriving N.Z. earnings—12 months.
(4) Continuous cover (up to four years and perhaps longer)—Government service overseas or service overseas in New Zealand firm and still controlled from New Zealand.

Clause 60: Seamen and Airmen. New Zealand seamen and airmen were covered everywhere provided, generally they were on New Zealand ships and aircraft—some special cases.

Clause 62: Armed Forces. They were within the scheme. Broadly speaking, the War Disablement Pension and the War Widows Pension were treated as sacrosanct (non-economic: no means test.

Clause 63: Persons in penal institutions. Treated as now—not employees—ex gratia payments.

Clause 64: Diplomats and Consuls. Out from earners' scheme. Covered by motor vehicle accident scheme but did not get earnings related compensation (they pay no levy).

Clauses 65-68: These clauses dealt with occupational disease, hernia and industrial deafness. The significance of them was that the provisions now applied to self-employed persons as well as workers.

Clause 69: Dealt with the composition of the Earners' Fund.

Clause 69A: This established the Active Service Compensation Fund. This was a war time fund. It was obvious that it could not be maintained by levies so that provision was made that it be maintained by a straight appropriation by Parliament.

Clauses 70-78: Dealt with the payment of levies under the "Earners Scheme". The clauses were quite complicated. These levies would be collected through the Inland Revenue Department. The transitional arrangements visualised employers paying premiums to their insurers to cover the six months period from 1 April 1972 to 30 September 1972. They would then fill in a form issued by the Inland Revenue Department and the Department would issue an assessment to cover the period 1 October 1973 to 31 March 1974. After that, assessments would be on an annual basis. Self-employed persons would in October or November 1973 fill in a form from Inland Revenue Department giving a statement of their earnings for the last financial year. Their levy payments would be based on a 1 October—30 September payment year. To cover the case of fluctuating earnings, the Commission might agree to the averaging of earnings over two, three or four years.

Clauses 79-84 provided for special provisions in respect of extensions to normal work accident cover. These were similar to those in the Workers Compensation Act re-drafted to cover all earners. Clause 80, dealing with accidents to and from work had been simplified.

Clause 85 dealt with illegal contracts of service. These were now all covered without qualifications.

Clauses 86-97 dealt with the Motor Vehicle Accident Scheme (Part IV). Broadly, if the motor vehicle was registered and licensed, a person (including a non-earner) injured through involvement with the vehicle was entitled to compensation whether the accident was on or off the road. A special fund was to be set up financed through levies on car owners and probably a loading on drivers' licence fees.

The compensation for car-accident victims was dealt with in Part VI. Where the victim was an earner he would get his normal compensation. Non-earners would get special payments such as lump sums for loss of bodily function and the like and in some cases would get compensation as a potential earner, under cl. 112.

Part V dealt with provisions common to both the Earners Scheme and the Motor Vehicle Accident Scheme. Largely it dealt with the calculation of "earnings" of an employee or self-employed person as a basis both for levies and earnings-related compensation.

The revised rules were adapted from the Land and Income Tax Act. Part VIII contained miscellaneous provisions. Although the provisions of the Bill were lengthy and complicated, this was necessary as the Bill broke new ground and had to deal with difficult transitional problems.

Mr J. R. Kirker, a leading orthopaedic surgeon from Auckland and a member of the Medico-Legal Committee which advised on the drafting of the Schedule to the Bill, then addressed the seminar.

Mr Kirker gave an explanation of the history and content of the schedule in the new Accident Compensation Bill, compared it with the Workers' Compensation Schedule and offered observations on cls. 113, 114 and 145 from a medical point of view.

At the outset this new schedule was not something that had just grown overnight or over the last seven months since the Medico-Legal Committee of the Accident Compensation Bill had been meeting. It had been formulated over a number of years at the instigation of the New Zealand Orthopaedic Association.

Long before the Woodhouse Commission was ever brought into being, orthopaedic surgeons in this country were very dissatisfied with certain medical aspects of the present Act and regarded the second schedule as inadequate and full of anomalies. These things used to be discussed at scientific meetings of the Association.

Papers were presented by Mr O. R. Nicholson and Mr Kirker. Their aim was to try and establish uniformity of standard of assessment amongst orthopaedic surgeons in New Zealand. Their views were largely accepted by the Association members and in fact the things that they recommended have been largely followed out over a number of years now by orthopaedic surgeons in this country when making quasi schedule assessments.

When the Woodhouse Commission was set up Mr Nicholson and Mr Kirker were asked by the New Zealand Orthopaedic Association to present submissions to the Commission and later further similar submissions were made to the Parliamentary Select Committee. More recently again, Mr Kirker was asked if he would be willing to sit on the Medico-Legal Committee of the Accident Compensation Bill. He accepted this and sat on that Medico-Legal Committee representing the New Zealand Orthopaedic Association and the Royal Australasian College of Surgeons.

Having accepted that portfolio, he received, as all committee members did, a letter from the Minister, giving the terms of reference of the Committee and it was quite apparent from that communication that the Minister, at that time, visualised the drawing up of a sophisticated schedule, leaving minimum room for quasi schedule assessment. Mr Kirker said that this was quite foreign to their thoughts on the matter and at the first meeting of the Medico-Legal Committee told the members that while they could produce a better schedule than the present one, that for numerous reasons it would be impracticable and undesirable to produce a truly sophisticated schedule, and the new proposed schedule was in fact as far as they were willing to go in that respect and they felt that its content would adequately cover the orthopaedic impairments that could be placed on a schedule basis, and remaining impairments would still have to be assessed on a quasi schedule notion. It would be realised probably that of all the disciplines in medicine, orthopaedic disability is the one that lent itself best to schedule assessment. Orthopaedic assessments for conditions apart from amputations and ex-

cluding spinal disabilities were largely made on losses of power, partial losses, and complete losses of movements in joints, alterations in sensation and shortening of limbs, and these were all objective things that could be accurately seen, felt and measured. Even allowing that, however, it would be realised that depletion or losses of power could never be adequately written into a schedule, neither could the vast varieties of alteration and losses in sensation, and it was quite impracticable to cover all degrees of partial losses of movements in joints.

When Mr Kirker prepared the proposed schedule for orthopaedic impairment for consideration and debate by the Medico-Legal Committee, he re-wrote the amputation section to remove the anomalies in the present schedule, using the realistic figures agreed to in the past by the Association, and enlarged the schedule to cover other impairments as well as amputations using figures already used by the orthopaedic surgeons of New Zealand for a long time now when making quasi schedule assessments and included a section on spinal disability evaluation, realising, however, that spinal disability was still largely a subjective field.

Using this type of schedule, a qualified orthopaedic surgeon could then assess quasi schedule or any other orthopaedic impairments presented to him and if the individual orthopaedic surgeon stuck to the criteria of the proposed schedule, undoubtedly uniformity of assessment would be possible throughout the country.

Before dealing with differences between the old and the new, Mr Kirker noted that figures for major amputations of limbs remained unaltered. The figures were somewhat higher than pertain to overseas schedules but he felt that the higher figures were justified under the Woodhouse concept of generosity, particularly when the figure for 100 percent total loss of bodily function under cl. 113 of the new Bill was only $5,000.

Some of the differences in the new schedule in comparison with the present schedule were:

(1) Under the present Act the percentage figures of the Second Schedule were notionally geared to loss of earning capacity or potential. Under the new bill the Second Schedule was to compensate for sheer loss of physical integrity and bodily function: it was a lump sum compensation for maiming.

(2) The figure for total loss of an index finger had been reduced from 20 percent of total to 14 percent of total. In the opinion of orthopaedic surgeons that previous figure of 20 percent of total had always been quite unrealistic: it had been far too high. The figure had been unrealistic when compared with the figure for total loss of the middle finger . . . 20 percent for the index finger, 8 percent for the middle finger. It was a well known medical fact that the function of these two digits was almost the same and in fact it could be argued that some people are better off without the index finger than without the middle finger. Without the index finger one still had a continuous finger/palm grip line, whereas with the middle finger absent there was a gap in the grip line with resulting weakness in total finger/palm grip. Not only, therefore, had they reduced the figure for the total loss of an index finger, they had raised the figure for total loss of the middle finger to 12 percent—putting it in proper perspective in relation to an index finger loss.

(3) They had dropped the term "loss of a joint of". It would be realised that what was really meant by that was "loss of a segment distal to a joint", either anatomical loss or loss of function, so that was replaced by "loss of a segment of".

(4) They had deleted the minimum loss figure under the old Act or loss or one segment or joint of a finger, 5 percent of total. There were many so-called tip injuries where the end segment of a finger had not been completely lost anatomically, or from the point of view of function, which still constituted a significant disability to a working man's hand. Under the present Act unless the assessor was being dishonest, no provision was made for such a disability. It was not assessable. What had so often happened, therefore, was that knowing the disability was a genuine one, the assessor quite dishonestly assessed such a loss at the minimum of 5 percent on the grounds that the law on the subject was an ass. They therefore brought in small figures, less than 5 percent of total, to deal with these pulp or tip injuries.

(5) Orthopaedic surgeons for many years had been dissatisfied with the provisions of the Act when assessing permanent loss or impairment, partial or complete, from multiple digit involvement. Under the present Act one was bound just to summate the individual losses in arriving at a final figure. Where two or more digits were involved the impairment must naturally be reflected as a loss of function to the hand as a whole as a composite gripping organ, and when looked at in that way the loss of function with multiple digit involvement would nearly always be greater than pertaining to just summating the individual losses. For

that reason, in the new schedule under the Amputation Section figures, there was a note allowing for assessment in multiple digit cases by two methods:

(a) by summating the individual losses specified in the provisions of the schedule and,

(b) assessment in relation to the permanent loss or impairment of bodily function affecting the hand or lower arm as a whole as a gripping organ, and the higher figure arrived at after assessment by both these methods should be the figure awarded.

The method to be used when assessing in this manner was described in a note in the proposed schedule.

(6) The proposed new schedule included figures for the assessment of arthrodeses—that was, complete stiffness of a joint in the position of optimum function, partial joint stiffnesses to be proportionately assessed quasi schedule under s. 113 of the Act. Those figures were ones that had been used for a long time now by orthopaedic surgeons in this country for such disability by common acceptance, but never before written into the schedule.

(7) Figures for varying degrees of shortening of legs had been added for the first time.

(8) Figures of disability had been given for the optimum results seen after certain common orthopaedic operations and procedures, procedures which, however, always left residuum, and again these were figures commonly accepted by orthopaedic assessors but never before written into the schedule.

(9) There had been a note made as to the method of assessing multiple disabilities. That stated that if the disability affected more than one limb, the assessment should be made by summating the figures but if the disabilities involved the one limb, the method of progressive extraction of losses—that was regarding the limb as a whole—should be used.

(10) A section on Spinal Disability had been added and this had been the most difficult field. What had been attempted there was to list a limited number of types of spinal disability which normally carried with them certain well-known objective physical findings of abnormality on examination and specific related radiological or x-ray changes. This was an attempt to get some objectivity into what was predominantly a subjective area, and while many many cases of back disability would not exactly fit this outlined pattern, intelligent use of the figures given in the proposed second schedule in this respect would at least be of great assistance to orthopaedic surgeons trying to achieve uniformity of standard of assessment in back conditions.

At the end of the Schedule there was a note which stated:

> "Where there are subjective symptoms of pain without demonstrable clinical finding of abnormality or demonstrable structural pathology, no assessment should be made under Section 113 of this Act".

That had been added because all orthopaedic assessors saw a considerable number of cases, in particular back cases, where the person injured still had subjective complaints to make but where on careful skilled examination there were no abnormalities detected and where ancillary aids, such as x-rays, showed no structural pathology. In those cases, it was the contention that the continuing subjective symptoms were either in the mind, a psychological disability, or the symptoms were so slight as to be purely of nuisance value and were not in any way a true depletor of bodily function.

In the past, in such cases it had been tempting to award a percentage figure so as not to present an injustice to the claimant, providing that it was thought the symptoms were genuine, whether in the mind or not, but this should not be done: percentage assessment should only be based on demonstrable objective abnormality and redress for this sort of case should be sought under cl. 114.

Under cl. 114 it is stated:

> "Provided that any sum payable under this section shall be paid as soon as practicable after the medical condition of the person is, in the opinion of the Commission, sufficiently stabilised to enable an assessment to be made for the purposes of this section or forthwith after the expiration of two years from the date of accident, whichever is the earlier".

In other words, there was a two year limitation period on this section. It is essential to have this period of limitation for this type of case to stop claimants from having many picks at the cherry for alleged increase in the subjective intangibles—pain suffering and so on—which could not be accurately verified objectively.

To offset any injustice that might appear to be done in this respect, cl. 113 had been modified to allow for a revision of disability under that section. A claimant would be able to ask for revision from time to time under Section 113 if he felt deterioration had occurred and under that section accurate objective evaluation could then be carried out with a re-assessment of the percentage disability figure pertaining which

would naturally, if there had been deterioration in the pain and suffering aspect, be reflected in the increase in objective findings.

As well as that safeguard, provision was made in cl. 114 for review of the sum payable at any time when a person suffered head injury by accident, in respect of which he had cover under the Act, and developed epilepsy after the lump sum payable under this section in respect of that injury had been assessed and paid. This also applied to such other cases as the Governor-General might by Order in Council prescribe.

There were also provisions made for the special circumstances governing paired organs —kidneys and lungs—to have an enhancement factor if the injury was specially serious by reason of a pre-existing loss or impairment of the other kidney or lung—again, by Order in Council.

Mr Kirker concluded on a personal note. For years now interested parties throughout the length and breadth of this country had been arguing the merits and demerits of the Woodhouse concept. The philosophy was ultimately accepted by the majority. It would appear now that a new argument was starting as to the relative merits and demerits of pure Woodhouse versus the modified form envisaged in this Bill. Mr Kirker urged that years of time not be wasted; he urged the Seminar to get behind the present Bill and launch it successfully, even if it still had got imperfections and anomalies. These would straighten themselves out in the light of experience once the machinery was operative. If this attitude were not adopted, then this far-seeing social reform could founder at its launching and Mr Kirker believed that it was potentially too good a piece of legislation to meet that fate.

Routine answers for routine questions—I have felt for some time that the Journal should offer a prize for the best model answers prepared by practitioners for use in replying the "routine" questions asked by the Inland Revenue Department—Duties Division. I contemplate an eventual set of model answers as extensive as the present set of questions.

By way of a starting point, I turn to the following question which is asked in some estates where the stamp accounts do not disclose ownership of a home.

Question: "Where was the deceased living prior to the date of death?"

Model answer 1.—(preferably on letterhead of a firm with a name redolent of Erin).

Sir,

Sure deceased was livin' with the little folk beneath a toadstool in his brother Shamus' garden.

Yours faithfully,

Model answer 2.—(for use when deceased manifestly of humble means).

Sir,

Your inquiry as to where deceased was living prior to the date of his death has drawn our attention to a notable omission in our preparation of the stamp account.

A clerk in our office, knowing the deceased lived in a flat, assumed that he rented it. Further research prompted by your inquiry establishes that the flat concerned is in fact a penthouse at the top of the multi-storey office block in which your Department's offices are situated. It also transpires that deceased owned the whole block at the date of his death. An application for the current government capital valuation is now being made and when obtained will be forwarded together with a valuation of deceased's extensive collection of antique furniture.

Attached is a Notice to Quit.

Yours faithfully,

Model answer 3.—(for use when practitioner is pressed for time).

Sir,

If you had mown your front lawn more frequently, you would have noticed deceased's caravan.

Yours faithfully,

"Bliss", Christchurch.

REGULATIONS

(Concluded from page 26)

State Services Salary Order (No 9) (SR 1973/319)
Telegraph Regulations 1967, Amendment No 5 (SR 1973/296)
Toheroa Regulations 1955, Amendment No 12 (SR 1973/315)
Transport (Comonwealth Games) Regulations (SR 1973/317)
Traffic Regulations 1956, Amendment No 26 (SR 1973/316)
Transport (Ordering a Vehicle Off the Road) Notice (SR 1973/298)
University Bursaries Regulations 1971, Amendment No 3 (SR 1973/294)
Workers' Compensation Amendment Act Commencement Order (SR 1973/318)

COURTING TROUBLE

Dr R G Lawson writes from Britain.

Impeachment is in the air. Enough of Mr Nixon, but more of Sir John Donaldson. He is President of the National Industrial Relations Court, a division of the High Court, and one created by the Industrial Relations Act 1971.

This Court presides over disputes as to union recognition, unfair dismissal and, more potently, unfair industrial practices. Ordering just such a practice to end, it fined the Amalgamated Engineering Union £75,000 when the order went ignored. That fine was duly extracted, and from the Union's political fund.

Here, the controversy arose and with it, demands in Parliament, from a fair-size number of Labour members, for his removal from office. He was, they alleged, motivated by political ends when pursuing the functions of his Court. It is true that he has been a prominent member of Conservative organisations. He once helped pen "The Strength of the Giant", a Conservative financed study of monopoly trade-unionism.

Doubtless, the move will fizzle out. One also hopes that the Labour Party will not pursue its promise retrospectively to absolve various local councillors from their refusal to implement the Housing Finance Act, and its provisions commanding the raising of certain council house rents. Nothing could be more damaging to what the woe-begone Richard Nixon once called "A rule of law, not a rule of men".

Still, that such moves could be publicly expressed are symptomatic of a disturbing trend; the increasingly fractious and segmented nature of British society. A friend of mine, some two months arrived from Auckland, assessed the British workers as the most worthy candidates of all for the Nobel Peace Prize, and I, for one, devoutly agree.

You may think that current events simply do not prove me right; indeed, that they prove me unequivocally wrong. For it is true that the miners are currently in their third week of a most damaging ban on overtime; it is true that the power workers are in the fifth week of a ban on out-of-hours working; it is true that there is trouble on the railways, at the docks, at British Leyland and so on and so forth.

But consider what they are railing against. Never mind, for the moment, that most of their jobs are hideously dull. What triggered this unrest is inflation. Phase II of the Counter Inflation Act 1973 recently expired. It allowed pay rises of £1 plus 4 percent, a formula which allowed increases to be made at a rate of some 8 percent. Not one pay rise infringed the limit, yet inflation galloped along at a rate of 10 percent, thus nailing for ever the credo of the right wing that monopoly trade unionism lay behind inflation. The blame now is attributed to world commodity rates, which certainly have spiralled frighteningly.

We have now all come to expect inflation and to plan accordingly. Indeed, the now embattled Phase III allows for automatic pay rises when the rate of inflation exceeds, as it assuredly will, the rate of 7 percent. When that 'threshold' is reached, inflation will inexorably be refuelled. One man's wage rise, spake Mr Wilson, is another's price rise. Inflation also causes uncertainty, restlessness and considerable discomfiture in mind, if not in body. But it does, indeed, sap the body, for life is becoming ever more difficult, and almost desperate, for many people. When all this is topped off with a petrol crisis, which deprives many of a pleasure which was the biggest bright spot in a miserable life, the slow disintegration of our social fabric is easier to understand. Remember, too, that much of this was played out against the back drop of the pomp and luxury of a Royal wedding, and my friend's plaudit of the British workers is seen for its essential validity; for if the revolution did not come then, it never will come.

George Orwell once said, as everybody knows, that "some people are more equal than others"; but he also wrote, in a less popular phrase, that "England is a family ruled by the wrong people". I suspect that, if you mash those two quotations together, the essence of our dilemma is struck. But I also suspect, nay am convinced, that no one will ever do anything about it.

Checkmate—A London shop owner has been arrested for displaying a chess set with all 32 pieces in sexual positions.

CORRESPONDENCE

Sir,

Casus Omissus

The schedule of appeals to the Privy Council since the establishment of the Court of Appeal on its present statutory basis (set out on [1973] NZLJ 506-8) omitted details of the following appeal:

Parties: Associated Motorists Petrol Co Ltd v Commissioner of Inland Revenue.
Supreme Court: McGregor J [1970] NZLR 431, 357-363(sic).
Court of Appeal: Affirmed (North P, Turner and McCarthy JJ) [1970] NZLR 431.
Privy Council: Appeal dismissed [1971] NZLR 660.

The *Associated Motorists* case is worthy of note as being the only instance where in the period covered by the schedule the decision of the Judicial Committee went against the Commissioner of Inland Revenue.

While it may be correct in substance for the schedule to describe Turner J as having dissented in *Mangin v Commissioner of Inland Revenue,* his judgment shows ([1970] NZLR 222, 236) that he concurred in the decision to reverse Wilson J, regarding himself as being bound by the decision delivered a few minutes previously in *Marx v CIR, Carlson v CIR* [1970] NZLR 182, notwithstanding his dissent in those cases.

Yours faithfully,

G P BARTON
Wellington

LEGAL LITERATURE

The Australasian Notary, by W. H. Blyth

Notaries will be aware that the standard textbook concerning their work, Brooke's "Office of a Notary", has been out of print for many years. Mr W. H. Blyth of Auckland has performed a signal service to notaries by preparing his monograph, "The Australasian Notary".

After giving a history of the office and setting out the procedure for applying for appointment to the office, Mr Blyth gives clear and practical directions as to the various duties a notary has to carry out. He also lists the authentication requirements of all major countries.

No notary should be without a copy of this most useful book. Copies may be obtained from Mr Blyth at P.O. Box 1408, Auckland.

L.F.B.

A NEW QUEEN'S COUNSEL

A Christchurch barrister, Mr E J Somers, has been appointed Queen's Counsel. Mr Somers was born in Christchurch in 1928. He graduated BA, LLB, from Canterbury University College and was admitted as a barrister and solicitor of the Supreme Court in 1952. From 1955 to 1971 he was a member of the firm of Champion and Somers. He has since practised as a barrister only.

Mr Somers has taken an active part in law society affairs, serving on the Council of the Canterbury Law Society from 1961 to 1968 with a term as president in 1967, and on the council of the New Zealand Law Society from 1966 to 1968. Since 1969 he has been the convenor of the New Zealand Society's Ethics Committee. He is a member of the New Zealand Council of Law Reporting and was a member of the Property Law and Equity Reform Committee from 1966 to 1972. He has lectured in legal subjects since 1954 first at Canterbury University College and latterly at the Canterbury University. As well, Mr Somers has presided as Judge Advocate over many courts-martial held in Christchurch, and he is a member of the panel of Christchurch lawyers who assist the Crown solicitor in that city in the conduct of trials in the Supreme Court. Mr Somers is married, with three children.