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LEGAL AID STILL AILING

The recently introduced Legal Aid Amendment Bill contains some welcome improvements to the field of civil legal aid, but is nonetheless conspicuous by its perpetuating a denial of legal aid in divorce proceedings.

On the credit side, salient features are:
—the bill extends legal aid to cover "all applications, objections, and appeals under the Town and Country Planning Act 1953";
—the minimum contribution is reduced from $30 to $15 (however, at the same time a District Committee's discretion to waive it is needlessly tightened up);
—a District Committee is given power to extend the time for the making of an application for the exempting of the Crown charge on the proceeds for successful aided litigants (to the relief of many practitioners);
—contributions will be more readily enforceable through the Magistrate's Court;
—contributions in domestic cases may be waived where aided parties have been reconciled and remain so for over 3 months;
—"income" is defined along the lines of s 3 (1) of the Social Security Act 1964;
—s 19 is amended by exempting home, car, household contents, clothing and tools of trade before determining "disposable capital", and allowances before "disposable income" is assessed are increased and provision made for their variation by Order in Council;
—in matrimonial property disputes, the disputed resources of those concerned are to be taken into account nonetheless, to the extent that a District Committee "considers fair and reasonable".

On the debit side is the continued denial of legal aid for divorce proceedings, as the Bill, by omission, perpetuates a denial of aid to those who need divorces but cannot afford them.

It is said that the decision in 1969 to drop divorce from the then Bill was motivated by two factors: feared opposition from women's groups, and expense.

Of the first, little need be said. The National Council of Women (representing some 300,000 of the country's adult women) has called for the extension of aid into this field—it is therefore so far from opposing, as to be actively promoting aid for divorce. As is, the restriction merely denies to many the blessings of lawful union, and renders their offspring as misleading statistics in the annual head count of the exnuptial.

Of the second, it is obvious that the cost of divorce has parted company with economic justification if not reality. Supreme Court proceedings, our clients are assured, are expensive —yet just *why* they should be so much more expensive than those in Magistrate's Courts has never been satisfactorily explained.

The logical step is surely to remove divorce into the Magistrate's Court, with the consequential advantages:

(a) Cost would be halved, if not quartered;
(b) The time within which petitions are heard would be reduced;
(c) The Supreme Court would be relieved of a mechanical processing that is time-consuming for Judge and counsel alike.
(d) Those in outlying areas would not have to travel as far to attend hearings.
(e) Divorce, like the making of separation and maintenance orders, properly belongs in the Domestic Proceedings Court, from which the public is excluded and where applicants are spared the embarassment of having to detail the

breakdown of their marriages to an uninvolved audience.

The only argument in favour of the present unsatisfactory situation as regards forum is that divorce involves a matter of status, and as such warrants the attention of a Supreme Court Judge. Yet it cannot be seriously suggested that the handling of divorce by the Supreme Court in any way confers greater sanctity on the marriage bond itself; if it did, then logically we should begin at the beginning and question the propriety of marriage ceremonies which are often performed by Registrars—and of the Magistrate's Court at that!

If, then, it is the *ending* of the marriage bond that is so significant, inevitably we must ask ourselves which is the more important decision: the making of a separation order after a contested and full hearing, or the granting of a decree after formal proof that an order has been made and has been in full force and effect for a period of at least two years? As Magistrates are already making the more important decision, there would seem to be little reason to continue in denying them the power to make the lesser.

JEREMY POPE

Never final—If New Zealand wishes to extend accident compensation to cover sickness as well, will it want to face the financial consequences? So asked the Chairman of the Accident Compensation Commission, Mr K L Sandford, of a recent seminar in Greymouth. Mr Sandford said far-reaching social legislation such as the Accident Compensation Act was never final. "It must be kept under scrutiny, in the light of our own experience, and in the light of opinions formed by people overseas who have brought their minds to bear on the same problems.

"In Australia it has been estimated that an accident plus sickness scheme would cost approximately five times the amount required for accident only," he said in an address to a seminar organised by the Institute of Chartered Secretaries and Administrators. Therefore, if accident only in New Zealand costs $74 million in this year, it could be that a combined accident and sickness scheme could involve more than $300 million. Dare we face such expenditure? Or do we accept that the accident victim was the one for whom the law provided the greatest anomalies, and we have in the meantime taken a sufficiently forward step by providing for them?

In broaching this and other topics to the meeting, after outlining the accident compensation system, Mr Sandford emphasised that he was not expressing any personal viewpoint on them but raising the subjects to provoke interest. "For certain, each of them will come under debate in New Zealand in the future," he said. "Think of them now, I suggest, for both you, the Commission, and our Parliamentarians will necessarily have to be thinking of them in the years ahead."

The other questions raised by Mr Sandford included:

- Should financial loss remain the test for self-employed who are accidentally injured, or should compensation be available merely for the fact of being incapacitated?
- Should compensation automatically be linked by some agreed index to keep in line with changing values of money or should these changes be made when the Commission recommends them periodically to the Government?
- Should employees contribute towards accident compensation cover?
- Should reserve funds be provided for future liabilities or the system be "pay as you go" with only sufficient levies collected each year to pay for the current year's outgoings?
- Is it worth debating whether there should be a flat rate levy on all employers regardless of different risks?

Do drop in—Ontario is experimenting with a new approach to the matter of handling minor traffic offences through a "drop in" Court. Those charged with minor violations are being asked to drop in at their convenience to explain their conduct. They can plead "guilty with an explanation" or not guilty without appearing in Court. Justices of the peace will deal with moving traffic violations except careless driving or those involving accidents.

In a relaxed, less formal atmosphere, they will hear the Crown's evidence, usually given by a policeman. There will be no prosecuting attorney. The defendant or his lawyer may then cross-examine the policeman and finally give the defendant's side of the story. The policeman may not cross-examine or question the defendant's story but the hearing officer may ask what questions he feels are necessary of either party. The reason for the experiment, which will continue until November, is to clear the Courts of minor traffic offences.

SUMMARY OF RECENT LAW

ADMINISTRATIVE LAW

Notice to enter and remove material—Notice given by Ministry of Works in September 1970 to enter farm land and remove material for a State highway held not to be a sufficient notice for the purposes of s 121 (1) (k) of Public Works Act 1928—Notice applied to the whole farm and did not indicate fairly what was intended to be done—Minister had no power, until legislation changed in 1972, to enter land "by his servants or agents" as stipulated in the notice —Obiter, s 13 (2) of the National Roads Act 1953 enables the physical tasks of the Board and such necessary incidental powers as those conferred by s 121 (1) (k) to be delegated to the Commissioner of Works—"Duties' 'in s 16 of the National Roads Act is the equivalent of "functions" used in a wide sense to include powers incidental to the exercise of functions—Comments on whether a Commissioner of Works is entitled to sub-delegate to a District Commissioner. *Attorney-General v Cooper & Ors* (Court of Appeal, Wellington. 16 August 1974 (CA 1/74). McCarthy P, Richmond and Woodhouse JJ).

CONTRACT

Computation of damages for wrongful dismissal—An employee who has forgone superannuation benefits which he would have earned by remaining with employer A cannot claim from employer B the value of those benefits on wrongful termination of his new contract by employer B—*Anglia Television v Reed* [1971] 3 All ER 690 distinguished. *Ash v Victor Enterprises Ltd* (Supreme Court, Auckland. 5 August 1974 (A 591/70). Cooke J.

Breach of regulations in sale of vehicle—Sale on hire purchase of secondhand motorcar—Failure to deliver warrant of fitness less than 30 days old—*Held,* no term implied by reg 53 of the Traffic Regulations 1956, nor did failure make the contract illegal within the meaning of the Illegal Contracts Act 1970—*Fenton v Scotty's Car Sales* [1968] NZLR 929 followed in preference to earlier Supreme Court decisions to contrary—Consideration of Hire Purchase Act 1971, ss 12 and 39. *Automobile Centre (Auckland) Ltd v Facer* (Supreme Court, Auckland. 6 August 1974 (M 992/73). Cooke J).

LIMITATIONS

Commencement of limitation period—Claim for contribution or indemnity in action in contract—Limitation Act 1950, s 14—Limitation period runs from time when defendant is able to obtain judgment for money. *Wrightcel (NZ) Ltd v Felvin Suppliers & Distributors Ltd & Anor* (Supreme Court, Palmerston North. 16 July 1974 (A 129/72). Wild CJ).

PRACTICE AND PROCEDURE

Applicability of Rules to application for review—Supreme Court (Administrative Division) Rules 1969 —Applicability of Rules to application for review under Judicature Amendment Act 1972. *Takaro Properties Ltd v Rowling & Anor* (Supreme Court (Administrative Division) Wellington. 23 July 1974 (A 186/74). Wild CJ).

Cross appeal under Patents Act—Licence under Patents Act 1953—Appeal—No provision for cross appeal—Practice of Supreme Court on civil appeals from Magistrates to be followed. *Hoffmann-La Roche v Bamford & Anor* (Supreme Court, Wellington. 16 August 1974 (M 49/74). Wild CJ).

Uplifting payment into Court—Jury's award of damages less than amount paid into Court by defendant—Judgment entered for defendant—Plaintiff moved for new trial on the issue of damages only —Defendant held not to be entitled to uplift the money paid into Court as the action had not been finally disposed of and there was no compelling circumstance showing that the money should be paid out. *Simpson v Extruded Products Ltd* (Supreme Court, Wellington. 14 August 1974 (A 175/72). Quilliam J).

NATURAL JUSTICE

Hearing of objections to proposed acquisition—Public Works Act 1928, s 22—Proposed public work requiring acquisition of portion of plaintiffs' land—Objectors contended breach of natural justice at hearing in that after the plaintiffs had given evidence and had retired from the meeting held to consider objections, Council in opening meeting considered material which had not been placed before objectors for comment. *Held,* Section 22A of the Public Works Act did not amount to a code—But although the principles of natural justice were applicable at the hearing into objections, this did not entitle plaintiffs to comment on all the material which the Council might ultimately consider—The hearing was merely into objections and not an inquiry into the validity of the scheme as a whole. (*Perpetual Trustees v Dunedin City* [1968] NZLR 19; *Brettingham-Moore v Municipality of St Leonards* (1969) 121 CLR 509; *Furnell v Whangarei High Schools Board* [1973] 2 NZLR 705, considered.) *Coles v Matamata County* (Supreme Court, Hamilton. August 1974 (A 156/73). McMullin J).

SALE OF LAND

Order extending time for Court approval—Land Valuation Committee—Requirement of notice under s 23 of Land Valuation Proceedings Act 1948 imperative—Vendor a "party" to whom notice was required to be given—*Tauhara Properties Ltd v Mercantile Developments Ltd* [1974] 1 NZLR 584 approved and followed—subsequent Court hearing was not a hearing de novo and non compliance not cured—Orders extending time under s 25 of Land Settlement Promotion and Land Acquisition Act 1952 and giving consent to the transaction quashed. *D G Allan Ltd v Blakely* (Court of Appeal, Wellington. 16 August 1974 (CA 30/74). McCarthy P, Richmond and Woodhouse JJ).

BILLS BEFORE PARLIAMENT

Agricultural Workers Amendment
Annual Holidays Amendment
Antiquities
Appropriation
Arms Amendment
Broadcasting Amendment
Chattels Transfer Amendment
Cinematograph Films Amendment
Commerce
Crimes Amendment
Drugs (Prevention of Misuse)
Education Amendment (No 2)
Finance (No 2)
Government Railways Amendment
Home Ownership Savings
Inland Revenue Department
Insurance Companies' Deposits Amendment
Investment Bonds
Joint Consultation in Industry
Joint Family Homes Amendment
Joint Family Homes Amendment No 2
Judicature Amendment
Land and Income Tax Amendment (No 2)
Land and Income Tax (Annual)
Legal Aid Amendment
Life Insurance Amendment
Local Government
Magistrates' Courts Amendment
Maori Affairs Amendment
Marine and Power Engineers' Institute Industrial Disputes
Moneylenders Amendment
Municipal Corporations Amendment No 2
National Parks Amendment
Neighbourhood Noise Control
Ngarimu V.C. and 28th (Maori) Battalion Memorial Scholarship Fund Amendment
Pork Industry
Post Office Amendment
Property Law Amendment
Public Works Amendment (No 2)
Queen Elizabeth The Second Arts Council of New Zealand
Soil Conservation and Rivers Control Amendment
Transport Amendment
Trustee Savings Banks Amendment
Waitaki Lakes Recreation Area
Women's Rights of Employment

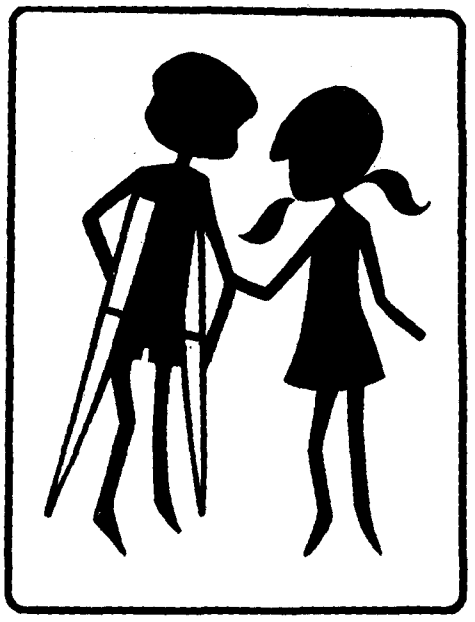
STATUTES ENACTED

Animals Amendment
Building Societies Amendment
Commonwealth Games Symbol Protection
Cornish Companies Management
Counties Amendment
Customs Acts Amendment
Dangerous Goods
Defence Amendment
Education Amendment
Estate and Gift Duties Amendment
Estate and Gift Duties Amendment (No. 2)
Farm Ownership Savings
Fire Services Amendment
Government Railways Amendment
Harbour Pilotage Emergency
Harbours Amendment
Hire Purchase Amendment
Housing Corporation
Imprest Supply
Land and Income Tax Amendment
Licensing Amendment
Licensing Trusts Amendment
Local Elections and Polls Amendment
Marine Pollution
Municipal Corporations Amendment
New Zealand Export-Import Corporation
New Zealand Superannuation
Niue Amendment
Niue Constitution
Perpetuities Amendment
Physiotherapy Amendment
Private Investigators and Security Guards
Public Works Amendment
Rates Rebate Amendment
Royal Titles
Rural Banking and Finance Corporation
Sale of Liquor Amendment
Sales Tax
Sales Tax Amendment
Scientific and Industrial Research
Social Security Amendment
Stamp and Cheque Duties Amendment
Time
Tobacco Growing Industry
Trustee Amendment
Unit Trusts Amendment
War Pensions Amendment
Wheat Research Levy

REGULATIONS

Regulations gazetted from 15 August to 2 September 1974 are as follows:

Aeronautical Research Scholarship Regulations 1974 (SR 1974/210)
Bay of Plenty Hospital District Order 1974 (SR 1974/213)
Construction Regulations 1961, Amendment No 7 (SR 1974/215)
Customs Tariff (Composite) Amendment Order 1974 (SR 1974/211)
Economic Stabilisation (Motorcar Hiring) Regulations 1971, Amendment No 1 (SR 1974/225)
Harbour Boards Representation Order 1974 (SR 1974/217)
Heavy Motor Vehicle Regulations 1974 (SR 1974/218)
Hire Purchase and Credit Sales Stabilisation Regulations 1957, Amendment No 26 (SR 1974/226)
Hospital Boards Representation Order 1974 (SR 1974/214)
Hospital Districts (Borough of Kapiti) Order 1974 (SR 1974/219)
Milk Producer and Other Prices Notice 1968, Amendment No 19 (SR 1974/216)
New Zealand Superannuation Act Commencement Order 1974 (SR 1974/221)
Potato Cyst Nematode Regulations 1974 (SR 1974/220)
Shipping (Crew Accommodation) Regulations 1974 (SR 1974/212)
Transport (Measurement of Weight) Notice 1974 (SR 1974/222)
Transport (Overloading-Infringement Fees) Notice 1974 (SR 1974/223)
Transport (Overloading Infringements) Notice 1974 (SR 1974/224)



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Any further information is readily available at all Branches and sub-centres where visitors interested in seeing the Society in action are always welcome.

PERSONAL INJURY BY ACCIDENT: TO DEFINE OR NOT TO DEFINE

In 1973 Parliament considered the Accident Compensation Amendment Bill (No 2). The bill proposed far-reaching changes in the scheme enacted by the Accident Compensation Act 1972, and not the least important of the proposed amendments was the definition of personal injury by accident contained in s 3 (2) drafted by a medico legal committee co-opted to assist with the task. This read as follows:

"(2) Subsection (1) of section 2 of the principal Act is hereby further amended by repealing the definition of the expression 'personal injury by accident', and substituting the following definition:

" ' "Personal injury by accident"—

" '(a) Means except as otherwise provided in this definition) damage to the human system which is not designed by the person who suffers it, and which—

" '(i) Is caused or contributed to by mishap, or an untoward event, external to the body; or

" '(ii) Results from an occupational disease to the extent that cover extends in respect of the disease under ss 65 to 68 of this Act:

" '(b) Includes—

" '(i) All bodily and mental consequences of any such damage; and

" '(ii) The consequences of medical, surgical or first-aid treatment, care, or attention in respect of any such damage, whether or not the treatment, care, or attention was proper in the circumstances;

" '(c) Does not include—

" '(i) Normal physiological changes; or

" '(ii) Except as provided in *paragraph* (b) of this definition, abnormal reactions to food, drugs, or other material introduced into the body; **or**

" '(iii) Damage to the human system which is the result of disease, except as provided in subparagraph (ii) of paragraph (a) or in paragraph (b) or paragraph (d) of this definition.' "

The bill passed into law in 1973, but with the proposed definition omitted in its entirety. The reasons for omission are clearly summed up by the Prime Minister who stated in the House in answer to an oral question from Mr J R Marshall:

> "As some doubts have been expressed as to whether it is necessary or desirable to define an accident to the extent proposed and also whether the definition is sufficiently specific the Government has decided to delete the definition from the bill at this stage and refer it to a select committee(*a*).

It is interesting to record some of those doubts: The Hon Dr Finlay QC: "We are trying to define the indefinable . . . in inserting the definition we are inviting a duplication of the same miserable process that attended the earlier apparently simple definition" (A reference to 'arising out of and in the course of employment')(*b*). Mr F D O'Flynn QC, MP: "I suggest that the Government might well consider again even at this late date the advisability of throwing away all the value of that litigation under the Workers' Compensation Act and starting with a definition that might easily give rise to a fresh crop of litigation"(*c*). Sir Roy Jack agreed with this contention(*d*).

On the other hand the Hon Hugh Watt was "convinced that it was the correct course to follow" (to insert the definition)(*e*).

Dr Wall considered that "an easily understood definition had been arrived at"(*f*).

The question of the desirability of a definition has been raised once again prompted no doubt by the reference of the question to a select committee of the House and by the decision of the Accident Compensation Commission to circulate the proposed definition to all interested parties in the form of "guidelines". It is a somewhat unusual procedure for a body which hopefully has a duty to act judicially and to hear and to determine each case on its merits, to announce in advance the criteria by which it will be guided, particularly as those criteria have no present legal basis. One would have expected the Commission to

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(*a*) NZPD 5215.
(*b*) NZPD 3615.
(*c*) NZPD 5134.
(*d*) NZPD 5137.
(*e*) NZPD 3615.
(*f*) NZPD 5127.

decide each case on its merits in the absence of any definition having the force of law. However no doubt there is some justification for the procedure in that the Act breaks new ground in so many respects, and the Commission no doubt wishes to give the public some general idea of the extent of their rights and of the ambit of the Commission's powers.

Notwithstanding this criticism it is evident that the Commission wishes to regularise its position by securing a statutory definition of personal injury by accident. Given this desire, two questions arise:

(1) Is any definition necessary?

(2) If so, is the definition set out above adequate?

The writers have no hesitation in answering the first question "Yes" and the second question "No". Dealing with each question in turn:

The Act makes provision inter alia "for the . . . compensation of persons who suffer personal injury by accident in respect of which they have come under the Act". Clearly the Act requires the Commission to be satisfied; first that a claimant has suffered personal injury and second that the injury arose in circumstances which can be described as accidental. Not as a result of *an* accident, be it noted.

In answering the question, the Commission will be required to embark upon the same sort of investigation which the Courts have hitherto pursued in dealing with accident claims. It may, by the exercise of its discretionary powers, and by implementing the spirit of the legislation, seek to conduct the investigation in a different way but in essence the object of the investigation will be the same, ie to establish that the facts alleged by the claimant bring him within the provisions of the Act. It can also be noted that irrespective of the view which the Commission takes of the incidence and burden of proof the claimant under the Act will still be required to adduce evidence of sufficient weight to persuade the Commission to his point of view; call it proof on the balance of probabilities or what you will, the practical requirement remains little different from what it was under the common law damages system, and Workers' Compensation Act.

Given these facts, it becomes vital that the Commission be required to exercise its functions within bounds, and that it be not left to its uncontrolled discretion to decide not only the way it will exercise its function, but also the very nature and content of that function. It is even more vital that the bounds set have the binding force of law, and are not subject to some sort of administrative elasticity which may vary with the holders of office.

Trite though it now may be, it is worth recording that the Act has removed important common law and statutory rights and has embarked upon an unprecedented venture. In such uncharted waters the Legislature has a duty to give the Commission as many clear and certain markers as are consistent with the spirit of the Act. One marker should at least define the very object of the Commission's inquiry.

If it is accepted that a definition is necessary, then what should be its fundamental requirements? We suggest the following:

(1) *Simplicity and brevity*—Any definition must be capable of being read and understood by lay people. More than any other Act of Parliament since the Social Security Legislation of 1938, the Act touches the day to day life of *every* member of the community. There is no place for the sort of complexity without which for example no taxation legislation appears to be complete, and which yields such an abundant harvest for lawyers.

(2) *Flexibility*—The definition must have outer limits as clear as the difficulties permit, while allowing the Commission generous freedom within those limits to consider each case upon its merits having regard to the spirit and intendment of the Act. It would be tragic if the Act were defeated by unnecessary and self-imposed limitations.

(3) *Certainty*—The ingredients of the definition should as far as possible be based upon proven principles. There is enough novelty in the Act without importing more. It must be recalled that the problem of deciding what is or what is not, "a personal injury by accident" will best be solved by the combined wisdom of medicine and the law (despite the apparent death wish to some young lawyers whenever the subject of Accident Compensation is raised). Let us then leave undisturbed as many of the tried and tested principles as are consistent with the spirit of the Act.

(4) *Comprehensiveness*—The definition must be capable of embracing all of the types of fact situation which experience has shown can give rise to personal injury by accident.

With great deference to the committee which framed the proposed definition it does not meet these requirements.

(1) Simplicity and brevity—The proposed definition is neither simple or brief. The latter speaks for itself, but to consider the former:

(a) What does "designed" mean (leaving aside the grammatical difficulties)? Does it

mean to exclude the person who is wholly volens? If so, the definition is apparently at odds with the intention of the Act.

(b) What are "normal physiological changes"? This is an Act having the purpose of compensation for "injuries". Clearly it can only include physiological changes if they are caused or contributed to by an accident. Such physiological changes can in no circumstances be described as "normal". What then is the purpose of excluding *normal* physiological changes? Is it possible that they will give a construction which would exclude those types of physiological change which were inevitable and were merely precipitated by an accident? If so, such a construction will run counter to the approach taken by the Courts under the Works' Compensation Act, and appears to be contrary to the intention of the Act.

(c) What is an "abnormal personal reaction to food or drugs"? To take an illustration: If a person eats bad shell fish and knows from past experience that they will suffer serious food poisoning, will they be compensated because on the particular occasion their reaction is true to form and "normal"? Whereas the person who in the past has never suffered from food poisoning in similar circumstances, but does so on the particular occasion, will *not* be *compensated?*

(d) How are the words "or other material" to be construed? Ejusdem generis with food and drugs? What then of poisonous gasses the inhalation of which produce a wholly normal and predictable reaction but not on an occasion of special exposure. Such an inhalation is clearly capable of inclusion as an accident under cl 2 (a) of the proposed definition but this must be read subject to the qualifications contained in cl 2 (c) and (d). This clause would apparently exclude such "accidents".

(e) What meaning is to be given to the words "special exposure", "particular occasion", and "abnormal conditions"? Assuming the words are capable of accurate definition, is it the intention of the Act to allow the football player to recover for his broken leg, but deprive the mountain rescuer who looses a leg as a result of frostbite in circumstances which are wholly usual and predictable on a mountain at that time of the year? To carry the analogy further, not, it is hoped, to absurdity), is it intended to compensate *one* party of rescuers who are caught by abnormal conditions on one side of the mountain and thereby suffer injury, but not to compensate those suffering injury in normal conditions on the *other* side? In this respect rescuers may be worse off than they were at common law or by virtue of the Cabinet Minute (58) 55 which at least gave them the protection of the Workers' Compensation Act.

In the light of these difficulties the proposed definition cannot be said to be simple.

(2) Flexibility—(a) The proposed definition is in many respects particular and explicit (subject to these difficulties of construction) and will undoubtedly give rise to hard cases. This state of affairs should only be tolerated if absolutely necessary. It is no answer to say that such cases can be dealt with under s 179A, because it only becomes operative when a person has suffered "personal injury by accident". Even if the section could be amended to include all hard cases this would render the object of having a definition partially pointless.

(b) Lawyers will be failing in their duty if they do not test and probe the proposed definition. That this exercise will be encouraged and protracted by the very nature of the proposal seems likely, but is hardly in keeping with the philosophy which produced the Act.

(3) Certainty—At common law, and under the Workers' Compensation Act, the Courts directed enquiry primarily to the question of ascertaining whether a claimant had suffered an accident. For a useful summary see Campbell & Neazor *Workers' Compensation in NZ* (2nd ed) p 32.) The proposed definition reverses the order of the enquiry. It abandons any attempt to define accident but concentrates upon the "injury" seeking to distinguish injury from disease by cataloguing the circumstances in which a disability may be termed an injury for the purpose of the Act.

It is suggested that it is neither necessary or desirable to depart from established practice in this way. As indicated above, the object of the Act in no way differs from the object of the Workers' Compensation Act and intent of the common law in this respect; all seek to compensate for personal injury caused by accident. Leaving aside statutory limitations imposed by the Workers' Compensation Act, and the self imposed limitation imposed by the principle of negligence, these systems have demonstrated the need to commence the enquiry by ascertaining the facts of the accident. It is the *accident* which intervenes and upsets the natural degenerative processes; it is thus the *accident* which creates the right to compensation, and not the nature of the disability. The definition of "accident" is therefore fundamental to the implementation of the Act.

It is readily conceded that to define

"accident" is no easy task but it proved possible in the past to produce an acceptable definition notwithstanding the gloomy forebodings of some Judges(*g*).

The definition which has received the most general approbation is that of Lord Macnaghten in *Fenton v Thorley* [1903] AC 443, viz "any unlooked for mishap or untoward event which is not expected or designed".

This definition can be applied to the Act, and has the merit of being supported by a large body of judicial interpretation and application.

In the writers' view there is no compelling reason to justify departing from this definition or for reversing the order of the enquiry. To do so is to create unnecessary uncertainty.

(4) Comprehensiveness—The wider the definition, the greater the number of fact situations to which the Act may be applied. A wide definition avoids the vice of over particularisation with the attendant danger of excluding all situations which are not specifically mentioned.

Such, then, are the writers' criticisms of the proposed definition. Is there a better alternative which will meet the above criteria? The following is offered as a basis for discussion.

"For the purposes of this Act—

"(i) Personal injury means all damage to the human system which is caused or contributed to by an accident.

"(ii) Accident means any unlooked for mishap or untoward event which is not expected or designed.

"(iii) Those occupational diseases set out in ss 66, 67 and 68 of this Act shall be deemed to be personal injury by accident."

In putting forward this definition the writers make the following basic assumptions:

(1) That it is the intention of the Legislature that the Act shall provide compensation for all persons who suffer disability as a result of an accident; providing such persons are otherwise within the provision of the Act.

(2) That certain diseases are to be compensatable as a matter of policy.

(3) That no account is to be had of previously existing disabilities and that any aggravation of such disabilities will enable the applicant to succeed.

(4) That suicide and wilfully inflicted injuries are to be excluded.

Observations concerning the definition of "personal injury"

(1) The definition includes *all* damage to the human system. Assuming that the medical profession is satisfied that "human system" is capable of embracing all of the constituent parts of the body, mind and emotions, it then becomes unnecessary to separately mention "bodily and mental consequences". (cf The Victorian Workers' Compensation Act 1965, s 2b. "injury means any physical or mental injury . . .")

(2) "Caused or contributed to". It will be necessary for the applicant to show that his disability was either wholly caused by an accident or partly so caused. This will mean that if the accident is only one percent to blame for the disability, the applicant must succeed as to the whole disability.

(3) It is not necessary to specify separately the consequences of medical or surgical treatment or first aid for this part of the definition, because clearly if the treatment does not cause damage to the human system, the applicant is not entitled to claim at all. If the treatment *does* cause damage to the human system, then the definition is satisfied.

(4) It is not necessary to provide that normal physiological changes are excluded because these can never be brought about by an accident. This is so, because they are "normal" and are therefore not brought about by an unlooked for mishap or untoward event.

To illustrate the point:

(a) A person who suffers a coronary incident while sitting in a chair does so because of some deterioration or malfunctioning of his internal organs (subject always to his right to establish that the incident was in fact precipitated by some earlier mishap or untoward event such as lifting a heavy weight). But equally it would not be sufficient if he were to establish that the attack resulted from his consumption of cigarettes, or because he was of a worrying disposition. Neither of these can be said to be an "unlooked-for mishap" or "untoward event".

(b) A person who suffers degenerative arthritis does so because of some deterioration or malfunctioning of his joint surfaces (however, it is open to the sufferer to establish that the particular degeneration was caused or contributed to by a mishap such as a broken bone involving a joint or an untoward event such as being required to work all day up to his knees in water, in which case he will be entitled to recover compensation. It can be noted

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(g) Mills v Smith [1963] 2 All ER 1078 at p 1079 per Paull J.

in passing that to recover for this latter type of injury under the work accident scheme it will be necessary to show that the sufferer was required by his work to stand in the water. However there seems no reason why a fly-fisherman who stands in the river all day should not recover for the same injury under the supplementary scheme).

Observations concerning the definition of "accident"

(1) There must first be some event (a "happening" or "occurrence") It is conceded that such words are wide enough to include almost anything to which the flesh is heir, including normal physiological change. However the word "event" is conditioned by those words which precede it, ie the event must be "unlooked-for" or "untoward" and must be in the nature of a mishap.

(2) The use of the word "untoward" is of vital significance in that it covers the case of persons who are wholly the author of their own misfortune, or who were doing an ordinary thing in an ordinary way. Prior to the formulation of this definition by Lord Macnaghten in *Fenton v Thorley,* it was assumed that doing an ordinary thing in an ordinary way can never be said to be an accident. It was this notion which the Court refuted by including the untoward as well as the unexpected within the definition of accident. "Accident", without further definition, connotes the unexpected, unusual or unforeseeable, whereas "untoward" connotes the inconvenient, troublesome, vexatious, *unlucky,* and unfortunate. Thus the person who knows that to drive while intoxicated will probably result in his injury may still recover compensation because (unless he is bent on suicide and therefore excluded) he hopes that he will be *lucky* enough to get away with it. If he isn't, then he can fairly be said to be "unlucky" or "unfortunate".

But because the word "untoward" in some of its definitions is capable of embracing those who wilfully injure themselves, it is necessary to modify it by the use of the words "not expected or designed". "Expected" means the wish that the event will follow as opposed to the high possibility that it will.*(h)* "Designed" clearly connotes wilful intention.

(3) It will be noted that the words "external to the body" have been omitted. These words formerly had significance in workers' compensation cases. It was thought that before a claimant could recover under the Workers' Compensation Act he needed to show that there had occured an event external to the body *and* arising out of the employment which caused the disability. This view was rejected by the Privy Council in *James Patrick & Co Ltd v Sharpe* [1954] 3 All ER 216 and hence the need to prove an act "external to the body" was no longer necessary in order to succeed under the Workers' Compensation Act. Translating this situation into the context of the Accident Compensation Act, in so far as the injury is work related there is no need to establish an event external to the body in order to succeed. In so far as the injury occurs *outside* of the work accident scheme, the use of the words is wholly inappropriate. To include the words will place the worker in a worse position than he was before the Act and place an undesirable fetter upon the rights of those who suffer injuries outside of work.

This article attempts to set out the issues and to propose an alternative definition to that brought down by the medicolegal committee. In offering these proposals the writers are conscious of the enormous amount of work put in by the committee, and the difficulty of the task involved. It is hoped that the proposals may assist in the forming of a basis for further discussion among members of the legal profession, and other interested parties.

A A P WILLY*(i)*
JOHN L RYAN*(j)*

Colourful counsel—The "gaudy garb" of lawyers was criticised by Mr Justice M A MacPherson at the opening of the non-jury sittings of the Saskatchewan Court of Queen's Bench in Saskatoon.

Mr Justice MacPherson said the attire of lawyers and the trend to informality—such as brightly coloured sportswear—had come to the attention of Chief Justice A H Bence. He said Judges in the past have been hesitant to embarrass lawyers in Court but warned that brightly coloured clothes will no longer be tolerated. He specifically referred to checkered pants and coloured shoes.

The blow was softened when he added there is no objection to "miniskirted lady barristers".

(h) *Shorter Oxford Dictionary:* "To look for mentally; to regard as about to happen; to look for and require."

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THE AUTHENTICATED SIGNATURE FICTION AND OTHER RELATED TOPICS — SOME RECENT CASES

The matters relevant to determining whether or not a contract for the sale or other disposition of land is evidenced sufficiently in writing as to be enforceable at law, have long raised problems. Section 2 of the Contracts Enforcement Act 1956(*a*) is in quite simple terms. But its interpretation rests largely upon a considerable volume of comparatively old authorities. In more recent times it has proved no easy task to relate the principles formulated and established in these authorities to modern fact situations. It is not surprising, therefore, that *D'Oyly Downs Ltd v Galloway* [1970] NZLR 1077, *Bilsland v Terry* [1972] NZLR 43, *Law v Jones* [1973] 2 All ER 437, and *Tiverton Estates Ltd v Wearwell Ltd* [1974] 1 All ER 209, have all attracted attention. This note is an attempt to recount and explain the reasoning in these and other pertinent decisions.

Before beginning, however, it should be remembered:

(a) The object of all negotiations as to the sale of land is to arrive at an agreement, not merely expressed orally, but put into writing and signed.

(b) The memorandum evidencing the sale must contain all the material terms of the contract including (either by name or sufficient description) the parties to the contract; and

(c) A memorandum sufficiently detailed as above, signed by one party (or by an agent duly authorised)(*b*), and accepted verbally by the other(*c*), will generally be a sufficient writing to render the contract enforceable against the signatory.

These propositions, it is felt, are too familiar to require elaboration here.

In the *D'Oyly Downs* case, Richmond J considered a written offer in which the name of the vendor was left in blank when the offer was signed by the offeror in the presence of a land agent. The agent relayed the offer by telephone to the effective seller. The seller telephoned his acceptance to the agent and subsequently sent a confirming letter. The agent left word of the acceptance with the offeror's family. The learned Judge found on the evidence that the acceptance had come to the offeror's knowledge prior to the offeror's dispatching a telegram to the seller purporting to withdraw the original offer. The seller discountenanced the withdrawal and one or two days later (the written offer having by then reached his hands), filled in the name and affixed the seal of the plaintiff company as vendor. A week or so later the defendant received the completed document.

The first question which Richmond J dealt with on these facts, was whether the description of the vendor in the form of agreement embodying the original offer, was sufficient. He noted that previous decisions had held that where the vendor is described as "proprietor", "owner", "mortgagee" or the like, the description is sufficient though he is not named, but if he is described as "vendor" or as "client" or "friend" of a named agent, that is not sufficient. Plaintiff's counsel cited *Arthur & Co & Clark v Cullen* [1917] NZLR 706, a case where use of the term "vendor" in the agreement had been found to point to the vendor as owner in such a way as to establish the vendor's identity. But the learned Judge had little difficulty in distinguishing that decision, as the *D'Oyly* agreement was in a standard printed form from which nothing as to the vendor's identity could be deduced.

The next question was more difficult. In response to a submission that the defendant had impliedly authorised the subsequent insertion of the registered proprietor in the blank space left in the agreement, Richmond J noted the general rule that a signature can ordinarily authenticate a writing only as to the form in which the writing stands at the moment of signing. But he noticed how alterations by an agent of a party may, in some cases, be deemed at law authenticated by such party's original signature. This involved examining aspects of the doctrine known as the authenticated signature fiction. On the facts, Richmond J found that the offeror had not evinced any intention of authorising anyone else subsequently to complete the writing, as to render the doctrine applicable. In any case the effective seller had received notice of revocation of the offer before filling in the blank in the agreement. So the

(*a*) Substituted for s 4 of the old Statute of Frauds 1677.

(*b*) As to memorandum signed by agent, note *New Lynn Borough v Auckland Bus Company* [1964] NZLR 511.

(*c*) As to communication of acceptances vide Coote, "Instantaneous Transmission of Acceptances", Vol 4 NZULR 331.

Also note: *Buhrer v Tweedie* [1973] 1 NZLR 517 re a conditional offer held incapable of acceptance.

plaintiff's argument failed. But had the memorandum been complete in its terms when the offer was verbally accepted, the plaintiff would have succeeded. Reference was made to *Koenigsblatt v Sweet* [1923] 2 Ch 314 in these terms:

> "That was a case in which a memorandum of a contract to sell land had been executed by the vendor with certain blanks left in it. The document was handed to the vendor's solicitor, apparently with authority to fill in the blank left for the date of completion of the contract and the date of the document itself. This the solicitor later did and he also, at the request of the purchaser's solicitor, struck out the name of one of the parties previously named as purchasers. The solicitor later informed his client of what he had done and he approved of the alterations. The Court of Appeal held that in these circumstances the vendor had recognised his original signature as authenticating the document in its altered form." (Supra, 1085.)

The learned Judge also cited a short passage from Williams, "The Statute of Frauds", explaining the effect of *Koenigsblatt v Sweet*, and after mentioning *Egan v Caveny* [1921] VLR 37 (which he described as the only case he had been able to find expressly dealing with the question of precedent authority given to a land agent to complete a blank left in an agreement), he concluded: "I accept the position that parole evidence may be given to show that the signatory to a memorandum of a contract authorised someone on his behalf to fill in a blank in circumstances showing an intention that his signature should be taken as authenticating the document so completed." (Ibid, pp 1085-6.)

In *Bilsland v Terry* Quilliam J also considered the authenticated signature fiction in these circumstances. The defendants orally agreed to sell and the plaintiff to buy a farm on terms mutually agreed upon. Their respective solicitors were instructed. The vendors' solicitor prepared an agreement and forwarded it to the purchaser's solicitor "for perusal in the normal way"(*d*). The purchaser desired to query three points. One point was resolved by the parties' respective solicitors orally agreeing upon the addition of an extra clause which was duly added by the purchaser's solicitor. The purchaser signed the agreement but instructed his solicitor not to part with the document until another clause had been altered resolving at least one of the two outstanding points. The purchaser's solicitor advised the vendors' solicitor by letter of his client's attitude. A reply letter advised that one of the outstanding points was acceptable. The agreement was amended as to this, and returned to the vendors' solicitors. The vendors subsequently intimated that they did not intend to proceed, and the plaintiff sued for specific performance alleging the existence of an enforceable binding agreement. His contention was that the solicitor's preparation of the agreement on the defendants' instructions, and tender of it to the plaintiff's solicitor, constituted a sufficient memorandum as against the defendants. It contained the defendants' full names and identified them as vendors. But the question was whether it was signed. Obviously, there was no handwritten signature. Nonetheless, the learned Judge found a sufficient signature at law by invoking the fiction. He spoke of the fiction having first appeared in *Schneider v Norris* (1814) 2 M & S 286; 105 ER 388. A bill of parcels was sent by a vendor to a purchaser containing details of the relevant transaction. The vendor's names were printed on the bill, and the printed names were held to be a sufficient signature to bind the vendor. Quilliam J also cited *Evans v Hoare* [1892] 1 QB 593 (as following *Schneider v Norris*), and *Leeman v Stocks* [1951] Ch 941; [1951] 1 All ER 7043. The latter case concerned a contract where an auctioneer acting for the seller presented an agreement form with the seller's name filled in, to the buyer (who was the highest bidder). The auctioneer filled in the buyer's name and the buyer signed. In attempting to resist an order for specific performance the defendant contended that the document contemplated by its own terms that it should be signed by both parties thus distinguishing it from the 19th century cases which dealt with different types of commercial agreements where handwritten signatures were not necessarily contemplated. Roxburgh J rejected this argument because although the document contemplated signature by both parties, there was evidence outside the language of the document to show that it was presented to the plaintiff as a document complete and perfect in itself.

Quilliam J reached a similar conclusion in *Bilsland v Terry*. All necessary matters having been orally agreed upon, the circumstances under which the writing was forwarded by the senders' solicitor were held to be such as to announce that the senders had recognised the document as complete in itself. The plaintiff

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(*d*) The text of the solicitor's letter forwarding the agreement is not quoted in the judgment.

was awarded specific performance subject to the deletion of the added clause, the terms of which were regarded by the Court as unimportant. Since the provision was not part of the original oral bargain nor present in the agreement when the document was forwarded for perusal, in the view of the learned Judge "at the worst from the plaintiff's point of view it should be deleted" (supra p 50). The other alteration to the agreement was allowed to stand as it was in conformity with the parties' original arrangements(*e*).

In *Leeman v Stocks,* Roxburgh J carefully considered *Hubert v Treherne* (1842) 3 M & G 743. That was a case where an unsigned copy of an agreement was sent to the plaintiff, but the Court was not satisfied that the transmission had been authorised by the defendant. The agreement contemplated signature by both parties and there was apparently no evidence outside the language of the agreement that the document was presented as being complete in itself. Roxburgh J regarded *Hubert v Treherne* as "an authority that evidence is admissible" to show what the parties contemplated. He went on to say that "while the form of the agreement is a matter of such importance that if there is no other evidence a memorandum would not be held to be in existence in the face of a document in such a form, that authority does not treat that important circumstance as conclusive, or, indeed, as paramount, if there is evidence to the contrary which the Court accepts" (supra, pp 950, 1048).

Undoubtedly, *Leeman v Stocks* is an important case. But it was concerned with an auctioneering agreement concluded under somewhat unusual circumstances. *Bilsland v Terry* may be seen as even more significant since the facts bear ready comparison with standard conveyancing procedure. Perhaps Quilliam J himself foresaw this when he said (supra p 50): "I realise that the rule to which I have referred is probably unknown to many conveyancers, but that alone is hardly a reason for not applying it where the facts render it applicable. The rule appears to be well established and I can see no reason why I should ignore it."

Hence, in order to overcome the rigours of the rule, it is suggested that practitioners, when forwarding draft agreements for perusal, should give recipients clearly to understand by covering letter or preferably in the document itself:

(1) That the document contemplates signature by both parties and is consequently subject to subsequent authentication by the sender's client; and

(2) That the document is not intended to be, nor should it be regarded as (a) complete in itself, or (b) as authenticated by the sender's client through any names or other words appearing therein(*f*).

It is now convenieint to pass to *Law v Jones,* where the English Court of Appeal had recently to decide upon these facts:

By oral agreement the defendant agreed to sell and the plaintiff to buy a property for £6,500. The defendant's solicitors wrote to the plaintiff's solicitors referring to their client's "proposed purchase of the . . . property for £6,500 subject to contract", and stating that they would submit a draft contract, which they later did. The parties subsequently agreed orally on an amended price of £7,000 and the defendant's solicitors wrote advising the other solicitors of the agreed increase and requested them to amend the draft accordingly. The plaintiff's solicitors thence forwarded the purchaser's part of the contract duly signed by their client, but the defendant refused to complete, believing he could obtain a better price elsewhere. Buckley and Orr LJJ held (Russell LJ dissenting) that the contract was enforceable because while the words "subject to contract" could be construed as denying the existence of an existing verbal contract, thus rendering the draft contract ineffective as to constitute a sufficient memorandum, yet this qualification was open to waiver. It was held that any effect which that qualification had on the initial correspondence was nullified by the subsequent oral agreement as to the price increase, such agreement being recorded in the defendant's solicitor's letter which contained no qualification. This letter (signed, as it was, within the scope of the solicitor's authority) was linked with the earlier correspondence and the draft contract, thus constituting a sufficient memorandum.

Two points bear noting:

(a) The solicitor's unqualified letter confirming the new oral agreement as to the increased price was apt to eliminate the

(*e*) While not forming part of the learned Judge's express reasoning, it seems that the former alteration (which was orally agreed upon between the parties' solicitors) was not authenticated by the defendants, whereas the latter alteration was, by virtue of the defendants' solicitor's letter accepting it.

(*f*) The course often adopted (especially in England) of forwarding a document "as a draft subject to contract" will usually suffice—vide post.

qualification "subject to contract" previously stipulated; and

(b) The letter was able to be linked with the previous writings and in effect to authenticate the terms of the earlier draft but with the price amended.

The principles determining whether later writing may be linked with earlier writing were succinctly stated by Richmond J in *D'Oyly Downs Ltd v Galloway,* as follows (supra, p 1086-7):

> "The ordinary rule is that an earlier writing can only be incorporated by parol evidence with a later writing signed by the party to be charged if the later writing contains some reference, express or implied, to some other document or transaction. Where any such reference can be spelt out of a document so signed, then parol evidence may be given to identify the other document referred to or the transaction referred to and to identify any document relating to that transaction. . . . There is another principle of law whereby even in the absence of an internal reference to one another, documents may be shown by parol evidence to form part of a continuous correspondence between the parties and thereby a later document can be regarded as having reference to the documents which had gone before."

Applying these principles, Richmond J found that the later writing before him did not fall within the first principle because the writing did not refer to a prior "agreement for sale and purchase" but only to an "offer". Neither did it come within the second, because it was not part of a continuous correspondence between the parties. In *Law v Jones,* however, the later writing was able to be linked with the earlier writing, because there was express reference to the "contract in your possession".

It is now proposed to review the dissenting judgment of Russell LJ in *Law v Jones* with some care, because very recently it received the approbation of a differently constituted Court of Appeal (Denning MR, Stamp and Scarman LJJ) in *Tiverton Estates Ltd v Wearwell Ltd* (supra). All those presiding in *Law v Jones* agreed that a document which denied the existence of a contract cannot be relied on as a sufficient memorandum. But Buckley and Orr LJJ, it will be recalled, held that the effect of the words "subject to contract" was removed by subsequent waiver. In support they cited *Griffiths v Young* [1970] Ch 671. Both Judges proceeded on the premise that in order to satisfy the statute(*g*) it was not necessary that the writing should acknowledge either expressly or impliedly the existence of any prior oral agreement. It was enough that if a contract was by word of mouth the terms thereof could be found sufficiently set out in written form. Russell LJ, however, thought otherwise, and said (supra, p 440): ". . . it is pointed out that it is well recognised that a written offer before any contract can suffice for the section if orally accepted: this shows, it is said, that a memorandum need not point to a contract. This well-recognised legal proposition is, I think, to be explained on the ground that the writing in terms envisages a contract, is a proposal of an agreement, is regarded as continuously in existence, and is ultimately simultaneous with the formation of the contract(*h*): see *Warner v Willington*(*i*) and *Reuss v Picksley*(*j*). I cannot think that in such cases the Court would find a memorandum if the letter had not been in form a firm offer or proposal. . . . Accordingly, I do not think that it follows that a post-oral-contract memorandum need not point positively in some way to the pre-existence of a contract".

But Russell LJ found it unnecessary finally to decide this point, for, in his view, the documents before the Court clearly pointed "away from the existence of any contract". He saw no difference between a writing which (1) denied there was any contract; (2) stated that the parties were still in the course of negotiation; or (3) stated that there was an agreement subject to contract—for he believed they all amounted to the same thing(*k*).

Having sat in *Griffiths v Young,* Russell LJ was particularly befitted to explain its effect in *Law v Jones.* He did so in these words (supra, p 441): "In that case the plaintiff purchaser's solicitor wrote on 2 May to the defendant's solicitor setting out terms agreed between the clients, stating them to be subject to contract and seeking a draft contract. On 3 May it was proved that it was orally agreed by the clients and solicitors that the contract should be absolute. The basis of the decision was expressed to be that 'subject to contract' was to be regarded as merely a suspensive condition which had been later orally agreed to be waived. . . . It does not, in my judgment, follow from that

(*g*) Cf s 40 (i), Law of Property Act 1925 (Eng), and s 2, Contracts Enforcement Act 1956.
(*h*) Stamp LJ adopted this dictum in *Tiverton Estates Ltd v Wearwell Ltd* (supra) at p 223.
(*i*) (1856) 3 Drew 523 at 532.
(*j*) (1866) LR 1 Exch 342 at 350.
(*k*) Vide also Denning MR in *Tiverton Estates Ltd v Wearwell Ltd* [1974] 1 All ER 209 at p 218.

decision that we have in the present case a sufficient memorandum."

It seems apparent that nothing emerged from *Griffiths v Young* to support any notion of waiver by inference. Neither did the facts warrant drawing such a principle. It is submitted that what the case did decide was that if the parties have orally agreed to waive a suspensory term, evidence to establish that fact will be admitted. What evidence of waiver, then, was available in *Law v Jones?* On the facts, there was no evidence of any waiver as such at all. On this aspect of the case, therefore, the dissenting opinion of Russell LJ appears convincing. But the majority viewpoint, it should be observed, rested largely upon the finding of a new contract (based on the increased price) in which no suspensory term was incorporated. The words "subject to contract" were "waived" in the sense that they were eliminated, as neither party had expressly so qualified the amended bargain.

This brings matters to *Tiverton Estates Ltd v Wearwell Ltd.* Plaintiff owned a leasehold property called "Empire House". On 4 July a meeting occurred between a Mr Israel, a director of Tiverton, and a Mr Nadir, a director of Wearwell. They orally agreed on the sale of the property by Tiverton to Wearwell for £190,000. They shook hands on the transaction and agreed to instruct their solicitors to implement the sale. On that very day the solicitor for the purchasers wrote to the solicitor for the vendor regarding ". . . the proposed sale of the above-named property to our client Wearwell Ltd at £190,000 leasehold subject to contract. We look forward to receiving the draft contract for approval, together with copy of the lease at an early date". The next day Mr Israel telephoned Mr Nadir about completion and also wrote confirming that ". . . you agreed that the completion of the purchase of the property can take place as soon as possible". On 9 July the vendor's solicitor wrote to the purchaser's solicitor sending "a draft contract for approval", but the vendor decided not to proceed. The Court held that no enforceable contract existed between the parties because the writing contained no recognition of the prior oral agreement or its terms. The tentative conclusion which Russell LJ reached in *Law v Jones* was thus unanimously confirmed.

Reliance was placed upon another appeal case, *Thirkell v Cambi* [1919] 2 KB 590, representing, it was said, a line of authority in conflict with the majority's reasoning in *Law v Jones.* That case involved a problem arising from the former statutory requirement that a sale of goods over £10 needed to be evidenced in writing(*l*). (The legislation was in substance similar to that still now applying to the sale of land.) The salient point was whether certain correspondence between the parties contained all the terms agreed upon. Written provision as to the manner of payment of the goods in question was missing, though the appellant alleged it had been orally agreed upon. The absence of this matter in writing was really sufficient to dispose of the case. But the appellant pointed to a letter from the respondent's solicitor which stated (inter alia) that "the terms upon which the goods were agreed to be purchased were not carried out by your client". The letter was alleged to be a sufficient memorandum of an agreement enabling the appellant "to give evidence that (the) terms were entirely in writing and that there were no other terms". Also it was argued that although the letter denied any liability it was "nevertheless a memorandum in writing of the agreement".

These contentions were rejected. Bankes LJ distinguished a writing which recognises the existence and terms of a contract but repudiates it from one which simply refuses to recognise the terms of a contract at all(*m*). He held that the letter in question was rather of the latter category than the former. Significantly, Scrutton LJ remarked (ibid, p 596): "It has often been said that the Statute of Frauds covers more frauds than it prevents. On the other hand, those who have experience of disputes as to oral contracts and of findings rather prompted by sympathy than guided by evidence know the value of a statute which removes any uncertainty as to the terms of a contract by prescribing that they shall be in writing; and it is a mistake in the administration of the law to whittle away this statute in order to do what is supposed to be justice in a particular case." He went on to say that the appellant could not succeed unless he proved "two things, which may be one thing containing two elements: a signed admission that there was a contract and a signed admission of what that contract was" (ibid, p 597). As there was no signed admission as to what the terms of the contract were (one

(*l*) Section 4 (i), Sale of Goods Act 1893 (Eng)—repealed in 1954.

(*m*) The learned Lord Justice pointed out that had the letter recognised the contract and its terms it would have been "immaterial that it also contained a refusal to perform the contract so recognised". (Ibid, 595.)

of which in any event could only be inferred by oral evidence) the appellant failed.

Buckley LJ quoted the last-mentioned dictum in *Law v Jones* (supra, p 446), but said it only applied in the case of "confession and avoidance, that is to say, if in effect (the writing) acknowledges a contract . . . but denies liability under that contract". With respect, this restrictive interpretation is hard to accept. Admittedly, the facts before the Court in *Thirkell v Cambi* were appropriate to invite comparison with a "confession and avoidance" situation, but it is submitted that what Scrutton LJ said may logically be applied to any post-oral-contract memorandum. Indeed, were it not so, it would seem to be open to anybody either to assert or deny (as suits his fancy) that a writing truly evidences the terms of a prior oral agreement. In short, "it would leave the contract to be established by verbal evidence"(*n*).

Such was the opinion of their Lordships in *Tiverton Estates Ltd v Wearwell Ltd.* They held *Law v Jones* was wrongly decided in that "it exposed clients to liability, even though there was nothing in writing which acknowledged the existence of a contract". Denning MR spoke of the decision as having "caused consternation" and "sounded an alarm bell". Faced with seemingly divergent cases of equal authority the Court elected not to follow *Law v Jones.* Conditional leave was granted to appeal to the House of Lords, whose decision (should the appeal proceed) must now be keenly awaited.

In conclusion, it remains to say this: The legal principles relevant to s 2 of the Act are innumerable, those referred to in the cases examined above being but a sampling. In approaching the statute, one should ever bear in mind, as Buckley LJ pointed out in *Law v Jones,* that the underlying purpose of the legislation "is to avoid parties being held to contracts the terms of which they have not agreed, not to facilitate the escape of a party from a contract in terms of which he has agreed". Thus, if one party leads another to believe that he is offering to be bound by certain terms tendered in writing, "it lies ill in his mouth to complain of any difficulties he may thereafter encounter in keeping his options open" (supra, p 447).

NOTE

Since the foregoing article was prepared the decisions of *Sturt v McInnes and Another* [1974] 1 NZLR 729 and *Van der Veeken v Watsons Farm (Pukepoto) Limited* [1974] 2 NZLR 146 have been reported. In *Sturt's* case, Wilson J relied on *Leeman v Stocks,* as did Quilliam J in *Bilsland v Terry.* The learned Judge held that from *Leeman's* case, and earlier cases, "it is clear that, in England, the principle (of the authenticated signature fiction) applies if, and only if, these conditions obtain:

1. The contract, or the memorandum containing the terms of contract, must have been prepared by the party sought to be charged, or by his agent duly authorised in that behalf, and must have that party's name written or printed on it.
2. It must be handed or sent by that party, or his authorised agent, to the other party for that other party to sign.
3. It must be shown, either from the form of the document or from the surrounding circumstances, that it is not intended to be signed by anyone other than the party to whom it is sent and that, when signed by him, it shall constitute a complete and binding contract between the parties."

Wilson J concluded that if the effect of *Bilsland v Terry* was to dispense with any of these conditions, then he "must respectfully disagree and decline to follow (Quilliam J) in that regard". He observed that Quilliam J did "not refer to any circumstances showing that it was intended that the contract would not be signed by the defendant".

Again, in *van der Veeken's* case Beattie J commented:

"It . . . seems to me that (Quilliam J) found that the parties intended that the document should be regarded as complete and binding in itself, but he has not expressly posed the question of whether another signature was required in that case. If *Bilsland* was decided on some basis other than a complete document, then, like Wilson J . . . I respectfully disagree."

In support of his opinion Beattie J cited *Neill v Hewens* (1953) 89 CLR 1, where the High Court of Australia found that a contract signed by only one of two vendors (the names of both being typed at the commencement of the document) was, on the evidence, intended to be signed by both vendors to render it complete. The document was consequently insufficient "to permit of the vendors' names, in typewriting, being given as a signature for the purposes of satisfying the statute" (per Beattie J).

In considering the criticisms levelled at *Bilsland v Terry* the precise question which Quilliam J posed should be noted. He asked himself: "In the present case, then, is there evidence that the agreement sent by (the defendant's solicitor to the purchaser's solicitor) was to be regarded by the parties as complete in itself?" With respect, it would have been helpful had he added the words "when signed by the purchaser". Thus extended, the question would surely have been consistent with the query which Wilson and Beattie JJ have preferred: "Was the document intended to be signed by anyone other than the party to whom it was sent?"

By spelling out his three conditions, Wilson J has undoubtedly helped clarify the scope of the authenticated signature fiction. In other instances, such a course might have been shunned lest too rigid an interpretation were to become evident in the context of subsequent fact situations. But this is an area of law where such a course was desirable, and indeed necessary, to elucidate the seemingly far-reaching effect of *Bilsland v Terry.*

R J BOLLARD

(*n*) Vide Stamp LJ in *Tiverton* (supra) at pp 221-2.

TRIBUTES TO THE LATE GUY SMITH

A special sitting of the Supreme Court was held at Wellington on 19 July last to mark the death in Germany of the President of the New Zealand Law Society, Mr Guy Smith. The Chief Justice, the Rt Hon Sir Richard Wild, presided over a full Bench and a Courtroom filled to capacity by members of the profession and relatives.

The closure of Wellington airport prevented Mr L H Southwick QC, a Vice-President of the New Zealand Law Society, from attending the sitting and in his stead his address was read by a fellow vice-president, Mr B. L. Stanley.

"In a letter written to the Secretary of the New Zealand Law Society, His Excellency the Governor-General has asked that he and Lady Blundell be associated in the tributes to the late Guy Smith, which I now address to you," Mr Stanley began.

"A faith which enlivens memory, and that comfort which consoles grief, inspire me, in paying this tribute to our late President, Guy Smith, to recall the word of Saint John—'In my Father's house are many mansions'. A simple belief persuades me that in a way given to none of us to understand those whom we no longer see, yet live in mansions in the Father's house. In this spirit I believe we remember Guy Smith.

"We remember him thus with those nearest and dearest to him as a loved husband and devoted father. He will be remembered, too, by those with whom he went to school here in Wellington and with whom he grew up, and by those with whom he attended university. He will be remembered as a citizen of the City of Wellington. He will also be remembered as a lawyer, and in the field of commerce in the City of Wellington and elsewhere in New Zealand, and for the part that he played in the affairs of the Wellington District Law Society. These matters will be referred to by my learned friend, the President of the Wellington District Law Society.

"But he will be most particularly and proudly remembered in the spirit to which I have referred, by those for whom I speak, namely the members of the New Zealand Law Society throughout New Zealand for his great and unforgettable contributions to the affairs of the Society in his long service on its Council and its several Committees. Guy Smith was elected Honorary Treasurer of the New Zealand Law Society in 1966 and his strength and ability to lead were soon demonstrated in his managing of the financial affairs of the Society, particularly when it was passing through the difficult period following the erection of its building in Waring Taylor Street. Then, after he had been elected as President-Elect in 1973 and President in March 1974, his humble yet strong leadership made itself apparent. In circumstances far from easy, Guy Smith had the ability and the foresight to understand the course which the New Zealand Law Society should follow in the years ahead. He reminded us that as mankind moved into what has been described as the 'super industrial society', the bonds of law, common values, centralised and student education and cultural production were seen to be breaking down. In this atmosphere he saw that whilst the primary objective of the New Zealand Law Society must always remain that its members might enjoy the exclusive right to practise the profession of law, that that privilege conferred on lawyers by the community more than ever before, had to be protected lest it be eroded and lost by the failure of lawyers themselves to use their rights in the true public interest and in a manner relevant to present day conditions.

"Guy Smith believed that it was the responsibility of the New Zealand Law Society to ensure that legal services to the public were efficient and honest. He saw as a most important responsibility of the Law Society the carrying out of a fundamental function to protect the interests of the public in relation to legal matters.

"He believed that the Society should accept responsibility for seeing that law making and law enforcement agencies should function in the public interest, and that justice should be denied to none.

"He was forthright in saying that a lawyer must bring to the service of the law, not only technical skills, but a well educated and trained mind. In this respect he had already introduced discussions planned to lead to the creation of a College of Law to supplement by practical instruction the law student's university education. He saw this College also as offering refresher courses for practising lawyers.

"Guy Smith was very much aware of the Law Society's responsibility to see that legal assistance is available to all whose legal rights

are threatened or require to be asserted. He supported the profession's efforts to have legal advice and representation provided free of charge to those unable to afford them.

"Above all he believed that lawyers must be concerned—and thus their Law Society should be seen to be concerned—with the rights of people irrespective of their individual cultural backgrounds, status and financial circumstances.

"His clear-sighted view of these matters led him to accept so very recently the highest office which it is in the ability of lawyers in New Zealand to bestow upon one of its numbers. He accepted that office with a patience born of a knowledge that the achievement of his aims and ideals faced many difficulties and delays: but he also accepted it in a sense of deep humility. In my belief, it was in this humility that he found his strength—It was this humility —leading as it must to an unemcumbered and enquiring mind—that quickly showed him to be a leader of man.

"So in faith and comfort which inspired my opening words, we of the New Zealand Law Society remember Guy Smith as a leader and as a friend. We convey our deep and sincere sympathy to Mrs Smith and to her children and to Guy's family.

"Finally, may I express to you, Sir, our Chief Justice and former Vice-President of our Society, our thanks for your enabling us to appear here today before you and your brother Judges, to pay tribute to our late President," Mr Stanley concluded.

Mr R D Richmond, President, Wellington District Law Society, then paid the following tribute:

"This is a sad occasion for the members of the profession throughout the country. It is a particularly sad occasion for the members of the Wellington District Law Society, especially for those of us who practise in this city and in the Hutt Valley.

"Mr Smith was a true Wellingtonian. He took his secondary education at Rongotai College and his law degree at Victoria University. He worked as a law clerk in Wellington, became a partner in what is now Messrs Buddle, Anderson, Kent & Co, and was a senior partner in that firm when he died. He achieved eminence in both the law and in commerce. Elected to the Council of the Wellington District Law Society in 1955, he was a member of it for nine years and President in 1963. His record as a member of the Council of the New Zealand Law Society has already been related. He was a director of a number of companies and a member of several charitable organisations. During the Second World War he served in the navy for four years and held the rank of Lieutenant when he was discharged.

"It is said that there is no better yardstick to measure a man's real worth than to learn how he stood in the estimation of those who were his direct associates in walk of life. The numbers that attended Guy Smith's memorial service yesterday, the numbers of his brethren here today, the fact that he was the elected President of the Wellington District Law Society, the elected Treasurer of the New Zealand Law Society, and the elected President of the New Zealand Law Society, speak for themselves. He was a true leader, for he was humble and led without being dictatorial. He did not seek high places; he attained them because of his ability and willingness to serve. He sought the best for those he served. He led for the good of the most concerned and not for the personal gratification of his own ideas.

"We mourn the loss of an esteemed colleague beloved of all his brethren and we extend to Mrs Smith and her children our deep and sincere sympathy in their sudden and tragic bereavement."

The sitting concluded with a tribute by the Chief Justice, the Rt Hon Sir Richard Wild, who said that the presence of the profession in such truly impressive numbers accorded with the long standing tradition of the law in New Zealand whereby, on the death of a distinguished leader, the profession gathered to pay its tribute in the Supreme Court, of which all who practise law are officers. "The occasion belongs," he continued, "primarily to the profession whose tributes you have heard offered in full measure by Mr Stanley on behalf of Mr Southwick QC, Vice-Presidents of the New Zealand Law Society, and by Mr Richmond, the President of the Wellington District Law Society, each of which bodies Mr Smith served so faithfully. I note, too, that Mr O'Flynn QC is here to represent the Government.

"But the Judges for whom I speak—and that, at their express wish, is all the 20 Judges in New Zealand—join with you in this public expression of sympathy, first to Mrs Smith and her family in the sadness of their sudden and irreparable loss of husband and father, and then to you of the profession in the death of your respected President.

"Though in earlier years Guy Smith was seen not infrequently as counsel in the Courts his special interests and talents led him in his maturity largely into the commercial sphere of practice. Such, however, was the range of his interests and his sense of participation and, especially, the nature of the man that he was always close to us in the Courts, and the Judges have watched with admiration the devotion of his service and his steady rise in the organised profession. It so happens that no less than six of us who presently sit on the Bench of this Court in Wellington served at one time or another with him in the Councils of your Societies. That six includes Mr Justice White, now on circuit in Dunedin, and Mr Justice O'Regan, in Auckland, who specially regret their absence today. Another is Mr Justice Beattie who paid so fine a tribute at St John's Church yesterday.

"Election to office in the Law Society is not only a privilege but very distinctly a high compliment for in no other profession or calling do men know their colleagues more intimately and judge them more astutely. That Guy Smith should have reached the very summit of the organised profession is therefore the surest proof of his worth in the eyes of his brethren. It reflected, too, the real qualities of leadership and devotion to his fellows that he showed at school and university, in sport, in war, and in the public spirited and charitable pursuits he made time to follow. That we should lose him at the richest fulfilment of his promise is a grievous blow to the whole community for in so many ways his life exemplified the true ideal of service.

"Finally there was Guy Smith himself. Manly, warm and friendly; rugged of countenance; robust of purpose; yet genial, generous, and gentle of spirit.

"In this time of sorrow our hearts go out to Mrs Smith and her family. We can but hope that the certain and abiding knowledge of the admiration and affection we had for him may comfort them now and sustain and inspire them in the days ahead."

An oration delivered by MR JUSTICE BEATTIE *at a memorial service for Guy Smith, conducted at St John's Presbyterian Church, Willis Street, Wellington.*

We have all come to this Memorial Service to do two things. One is to say together some of the grave and beautiful words of the Church Service which throughout the centuries, have in various ways been said when men and women, having done their work in the world, have turned to their rest, and by doing so to link our friend with those who have gone before him. The other is, while the edge of memory is still fresh, to recall, in his honour, some of those special gifts, those individual graces and talents, that made him the remarkable person that he was.

No one who knew or talked or worked with Guy Smith would ever doubt his quality, because everything that is good in this small country of ours went into him—strength of character, common sense, humour—all the versatility of a practical man.

Most of you will know part of his background and accomplishments, but he came the full course in a life compressed with achievement. Educated at Rongotai College where he was head prefect, captain of the first XI and where he won debating and oratory prizes, he later graduated from Victoria University receiving blues for cricket and rugby. During the War he was a naval officer serving overseas and those who knew him then, knew him as a man of oak and rock and great fun. On his return he joined the Wellington law firm of which he was a senior partner and enjoyed there the respect and affection of his partners. Eventually he was elected President of the Wellington District Law Society and was for many years Treasurer of the New Zealand Law Society. All this background amply fitted him for the high position of President of the New Zealand Law Society when he assumed that office in March of this year. It is one thing to say of a lawyer that he practised his profession in an honourable and diligent way as he did, but it is perhaps a greater tribute to say he has also given greatly of his talents for fellow citizens.

This our friend did in full measure. He was a member of the McKenzie Education Foundation, the Sutherland Trust Board and the Arthritis and Rheumatism Foundation Council and other Trusts. He also served on the Courts Martial Appeal Court and the Company Law Advisory Committee set up under the Companies Act and was Chairman of the Payroll Tax Relief Committee. In a world where every country needs the greatest possible supply of top talent, he did not end at this point, for he was also a Director of several New Zealand companies, including Fletcher Holdings, National Mutual Life Association, Philips Electrical Industries, Kirkcaldie & Stains Limited, Self-Help Co-op Limited, Challenge Corpora-

tion Limited, Sandwick N.Z. Limited, Henry York & Co Limited and others. If I have presumed to name both these charitable and business organisations, I do so because today I see so many of his colleagues in them who served with him and who I know feel a sense of personal loss.

I can remember once taking a brief for him before the Law Society Disciplinary Committee seeking to have a former lawyer restored to the Rolls. It was fairly obvious after a while that my submissions were being received in stony silence but because I knew that with Guy so long as there were possible wrongs to be redressed, so so long as he thought injustice might sit in high places, the effort should be doubled; I decided to call him as a character witness. In an eloquent, sincere but unprepared address, he won the day. At the last New Zealand Sportsman of the Year Dinner in Wellington, when as sometimes happens, the function lagged a little, he rose as last speaker and soon had the assembly roaring with applause at his common-sense message interspersed with humour.

The ink is barely dry on the report of an address he gave called "Aspirations of a new President" ([1974] NZLJ 249). In essence it was an analysis of the privilege that lawyers have in being allowed the exclusive right to practise law in New Zealand, and the corresponding duties that he considered should be observed. These were three in number and illustrate better than can any words of mine, the rounded mind. He said that this privilege is conferred on lawyers by the community and will be eroded or lost to the extent that lawyers fail to:

(1) Justify their restrictive practices as being in the *public interest* and relevant to present-day conditions.
(2) Retain the confidence of the community in the ability and integrity of lawyers in present practice to provide an efficient, honest and confidential legal service, and,
(3) Accept responsibility for seeing that law making and law enforcement agencies function in the public interest, and that justice is denied to none.

Laws and the constitutional process for making them may well not be the most important aspect of social activity, but they have a unique power of illuminating dramatically the structure which the individual can count upon for the building and development of his own life. Guy Smith strongly believed that a firm confidence in the stability of that structure was more than ever needed today. I suggest that the charter he proposed as President of the New Zealand Law Society will be part of his epitaph.

There are many more cameos of his character I could recite but from the tributes already paid in the Press and my observance of this large attendance today, it is obvious what a marked impact he has had upon our community. (I can almost hear him saying, "Now, don't overdo it!".)

A man's life is not in vain if he uses his time, which so often means his leisure moments as well, in doing many things to try and put matters a little more to rights.

I do trust that in their sorrow, his wife and family, his relatives, and partners who all meant so much to him, will receive some comfort from the numbers present here who all show their esteem for him and wish to share the loss.

To his six children who are left with the memory of a warm and loving father, I commend the famous passage from Shelley's "Prometheus Unbound":

"To suffer woes which Hope thinks infinite;
To forgive wrongs darker than death or night
To defy Power which seems omnipotent;
To love, and bear; To hope till Hope creates
From its own wreck the thing it contemplates
Neither to change, nor falter nor repent;
This, like thy glory Titan, is to *be*
Good, great and joyous, beautiful and free."

On the list, which stretches out forever, we his friends gladly write the name of *William Guy Smith.*

RECENT ADMISSIONS

Terence Raymond Hawkins and David Arthur Hollinger were admitted as Barristers and Solicitors of the Supreme Court on 2 August 1974.

Put not your trust in politicians—"My father was a barrister . . . I do not like writing letters, and solicitors do practically nothing else . . . I do not keep accounts, and solicitors have to keep not only one set of accounts but at least two; or they get turned out . . . and I cannot be trusted with my own money, let alone anybody else's . . ." Lord Hailsham.

ACCESS TO A SOLICITOR AFTER ARREST

The Minister of Justice, the HON MARTYN FINLAY, *has promised multi-lingual information sheets to advise all those in custody of their rights.* DR M W DOYLE, *Senior Lecturer in Law at the University of Auckland, looks at recent developments.*

One of the most undefinable, and until recently, the most unenforceable rights in the field of criminal law, is the so-called "right" of an arrested person to see and consult with a solicitor at the police station. Practitioners, both here and abroad, regularly receive complaints that either the person arrested was not informed of this right or, that when access to a lawyer was requested, it was refused by the police(*a*). A recent study in the United Kingdom found that only 15 percent of arrested persons sampled actually saw a solicitor at the police station, while 74 percent of those actively seeking legal consultation had their requests refused by the police(*b*). One might assume that the situation is not so terribly different in New Zealand.

The central reason why this alleged "right" has been found difficult to enforce is that heretofore it was due only to police benevolence that it existed at all. There is no statute or regulation that obliges the police to allow an arrested person to see a lawyer; nor has there been any legal remedy available where the police refuse a person's request to see his solicitor.

The basis of any feeling that an authentic right does exist stems, it would seem, from an internal directive within the Police Department. This directive instructs the police to heed a prisoner's request to see a solicitor, to make arrangements for private conversations and to allow solicitors access to prisoners(*c*). Additionally, since 1970 a notice has been printed on the back of the prisoner's property sheet which informs him, among other things, that "you are entitled to communicate with and be visited by a solicitor of your choice . . ."(*d*). Persons arrested are required to read this notice before signing the form, but what percentage actually comprehend the message is unknown. Further, the notice appears at the "booking" stage, after arrest, and would not have any effect on investigative, "non-custodial" inquiries *prior* to arrest, which is the time where legal advice would be most useful to the potential defendant. Since both the instructions and the notice are administrative in origin they do not have the force of law; consequently, the only remedy for police disobedience has been internal departmental discipline.

Yet there may be a genuine breakthrough in the offing. Two recent Supreme Court judgments have considered this problem and, when read together, indicate that this somewhat ephemeral "right" may be taking a more con-

(*a*) See K A Palmer, "The Right of An Arrested Person to Consult a Solicitor" [1972] Recent Law 248 for a summary of the 1971 Ombudsman Report which investigated several complaints.

(*b*) Zander, "Access to a Solicitor in the Police Station" [1972] Crim LR 342.

(*c*) Police Instruction 107 states: "(1) A prisoner shall, on his request or that of his relatives, be permitted to communicate with a solicitor, and the police shall send for any solicitor whom a prisoner may, of his own volition, desire to see. (2) An up-to-date list of all solicitors practising in the local Magistrate's Court is to be kept at each station and this is to be handed to a prisoner requesting a solicitor, but the choice shall be left entirely to the uninfluenced discretion of the prisoner. (3) Arrangements are to be made, as far as practicable, that the communication between a prisoner and his solicitor is not overheard by anyone. (4) Care is to be taken that the prisoner does not escape, and a member shall keep the prisoner in sight during the communication. (5) Solicitors or their clerks are at all times to be allowed access to a prisoner."

(*d*) The full text of the Notice is as follows: "As a prisoner you are entitled to communicate with and be visited by a solicitor of your choice, your relatives and friends, a minister of religion, a medical practitioner, social workers and, if you are an alien, by the diplomatic or consular representative of your country, subject to the necessity of the police to prevent interference with witnesses, the suppression of evidence, or the passing of information which may assist you to escape or assist your accomplices. The police (unless forbidden to do so by you) will contact a nominated relative or friend for you, unless impracticable, and inform him of your arrest, the charge, and whether you are bailable. Where the relative or friend does not reside within a reasonable distance the information may be sent by telegram or other means. However, if you are under 21 years of age, your wife, parent, or guardian will be informed irrespective of your wishes. I have read the above information."

crete form. In *Nazer v Ministry of Transport* (see [1973] Recent Law 117) Speight J considered an appeal by a defendant who had been convicted of refusing to supply a blood sample under s 58c of the Transport Act 1962. The appellant contended that since he was denied access to his solicitor after the second breath test, the entire procedure was invalid. Although the learned Judge did not accept this argument, he did have some very harsh words concerning the behaviour of the police in this matter.

> "I repeat that there can be no excuse for the conduct of the officers engaged in this affair. Even if a person is arrested he must not be held incommunicado, and if a sensible bona fide request is made for a solicitor or any other appropriate person to be communicated with, then attempts should be made to facilitate this. It may be that circumstances do not permit it for remoteness or other reason. But here, at the central police station, there is a public telephone in the lobby and doubtless ample police department telephones readily to hand. No procedures or requirements which it was the duty of the officers to carry out would have been impeded by allowing the suspect to communicate with his solicitor."

To mark his disapproval of the police conduct in depriving the appellant access to his solicitor, Speight J exercised his discretion under s 42 of the Criminal Justice Act 1954 and quashed the conviction. Thus one method of enhancing the right to see a solicitor is to quash convictions where the police have failed to honour their obligations.

A somewhat different approach was taken by Cooke J in the case of *R v Puhipuhi* (see [1973] Recent Law 139), which involved the obtaining of a confession by allegedly unfair means. Puhipuhi was a 16-year-old Maori boy who had indicated upon arrest that he wished to contact a solicitor and refused to make a written statement. In spite of these desires, the police interviewed the defendant without allowing him to contact a solicitor or informing him that any verbal admissions could be used against him. In considering whether to exercise his discretion to exclude the resulting confession, Cooke J adopted the approach suggested by the Court of Appeal in *R v Convery* [1968] NZLR 426 and concerned himself more with the "spirit" of the Judges' Rules than their technical application. Consequently, he examined several factors, including evidence that the defendant had indicated a desire to see a solicitor and not make a statement until he had done so. The refusal of the police to accommodate this request, while not the sole basis of the judgment, was a substantial factor that Cooke J considered in deciding that the confession should be excluded due to the unfairness of the procedure. Basically, the police had forged ahead, despite the demonstrated unwillingness of the suspect to make a statement.

Judicial recognition of an arrested person's right to contact a solicitor is a significant step forward. It converts what was heretofore more of a privilege than a right into something approaching a rule of law, rather than a mere inter-office memorandum. This is particularly important in cases like *Puhipuhi* because the most common result of continued police interrogation without legal consultation is a confession or an admission on the part of the person in custody. It must be noted, however, that exclusion of such a statement is still discretionary with the trial Judge; denial of access to a solicitor does not automatically mean that a statement will be excluded or a conviction quashed. The significance of the cases is that it now appears as though New Zealand Judges may be prepared to consider such police conduct as one of the factors taken into account when exercising their inherent discretion to exclude evidence obtained unfairly, or in appropriate cases, to discharge a defendant altogether.

A good example of the scope of a Judge's power to exclude evidence obtained unfairly was observed recently in a Supreme Court murder trial, *R v McDonald* (Auckland 9 May 1974). The accused had been found by the police, searched and placed in a patrol car for transportation to the police station. He had been told that he was "wanted" at the station for questioning; although no formal arrest had been made, the accused considered himself under arrest. At the station the accused was questioned for a period of two hours in a manner that amounted to cross-examination; his version of the facts was contradicted in stages by the interrogating officers. It was accepted by Mahon J that the accused was at first unwilling to make a statement until he had legal advice and that for some time he refused to answer any questions because of this desire. Access to a solicitor was not forthcoming, however, and eventually the accused made a confession that was duly objected to at trial. After hearing evidence on voir dire, Mahon J ruled that although the statement was voluntary it would be ex-

cluded because it was obtained unfairly, following the principles laid down in *R v Convery* (supra). It was felt that the culmination of three factors obliged his Honour to exercise his discretion to exclude the confession: (1) the accused was "in custody" at the time of the questioning, even though not under arrest; (2) the manner of questioning, without caution and by cross-examination, was improper under the Judges' Rules; the law has always been against the concept of detention by the police for purposes of interrogation; and (3) the accused had sought legal advice and assistance before making a statement but this was refused by the police. As to this latter point, Nazer (supra) was cited by counsel during argument.

The *McDonald* case is not only illustrative of the two-pronged attack on confessions (voluntariness and unfairness), it points out the possibilities which exist under the Court's broad discretion to exclude, quite apart from the voluntariness of the statement under the common law or s 20 of the Evidence Act 1908. Recent judgments demonstrate that the discretion is concerned primarily with fairness, and while the Judges' Rules should be looked to for guidance, violations will not necessarily result in exclusion, especially if they are merely technical. Conversely, evidence may be excluded in situations where no specific Judges' Rule was violated, as in the above cases concerning denial of access to a solicitor(*e*).

On the whole, it is submitted that judicial consideration of police refusal to allow contact with a solicitor is a welcome bit of fresh air as far as criminal procedure is concerned. By avoiding the pitfalls of creating an absolute rule, the Courts are maintaining flexibility, and it seems clear that further developments will come on a case by case basis. This recent trend in judgments does give judicial recognition to the principle that a person in custody is entitled to see a lawyer on request, and to this extent it raises the hope that this particular "right" may, in the future, become more real than illusory.

(e) See also, Lord Devlin's lectures, "The Criminal Prosecution in England" referred to by Turner J in *R v Convery* (supra) at p 440.

CONFLICT OF LAWS AND LEGAL AID

It is an axiom of Commonwealth conflict of laws that the Courts of one state will not act as tax gatherers on behalf of another state. In other words, no Court has jurisdiction to entertain an action for the direct or indirect enforcement of a revenue or other public law of a foreign state(*a*). Pursuant to this rule a "revenue" law has been held to include income tax(*b*), customs duties(*c*), stamp duties(*d*), death duties(*e*), income tax and capital gains tax(*f*), and excess profits tax(*g*). The rule has even been held to operate at the municipal level, so that the English Courts have held that the Municipal Council of Sydney could not sue in the English Courts to recover a municipal rate(*h*).

Two more recent decisions in this field, however, call for more extended comment. In *Metal Industries (Salvage) Ltd v Owners of the St Harle* [1962] SLT 114 (Court of Session, Outer House) a multiple poinding action arose out of the sale of the *Harle,* a French trawler, in which the pursuers claimed preferential ranking in respect of both the expenses connected with the sale of the ship and salvage services which they had rendered. The French government, represented by the French Consul-General, also claimed preferential ranking in respect of compulsory contributions due by the shipowners under the French health insurance and family benefits scheme. Lord Cameron held that the latter claim was essen-

(*a*) See Dicey and Morris, *The Conflict of Laws* (9th ed, 1973), Rule 3, pp 75 et seq.

(*b*) *Indian and General Investment Trust Co Ltd v Borax Consolidated Ltd* [1921] 1 KB 539. See also *Brokaw v Seatrain UK Ltd* [1971] 2 All ER 98.

(*c*) *A-G for Canada v Schulze* 1901 9 SLT 4. No doubt the same would be true of Value Added Tax.

(*d*) *James v Catherwood* (1823) 3 Dow & Ry (KB) 190.

(*e*) *Re Visser* [1928] Ch 877.

(*f*) *Government of India v Taylor* [1955] AC 491; [1955] 1 All ER 292 (HL).

(*g*) *Peter Buchanan Ltd v McVey* [1955] AC 516, a decision of the Supreme Court of the Irish Republic. See also *The Eva* [1921] P 454 in which a levy charged by the Finnish government on the sale of ships registered in Finland was regarded as a sales tax and hence was not enforceable in England.

(*h*) *Sydney Municipal Council v Bull* [1909] 1 KB 7; [1908-10] All ER Rep 616.

(*i*) Cf *The Acrux* [1965] P 391; [1965] 2 All ER 323; Webb (1965) 28 MLR 591.

tially fiscal by nature and hence was unenforceable in Scotland(*i*). He went on to explain that ". . . what is fiscal and what would be regarded as enforcement of a revenue claim or an attempt to recover taxes due under foreign law seems to me to depend, not so much upon the form which the imposition takes or the object upon or in respect of which it is levied, but on the substance of the claim as viewed by a Scottish Court applying Scots law" (at p 116). With this may be contrasted the Canadian decision in *Weir v Lohr and Allstate Insurance Co of Canada* (1967) 65 DLR (2d) 717 (Manitoba Queen's Bench). The plaintiff, a Saskatchewan resident, was injured in a car accident in Manitoba and he had to have hospital treatment. As a beneficiary under the Saskatchewan Hospitalisation Act 1965, his hospital bill was paid direct by the Saskatchewan authorities out of funds deriving from an annual "tax" levied on Saskatchewan residents(*j*). By virtue of their subrogated interests, the authorities sought to recover the amount paid. They were met with the argument that the Mantitoba Court could not entertain a claim for a tax or revenue debt of a foreign state. Tritschler J held that the authorities could recover, the hospital bill not being a tax or revenue claim. The scheme was thus regarded as a health insurance scheme and not as a fiscal measure.

In the light of the foregoing the recently reported New Zealand case of *Connor v Connor* [1974] 1 NZLR 632 is of considerable interest. This was a motion for an order setting aside registration under the Reciprocal Enforcement of Judgments Act 1934 of an order for costs made by the Victorian Supreme Court. The latter Court had been seised of divorce proceedings between the parties and the costs had been taxed and allowed at $A917.20. The sum of $A200 had been paid into Court by the judgment debtor, so that $NZ718.64 remained unpaid. The payment debtor was now resident in New Zealand—hence the registration under the 1934 Act. The judgment creditor had received legal aid in the state of Victoria and it was accepted that, if the $NZ718.64 was recovered, it would have been payable, not to the judgment creditor, but to the Legal Aid Committee of Victoria under the Victorian Legal Aid Act 1969. The judgment debtor moved to set aside the registration on the ground that enforcement would, under s 6 (1) (e) of the Reciprocal Enforcement of Judgments Act 1934, be against public policy. Roper J considered that "The principle that a Court will not execute the revenue laws of another country is well recognised" (at p 635) and added that: "The decided cases establish that the term 'revenue law' includes not only taxes in the ordinary sense but payments such as death duties, municipal rates, and compulsory payments to a social security scheme". His Honour proceeded to consider the *Harle* case and *Weir v Lohr* and reached the conclusion that: "I do not think the authorities support the proposition that merely because enforcement of a judgment may result in the reimbursement of a fund which has the blessing, or even the financial support, of a foreign State, enforcement of that judgment by another State would be contrary to public policy"(*k*). It is respectfully submitted that Roper J was right to regard the Victorian legal aid scheme as being not of a fiscal nature and that he was correct in viewing it differently from the compulsory contributions to the French health insurance and family benefit scheme which figured in the *Harle*.

It is devoutly to be hoped that, were divorce proceedings to be legally aidable in New Zealand and the facts had been appropriately reversed, a Victorian Court would have taken the same view(*l*).

P R H WEBB

(*j*) The contributions were compulsory, and the amount paid varied with each person's means.

It will be appreciated, of course, that all the Canadian provinces owed allegiance to the same sovereign. For the purposes of the rule under discussion Tritschler J was prepared to say that they were not "foreign" to each other. Cf in this respect *Government of India v Taylor* (supra).

(*k*) At pp 636-637. His Honour fully analysed the Victorian legal aid legislation at pp 633-635.

(*l*) The 1934 Act extends to Victoria by virtue of SR 1940/88.

In the marketplace—"No newspaper can exist except upon its merits, a condition from which the Bench, happily for Mr Justice Darling, is exempt. There is not a journalist in Birmingham who has anything to learn from the impudent little man in horsehair, a microcosm of conceit and empty-headedness.

"One is almost sorry that the Lord Chancellor had not another relative to provide for on the day that he selected a new Judge from among the larrikins of the law. One of Mr Justice Darling's biographers states that 'an eccentric relative left him much money'. That misguided testator spoiled a successful bus conductor." A Birmingham newspaper's comments in 1900. The editor was charged with contempt.

STATE OF THE UNION

A propos of nothing, except that it is a catchy way to start, I quote the proposition that New Zealand is "but a state of Australia". That was Clyde Cameron's observation when announcing that New Zealanders would be exempt from the new passport control soon to be imposed on the rest of the Commonwealth.

Perhaps that bit of Australian arrogance was never brought before you. But then, news media tend to be a bit eccentric in their selection of material. Thus, with the preface that it must have brought a "wry smile" to those who had not stampeded thither during our last winter of discontent, our newspapers and screens actually led with New Zealand's worst industrial strife since heaven knows when over the gaoling of a unionist. But there the story ended abruptly, leaving us to wonder whether all had ended peaceably; if news simply could not penetrate a communications blackout; or whether a French bomb had inadvertently landed on Wellington. I suspect, however, that somebody backed down and peace was bought at a suitable price.

What I am sure about is that you, like us, are wrestling with problems of labour unrest and inflation (or "hyperinflation", as we have here). When Parliament broke up for its summer recess (it has, incidentally, been a ghastly summer), a Trade Union and Labour Relations Act received the Royal Assent. Precisely what it says, very few people know, for a dispute at HMSO has stopped for many a week now the publication of Government matter (including Hansard). To make matters worse, the Act was butchered by the Conservatives and Liberals defeating the minority Labour government on a number of important amendments.

What is certain, however, is that the Industrial Relations Act 1971, has gone; and, with it, the National Industrial Relations Court presided over by Sir John Donaldson. He goes, not to the House of Lords as Lord Donaldson of Tolpuddle, but back to the Commercial Court as Mr Justice Donaldson.

So the attempt to order the affairs of trade unions by law has ended, foundering upon the unbridled hostility of the trade unions. In its place, we now have (with scant regard for Rousseau, Locke, Hobbes, et al) a much vaunted, or much derided, "social contract". Its one condition (or perhaps a mere warranty) is that the unions will play ball with Labour if Labour will play ball with them. To a degree, it's working; but one suspects that the price of industrial peace is being dearly bought.

Certainly, the TUC has asked its members for moderation in its pay claims, seeking not more than one rise a year. But wage settlements seem to be averaging some 20 percent, a rate which few can afford; and they're coming more than once a year.

There was a statutory wage control (Phase 3, you may recall) which the miners destroyed and which has now formally ended. Nothing has taken its place, except the social contract.

So two experiments have ended, and one doubts that they will be seen again. In a way, they were doomed to fail, since they were laws which did not have the support of enough of the people; or, at any rate, of enough of the people that mattered. It seems beyond doubt too that if such laws had not been repealed, the disrespect for law which they had engendered would have spread. Happily, the Conservative opposition has promised never to reintroduce the Industrial Relations Act, but to strive to build "one nation". Perhaps we are all social contractors now.

RICHARD LAWSON

Protecting informants—A bill protecting anyone who reports mistreatment of a child is before the British Columbia Legislature. Amending the Protection of Children Act, it provides that anyone who has reasonable grounds for suspecting a child has been abandoned, deserted, or mistreated and reports this to the superintendent of child welfare in good faith cannot be sued. At present, only a doctor can make a privileged report about a child's treatment.

The bill also provides for two lay people to sit with a Family Court Judge at hearings to determine whether children should be removed from custody of their parents. These lay people will be chosen from a roster of names made up of volunteers and others chosen in a manner approved by the Cabinet.