The New Zealand
LAW JOURNAL

6 MAY 1975 No 8

JUDGING JURORS

The jury is, at best, an imperfect instrument. Some of the imperfections were highlighted by a recent newspaper attack on the selection of the Sutch jury, speculating that Justice Department staff had behaved illegally with the result that the defence had been prematurely supplied with the week's jury list.

The attack was based on a complete misapprehension of the mechanics of jury selection, and proved once more that in law, perhaps above all else, a little knowledge can indeed be a dangerous thing. Certainly the Jurors Act 1908 provides that a jury list *must* be available three days before the commencement of the sitting; but it does not say that it cannot be made available before then. In any event, members of the public have the right to attend the ballot by which the names on the jury list are determined and this, of course, takes place several weeks before the sitting in question.

The mechanics were shown to be inviolate, and any residual doubts must surely have been dispelled by the Attorney-General's comment that "as soon as the list is compiled, two copies are supplied to the Police". What is sauce for the goose is surely sauce for the gander, whatever *"Truth"*, that erstwhile guardian of our liberties, may feel.

Rather the question raised is how much the defence in a criminal trial should be entitled to know about prospective jurors to enable it to exercise its challenges intelligently. For the "challenge" system seems to be an attempt to graft a filter of logic on to a system of selection by chance.

In criminal cases the dilemma lies with the defence rather than with the prosecution, as although each side is given but six peremptory challenges, the Crown (for some reason that is altogether beyond the wit or ken of the writer) is first given the right to simply "stand aside" the jurors as called until the list is exhausted. Then, and only then, is the Crown required to begin to exhaust its quota of challenges. There would seem to be no good reason why the defence should not be permitted a similar privilege.

The right to challenge is "to give the litigant, *if he is diligent,* reasonable protection against the possibility that some member of the jury, for one reason or another, may be liable to have a conscious or unconscious bias against him" (*Holmes Motors Ltd v Spence* [1956] NZLR 59 CA).

How "diligent", then, may he be? According to Baron Bramwell (in *Williams v Great Western Railway* (1858) 28 LJ (NS) Exch 2), where a juror was later found to be a shareholder in the company, "You should have challenged the juror ...". The fact was not known in time, replied counsel. "It was for you to discover it in due time", the Judge rejoined. "Those who have the right of challenge *must make inquiries* with the view to its exercise."

It has been said elsewhere that the fact of a juryman who is open to challenge having served on a jury is not, in itself, a ground for disturbing the verdict.

But if inquiries *must* be made, what "inquiries" are permissible?

Certainly the solicitor in *In re Blomeley* (1900) 26 VLR 15 went too far when he personally approached potential jurors and asked them about their views on the very case listed for trial.

He invited the condemnation (dispensed in a judgment concerned with the taxing of his costs) that "I can imagine no practice more

likely to interfere with the proper, impartial, independent, and honest administration of justice than that of the several parties to any cause interviewing persons who have been subpoenaed as jurymen *for the purpose of finding out what their views may be, what views they may have expressed, and whether, having expressed those views, they intend to stand by them.* It would open the door to corruption in very many forms which it might be utterly impossible to prevent. A juryman in my opinion ought not to be approached *on any such question,* either by his friends or by the solicitor, nor ought the surroundings of the juryman to be sifted in this kind of way. If this could be done and charged for, it could be carried to lengths that would make trial by jury a corrupt method of disposing of any cause."

So we are left with counsel under a positive duty to make inquiries, but only to some undefined limit.

Perhaps what is basically wrong is our approach to the selection of the jury. Given that the object of the exercise is to find a fair jury, one which will give a verdict according to the evidence, it would follow that the adversary system is of limited value. If both parties desire the common end, there would be no reason why information on jurors should not be shared.

Both counsel would then be better able to use logic rather than instinct, and (interestingly) a research programme undertaken by one side would automatically benefit the other. This, in turn, would so reduce its effectiveness as to deter development of any widespread practice—for it is easy to imagine such research as on occasions serving one's opponent somewhat better than one's client.

The Attorney-General acknowledges that he has in the past criticised a system that appears to place Crown prosecutors in possession of information about jurors (presumably drawn from Police resources) which is not available to defence counsel. He has recently reaffirmed his views. Perhaps the time is opportune for a directive to his law officers that they make this information available in criminal cases. There would be no need for legislation and the matter could be attended to in the time it takes to dictate a letter.

Once there has been time to study the ramifications in practice, consideration could be given to an extension of information—sharing at least to civil cases, and possibly to the defence in criminal trials.

In the meantime the sage words of a senior Judge to young practitioners still apply: "If you have a friend on the jury list you should tell your opponent so that he may challenge him—if you have an enemy, you should also tell your opponent. But in the latter case perhaps you could describe him as being a friend!"

JEREMY POPE

Plaintiff bites dog: At [1974] NZLJ 375 we noted an exchange of correspondence between solicitors for dog owners. We now note the judgment of Mr D B Wilson SM in the subsequent case:

"This case revolves around the rather spontaneous and sudden romantic attachment which a virgin canine bitch of the Clan Alsatian, felt towards a readily available canine swain of the Clan Labrador. The mutual affection appears to have resulted as soon as they were introduced, if indeed they were ever introduced, in an almost immediate illicit relationship, which some two months later resulted in the birth of nine bastard and unwanted offspring. Both of the enamoured canines were at the time of their fleeting romance under the care and control of the defendant, which he readily admits. As a result of this affair the plaintiff now claims general damages and special damages arising from his and his family's loss of enjoyment of the young lady, together with her unwillingness to surrender her maternal instincts in favour of the chores that she was required to carry out in the plaintiff's property. In addition there is a claim for the post-natal expenses of the infants pending their placement in foster homes.

"The defendant rejects the claim, saying that he exercised reasonable precautions to prevent the occurrence of any illicit relationship of Cleo, and further that after such event was a fait de comple, he recommended a visit to the veterinary surgeon, where the veterinary surgeon, not hidebound by the moral or legal implications which at present complicate the medical professional, could have terminated the unwanted pregnancy, at least unwanted as far as Cleo's owners were concerned.

"After hearing the evidence and considering the matter carefully, I am satisfied that there was a certain lack of care on the part of the defendant, having regard to the earlier escape of an animal from this particular enclosure. I am satisfied, however, that the above claim is manifestly excessive. There will be judgment for the plaintiff for the sum of $60, costs and disbursements on this amount as fixed by the Registrar."

DO WE NEED A LEGAL DEFINITION OF DEATH?

In his paper, "The Right to Life", MR JUSTICE BEATTIE *suggested that it is important for us to have a definition of death which would remove "the uncertainty of the present law". W A P* FACER *examines the problem.*

Because of the increasing powers of medicine to preserve and prolong life and the resulting dilemmas which these powers create, society is faced with urgent problems concerning the meaning and definition of death. It is, ironically, the success of modern medical devices in forestalling death that has introduced perplexity about an adequate definition of death. The process of biological death requires a more accurate criterion than has been provided in the past for both medical and legal reasons.

Two related developments in biomedical science have come into public and professional prominence: these are the care of hopelessly and irreversibly unconscious patients and the possibilities which have arisen because of organ transplantation. It is therefore necessary for both law and medicine to reach agreement in order to: first, give protection to the donor, or in other words safeguard the rights of the living; secondly, protect the physicians involved in transplant decisions; and finally to reassure both relatives of the deceased and society as a whole that no unlawful act was committed when cadaver donation of an organ for transplantation was removed, or when a patient was allowed to die.

Robert M Veatch, in "Brain Death: Welcome Definition or Dangerous Judgement?" (1972, *The Hastings Centre Report,* 2:10-13), has stated that: "the task of defining death is not a trivial exercise in coining the meaning of a term. Rather, it is an attempt to reach an understanding of the philosophical nature of man and that which is essentially significant to man which is lost at the time of death. When we say that a man has died there are appropriate behavioural changes; we go into mourning, perhaps cease certain kinds of medical treatment, initiate a funeral ritual, read a will . . .", and so on.

Proposals for altering the definition of death may be examined according to how they affect the concept of death and its meaning, and the criteria to be used for determining when death has occurred. Some of the proposals suggest a revision of both our understanding of death and the criteria to be used in pronouncing persons to be dead, while others suggest that only the tests be updated.

The traditional medical standard for determining death which was accepted by the common law has been defined in *Blacks Law Dictionary* as: "the cessation of life; the ceasing to exist; defined by physicians as a total stoppage of the circulation of the blood and a cessation of the animal and vital functions consequent thereon, such as respiration, pulsation, etc". Many medical authorities no longer believe that a definition of death should be based solely on the cessation of heart beat and respiration. Criteria for death centering on death of the brain is that most widely favoured by the medical profession.

The criteria for brain death are not as simple as that for the failing of the heart. A comprehensive definition of brain death has been set forth by the ad hoc committee of the Harvard Medical School under the title "A definition of Irreversible Coma" (1968, *The Journal of the American Medical Association,* 205, 337). Their criteria are:

(1) Unreceptivity and unresponsitivity (that is no response even to painful stimuli).
(2) No muscular movement and no spontaneous breathing for at least one hour, or for 3 minutes if a mechanical respirator is turned off.
(3) No elicitable reflexes, ocular movements, or blinking, and the presence of fixed dilated pupils.
(4) A flat isoelectric electroencephalogram (EEG).
(5) No change when all of these tests are repeated at least 24 hours later.
(6) These criteria to be exclusive of two conditions: hypothermia (body temperature below 90°F), or central nervous system depression due to drugs such as barbiturates.

So far as the concept of death and its significance is concerned, technical definitions concerning irreversible coma are not capable of providing a comprehensive answer to this problem. Two distinct events occur for the dying human being: one is the death of the body, the other the passing of the person. The death of the body is a physical phenomenon providing a

series of measurable events that come within the province of medicine. The passing of the individual is a non-physical process, poorly defined, largely unmeasurable and closely connected to the nature of the dying person. The passing of the individual is also part of the work of physicians, but more importantly falls within the orbit of family, friends and religious advisors.

It is the passing of the person that entails a choice among the many factors of what is essential to the nature of man, and therefore the loss of which is to be called "death", thereby raising questions that are essentially philosophical and moral, not medical or scientific.

Another definitive statement was produced at an international meeting of medical specialists organised by the Conseil Internationale des Organisations des Medicales Sciences in June 1968. Cerebral function was defined as having completely and irreversibly ceased when there was:

(1) Loss of all response to the environment.
(2) Complete loss of reflexes and muscle tone.
(3) Absence of spontaneous respiration.
(4) Massive drop in arterial blood pressure when not artificially maintained.
(5) An absolutely linear electroencephalographic tracing recorded under the best technical conditions even with stimulation of the brain.

These criteria are not valid for young children or for subjects in hypothermic states, that is extreme chilling, or with acute toxic conditions. The need for exceptions to the criteria is illustrated by the following case reported in the medical literature: in 1962 a five year old boy fell into a partly frozen river where he remained for about 22 minutes. When a doctor reached him he was apparently dead, the pupils were widely dilated and the skin blue white. After more than two hours of mouth to mouth resuscitation, heart massage, drug injections and blood transfusion, the boy's heart and breathing started to work again spontaneously. Five times during the next 24 hours his breathing stopped again, but was restored by an artificial respirator. His blood was exchanged by transfusion and he was fed intravenously for a week. On the tenth day after his accident he had recovered sufficiently to recognise his mother. Then he lapsed into unconsciousness for 5 weeks and for part of this time had no measurable brain function at all. (1963, *Brit Med J, 1:* 1315-1317.)

At present the discussion seems to fall between two schools of thought. One is the traditional criterion of heart stoppage as synonymous with death and the confusion imparted to that criterion when modern resuscitative measures are available and employed. The other is when there is massive and irremediable brain damage despite persistent circulation and respiration, or when there is no spontaneous function of the heart despite viable cerebral and respiratory function.

Another aspect to be considered is the need to define death in an individual and not in any of its component parts as the above criteria try to do. In 1968 the World Medical Association adopted the Declaration of Sydney, a statement on death in which it has noted 'that clinical interest lies not in the state of preservation of isolated cells, but in the fate of the person, and that the time of death of various body cells and organs is less important than the determination that the process has become irreversible, irrespective of resuscitation techniques that may be employed". In view of the fact that death however conceived is not an identical or uniform human experience, the validity of this point can well be seen. The cessation of spontaneous function in all the great organ systems may be preconditional for death but cannot be regarded as definitive of it. If we want to attach significance to human death as opposed to death of other members of the animal species, then the human factor must be articulated in appropriate terms, probably ethical and religious.

One of the consequences of not having a uniform operational definition of death is that innovations in biomedical support systems impinge upon the old criteria with the practical result that different doctors may employ different criteria for defining and pronouncing death. Such a situation increases the possibility of legal prosecution to the doctors themselves, but this would appear to be a remote probability in view of legal precedent. (Although the last decade has seen a few cases over the appropriateness of medical definitions of death when organ transplants have been involved in America, and investigations by British coroners over the same problem.)

Of more significance is the inequality in patient care that appears to be unavoidable while a new consensus is evolving. There are doubtless many patients in the hospital services who are being mechanically metabolised by artificial means when they have no expectation of recovery. In order to spare these patients needless extension of their distress, their families

needless anxiety, hospital facilities, needless consumption of their resources, and waiting patients needless delay in receiving attention, it is necessary to know and agree when further possibility of recovery has been exhausted. Otherwise we may find the situation where costly medical procedures are being inflicted upon a lifeless corpse.

Perhaps the greatest difficulties arise when organs are required for transplantation. Under the Human Tissue Act 1964, a dead person has no rights in his body. Even if he has bequeathed it or parts of it for medical use after death, his next of kin are not bound to honour his wishes. If a person dies suddenly the transplant doctor must find his next of kin, and while they are in a state of grief and shock obtain approval to remove organs. It has been suggested by medical authorities that the transplant doctor should not be one of the doctors declaring that death has occurred. In any event s 3 (4) of the Human Tissue Act 1964 simply provides that "no such removal shall be effected except by a medical practitioner, who must have satisfied himself by personal examination of the body that life is extinct". No indications are laid down in the law as to what means the medical practitioner is to use to determine that the person is dead. Ideally, definitions and criteria for death should not be determined in any way by consideration for organ transplantation.

Part of the problem of cadaver transplants is caused by present limitations of medical technique. Especially where the heart is concerned transplantation must be effected within a relatively short space of time, otherwise problems of organ degeneration occur. It would be preferable for both technical and ethical reasons if organ banking could be widely instituted. This would not only help avoid some of the anguish which exists at present, but could also assist in dealing with the expected chronic shortage of spare organs that will occur in the future as organ transplantation becomes a more routinised medical procedure.

Already proposals are coming forth in both Britain and America aimed at ensuring an adequate supply of donor organs. So far these proposals can be grouped into one of four categories:

(1) A system of routine salvaging of organs from which exemption may be granted only at the special initiative of the pre-deceased or his family.

(2) A programme of organised giving of organs which is dependent upon the consent of the donor or his family.

(3) Provision for the sale of organs by the pre-deceased or his family.

(4) Provision for the crediting of a family account against the day that some member of the family may require an organ.

A M Capron and L R Kass, in "A statutory Definition of the Standards for Determining Human Death" (1972, *University of Pennsylvania Law Review*, 121:87-118), have argued that a need to define death exists because medicine appears to have departed from the traditional understanding of the concept of death and the uncertain nature of proper standards of defining death at the present time creates a source of public confusion and concern. Regarding what a statutory definition should attempt to do, they state "it is our belief that legislation ought properly be addressed to the general physiological standards by which death is to be determined. The underlying philosophical concept of death would be much less susceptible of resolution and if agreement were reached, a definition on this more abstract level would probably not provide enough practical guidance".

The authors point out that the first attempt at a legislative resolution of the problem was made in 1970 when the State of Kansas adopted "an act relating to and defining death". This statute was then followed as a model for similar legislation adopted in Maryland in 1972. There are, the authors believe, problems relating to the existing American statutes mainly due to unclear language and the provision of alternative definitions of death in different parts of the statute. As an alternative to existing American statutes they propose the following:

"A person will be considered dead if in the announced opinion of a physician, based on ordinary standards of medical practice, he has experienced an irreversible cessation of spontaneous respiratory and circulatory functions. In the event that artificial means of support proclude a determination that these functions have ceased, a person will be considered dead if in the announced opinion of a physician, based on ordinary standards of medical practice, he has experienced an irreversible cessation of spontaneous brain functions. Death will have occurred at the time when the relevant functions ceased."

Unlike existing American statutes this proposal is framed in terms of a single phenomenon

and it specifies the circumstances under which each of the standards is to be used to measure different manifestations of this phenomenon rather than leaving it to the unguided discretion of doctors.

The Capron and Kass definition is an amalgam of the traditional medical definition of death including the modern irreversible coma aspect, where applicable. It should be noted, however, that it still leaves a large degree of freedom for medical judgment "based on ordinary standards of medical practice".

In a time of increasing change and development in medical technology the establishment of a legal definition of death must be viewed as having advantages for both individuals and society, as well as for the medical profession. The absence of any such definition in New Zealand law is a defect which should be remedied as soon as possible.

McRAE v COMMONWEALTH DISPOSALS COMMISSION—A FORGOTTEN DECISION

DENNIS PALING *suggests that, in implied term cases, Courts proceed on grounds of policy and justice rather than on the intention of the parties.*

McRae v Commonwealth Disposals Commission (1951) 84 CLR 377 was heralded as one of the most important decisions of its era. The series of events which led to the lawsuit had begun in 1944 when an oil barge was wrecked on a reef surrounding The Jomard Islands, in latitude eleven degrees sixteen minutes forty seconds south, longitude one hundred and fifty two degrees eight minutes east. In April 1945 the vessel was inspected by a government salvage officer, and an unsuccessful attempt was made to salvage the vessel.

In March 1947 the Commonwealth Disposals Commission inserted an advertisement in the Melbourne *Argus:* "Tenders are invited for the purchase of an oil tanker lying on Jourmand Reef, which is approximately 100 miles north of Samarai. The vessel is said to contain oil. Offers to purchase the vessel and its contents should be submitted to the Commonwealth Disposals Commission ... and should be lodged not later than 2 pm March 31, 1947".

On 31 March McRae delivered a tender to purchase the vessel "as advertised" for £285.

On 11 April the Commonwealth Disposals Commission wrote accepting the tender, and adding "No warranty or condition whatsoever is given by the Commonwealth. ... The Commonwealth shall not be liable for compensation or otherwise by reason of any misdescription".

In August 1947 McRae's salvage team visited the island, but found no tanker. They did however find the barge located at a distance of twelve miles.

McRae commenced proceedings for breach of contract and for negligence in the High Court of Australia.

Webb J found that the contract was void because the subject-matter of the contract was non-existent. "I do not think that this oil barge was an oil tanker as that term was understood in shipping circles in Melbourne and by the parties. ... What both the plaintiffs and the defendants had in mind throughout was an oil tanker as distinct from an oil barge. But there was no oil tanker to sell, and so there was no contract." In support of this conclusion he cited *Couturier v Hastie* (1856) 10 ER 1065. Webb J also found that the Commonwealth Disposals Commission had been negligent, and awarded damages of £756.

Both parties appealed to the Full Court of the High Court of Australia.

Dixon and Fullagar JJ delivered a joint judgment. They dealt first with the claim for breach of contract. They distinguished *Couturier v Hastie* on the grounds that the earlier decision had depended upon an implied term in the contract that if the cargo of corn believed to be on its way from Salonika to London had already perished the contract should be void. They said that each case depended upon the terms of the contract, and that in the case of *McRae v Commonwealth Disposals Commission* there was an implied term in the contract that if there was no tanker the Commonwealth Disposals Commission would pay damages. "The only proper construction of the contract is that it included a promise by the Commission that there was a tanker in the position specified. ... Since there was no such tanker, there has been a breach of contract." This made it unnecessary to decide whether or not the defendants had also been negligent.

Writing in 1966, Professor Atiyah commented "Looking at the problem as one of interpretation the facts of *Couturier v Hastie* were open to three possible constructions:

"(1) There might have been an implied condition precedent that the goods were in existence, in which case if they were not neither party would be bound; or,

"(2) The seller might have contracted, or which case he would be liable for non-delivery, warranted, that the goods were in existence, in and the buyer would not be liable for non-acceptance; or,

"(3) The buyer might have taken the risk of the goods having perished, in which case he would be liable for the price even in the absence of delivery, and the seller would not, of course, be liable for non-delivery.

"In *Couturier v Hastie* the House of Lords merely decided that the contract could not be construed in the third of the above three ways, but the House did not decide, as it was not called upon to decide, whether the proper interpretation was of the first or second types above. A decision between these two possibilities would only have been necessary if the buyer had sued for non-delivery."

Professor Atiyah's interpretation of *Couturier v Hastie* might perhaps be amplified by adding that construction (1) foreshadows s 6 of the Sale of Goods Act 1893 which enacts that "Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void". Constructions (2) and (3), however, fall outside the scope of s 6 of the Sale of Goods Act, and the true construction of the contract may therefore show that s 6 is inapplicable.

Professor Atiyah continues:

"[A decision between construction (1) and construction (2)] was necessary in *McRae v Commonwealth Disposals Commission* where the defendants contracted to sell to the plaintiffs a shipwrecked tanker on a certain reef. After the plaintiffs had incurred considerable expenditure in preparing a salvage expedition it was discovered that not only was there not, and had never been any tanker, but also that the reef was non-existent. The High Court of Australia approached the case on the basis that the defendants were liable for breach of contract unless they could establish that there was an implied condition precedent that the ship was in existence. Manifestly on the facts of the case, no such condition could be implied. On the contrary the Court concluded that—*The only proper construction of the contract is that it included a promise by the Commission that there was a tanker in the position specified The Commission contracted that there was a tanker there.* [Ie the Court preferred construction (2) to construction (1).]"(*a*)

Against the view adopted by Professor Atiyah it may be observed that the implied term theory is in fact a fiction. The parties did not forsee the actual facts of the case. The Court is in fact intervening to imply terms into the contract, and is influenced in doing so by its views as to the merits of the case and as to the demands of justice. Elsewhere in the law of contract the implied term theory has been abandoned (eg in the doctrine of frustration). It might perhaps be better to recognise that the Court proceeds on grounds of policy and justice rather than of the intentions of the parties.

It is perhaps for this reason that *McRae's case* has not been followed in England. It is perhaps worth while to remind Judges of its existence.

DENNIS PALING

(*a*) Atiyah, *The Sale of Goods* (3rd ed, 1966), p 30.

CANTERBURY DISTRICT LAW SOCIETY OFFICERS

At the Annual General Meeting of the Canterbury District Law Society, the following officers were elected:

President	Mr A Hearn
Vice-President	Mr D H Godfrey
Treasurer	Mr J A Robertson

Council Members—Messrs C B Atkinson; N G Clark; K W Frampton; P G Hill; R L Kerr; G T Mahon; A F Shaw; N W Williamson.

New Zealand Council Members

Messrs A Hearn, D H Godfrey and J A Robertson.

Hashing a question—"Why not", asked counsel severely of the witness, "set in your affidavit that a man and a woman had been taking drugs?" Interposed Mr Justice O'Regan, "That would simply be putting their 'pot' on".

SWEARING IN OF MR JUSTICE SOMERS

Mr E J Somers QC of Christchurch was sworn in as a Judge of the Supreme Court at Christchurch by Sir Ian Macarthur on 31 January.

The new Judge has been a leading equity lawyer for many years. He was born at Christchurch and has practised there since 1952—since 1971 as a barrister only. He took silk in 1973. He is married, with three children.

Mr Justice Somers has served on the Councils of the Canterbury District Law Society and the New Zealand Law Society, and is a past president of the Canterbury Society. He was a member of the Property and Equity Law Reform Committee from 1966 to 1972 and has been a member of the Council of Law Reporting since 1970 and the Council of Legal Education since 1971. As a Judge Advocate he has presided over many Courts-martial at Christchurch and he has represented the Crown there in the conduct of criminal trials in the Supreme Court as a member of the panel of Christchurch lawyers briefed from time to time by the Crown Solicitor.

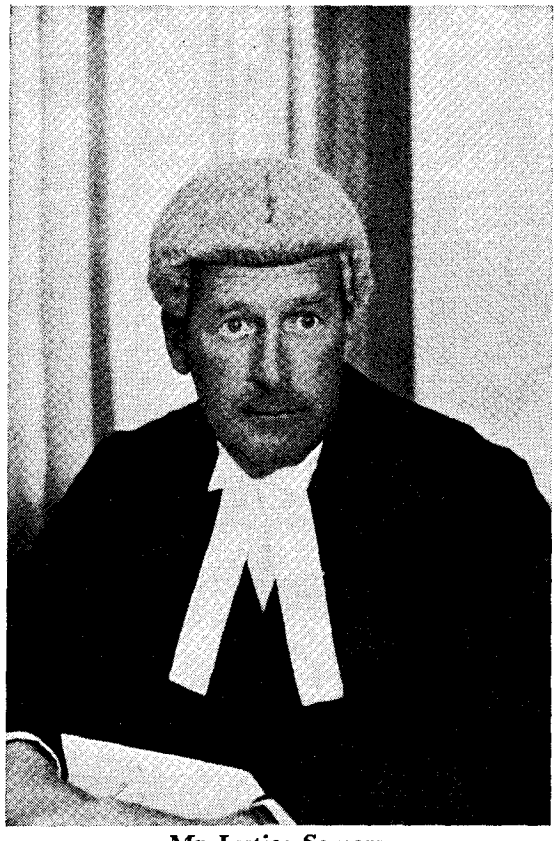
The appointment is temporary, the Attorney-General said when announcing it, but will be made permanent. It became necessary by the illness of two senior Judges, one of whom is due to retire during 1975.

After administering the oath of office, Mr Justice Macarthur then addressed Mr Justice Somers in the following terms:

"Your Honour—That completes the formalities prescribed by the statute. I wish to say however that although Mr Justice Somers has been appointed as a temporary Judge the Minister of Justice and Attorney-General have intimated that the appointment will be made permanent in due course.

"It now gives me the greatest pleasure to extend to you a very warm welcome from your brother Judges of the Supreme Court, both in Christchurch and elsewhere. I have had messages from the Chief Justice and the Judges stationed in other centres asking me to express their welcome to you. We are all pleased indeed to have you as a colleague; and we wish you success, good health, and satisfaction throughout the judicial career upon which you have now embarked."

The Solicitor-General, Mr R C Savage, QC said that the Attorney-General very much regretted that other long-standing commitments prevented his being present in Court to take part in the ceremony. "He has expressly requested me to convey his regrets to the Court. He had wished to be present, particularly to represent the Government for the appointment



Mr Justice Somers

of a Judge to the Supreme Court is a matter of the greatest importance to the community", he said.

"In place then of the Attorney-General, and he speaks as the titular head of the profession, and on behalf of the Government, I convey to his Honour Mr Justice Somers our congratulations on his appointment as one of Her Majesty's Judges," Mr Savage continued.

"An appointment as one of Her Majesty's Judges is the highest honour that is open to

one of our profession, so this day, I am sure, will always have a clear and proud place in your Honour's memory. But also, as I mentioned a moment ago, it is an important day to the community generally.

"If it be asked why is it a matter of such importance to the community generally then the answer is because we value our freedom, and the condition of freedom, in the words of a recent Lord Chancellor, 'is law that is the enforcement of objective rules based on justice, ascertained in advance of application and applied by an *independent judiciary*'.

"We take the complete independence of our Judges for granted. But it is as well to remind ourselves from time to time that our very freedom depends upon it for otherwise we may forget its fundamental importance.

"In that extract from the Lord Chancellor's remarks, there was also the reference to 'objective rules based on justice, and ascertained in advance of application'. Your Honour will, we know, apply with great skill the rules ascertained in advance either from the common law or from Parliament for your Honour's reputation in the field of lawyers' law is second to none. These rules, however, are not wholly to be found in the books. They develop and mature with the changing attitudes of the times and the Judge who interprets and applies them must also be a practical man with experience of ordinary folk in the work-a-day world. There again, your Honour's experience has equipped you well for the office of a Judge—and included in that experience is service as a member of the panel of prosecutors in criminal cases in this district, and as a Judge Advocate in Courts martial—not to mention your being, I understand, the breeder of exotic cattle in a modest way.

"Sir John Marshall, at the time Attorney-General, when speaking on the appointment of another Judge, said that what was sought in a Judge was integrity, sound judgment, a keen mind and a wealth of experience in the law. Your Honour's share of those qualities will, we are sure, lead to a long and successful term of office," Mr Savage concluded.

Welcoming the appointment on behalf of the New Zealand Law Society, the President, Mr Lester Castle, said that the appointment of one of the members of our profession as one of Her Majesty's Judges is always a source of pride and quiet satisfaction to the New Zealand Bar. "These proceedings today are certainly no exception," he continued. "It is my privilege, and I sincerely regard it as such, to express on behalf of the New Zealand Law Society—that is, on behalf of all members of the profession—our warmest congratulations to the new Judge on his elevation. No man attains this eminence and the profound respect of his erstwhile brethren without the characteristics so necessary for judicial office. The victory of success, if it can be thus acclaimed, is half won when one gains the habit of work. Our new Judge is no stranger to success nor indeed work.

"We are reminded of his services in the Councils of the New Zealand Law Society as a representative of the Canterbury District Society and as its president in 1967 at the 'tender' age of 39 or thereabouts; of his conscientious and effective contributions to the Property Law and Equity Reform Committee; as a member of the Society's Legal Education Committee; its representative on the Council of Legal Education; and as a member of the New Zealand Council of Law Reporting; as Chairman of the Ethics Committee of our Society since its inception in 1969. Indeed, few men have given so unstintingly of their time and talents in service to the Society and to the profession over such a comparatively short period.

"Those of us who know him well and are proud to call him 'friend' marvel at his capacity and capability in so many fields, not least the law. From a not unnatural propensity towards equity, his sphere of influence within and without the law has been extended to the point where his prowess in so many areas will stand him in good stead in the challenges that lie ahead.

"With your Honours' permission, I address myself to his Honour Mr Justice Somers, and say: 'We hope you will continue "to seek your happiness in the society of your friends, in the cheerful glass and candlelight and fireside conversations and innocent vanities and jests"; that you will return to your native heath in the fullness of time and take your place in presiding over this honourable Court in the new Courthouse; that you will experience the truth of the observation that it is much pleasanter to spend your life seeking for the truth than pass your days searching for an argument.'

"It was Lord Justice Birkett who said, 'I think that the Bar is the source and guardian of the virtue of the Bench. It is the good Bar that makes the good Bench'. In your appointment today, sir, you complement that thought as have your predecessors," Mr Castle concluded.

On behalf of the Canterbury District Law Society, its President, Mr P G S Penlington, said that its members were grateful for the opportunity of being able to express, in open Court, their congratulations, their best wishes and their tribute to his Honour, Mr Justice Somers on his appointment as one of Her Majesty's Judges.

"To you Mr Justice Somers—first and foremost, we offer our very sincere congratulations on your appointment to high judicial office for it is the ultimate achievement for any member of the practising profession," Mr Penlington continued.

"We gather here to-day in large numbers, not merely as your former colleagues at the Bar, not just out of a sense of duty, but rather as your friends.

"The Bar of this city has had a long and distinguished history. It has always had a tradition of continuing competence and fellowship in its ranks. Time after time these ranks have produced leaders who have been appointed to the Supreme Court Bench, usually at an early age, and who have subsequently graced that Court and the Court of Appeal with great distinction.

"Your appointment continues this Judicial tradition and maintains a record which is the envy of the rest of the legal profession in New Zealand.

"Your elevation to the Supreme Court was an event which occasioned no real surprise to practitioners here in Canterbury. Rather, it was an inevitable culmination of an outstanding record of personal scholarship and professional achievement, a natural progression following many years of loyal and devoted service to the law, to the practising profession, to legal education, to Law Reform and to the community at large.

"We take pride in the fact that you go forth to your new duties as essentially a Christchurch man, born and educated here in this City. In 1952 you were awarded the Canterbury District Law Society's Gold Medal for the best law graduate in that year. Later you made a full contribution to the affairs of the Society on its Council and finally as its President in 1967.

"For 20 years both Canterbury law students and the Law Faculty of the University of Canterbury, of which you were a member, benefited from your wide knowledge of the law and, in particular, in the field of equity.

"My learned friend Mr Castle has made reference to your valuable work on the New Zealand Law Society and in the area of law reform. But it is also to be noted that the services which you have rendered, have extended far beyond the law; and a grateful community now acknowledges work which has included service for a number of years as a Territorial Officer and more latterly, service as a racing administrator.

"In your time in practice you have shown that you were in the first rank of counsel with a reputation which extended well beyond this City. This was acknowledged in 1973 by your call to the Inner Bar as one of Her Majesty's Counsel. For a long time we, your former Colleagues, have recognised in you all the judicial qualities—a deep knowledge of the law, intense industry, thoroughness, good judgment, fairness—and above all things, to quote Sir Francis Bacon, 'Integrity is your portion and proper virtue'. It gives us great pleasure that these qualities have now received their proper and rightful recognition.

"Regrettably your appointment means that you will be departing from Christchurch. This saddens us. We will miss your good company and your good conversation which always reveals the wide diversity of your interests. Sometimes a reference to a rare rhododendron, or perhaps surfing explained by the principles of hydrography, or perhaps a fine point in equity, or perhaps a fine point in thoroughbred breeding which leaves your listener convinced of the winner of the New Zealand Cup on the following Saturday.

"Although you will be leaving us, your Honour will always be welcome here in Christchurch and we hope that your judicial duties will permit you to visit this city from time to time.

"You take with you to your new office the good will of us all. You have our best wishes for a judicial life which will occupy the full span prescribed by Statute and which will be blessed by good health. We hold high hopes for the judicial career on which you now embark. Although not possessed of the power of prophesy, we nevertheless hazard a forecast, and indeed a hope, that one day you will sit in the highest places of judgment in our judicial system. Again I repeat our good wishes for the future and I extend those good wishes to your very charming wife and family," Mr Penlington concluded.

Replying to the tributes, Mr Justice Somers said that he wanted first to express his gratitude to the Judges for the very warm welcome he had received from them.

"I thank you Mr Solicitor and you Mr Castle for your kindness in coming from Wellington and for your expressions of congratulations and confidence. Mr Penlington, I am grateful to you for your generous remarks and good wishes. And I am honoured and heartened by the presence here today of so many of my friends at the Bar. Thank you all," he said.

THE DISADVANTAGES OF INJUNCTIONS IN INDUSTRIAL DISPUTES

The issue of an injunction against the Northern Drivers Union, the Seamens Union and their secretaries, and the subsequent gaoling of Mr Andersen, the Secretary of the Drivers' Union, has made New Zealand aware of the possible impact of the injunction if used as a weapon in industrial disputes. In the aftermath of the stoppages caused by the gaoling, the Federation of Labour has called for changes in the law to protect employees from this restriction on their right to strike, while the Employers Federation has urged that the law should not be changed, and that all groups should remain equal before the law*(a)*. The Government has refused to act while under pressure, but has indicated that it may be prepared to consider changes in the law in due course.

Until now the injunction has been rarely used to solve industrial disputes in New Zealand*(b)*. In this respect New Zealand employers have lagged behind their counterparts in the United States, Canada and Britain, or perhaps have learned from the results injunctions have had in those countries. The United States in particular has had a long history of injunctions being used in industrial disputes. The ease with which they could be obtained and the predominant anti-union bias in their issue goes a long way to explain union objections to injunctions.

The remedy came into prominence in *Re Debs* 158 US 564 (1895). In that case the injunction was issued against the American Railway Union to attempt to end a strike which had spread over much of the American railway system, and which had continued notwithstanding the use of strikebreakers and Federal troops. The injunction was sought as a last resort to end the strike which was close to success (the employers had refused to negotiate with the union). The injunction, obtained by the Attorney-General (an ex-railroad executive, lawyer and still a major stockholder), succeeded in breaking the strike by imprisoning union leaders. The final result was a complete victory for the railroad companies.

The injunction remained popular because it could be issued by a judge alone, and contempt proceedings did not require a jury. The use of criminal proceedings against unionists was abandoned when the juries of farmers and small businessmen, who hated the trusts as much as the workers, refused to convict strikers.

An attempt to limit the use of injunctions in the Clayton Act of 1914 was thwarted by the courts, who in fact widened the law by allowing individual employers to apply to the Federal Courts for injunctions. Previously only the Government could do so, although employers always had the right to go to the state Courts. Until the issue of injunctions was finally limited by various state statutes and the Norris-La Guardia Act of 1932 injunctions were used not only to break strikes but to prevent other forms of industrial action such as organised boycotts of an employer and peaceful picketing. One writer has found that between 1890 and 1931 1,872 injunctions were granted to employers in State and Federal Courts, and only 223 denied*(c)*. This period was the formative period of union growth and was marked by strong and often violent opposition from employers.

In *Truax v Corrigan* 257 US 312 (1921) Brandeis J, in a dissenting opinion, discussed the problems caused by labour injunctions and the root of union objections to it. He said:

"When ... its use became extensive and

(a) See the statement by Mr P J Luxford in "Employer", September 1974.

(b) *Flett v Northern Drivers IUW* [1970] NZLR 1050 is the only other reported case. See article by I T Smith [1974]' NZLJ 432 on the law relating to labour injunctions.

(c) E E Witte, *The Government in Labour Disputes* (1932) p 64.

> conspicuous the controversy over the remedy overshadowed in bitterness the question of the relative substantive rights of the parties. . . . The equitable remedy, although applied in accordance with established practice, involved incidents which it was asserted, endangered the personal liberty of wage earners."

He went on to say that injunctions took too much regard of property as compared with individual liberty, and that in seeking to say when strikes were permissible and under what conditions, the courts were usurping the function of the Legislature, and by imprisoning for contempt were abridging the constitutional rights of individuals. He went on to state:

> "It was urged that the real motive in seeking the injunction was not ordinarily to prevent property from being injured nor to protect the owner in its use, but to endow property with active, militant power which would make it dominant over men. In other words, that, under the guise of protecting property rights, the employer was seeking sovereign power. And many disinterested men, solicitous only for the public welfare, believed that the law of property was not appropriate for dealing with the forces beneath social unrest."

Since the Norris-La Guardia Act the use of injunctions has been limited. The provisions of the Act divest the Federal Courts(*d*) of the power to issue injunctions in labour disputes except in restricted circumstances. These circumstances mainly relate to where unlawful acts are likely to cause "substantial and irreparable" injury to property and other remedies or protection is not available. The definition of a "labor dispute" is a broad one and includes many matters which may not be regarded as industrial matters in New Zealand. In *New Negro Alliance v Sanitary Grocery Co Inc* 303 US 552 (1938) for example, picketing by a civil rights group over a company's employment policy in respect of negroes was held to come within the definition.

Injunctions in America have played a prominent role in labour relations, particularly at a time when organised labour was attempting to establish itself and to gain recognition from employers. In this period employers were able to use the injunction as a strike breaking weapon with what seemed to be the positive encouragement of the equity Courts. One writer(*e*) summing up labour's attitude said:

> ". . . practically everything which trade unionists have done to protect their organizations from being destroyed by employers, or in connection with an industrial dispute resulting in a strike has been restrained by some Court of equity."

The British situation

The American experience may go far to explain the attitudes unions have to injunctions. Nevertheless the American situation is less relevant now that unions are well organized and in most cases recognized as a fact of life by employers. It is not the case, however, that objections to injunctions are purely historic. Their use in the United Kingdom in recent years shows that they are still a potent weapon and that they tend to favour employers. In Britain the use of permanent injunctions in industrial disputes does not seem to be common. What an employer seeks is an interlocutory injunction, often on an ex parte application, and once the strike is over the action for damages or a permanent injunction will be allowed to drop.

An illustration, admittedly extreme, of the type of situation that can arise is shown by *Boston Deep Sea Fisheries Ltd v TGWU*(*f*). This case concerned trawlermen in Hull who were TGWU members. These men had struck over a pay issue and a total membership claim. Two other unions working the wharves had joined in sympathy and refused to work the plaintiff's boats. The result was that the plaintiff could not unload any boats. Three weeks into the strike the plaintiffs obtained, on an ex parte application, a mandatory injunction ordering the strike orders to be withdrawn. The main ground was that a fleet of trawlers were returning that afternoon and if they could not dock some £250,000 fish would be lost. It was also claimed there was some danger to fishing and life.

Although the TGWU ignored the injunction, the other two unions stopped their actions and the boats were unloaded. The plaintiffs also smuggled in strike-breakers(*g*) and persuaded some men to return to work, presumably because they saw the cause was lost and feared

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(*d*) Many state Legislatures have passed similar acts.

(*e*) Frey, *The Labour Injunction*, p 29.

(*f*) *The Times*, 13, 14, 17, 18, 20, 21 March and 9 April 1970. See also Wedderburn, *The Worker and the Law* (1971), p 381 et seq.

(*g*) Wedderburn, *op cit*, p 381-3. Highly paid strike-breakers were smuggled ashore in horse boxes and driven through picket lines at high speed.

for their jobs. They had also been without pay for over three weeks. Within a month of the injunction being issued the plaintiff was able to tell the Court that the strike was broken.

The injunction seems to have played a major role in the employer's strike breaking strategy. After forcing a resumption of work by the supporting unions the plaintiff was able to engage in strike breaking tactics against TGWU members. It was 10 days before the union's case was heard and the injunctions withdrawn. The issue of the injunction was later described as "very odd" by the Court of Appeal. The fleet in question had sailed after the strike began, a fact the Court ignored. It also did not seem to concern the Court that the plaintiffs must have known of the fleet's return for some time and that they could have applied for the injunction earlier, thus allowing both sides to have their case heard before it was issued.

Although this case was an extreme example there seem to have been other cases where injunctions have been granted with little thought in seemingly genuine disputes. In one case, *Brown, Knight & Truscott Ltd v Anderson* (The Times, 13, 18 September 1969) an ex parte injunction was granted to prevent a printer's union "blacking" work from the plaintiff company. The union's action arose out of the dismissal of nine men which the union regarded as victimisation, and an attack on the union.

In 1965 the House of Lords had the opportunity to consider the principles involved in *J T Stratford & Son Ltd v Lindley* [1965] AC 269. The dispute was over a union recognition claim by the Watermen's Union against Bowker & King Ltd. Bowker & King was a private company controlled by Stratford, who also controlled J T Stratford & Son Ltd. Although Bowker & King Ltd had initially been negotiating with the Watermen it reached an agreement with the TGWU behind the Watermen's back. The Watermen, who had only a few members at Bowker & King Ltd, decided that pressure against the plaintiffs would be more effective. The plaintiffs obtained an interlocutory injunction to end the strike. The union appealed.

The Court of Appeal held that the union was in the right and the injunction should be withdrawn. Lord Denning felt that there was a genuine trade dispute and that the aWtermen were protecting a legitimate interest, their membership position. He also felt that Bowker & King Ltd had contributed to the position by their actions. Unlike the House of Lords, the Court of Appeal was prepared to look at the reality of the position behind the company veil. Lord Denning added that such disputes were intended, by Parliament, to be settled outside the judicial arena.

The House of Lords reversed the Court of Appeal's decision. Their Lordships regarded the dispute as an inter-union quarrel. Lord Pearce summed up their attitude when he said:

> "The defendant's object in damaging the plaintiff's business, was to put pressure on another company for the purpose of maintaining or enhancing the prestige of the defendant union" (Ibid, 330).

Bowker & King Ltd's conduct did not seem to concern their Lordships, who preferred to regard J T Stratford & Son Ltd as a more or less innocent party. Their Lordships also did not consider the defendant's position in trying to maintain its position against the large and powerful TGWU. The financial loss the plaintiffs were suffering, as against the mild inconvenience the defendants would suffer from having the strike ended seemed to weigh most heavily with their Lordships. The fact that the injunction was only interlocutory was also stressed. The defendants, if they succeeded, could later resume their strike. It was admitted that the facts were such that the union could well succeed at a full hearing*(h)*. In fact a full hearing was never held, the case being dismissed for want of prosecution over five years later.

In two recent articles Davies and Andermann*(i)* have analysed the English situation before and after the advent of the National Industrial Relations Court. They show that until 1971 the injunction was primarily an employer's weapon and that it was relatively easy to obtain on an interlocutory application. This was because the Courts tended to look only at the financial loss suffered by the employer when considering the balance of convenience, and disregarded the basic issues in the dispute and the effect of the injunction on the union's position. They also show that a narrow approach was taken to what was a "trade dispute", and that this allowed injunc-

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(*h*) Viscount Radcliffe at 326; Lord Pearce at 331, 335; Lord Donovan at 340.

(*i*) (1973) Industrial Law Journal 213, and (1974) Industrial Law Journal 30.

tions to issue in a wider range of cases. They conclude that the Courts rather than preserving the status quo, were deciding where the loss should fall in a dispute.

After 1971 the NIRC took a new approach to injunctions by changes in procedure and reasoning. Greater care was taken to see that both sides of the case were argued, and this was done while maintaining a speedy process. The Court also showed itself prepared to investigate the causes of the dispute, and seemed to be reluctant to make purely legal decisions without attempting to solve the basic issues. In particular there seems to be a readiness to transfer cases to other areas of the Court's jurisdiction to enable a dispute to be settled. This new procedure seems much more satisfactory and more likely to lead to justice. Unfortunately both the Industrial Relations Act 1971, and the NIRC failed to gain popular union support and the Act has been repealed. Future trends are still uncertain.

What is wrong with injunctions?

Past history and decided cases show that, as a remedy in industrial disputes, the injunction causes serious problems and is probably an inappropriate solution to the problems involved. The major problem is that the injunction has always favoured employers, and the Courts have tended to regard their function as being to protect the property and financial position of the employer. Once an employer establishes a prima facie case, and shows the likelihood of financial loss because of the union action, an injunction will usually be issued. There has been a failure to look at the social or political consequences of the issue of the injunction on the union. Normally the Courts seem to regard the suspension of a strike or boycott as a temporary or minor inconvenience capable of being resumed if the union's case is supported.

The Courts have always regarded interlocutory injunctions as preserving the status quo until a full hearing. This myth perhaps accounts in part for the idea that the suspension of the strike is only of minor importance. It is not possible to hold an industrial dispute in limbo for up to several months, as may be done in other areas of law such as property disputes. The attempts to settle the dispute will continue, but the employer no longer has the threat of a strike or boycott to contend with. Continued inactivity will be to his advantage. Dismissed men will find other jobs, the heat will go out of the situation and the union may be forced to accept a less than favourable solution. By the time a full hearing is possible the dispute will have been settled, and neither party will wish to reopen old wounds by further Court action. Both cost and future relationships will count against any further Court action. Frankfurter and Greene*(j)* state:

> "In labor cases ... the injunction cannot preserve the so called status quo; the situation does not wait in equilibrium awaiting judgment on full knowledge. The suspension of activities affects only the strikers; the employer resumes his efforts to defeat the strike."

Delay usually will prejudice the union and aid the employer. By allowing injunctions to be used by an employer the Courts consciously or unconsciously take an active role in the dispute.

A further problem is that the injunctions sought in disputes are usually interlocutory, and are not followed through to a full trial. The interlocutory injunction is the de facto final solution sought in the Courts. Unfortunately such applications are decided on affidavit evidence in most cases, and in many cases are granted on an ex parte application. The Courts, regarding the injunction as only temporary, do not try to receive all relevant evidence and do not try to look at the facts and issues in any depth. All they are really concerned with is the interim balance of convenience. Other questions, they say, can await a full hearing. This leads to the unfortunate position where a final decision is given on inadequate evidence and without any real attempt to decide the relevant issues.

The position in New Zealand

The use of the injunction in industrial disputes is a new phenomenon in New Zealand. This is almost certainly due to the success of the conciliation and arbitration system in dealing with industrial disputes. It would also seem that New Zealand employers have been more prepared to accept the existence of unions, and to negotiate with them, than have employers in other countries. Thus strong anti-union activities have never been a major problem in New Zealand for many years. The Industrial Conciliation and Arbitration Act of 1894 was passed in the same year as the events leading

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(j) The Labor Injunction, p 201.

up to the *Debs* injunction in the United States. It has been rare for the ordinary Courts to be involved in industrial disputes in New Zealand. Neither the common law actions for inducing a breach of contract, intimidation, etc, or injunctions, have ever been used to any extent in New Zealand, and never in an organised anti-union manner. It is only in the last four years that this type of case has started to emerge at all and then usually by a small employer, not by a major employer or employer's association*(k)*.

The latest case, and the only one to cause considerable controversy is *Northern Drivers IUW v Kawau Island Ferries Ltd* [1974] 2 NZLR 617. In their decision the Court of Appeal, while seeming to recognise the problems involved in acting in industrial disputes, failed to adequately deal with them. The facts of the case were relatively simple. The respondents and the Seamen's Union were in dispute over manning scales on the hydrofoil *Manu-Wai*. The Shipping Industry Tribunal in an interim decision*(l)* upheld the Union's claim that a seaman be employed. The respondents instead of continuing the service elected to introduce a new service using the ferry "Motonui". The Seamen's Union feeling that this was an attempt to evade the Tribunal decision blacked the ferry. They were supported in this action by the Northern Drivers Union, who presumably acted to aid a brother union. It was in fact the action of the Drivers Union in preventing oil supplies reaching the *Motonui* that lead to the respondent's action. The respondents sought an interim injunction, which was granted after an earlier unsuccessful application when the service was being operated without a licence.

The Court of Appeal in its decision refused to enter into a discussion of the rights and wrongs of the dispute. McCarthy P stated that:

> "Because events such as this can often be viewed in opposite ways ... it is highly desirable that we confine ourselves to the legal rights of the parties."

The legal rights of the parties were simple. The respondents were acting legally in attempting to operate the ferry service, and the unions acting unlawfully in procuring a breach of the respondent's supply contract with Mobil Oil. For this reason there was a case for the issue of an interim injunction, as the respondents could show they were suffering "a manifest detriment which, if allowed to continue, will place them in a difficult situation with permanent effects". As against this the Court doubted if the unions would be "to any extent incommoded".

The Court of Appeal in its decision acted on the principles relevant to interlocutory injunctions as set out in *L T Stratford & Son v Lindley* [1965] AC 269. This case assumes that an interlocutory injunction is only temporary, and preserves the status quo. For this reason the Court did not consider the factual situation or the Union's defences in any depth. The Court did however make several points. The respondent's actions to avoid the Shipping Industry Tribunal's decision were not regarded as justifying the Union's action as the Ministry of Transport was taking enforcement action, and the alternative service was a perfectly legal operation. This viewpoint seems naive in the context of the dispute involved. If an employer takes an action, even if legal, to avoid the decision of an industrial tribunal he cannot be surprised if the Union resents this and takes counter-action, and the Courts are failing to recognize the realities of the industrial situation if they support such actions by an employer.

The Court also referred to the "moral" duty of unions to protect their members and said that on the interlocutory application this did not amount to a sufficient justification for the union's action. It seems that the Court did not regard this as a particularly strong argument for interference with the respondent's contract. In the light of the English cases on justification this would seem reasonable. However Speight J in *Pete's Towing Services Ltd v Northern IUW* [1970] NZLR 52, 50-51 took a wider, and more realistic view of justification. In that case he held that a union was justified in taking action to prevent a conflict with another union which could result in serious industrial disharmony. This is a much wider view of justification than has previously been taken. To argue that a union's duty to protect its members is only a moral one is unrealistic. This is the main function of an industrial union and is recognised by statute*(m)* as such. In this case the union was acting to uphold the decision of an industrial tribunal in favour of its members. The fact that some other agency had also taken over this function was regarded as important by the Court. This ignores the

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(k) See *Pete's Towing Services Ltd v Northern* IUW [1970] NZLR 32.

(l) The decision has since been held to be ultra vires by Speight J on July 3rd.

(m) Industrial Relations Act 1973, s 163.

fact that the union's members in the meantime remain out of a job, or have to find other employment and that this must affect the effectiveness of the union in its ability to protect the jobs of its members.

The Court also rejected a union suggestion that the injunction should order the service to be continued by the hydrofoil *Manu-Wai*. This was done on the grounds that the respondents had a licence to operate the *Motonui*.

The Court of Appeal's decision is an unrealistic one in that it fails to take account of the nature of the dispute involved and relies heavily on the technical legal position of the parties. In one English case, *Shipside (Ruthin) Ltd v TGWU* [1973] IRLR 244, 245, the National Industrial Relations Court remarked that workers "can see neither justice nor equity in a Court ordering them to cease taking industrial action without investigating and remedying any underlying grievance which on investigation may be found to exist". This dictum should have been applied in the *Northern Drivers IUW* case.

The Court of Appeal's decision is made somewhat more acceptable by the fact that an immediate full hearing was possible. The Court was concerned about the possibility of delay and mentioned that an immediate hearing was possible. Whether the decision would have been different if this were not so is, however, unlikely. This case would seem to be one where the Court should have declined to exercise its discretion, even though its decision seems acceptable in the light of the English decisions. There are good reasons why a New Zealand Court should refuse to follow English decisions where local conditions differ and industrial relations is one area where there are substantial differences. The Court was too preoccupied with the property rights of the employer and overlooked the fact that there is a system of law designed to settle industrial disputes outside the ordinary Courts. The ordinary Courts should recognize this and insist that the parties use and abide by those procedures. If there is a failure to do so the Industrial Relations Act provides its own remedies.

A possible solution

Past history and present experience indicate that it is unwise to allow the injunction to be used as a general remedy in industrial disputes. Labour is, with justification, intensely anti-injunction and New Zealand employers in general, while supporting the present law, have never used the injunction as a remedy. It would therefore, not seem unreasonable to bar the use of injunctions in a dispute involving an "industrial matter" as defined within s 2 of the Industrial Relations Act 1973. If necessary a special class of injunction could be created to deal with any deficiencies in the present law. Such an injunction would need to be granted by the Industrial Court and only in serious cases and on prescribed grounds, eg a serious and unreasonable refusal to follow disputes procedures. Such injunctions would need to be enforcable against either the union funds or by deregistration of the union concerned. In the case of employers a large fine would probably be the most suitable remedy.

By making such applications a priority matter the Court could give them immediate consideration. The Industrial Court also has the knowledge and experience to get at the real issues involved and to consider the true nature of the dispute.

It should be noted that the change would only apply where "industrial matters" were concerned. In other cases the ordinary law would continue to apply. If a trade union chooses to become involved in protest activities, business operations or attempts to regulate prices, it must be prepared to accept the same law that applies to other groups active in non-industrial areas. Injunctions such as the one granted in *Flett v Northern Drivers IUW* [1970] NZLR 1050 would still be possible.

What is important is the need to recognise that traditional legal remedies do not necessarily work in all social contexts. In New Zealand industrial relations has had its own system of law since 1894. The common law has intruded only rarely. Overseas experience shows the dangers inherent in the use of injunctions in industrial disputes. In New Zealand we should have regard to these mistakes and formulate our solutions to the problems injunctions try to solve within the framework of existing industrial law.

GORDON ANDERSON(*n*)

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More of Mrs Malaprop—"Our client advises that she will be able to make arrangements for payment of certain funds to us early in the new year and on receipt of those funds we will proceed with the actual *divorce partition*. . . ."

REFERENDA, RADIO AND RUMPS

That damned referendum raised its ugly head the other day. Not that I have any universal objection to such a device, but it seems to me so utterly out of sorts with a Parliamentary democracy containing no written constitutional method containing provision therefor. Where the referendum is part of the constitution, neither Parliament nor, ex hypothesi, the constitution is threatened at all by its use. But it is different, wholly so, where the referendum is a response to a situation which the Labour Party painted itself. The springboard for such folly, no doubt, was Mr Heath's declaration that only "with the full-hearted consent of the British people" would he sign the Treaty of Rome. He never came remotely near that consent, yet still marched into Europe. But what intrigues me is the "binding nature" of the referendum, granted to it via the Referendum Act. Practically from the cradle, we are taught that no Act of Parliament can bind its successors. The problem is insoluble.

Though it has angered the Welsh and Scots nats, I am glad that the referendum is to be counted on a national basis, not area by area. When the question is whether the United Kingdom should stay in, that is a question for the United Kingdom, not for Scotland, Wales, Lancashire, Yorkshire, or, for that matter, the Isle of Wight.

One thing that struck me in what passes for a public debate on the Common Market is the question of sovereignty. This is really a bogus issue. No one has any clear idea of what sovereignty is, save that it is some vaguely felt idea that we should be able to do as we want in our own little island. Certainly, in a practical sense, we have had to accept the dictates of our multitudinous creditors for donkey's years now. And if we stay in the Common Market, 99 percent of our law-making capacity is untouched. It is only where our law might conflict with some Directive on the labelling of witloof chicory; and that stirs the blood of not the many. Anyway, there appears to me one crunching flaw in the sovereignty argument of the anti-marketeers: if joining the Community means a surrender of sovereignty, how can they logically campaign for our withdrawal? By acknowledging that we can withdraw, they are effectively dismembering their own argument.

Another issue which Parliament looked at to a chorus of public apathy is the broadcasting of Parliament. At long last, our lords and masters have lurched into the age of Marconi, but turned their collective back on the work of Logie Baird. Which is to say that a selective recording of that day's proceedings will be played in the evening, but Parliament will not appear on the box.

What is fatuous about this experiment is that much fuller, live broadcasts, as you know, already occur in Australia and New Zealand. Why we simply cannot see that broadcasting does work is beyond me. It is part of the same bureaucratic syndrome that demands a full Royal Commission on personal injury liability instead of recognising that all the work has already been done by Woodhouse. Then again, this year, for an "experiment", we took a great leap forward into the world of charity stamps. Oddly enough, it worked, as anyone who had taken off his blinkers knew it would.

At any rate, we got there first in electing a female to lead a major party, if that is not too grand a description of the South Eastern rump of the British electorate. While delighted that just such an innovation had come about, the uneasy feeling remains that the media men supporting the Thatcher have pulled some masterly wool over our eyes. I think we just might be feeling our way towards the Haldeman-Ehrlichman syndrome.

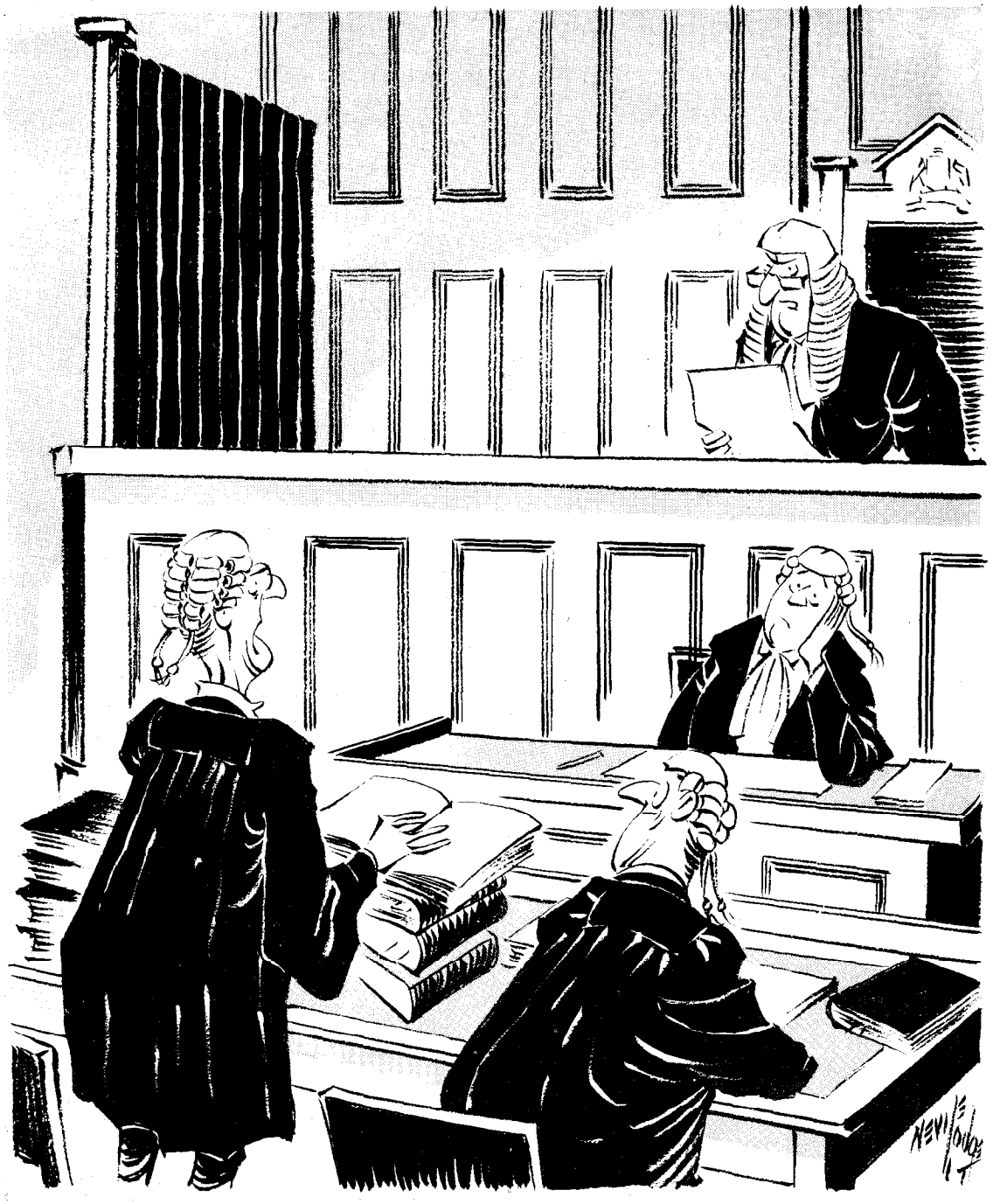
But nothing was quite as absurd in and about Mrs Thatcher's election as the election system. First ballots, second ballots, third ballots, candidates coming in at different stages, percentages, transferable votes, etc. So great was the disapprobation that it seems unlikely it will be re-employed. Named by some as Sir Alec's Revenge, the inane scheme was dreamt up by a former foreign secretary and prime minister. To think he was one of those who dealt with Hitler!

On the subject of foreign secretaries, Mrs Thatcher named Mr Maudling to the shadow post. The Poulson affair is behind me, Reggie said, adding that: "The man duped me, completely took me in". Just the sort of shrewd guy we need as foreign secretary, our Reggie.

RICHARD LAWSON

"A FUNNY THING HAPPENED ON THE WAY TO COURT THIS MORNING . . .": 15

Drafted by Scilicet *Engrossed by Neville Lodge*



"Ah, Mr Bumble, after listening to your submissions on the law, I do now appreciate the aptness of the telegraphic address on your notepaper—'necessity'."

THE LAWYER AND THE COMMUNITY PART VIII — ALTERNATIVE SCHEMES

In this Part, four alternative schemes for making legal services more widely available will be considered.

I English Legal Advice and Assistance Scheme

A legal advice and assistance scheme came into operation in England in April 1973 and replaced the old Legal Advice Scheme which had never worked satisfactorily. Under the new scheme, any lawyer can give advice and undertake work to a limit of £25 where the client qualifies financially *without first obtaining a grant of legal aid.* There is no charge to any client whose disposable income does not exceed £12-50 per week. Some contribution is payable where the disposable income is between £12-50 and £24-00 per week.

The Scheme covers most types of work traditionally done in a lawyer's office—legal advice, writing letters, negotiations, preparation of documents including wills, simple conveyancing matters, a barrister's opinion, rent tribunal work, completion of civil or criminal legal aid forms—all will qualify for a payment under the new scheme.

The Scheme does not apply to any step in Court proceedings nor to representation before a tribunal, where a legal Aid Certificate is necessary.

II Group Legal Practices

Increasingly it is recognised that legal problems cannot be separated from social problems. The mother of five whose husband gambles all his earnings and who is threatened with eviction for non-payment of rent can receive only limited help from a lawyer. Just as there is a movement towards group medical practices so the idea is being mooted that it is not enough merely to provide community legal services but that these should be integrated into a wider scheme. Lawyers would work with trained social workers, law students and para-legal personnel so as to be able to offer a comprehensive service under the one roof to people in need. Marriage counselling, budgeting advice, help with accommodation, advice on social welfare benefits would supplemnt the legal advice. Lawyers would be part of a social service team.

In its Annual Report 1973 the New Zealand Legal Aid Board seems to envisage something along the lines of a Group Legal Practice.

After pointing out that most legal aid applications relate to domestic cases, the Report continues: "There may be a place for social science students and students of other disciplines to be brought into a wider . . . scheme, together with law students, to supplement the assistance presently provided by law practitioners".

The Dalhousie Legal Aid Service in Nova Scotia is organised along these lines.

The Lane Neighbourhood Centre in Birmingham, England, seeks to integrate the legal and social resources of the community by arranging simultaneous interviewing by lawyers and social workers and offering combined legal and social work help. The legal sessions are attended by community workers who acquire para-legal skills through working alongside the legal adviser. The legal adviser has the benefit of their help and follow-up support.

One must agree with the Legal Aid Board that some such scheme would be suited to New Zealand conditions.

III Legal Assistance offered through other community groups

In the United States and the United Kingdom, lawyers are increasingly providing free legal advice through national or local interest groups. Lawyers are helping in the Citizens' Rights Offices that have been opened in several London suburbs under the aegis of the National Council of Civil Liberties. Others are assisting Child Poverty Action Groups. Legal advice services have been started in conjunction with independent community ventures with a variety of names: Centerprise, Inquire, Community '70, Contact, Response. A local community group offers office accommodation and support facilities. The lawyers make their professional skills available to the group. Schemes of this type rely on the energy and enthusiasm of local volunteers and tend to wax and wane accordingly.

The Brent Community Law Centre in London considers the most effective way of providing legal assistance is to feed materials, training, help and advice into existing community networks and to work through tenants' associations, community associations, trade unions and local social workers. They believe that the lawyer's skills can be put to the best use of

the community by providing training in common legal problems for people who come into day-to-day touch with the poor and underprivileged.

Check, a Liverpool legal advice service says that it is not in business to build for itself an ever-increasing caseload but rather to share the skills and expertise it accumulates. It works with trade unions, runs courses for people working in the field, publishes information sheets.

These developments are a manifestation of a wider movement on the part of social workers away from a casework approach to social problems. Instead of providing counselling or psychotherapy to individuals and families, social workers are becoming conscious that many social problems arise not from personal inadequacy but are directly related to economic and material factors, eg unemployment, poor housing, lack of child care facilities. Social workers seek to provide immediate practical help and are working through existing community networks and through pressure groups.

IV Judicare

There is no comprehensive civil legal aid scheme in the United States but several experimental programmes have been launched under which a private lawyer is paid to handle legal problems of the poor on a case by case basis. Even though the lawyer receives only 80 percent of the State minimum fees, the cost of this type of programme is double the cost of offering legal services through a neighbourhood law office. The Judicare programme has been found to be suitable for rural areas in the United States. Once a person has satisfied a means test, he is given a card which entitles him to free legal services for a defined period from any lawyer of his choice.

ROBERT LUDBROOK

ZIMMERMAN'S PEDIGREE BULL

The late MR E. M. MACKERSEY'S *reminiscences continue. An earlier extract appeared at* [1975] NZLR 137.

This was a case which was not only unusual but was also, to some extent, unique. Not only did it provide wide public interest and considerable humour which was made the most of in the press, but it also produced the leading New Zealand case as to whether the old and well established doctrine of "concealed fraud" applied in an action against the Crown under the then Crown Suits Act 1908.

The principal actor in this drama was one Henry Zimmerman, who was born in Switzerland and of poor education but was essentially honest and hard working, and although he had been in New Zealand for some years he still lacked a full command of the English language. He was also extremely naive. For some years he had been endeavouring to make a living on a rough bush dairy farm at Mapiu, situated some 15 miles South of Te Kuiti, which property he held under Crown lease. On this farm, assisted by his wife and family, he milked a herd of cows of mixed Jersey breed and below average quality. He supplied his cream to the Aria Co-operative Dairy Co.

In the year 1923 an endeavour, sponsored by the NZ Co-operative Dairy Co, was set up with the object of improving both the quality and butterfat production per cow of the dairy herds in the Waikato and surrounding districts. A herd testing association was formed and all dairy farmers were urged to have their herds tested for butter-fat production and were also advised to use only pedigree bulls. In due course a representative of the Association called on Zimmerman and urged him to adopt this course and stressed the advantage of the use of a pedigree bull, a suggestion which Zimmerman received with enthusiasm.

Mapiu was situated in the Taranaki Province. At that time, one Michael Joseph Galvin held the position of Crown Lands Ranger and was a servant of the Crown, working under the control and jurisdiction of the District Commissioner of Crown Lands at New Plymouth. His duties included periodic visits to all Crown tenants in his area, to whom he was supposed to offer his advice and assistance.

Shortly after Zimmerman had seen the representative of the herd testing association, he received a call from Galvin, to whom he explained his desire to purchase a pedigree Jersey bull, but stated he did not think he could afford

one. Galvin (who it transpired was a confirmed "practical joker") at once said he could assist him. He told Zimmerman that it so happened that at that particular time there was a most excellent pedigree Jersey bull on a Crown property also situated at Mapiu, only a few miles from Zimmerman's property. Galvin said that as Zimerman was a Crown tenant he could arrange for him to have this most excellent animal, whose name he said was "Sir Galahad," for the extremely reasonable price of £25.

Zimmerman, after obtaining an advance from the Aria Co-operative Dairy Company, paid the money to Galvin, who told him to collect the bull from the Crown property nearby, which was then managed by one Henry Dowdall. Without delay Zimmerman hastened to the Crown farm and took delivery of Sir Galahad from Dowdall, who confirmed that the bull was a genuine pedigree bull, but when Zimmerman asked for the pedigree to be also handed over Dowdall replied that he would have to obtain this document from Galvin. The purchase of the bull took place in November 1923.

After many requests and some considerable delay, Galvin finally personally handed to Zimmerman a document which he said was the pedigree of Sir Galahad. For this pedigree he charged Zimmerman the sum of two shillings and sixpence on payment of which Galvin wrote out and handed to Zimmerman a receipt for this amount. Here is an exact copy of the pedigree:

PEDIGREE OF THE JERSEY BULL

"SIR GALAHAD"

Owner

Mr Henry Zimmerman, Farmer, Mapiu

Sire	*Dam*
Jupiter	Venus
Zeus	Europa
Rhoamanthus	Alcmene
Poseidon	Aphrodite
Ahab	Jezebel
Jehoshaphat	Athaliah
Pluto	Persephone
Milanion	Atalanta
Ulysses	Circe
Mark Antony	Cleopatra
Raleigh	Elizabeth
Napoleon	Josephine
Ivanhoe	Bride of Lammermoor
Rob Roy	Joan of Arc
Hercules	Megara
Copperfield	Little Dorrit
Jason	Niobe
Sherlock Holmes	Lady Watson
Agamemnon	Clytaemnestra
Arestes	Hermione
Lloyd George	Sylvia Pankhurst
Orion	Diana
Oscar Wild	Lady Windermere
Bismark	Wilhelmina
Eugene Aram	Maid of Perth
Lancelot	Elaine

SIR GALAHAD

As the reader will see, the alleged pedigree comprised a list of 26 sires and dams culled at random from classical mythology, Hebrew genealogy, history, ancient and modern, and even poetry and fiction.

Nevertheless, Zimmerman accepted without the slightest doubt or hesitation this so-called pedigree as completely genuine and authentic, and was so delighted to possess this document that he had it framed and prominently displayed in the best room of his dwelling, where it was proudly shown to all visitors who, after they had been given sufficient time to admire and digest the famous and distinguished ancestors of Sir Galahad, were then taken out to personally inspect and see this noble animal.

Needless to say, the news of this extraordinary document soon spread like wild-fire through the district and the number of Zimmerman's visitors increased accordingly. Believe it or not, this continued for a period of nearly two years without at any time Zimmerman realising that he had been made the subject of a cruel and heartless joke and fraud.

However, about the middle of 1925 some of Zimmerman's friends, feeling that the joke had gone far enough, suggested to him that the pedigree was not in fact a genuine document at all—a suggestion which was received at first by Zimmerman with scorn and disbelief. However, after thinking the matter over, he decided to write to the Secretary of the New Zealand Jersey Cattle-breeders Association in Palmerston North, never doubting that the reply would enable him to finally rout the unbelievers. He accordingly forwarded to the secretary Sir Galahad's pedigree, with the request that it be confirmed as genuine.

To this letter he received a prompt reply saying that there was in fact a registered pedigree Jersey bull named "Sir Galahad" but that this animal was then owned by a Jersey cattle-breeder in the South Island. The letter then

went on to say that the list of sires and dams (which was returned herewith), although it contained many names well known even outside Jersey breeding circles, was of no use as a pedigree.

The receipt of this letter was, of course, a complete and utter shock to Zimmerman, who for two dairy seasons had been carefully preserving the female progeny of "Sir Galahad" under the belief that this progeny would substantially in due course improve the butter-fat production of his herd. One can easily imagine, therefore, that a few days later it was a very angry and disillusioned man who entered my office.

In somewhat broken English he told me his story at some length, and handed to me "Sir Galahad's" Pedigree, together with the letter he had received from the New Zealand Jersey Cattle-breeders Association.

As I read this extraordinary pedigree, as can be imagined I had the greatest difficulty in maintaining a straight face. When I came to the names of Lloyd George and Sylvia Pankhurst, I said to Zimmerman, "Do you know who Sylvia Pankhurst was?" His reply was, "I do not know but Galvin, he say she vos a very good cow in Taranaki."

I had no difficulty in concluding that a clear case of fraud had been established. The obvious defendant was, of course, the Crown. The bull had been sold by the Crown. The false and fraudulent representation that it was a pedigree animal had been made by a Crown servant. An immediate difficulty, however, arose At that time all actions against the Crown had to be by Petition of Right issued under the provisions of the Crown Suits Act 1908. Section 37 of that Act provided that any action against the Crown had to be commenced within 12 months of the arising of the cause of action. In this case the cause of action obviously arose on the sale of the bull and the fraudulent representation that it was a pedigree animal. This was in November 1923. When Zimmerman walked into my office it was then about the middle of the year 1925. How was this difficulty to be overcome?

I then remembered the old and well established equitable doctrine of "concealed fraud" which provided that the cause of action was deemed not to arise until the discovery of the fraud, which in this case had only just occurred. Did this equitable doctrine of concealed fraud apply in actions against the Crown? An exhaustive search of the Law Reports failed to disclose any case in which this point had previously been decided.

It also occurred to me that this was not the sort of action in which the Lands Department would welcome any publicity. The facts were all too clear. I felt that if a claim were made against the Crown the Lands Department, realising that whatever the legal position was, a grave injustice had been perpetrated against a Crown tenant and that reasonable compensation would be paid.

In this, I was to be proved to be utterly wrong.

Without delay I wrote to the Commissioner of Crown Lands at New Plymouth, setting out the facts as supplied to me by Zimmerman and asking for reasonable compensation to be paid. To my surprise I received a letter from the Commissioner which, while neither denying nor admitting the facts set out in my letter, definitely denied all liability and stated that any claim made would be resisted.

There was no course but to proceed and a Petition of Right was duly issued in the Supreme Court at Hamilton.

I soon received proof that I had been right in my assumption that the Crown would use every endeavour to avoid any undue publicity. Under the then Crown Suits Act the Crown had the right to select the venue for the hearing of any Petition of Right. This right was promptly exercised and the venue was changed to Wanganui. The Crown's next move was to obtain an order for argument on a point of law before trial. The point of law, of course, being "whether the equitable rule of concealed fraud apply in actions against the Crown.

The question was duly argued before the Supreme Court at Wanganui early in 1926, when decision was reserved. The hearing, I may say, received no publicity in the press whatever.

After some delay the Judge's reserved decision was received, which unfortunately was in favour of the Crown, the Court ruling that the doctrine of concealed fraud did not apply in proceedings against the Crown.

This case was reported in the Law Reports, as *Zimmerman v The King* [1927] NZLR 114, and is, as far as I am aware, still the leading case on the point. The only thing that Zimmerman gained out of this action was the doubtful distinction of giving his name to a leading case. Round one undoubtedly went to the Crown. However, there was more to come.

Having failed against the Crown, a writ was

then issued against M J Galvin and H Dowdall for fraudulent misrepresentation. Against these defendants the technical defence successfully raised by the Crown was, of course, not available. The action duly came on for trial in September 1926 at Hamilton before Mr Justice Stringer and a jury. I appeared for the plaintiff. Galvin was represented by H F Johnston (later Mr Justice Johnston), while John Strang appeared for H Dowdall.

This case was "news" indeed, and received the widest publicity in the press, several newspapers publishing in full the alleged and now famous pedigree of Sir Galahad.

During the trial great emphasis was made by the Defence that Zimmerman's dairy herd was of such a mixed breed and of poor quality that even if Sir Galahad had, in fact, been a pedigree Jersey bull of the highest quality, no material improvement in the butter-fat production of Zimmerman's cows would have eventuated, and consequently that he had not in fact suffered any loss or damage. Unfortunately this argument was to some extent accepted by the jury, who after a fairly lengthy retirement, found that fraud had not been proved against Dowdall.

In regard to Galvin, the jury—while returning a verdict in favour of the plaintiff, awarded him a sum by way of damages which, in view of all the circumstances of the case, could only be regarded as little better than nominal.

So ended the Zimmerman litigation which, while creating great local and general interest and not a little humour and amusement to many, had in the end exposed and brought to the light of day what I still and have always regarded as the perpetration of a cruel and heartless fraud by a trusted Crown servant against a naive but honest and hard working farmer of foreign extraction, whose belief in the fairness of British justice must have received a severe jolt. I have always felt that Zimmerman was most cavilly treated by the Department of Lands and Survey, and it has always been a matter of some considerable satisfaction to me that the Crown in the end failed to achieve its main object, namely to avoid any publicity whatever.

THE CHIEF JUSTICE'S NEW EXAMINATION PAPERS

[The following intimation has recently been issued by the Chief Justice at Wellington]:

Examination for Barristers

Subjects for the "general knowledge" examination:

Latin.—Cicero, de Officione, and the Orations against Cataline; the First and Second Books of Livy, and the first four books of the Æneid.

Greek.—The Iliad (first two Books), the Antigone of Sophocles; Herodotus (Second Book). [NOTE.—The passages for translation will be set from these subjects, and candidates will be required to answer grammatical, historical, and geographical questions arising out of the papers set.]

Law.—Theory and Practice of the Civil and Criminal Law of England and New Zealand. (1) Property.—Estates, rights, and interests in real and personal property, and assurances and contracts concerning the same. (2) Perpetuity or remoteness, conditions, easements, notice, election, and satisfaction. (3) Common Law.—The law of Contracts generally, and Mercantile law. (4) The law of Torts. (5) The law of Crimes. Equity.—(6) Trusts. (7) Rights and Liabilities of Married Women. (8) Injunctions. (9) Satisfaction. (10) Mistake. (11) Pleading and Procedure in the Supreme and inferior Courts, and the law of Evidence. (12) A knowledge of the leading decisions in the Court of Appeal in New Zealand.

Law of Nations.—Elements of public and private international law. British Constitution. —Broom's Constitutional Law, Blackstone's Commentaries, Hallam's Constitutional History.

Euclid.—The first four books.

Algebra.—Quadratic equations.

History.—History of England, Alison's History of Europe, History of Greece, History of Rome, Hallam's Constitutional History, and Hallam's Middle Ages, the 8th chapter.

Any candidate may elect to be examined in French or German language instead of Greek. Notice of such election shall be given at the time the candidate notifies his desire to be examined, not being less than two months before the time fixed for the examination.

English.—The etymology of the English language, and English composition.

The examinations will be by papers and orally.

By virtue of the authority to delegate the examination of candidates conferred on the Judges of each judicial district, the Chief Justice will, in the case of any candidate who has passed the annual examinations for first and second year's students in the University of New Zealand, accept such examination as sufficient, provided that in such University examination the candidate has been examined in at least the following subjects: Latin, Greek (or French or German), mathematics, and history.

The written examination of candidates resident at Wanganui or Napier, will be held at the date above-mentioned, but the oral examination will be held by the Judge when on the circuit next after the candidate has answered the papers.

Examination of Solicitors

Examination of articled clerks to solicitors for admission as solicitors, will be held in the judicial district of Wellington on the days above appointed.

First and Second Examinations.—Ancient History: Student's Gibbon, Student's Rome, and Student's Greece, by Dr. Smith.—Modern History: Student's Hume, by Dr. Smith.—Creasy on the Constitution.—Feudal System: Hallam's Middle Ages, ch. viii.—English Composition and Etymology: Reading aloud and writing from dictation.—Latin Language: First four books of the Æneid, or Cicero's orations against Cataline. Passages for translation will be set from these authors, and candidates will be required to answer grammatical, historial, and geographical questions, arising out of the passages so set. Two months' notice must be given by the candidate as to which author he selects.—Arithmetic, including vulgar and decimal fractions.—Geometry: First four books of Euclid.—Algebra: To quadratic equations, inclusive.

Law.—In addition to the subjects and books specified in rule 22 of the General Rules of the Supreme Court of 1863, candidates should read the following works: Joshua Williams on the law of real property and personal property; Dart or Sugden's vendors and purchasers; Smith on contracts; Broom's commentaries; Smith's equity manual.

Examinations will be by papers and orally.

By virtue of the authority to delegate the examination of candidates conferred on the Judge of each judicial district, the Chief Justice will, in the case of any candidate who has passed the senior Civil Service examination, accept such examination as sufficient for the purpose of the general knowledge examination.

Candidates at Napier and Wanganui will be accorded the same privilege as in the case of examinations for admission of barristers.

Examinations of pupils of barristers for admission as barristers, by virtue of the fourth sub-section of section five of the "Law Practitioners Act, 1861," will be held for the judicial district of Wellington as under, commencing on the fourth Monday in the month of March, 1876, and the three following days; commencing on the fourth Monday in the month of September, 1876, and the three following days.

[*Reprinted from* (1875) Colonial Law Journal, Vol I, Part II, p. 34.]

Lawyer wee bit late ...—They say that when you know your number is up, visions of your childhood, family, sweethearts and friends flash before you. But a city lawyer is not shedding any light on the theory after his experience this morning.

Children's Court was sitting today and he was due to appear for a boy. The boy was there, the magistrate was there ... everyone was there, but no lawyer.

Came the word he was indisposed. That wasn't half of it.

Ask anyone who has spent nearly an hour locked in a lavatory and he will tell you indisposed is not the word.

It seems our man found the door would not close properly so he lent a little shoulder weight to it. It must have been his bowling arm, for the door jammed neatly and permanently.

His frantic banging on the walls was mistaken by Court staff for noisy customers and the word was sent up to knock it off. The accusation was denied and puzzled Court staff were put in the picture when a fellow law type raced for help after hearing the commotion in the closet.

The arm of the law could not match the strength of the door.

One carpenter and a crowbar later our man emerged, none the worse for his ordeal, but, as a social welfare wit observed, looking a little flushed—David Conway in the Gisborne Herald (13 January 1975).

Ask a silly question . . .

Constable: It was a four-way intersection.
Prosecutor: Controlled or otherwise?
Constable: Yes.