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RECOGNISING A BROADER PROFESSIONAL BASE

A significant proportion of this year's law graduates will not find jobs in law offices. This trend has become increasingly obvious in recent years, and the signs are that it will continue for some years yet. Those of us who found our way into the law in happier times have cause to reflect on the implications of what is happening. Are the legally trained people who are thus excluded from law offices to become "non-lawyers", men and women who have little more to offer the community than a refined mind? Or do we believe that the traditions of the law, which have been absorbed by these students over the last four years, will be carried by them into a wider world of government, commerce and industry? Perhaps even more importantly, what will the graduates themselves think about our beliefs and convictions?

I ask this question because, as a member of the legal profession and as a teacher I am saddened by a recent pronouncement in Law Talk (94) on the subject of postgraduate training for lawyers. As I understand it, law graduates who have distinguished themselves in their studies and, through their diligence, attained a professional status, are to have that status seriously impaired if they do not sit through eighty hours of lectures on a series of mundane topics most of which have already been covered in their degree and postgraduate studies. Worse, many of these topics are petty and irrelevant to those graduates who are destined for commerce or government; while skills which are generally important in any organisation, such as counselling and general principles of management, will be given little if any attention.

What I find particularly disturbing about the article in Law Talk is the assumption lying behind its assertion that "The LL.B course gives *graduates* an excellent academic background for the practice of law but in general terms it is not possible until after graduation for adequate practical training to be undertaken for *entry into the profession*" (My italics) Am I to understand that the man who has a law degree, and indeed, even a practising certificate, is not yet a fit person to enter upon the profession of "being a lawyer", and will not be so until this new barrier to professional status has been surmounted? If so, where does this leave the law graduate who, by choice or necessity, spends his postgraduate years developing his expertise in some other institution than a solicitor's or barrister's practice? Is he merely a "graduate"? Or should we not review this narrow view of what is meant by the term "legal profession"?

My own conviction is that the movement of law graduates into positions of responsibility in other walks of life will be a social factor of enormous significance in the years to come. The modern law student may not know how to draft an easement for light and air, or how to dress up a transaction so that it does not attract the unwelcome attentions of the Commissioner of Inland Revenue. But he has thought deeply about human relations in a variety of situations. He has studied constitutional rights; he has explored notions of precedent and the art of decision making which has to be consistent over a period of time; he has seen the law deal with acute conflicts between members of a family, and others closely engaged in co-operative ventures. He has been taught about procedures designed to tell a man he is wrong without taking away his basic human dignity. Above all, he has come to grips with a complex

system in which competing moral principles, broad policy considerations, and individual human idiosyncrasies all have their part to play. These things he has in common with the solicitor and the barrister; it is just that he will work them out in a different way, though no less pragmatically. For too long, people with an education which (potentially at least) is unrivalled in its breadth and scope have applied it within very narrow confines. Too many other facets of New Zealand society have remained the sole preserve of men whose education in such matters has not been adequate.

To be effective in these new roles, the law graduate needs help. If he attempts to function alone, without communication with his fellow lawyers and without the benefit of professional standards which transcend the immediate demands of the institution for which he works, he may become disillusioned and lost. This loss will reflect upon the entire legal profession. Take the unhappy story of John Dean, house counsel to the President, a story told in his book, "Blind Ambition". People trusted him, and looked to him to exercise an independent judgment, simply because he was a lawyer; and yet he had been called upon to perform a function which was quite different from that of the ordinary legal practitioner. If a lawyer is trusted by people and fails them, the profession as a whole diminishes in public stature. If a lawyer is distinguished by his fairmindedness in situations where this is against the financial interests of himself or his employer, the profession gains in stature. Nor can this collective responsibility be sloughed off by issuing different coloured pieces of paper to different types of lawyers. For better or for worse, we are inevitably bound together by our legal training, by the traditions of the profession, and by the roles that other people thrust upon us.

I do not believe that a caring profession would leave law graduates without professional sustenance and support, simply because their work does not correspond with the traditional roles of conveyancer and court lawyer. I do not believe that members of the profession think that their own traditions and skills are relevant only in those narrow areas. I cannot bring myself to believe that any one of my friends in the profession would deliberately say to such people, "you are not worthy of independent standing as a lawyer". And yet it seems to me that this is the effect of what is being proposed, and what a short-sighted and potentially disastrous course it is! Are we not isolating ourselves, and depriving our profession of a rich source of new ideas, contacts and stimulation in future years?

It is with the greatest diffidence that I put forward these views, inconsonant as they are with those of people whose opinions in such matters would normally be entitled to much greater respect than mine. But if I am convinced of them, I must state them in the hope that lawyers who still have some sense of social responsibility and compassion will recognise their force. It is my belief that we should not disown one half of the law graduates of 1979. We should welcome them; we should say to them, "you are one of us; how can we help you as you take up your responsibilities, and employ your expertise in new fields? In what ways can we share with you what wisdom we have, and strengthen you for the journey ahead?" If we as a profession thought this, then a very different set of proposals would be coming before us today.

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Accident Compensation

As with any scheme of public-funded compensation one may expect to see a number of try-ons. Some of these are justified and represent a quite proper testing of the legislation and a probling of limits of compensation.

However there have been a number of cases that quite clearly should not have been brought. These range from obviously avaricious claims where the appeal seems to have been founded more in the hope than expectation of getting more. Others, particularly those relating to earnings related compensation have not been supported by adequate evidence at any stage; in some cases adequate evidence is not provided until the appeal hearing; and in others there is simply no appearance by the appellant. And there are also one or two who fall in the utterly unforgiveable category where an applicant has throughout been less than frank in his evidence.

The cost of an appeal hearing (a cost borne by the public) is not cheap and apart from that there is the question of inconvenience to witnesses called by the Commission. With this in mind the Accident Compensation Appeal Authority is increasingly awarding costs *against* appeallants in cases where it considers that the appeal is frivilous or vexatious. Awards so far have ranged from a nominal $25 to $150. Those who have genuine claims should not be deterred.However it is worth publicising that the days of the cheap try-on are over.

CASE AND COMMENT

Maintenance and the not-quite de facto

Curline v Curline (Casey J gave his judgment on 15 June 1979) raised the issue whether the Magistrate's Court had been right in reducing the maintenance payable to the respondent wife from $36 per week to $20 instead of cancelling it outright because of her association with another man. The Magistrate had found that the wife could not work because of a long-standing medical condition and that her relationship with the man was not simply one where sex was the purpose of it. It was, in his view, "much deeper obviously than that." In a literal sense, the Court below accepted that the man did not live with the respondent but it was observed that there was "a frequency of association and affection in their relationship of such a degree that it is much more than a merely casual relationship. It is not a case of simply a little extra-marital felicity in a sexual sense by a separated woman with a man whom she is casually attracted to." Indeed, matters appeared to have extended far beyond this, to the point, indeed, of a discussion of marriage, albeit inconclusive.

Casey J found the wife's answers in cross-examination of some significance where she said she and the man had discussed the prospect of marrying and the financial side of it "and left it at that". When probed upon this, she said both she and the man had commitments. Hers was a time payment she wished to finish paying off. She further said she would prefer to be in better health before embarking on a new relationship - a remark not easy to follow in the light of the fact that her health was one of the factors which had led to the man's devoted attention to her, as, indeed, Casey J remarked. His Honour said: "it requires little imagination to appreciate the significance of her expressed desire to reduce her financial commitments before remarrying. Obviously her present sources of the Domestic Purposes Benefit and former husband's maintenance will dry up in that event."

Casey J found the association to be a semi-permanent one falling short of a stable de facto relationship of the kind mentioned by White J in *Mitchell v Mitchell* [1975] 2 NZLR 127, at p 129 - the ratio of which was followed by Roper J in *Turner v Turner* [1978] NZ Recent Law 269. The Court in the present case was satisfied that the man had the means to support the respondent and found itself "somewhat at a loss to understand the learned Magistrate's reasoning in finding such a relationship warranted only reducing the maintenance from $36 to $20 as a result. He said this was a compromise . . ." Casey J said that whether or not the man was only supporting her "in an irregular gratuitous "gifting sense" as he stated, the plain facts were that, in such an association over three years, it seemed quite contrary to public policy that the appellant husband should be required to continue maintaining his wife regardless of any decision the social welfare authorities might have made about her DPB. He accordingly allowed the appeal and cancelled the maintenance order. It is respectfully submitted that this decision was entirely correct and, indeed, fully consonant with the decisions of Mahon J in *Crawford v Crawford & Russell* [1979] NZLJ 202 (which was concerned with maintenance after divorce), and of Beattie J in *Taylor v Taylor* [1974] 1 NZLR 52 (in the same context.

As was neatly observed by White J in the Mitchell case (at p 129): "As has been said frequently, it is a question of fact in each case." Practitioners acting for husbands in these situations will indeed have nicely to sift the facts before they make so bold as to seek cancellation of an order. It is sometimes no more easy to say which side of the borderline a case will fall than it is to say whether a partnership exists within the meaning of the Partnership Act 1908. However, if one does seek a case at the other end of the scale, ie, one where the Court would not cancel an order, one may perhaps analogise from *Iverson v Iverson* [1967] P 134. It would seem to be a legitimate inference from that case that if a wife had done all that she could to persuade her deserting husband to return to her and her children and were to lapse and commit two isolated acts of adultery in her loneliness, her maintenance order would not be liable to cancellation at all.

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INDUSTRIAL LAW

UNLAWFUL SUSPENSION AFTER UNILATERAL VARIATION OF "TERMS AND CONDITIONS". THE NEW PLYMOUTH ELECTRICITITY WORKERS' CASE

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Besides significant aspects of constitutional and administrative law the Supreme Court dealt also with important points relating to the law of employment in *Elston v Williams and the Attorney-General* (unreported Supreme Court, Wellington. 18 December 1978 (A281/76), commonly known as the *New Plymouth Power Station Workers' Suspension* case. A summary of the complex issues fills nearly seven pages of the decision, but Barker J still thought it prudent to warn that amplification in some areas might be required later. For this reason a brief outline of events in the present comment may seem inadequate and oversimplified.

The Electricity Department converted the New Plymouth power station from burning coal to using Kapuni gas. The employees expressed anxiety about the danger of possible explosion and hazards of toxicity arising from work with a non-odourised gaseous fuel. They claimed that the change of fuelling considerably altered the conditions of employment for them by making the working environment unnatural, stressful and more hazardous. As compensation for the extra strain the Public Service Association (PSA) representing the employees, claimed a gas allowance of $416 per annum and an additional 20 days' leave. As it appeared to the workers that their claim was being "shelved" they imposed a ban on working with gas. After being lifted it was reimposed when resumed negotiations broke down. The PSA in a letter to the State Services Commission (SSC) emphasised that the ban was not a "direct action", merely a refusal by the workers to accept a radical change in their working conditions and environment until satisfactory terms of employment had been agreed. The Electricity Department and the SSC, however, saw the matter in a different light and arranged suspension notices to be served under reg 64A of the Public Service Regulations 1964. Notices served on 16 February 1976 to 55 employees were revoked retrospectively, but upon reimposition of the ban further notices were served on 27 February 1976. As a result of meetings between the Minister of Labour and the PSA the suspensions were lifted on 18 March 1976. The parties agreed to place the issues before the State Services Tribunal which on 16 December 1976 determined that certain workers were to receive a monetary allowance and an extra week's leave in every six months as compensation for the particular strain of work.

It is of some interest, though not germane to the issues of the case, that in July 1976 an explosion occurred in the power house for which the investigating authority absolved the employees from any blame.

For the period of the suspension the employees did not receive their salaries and allowances. One of the workers, Peter William Elston, brought the action for a declaration that he was wrongfully suspended by the Commission in February 1976 and for recovery of his wages lost during the period of allegedly unlawful suspension. As Barker J observed, in fact the PSS fostered the claim on behalf of all the electricity workers at the New Plymouth power station who had been suspended at the same time as the plaintiff. In particular the plaintiff sought declarations that: (a) the Commission's decision to suspend him was unlawful and consequently null and void; (b) the Commission failed to act independently as required by the proviso to s 10 (1) of the State Services Act 1962; (c) the plaintiff was entitled to salary, wages and allowances for the period of his suspension.

The unlawfulness of the suspensions

The suspension of the 55 workers as a retaliation for the ban had the effect of closing down the power station, because almost all employees working there were involved. Regulation 64A gives power to the Commission to suspend from duty any employee, or group or class of employees, who in the course of an industrial dispute refuses or fails diligently and efficiently to carry out his or their duties, by giving notice as prescribed in s 74 of the State Services Act 1962. The regulation further provides that notice of suspension remains in force until revoked by the Commission and that the employee

shall not be entitled to any remuneration for that period.

In fact the suspensions were decided upon by one member of the Commission, Mr Darcy Ellis Topp, acting alone under purported delegated authority pursuant to s 14 of the State Services Act 1962. It was argued on behalf of the plaintiff and accepted by the Court that invoking the power of suspension under reg 64A constituted a determination of a matter of major policy by the Commission. The instrument giving delegated powers to each member of the Commission signed by the members on 18 September 1967 clearly excluded "the determination of matters of major policy". Barker J held that as a result Mr Topp did not have delegated power to make the decision to suspend and for this reason the suspensions "must be regarded as null and void".

Furthermore, even if the suspensions were valid, the mode of enforcement invited criticism. The Commission's power to suspend under reg 64A was exercisable only after the individual employee had refused to carry out his full duties. When Mr Topp decided to serve the suspension notices there had been only a resolution by the power station subgroup of the PSA as to the future conduct of each individual member in refusing to handle gas, but there had not been a refusal by any of them to carry out his full duties. The learned Judge commented:

> "[T]he clear wording of the Regulation [64A] does not entitle the Commission to exercise its power to suspend until there has been a refusal to carry out full duties . . . a decision by a meeting of workers of an *intention (a)* to refuse to carry out full duties is not the same thing as a refusal by an individual to carry out full duties. The condition that must be satisfied before the Regulation can operate is that there must be an employee or group of employees who refuses or fails diligently and efficiently to carry out his or their full duties."

The Judge stressed that strict compliance with the requirements of the Regulation is necessary considering the gravity of suspension, and before such a Draconian power with such far-reaching consequences to individuals is invoked, all the conditions precedent to its exercise must exist.

As the Commission "short-cut" the procedures, Mr Topp – should be have been a proper delegate – had no jurisdiction to impose suspension notices when he did. Consequently, the invocation of the power of suspension, even if it were validly exercisable, was premature.

Did the Commission act independently?

At this juncture it seems appropriate to mention briefly another important aspect of the case dealt with in a later part of the judgment which, however, logically belongs to the narrow administrative-constitutional law issues of the Commission's power to suspend. Section 10 (1) of the State Services Act 1962 makes the Commission responsible to the Minister of State Services for the administration of the Act, but specially provides that in matters relating to individual employees the Commission "shall act independently". The Judge stated it as of paramount constitutional importance:

> (a) that a public servant ought not to be subject to political or other pressure; and
> (b) that a public servant is appointed, transferred, promoted, demoted or disciplined by the Commission, independent of Government influence (p 36).

His Honour found on the proper interpretation of s 10 (1) that the Commission was bound to act independently in dealing with such a drastic measure as the suspension of individuals, where unlike cases of transfer or demotion, no appeal rights exist. "Independently", nevertheless, does not mean that the Commission must act with the complete and utter independence of a Judge, but "[b]ecause of the thin line between policy and individual rights, the word must mean in the context of s 10 (1) not depending on".

After examing at length the evidence on how the decision to serve suspension notices was arrived at following meetings with the Minister and analysing the delicate relationship between the Minister and the Commission in respect of the very fine boundaries between matters of policy and administration Barker J concluded:

> "I am not able to hold that it has been proved that the Commission failed to act independently; nevertheless, I consider that the Commission would have been better advised to have acted differently. The notion of "fair play" would have been much better served by the actual decision to suspend the workers . . . being taken by those members of the Commission who were not involved in the numerous "toings and froings" between the Association, the Commission, the Department and the Minister . . . minds less involved and better placed to make an objective ruling . . . . This was not done . . . there was considerable blurring of the roles of the Minister and the Commission."

Entitlement to wages lost

Whether workers are entitled to unpaid wages in respect of a period of suspension or dismissal after resuming employment depends on the very question of the wrongfulness or lawfulness of the employer's action. The common law emphasises the breach of contract aspect. Simply, if the

(a) Emphasis by Barker J.

worker has committed an act or omission amounting to a breach of the service contract, the suspension or dismissal is lawful and in such circumstances wages are not claimable for the period of non-employment when employment eventually resumes; if no default of the worker can be proved, the dismissal or suspension itself will constitute a breach by the employer, and therefore wages must be paid for the time the employee was wrongfully deprived from earning his livelihood.

Counsel for the Commission submitted that the principles of common law are "unclear" on the right to wages following invalid dismissal, though there is a right to claim damages *(b)*. Lord Morris' dictum in *Francis v Kuala Lumpur Councillors* [1962] 1 WLR 1411, 1418 *(c)* was relied on in asserting that a refund of lost wages after a declaration on invalidity of dismissal would give monetary recompense far in excess to any measure of damages.

One must admit that a declaration of invalidity has the effect of specific performance and this coupled with a full refund would certainly far exceed the meagre damages normally granted. While Courts in general refuse to grant specific performance in claims for wrongful dismissal *(d)*, under industrial legislation reinstatement, a statutorily recognised form of specific performance has become a normal remedy. Furthermore, reimbursement of lost wages in grievance proceedings for unjustified dismissal *(e)* may, and in victimisation cases *(f)* must, be granted. In addition compensation can be awarded for what would be headings of damages not admitted by common law *(g)*.

Reliance was also placed on Lord Denning's dictum by counsel for the Commission in *Secretary of State for Employment v Associated Society of Locomotive Engineers and Firemen (No 2)* [1972] 2 QB 455, where the English Court of Appeal dealt with a work-to-rule situation. His Lordship holding that each worker was in breach of his contract of employment said:

> "Wages are to be paid for services rendered, not for producing deliberate chaos. The breach goes the whole of consideration."

Barker J held that in the case before him there was nothing to show any deliberate chaos produced by the power station workers; on the contrary, according to the evidence of the station supervisor, they "took a responsible attitude and agreed to close down the power station in an orderly way". There was no evidence that the plaintiff and the other workers were unwilling to do their normal work. The Judge also accepted as correct the reference to the Wages Protection Act 1964 by counsel for the plaintiff pointing out "the serious way in which the law regards unlawful deductions from salary and wages". Consequently he took the view that "[b]y means of the invalid suspension" and by declining to carry out the obligation to provide work "it [was] the employer who [was] in default" and committed a breach of the employment contract (p 28).

At this juncture it is of some interest to note that in *McClenaghan v Bank of New Zealand [1978] 2 NZLR528* Chilwell J held that the employers acted unlawfully when they deducted two days' payment on account of a two-day stoppage that occurred in the previous pay period from the salary due for the following fortnight during which time the employees fully performed their contracts of service. For the pay period in which the stopwork took place full amounts were paid, as the computerised pay system could not be reversed. As the employers had not terminated the contracts and as the contracts provided for an annual salary to be paid fortnightly, in the absence of an express provision in the contracts allowing the employers to retain as liquidated damages wages due to the employees at the time of the breach, the employers remain liable, notwithstanding the employees' breach of contract, to pay wages already accrued due *(h)*.

The Supreme Court and the Court of Appeal (confirming the decision of first instance) earlier considered the effect of stoppage on entitlement to wages in *Weir v Hellaby Shortland Ltd* [1975] 2 NZLR 204, SC, and *Hellaby Shortland Ltd v Weir* [1976] 2 NZLR 355, CA. In this case on account of an industrial dispute, variously described as "walk-out", "withdrawal of labour" or "industrial stoppage", there was no work for three weeks. Four statutory holidays fell in this period for which the workers claimed pay. It was held that the service contracts were not terminated as the events did not destory their substance, and therefore the employees were entitled to be paid for the holidays. In the words of Mahon J the right to payment "depends not upon performance of work over the relevant period, but upon the

(b) Subject to considerable restrictions; see [1979] NZLJ 13.

(c) As quoted in the judgment; reported also in [1962] 3 All ER 633, 638, PC; Counsel referred to Freedland, *The Contract of Employment*, 290-292.

(d) Except in *Hill v C A Parsons Ltd* [1971] 3 All ER 1345, CA; *Giles v Morris* [1972] 1 All ER 960; see comments in Szakats, *Supplement to the Law of Employment*, (1979) Butterworths, para [129] (4).

(e) Industrial Relations Act 1973, s 117.

(f) Ibid s 150; see [1977] NZLJ 319 and [1977] NZLJ 348.

(g) See [1979] NZLJ 13.

(h) See Mazengarb and Others, *Industrial Law*, 4th ed, paras 891-903; Szakats, *Introduction to the Law of Employment*, para 64 and *Supplement*.

existence of a contract of service over that period." ([1975] 2 NZLR 204, 217).

Doubtless, the facts in *Weir's* case introduce many other considerations not present in the *New Plymouth Power Station* case, but the judgments underline the essential point that wages are payable while the service contract exists. It must not be forgotten, however, that Weir and the other 1,200 workers claimed only holiday pay to which ss 26 and 28 of the Factories Act 1946 gives entitlement without work, as for a paid holiday, and they did not demand wages for other days falling in the period of stoppage that would have been normal workdays.

The facts in *Shell Oil NZ Ltd v Canterbury Drivers etc IUW* (1978) Bk of Awards 4637 are more in point. Driver members of the union refused deliveries to certain customers. The employer made rateable deductions from the wages, but the Industrial Court *(i)* examining the deductions clause in the Award found that such right could be exercised only where idle-time was due to circumstances brought about by the worker. The Court after commenting that the drivers had not been dismissed for breach but had merely received written "deemed to be in default" notices, stated that as there was plenty of other work, "the men lost wages because they were not permitted to carry out work" (p 4640).

As far as suspension is concerned the attitude of the Arbitration Court (formerly the Industrial Court) always has been that if an appeal under s 128 of the Industrial Relations Act 1973 is successful, refund of lost wages will be granted. Thus, in *North Island Electrical etc IUW v Carter Oji Kokusaku Pan Pacific Ltd* (1977) Ind Ct 155, the suspension of non-striking workers was effected on a mass basis and not on a group to group basis as the work ran out. As at the time of general suspension there was still work available, the suspension had no effect, and workers were entitled to their wages as if there had been no suspension at all.

The basis for suspension, of course, under s 128 of the Industrial Relations Act 1973 is quite different from that in the *New Plymouth Powerhouse* case. Section 118 gives the employer the right to suspend non-striking workers for whom, as a result of the strike, he is unable to provide work normally performed by them. This provision does not purport to be a punitive, merely an economic measure, notwithstanding that in fact it penalises workers who would be willing to work.

(i) This is one of the last decisions of the Industrial Court before its reconstruction as the Arbitration Court.

(j) Emphasis by Barker J.

Variation of terms of contract

The plaintiff further argued through his counsel that even if the right to suspend the workers in the power station were validly exercisable, in view of the facts it was not validly exercised, as the workers did not refuse to carry out their full duties in accordance with the terms and conditions normally applying to the performance of such duties. Detailed evidence before the Court showed that the unit operators task in activating the controls of the power house affected fellow workers, and the seemingly simple job of pushing the buttons of a console could increase or diminish the dangers of the employees present at the station. An operator spends about 95 percent of his working time at the console. He is allowed to leave it only for very short meal or nature breaks. The State Services Tribunal "affirmed" the increased anxiety and stress present in the operator's job, when the burners are fired by Kapuni gas, which is heavier than air, toxic and odourless. Attention was drawn to the circumstance that the stressful conditions applied not only to workers in the powerhouse, itself, but also to unit operators whose task was made more stressful and difficult by three factors:

(a) fear of gas explosion in the boilers;
(b) fear of gas poisoning or asphyxiation; and
(c) frustration in attempting to get this system started.

Barker J rejected the counter argument that the "terms and conditions of employment", as the phrase appears in Reg 64A (1), did not change by the introduction of gas fuelling, because the expression "conditions of employment" did not equal conditions of *work*, in the sense of physical conditions *(j)*. His Honour considered the expression wide enough to include the physical environment and the stress under which the work is performed. After referring to the House of Lords decision, *Stock v Frank Jones (Tipton) Ltd* [1978] 1 All ER 948, and the English Court of Appeal judgment, *British Broadcasting Corporation v Hearn* [1977] 1 WLR 1004, he concluded that "conditions of employment" cover "the totality of the provisions of employment," not only those "articulated in a contract, but those terms which are understood and applied by the parties in practice" (pp 32-33). From the whole of the evidence he found that the duties of a unit operator did change, when the operator was required to work with gas, "although these changes were not specifically articulated in any document". He stated:

> "[T]here was, at least in the transition period from oil to gas firing . . . a change in the terms and conditions of employment of such

magnitude as to not be 'terms and conditions normally applying to the performance of full duties' " (p 33).

It can be interpolated at this point that certain unilateral variations, if the contract itself provides for them, may be allowed in three respects: concerning the place of work, the hours of work and job specification, but the extent of such right is far from clear cut. As English decisions illustrate, upon the examination of various factors in some cases the variation was valid *Stevenson v Teeside Engineering Ltd* [1971] 1 All ER 296, Div Ct; *Sutcliffe v Hawker Siddeley Aviation Ltd* [1973] ICR 560, NIRC, in other cases invalid *(Ingham v Bristol Piping Co Ltd* (1970) 5 ITR 218, *Mumford v Boulton and Paul Steel Construction Ltd* (1971) 6 ITR 76). The Supreme Court in *New Zealand Needle Manufacturers Ltd v Taylor* [1975] 2 NZLR 33, following *Morris v Baron and Co* [1918] AC 1, held that a new term imposed could either be a variation or an elucidation of an existing contract, or a rescission of the contract to be replaced by a new contract. The change of conditions in the power house workers' contracts certainly went beyond mere elucidation. Likewise there was no rescission and a new agreement to replace the original contract with a new one. Thus, the change amounted to a variation which could have been validly made only by mutual agreement supported by fresh consideration: *British and Benningtons Ltd v North Western Cachar Tea Co* [1923] AC 48, 62, quoted in Taylor's case. Unilateral attempts to vary a service contract, even the basis upon which the wages should be calculated, were generally rejected by New Zealand Courts: *Nancekivell v Auckland Harbour Board* (1946) Bk of Awards 795 *(k)*.

Generally applicable principles

While the dicta in respect of the Commission's power to suspend, the exercise of its power by delegation and its duty to act independently clarifies fundamental constitutional and administrative legal points on the complex relationship between the Minister and the State Services Commission, between the Commission and a Government Department, between the Department and the Minister, and among the members of the Commission themselves, those parts of the decision dealing with the consequences of unlawful suspension and with the "terms and conditions" of employment enunciate broader principles equally applicable to contracts of service in the private sector.

Whether the employer's right to suspend derives from legislation, as in the present case and under s 128 of the Industrial Relations Act 1973, or from the contract between the parties, its exercise is always a "Draconian" measure with "far-reaching consequences" to the employee affected by it. The principles on the preconditions to its valid exercise as expressed in the judgment of Barker J may be set out in the following points:

(a) The relevant legislation or contract must define the precise nature and limits of the right.

(b) All the facts establishing the preconditions to suspend must be present; thus, depending on the particular preconditions in the relevant legislation or contract
  (i) the worker must have committed a default by refusing to carry out the contractual duties; or
  (ii) no work was available normally performed by him.

(c) The facts establishing the preconditions must directly and individually relate to, or arise from, the worker's person, whether or not jointly with other workers, but not as merely a member of a group.

(d) The employer must exercise the right exactly in the manner prescribed by the legislation or contract, that is
  (i) if the legislation or the contract so requires warning should be given before suspension;
  (ii) the notices should not be served prematurely before all preconditions are established;
  (iii) the notices must be served individually, not on a mass basis;
  (iv) the form of notices and the method of service must strictly comply with the requirements of the relevant legislation or contract.

The pronouncements relating to "terms and conditions" and the unilateral variation of physical working conditions also carry a significance extending well beyond the State services. Although the Judge, when considering the meaning of the phrase "terms and conditions" specifically had in mind Reg 64A (1), his observation that "conditions" cover not only the provisions articulated in the contract but all those "which are understood and applied by the parties in practice", is manifestly applicable to all contracts of employment. Changing the physical environment of work, altering the substances to work

(k) See Szakats, *Introduction to the Law of Employment* and *Supplement*; paras 74 and 125; also Freedland, *The Contract of Employment*, ch 2 and ch 5, sec 7.

with and making the whole process of production more dangerous than originally understood and applied, no doubt, constitutes a variation in the conditions of employment of some "magnitude". The full duties of the worker do not include the presence of added peril and increased hazards.

"Security of employment" and "safety in the place of employment" denote twin, but distinct, problems of prime importance, the principles of which, however, are still somewhat unclear. The judgment in the *New Plymouth Power Station Workers* case has greatly added to the clarification and development of these complex issues.

LEGAL PROFESSION

TOMORROW'S TECHNOLOGY

This address was given by the President of the New Zealand Law Society Mr L H Southwick QC *to the Auckland University Law Students' Society at their annual dinner on Thursday, 26 April 1979.*

There was a time when those of us concerned with the law expected never to question the old adage that"ignorance of the law was no defence". Indeed it was one of the pillars upon which our society has been built.

I wonder, however, whether that adage should now be replaced to read "ignorance of the law is inevitable". In fact I believe it can be confidently claimed that even for the lawyer, that inevitability exists and is most alarming. The inevitability arises because the law is beoming so voluminous and so complex that even hard-working lawyers now cannot cope with it. Thus we are surely on the slippery slope which must lead inevitably to the breakdown of our social order as we know it.

Even in a little country like New Zealand, in 1978 Parliament passed 137 Public Acts, 11 Local Acts and one private Act. In addition 57 statutory amendments were contained in a Statutes Amendment Act. How one lawyer, or even a firm of lawyers, can claim to be aware of the changes involved in these many legislative Acts is a question that must be seriously considered by one who would still claim that "ignorance of the law is no defence". Further we must not overlook the multiplicity of statutory regulations or non-statutory regulations, however you view them, that we now face. Over 340 regulations were promulgated in 1978, and already I have counted 90 this year. The situation is so complex that to trace statutory regulations is daunting enough without trying to find their intertwining amendments.

I believe that very much of the statutory law that we are churning out is bad. Indeed I do not think it is wrong to claim that such a volume of new law is born of over-Government, bad administration and inadequate consideration. Much of our statutory law and regulations are utterly inimical of democracy and to the Rule of Law itself. Much of it contains within itself the seed of its own destruction in that the law almost inevitably must cease to be enforced or to be enforceable simply for the reason that there is too much of it to cope with. Moreover, I am quite satisfied that the quality of legislation and of draftsmanship necessarily deteriorate when laws are produced in such quantity and at such speed, and what is more passed with such rapidity in the small hours of a long dawn, that we should not lose sight of what Rousseau said, "Good laws lead to the making of better ones, and bad ones lead to worse ones".

There is of course much that we can do in regard to legislation, and I want to tell you that the New Zealand Law Society's Legislation Committee is well aware of the need for something to be done. Our Legislation Committee studies most of the Bills which are introduced. The Committee studies Bills to assess their impact on lawyers and on the public. But however commendable may be the motives behind legislation, I believe we have today examples of legislation that should never be enacted at all. It is easy to see an evil and to rush in with legislation to cure it. Very often the need for that legislation, on careful thought or sometimes even on pretty cursory examination, is completely unnecessary. often what is called for is education of people rather than cramming something down their throats in the form of legislation. I have asked the New Zealand Law Society's Legislation Committee to view all Bills with this thought in mind. To introduce a new discipline directed towards deciding whether a particular Bill is necessary or whether it is not and to say so.

But given that in the years ahead the complexity of the law will increase, and given that no matter what happens we are sill going to be faced with increasing volumes of statutory law and of regulation, something clearly has to be done to stop our social order from disintegrating under the volume of legislation, and to prevent the lawyers being obliged to accept the adage that "ignorance of the law is inevitable".

Much can be done of course by lawyers specialising to a far greater extent than they now do. I believe that we will see this occurring. I believe that it is important that it should occur, but it is not the final answer to the problem. We have to remember that even if there is a specialist, the lawyer who is initially approached must have ready means to basic information upon which to build his initial advice.

I believe that it is to the computer that we will look more and more. Indeed, as I hope to demonstrate to you, I think that the computer can prevent many of the serious consequences I have discussed. It will enable lawyers to have access to vast fields of legal source material in a matter of seconds.

Before I leave what I have been saying however, let me assert that if we do provide these computer or electronic aids for the lawyer, this will tend to encourage legislators to maintain a flow of new laws. It will tend to encourage more over-Government and more Government interference in peoples' lives, the wisdom and justification for which must always be questionable and questioned. This means therefore that even with the aid of the computer, we must continue our vigilant attack on and our close scrutiny of the legislation which is introduced.

Let me also make this very clear because it is a matter that is so often misunderstood. The computer does not and will never do away with the need for research by lawyers. Many people seem to think that this will happen. I believe again that I can demonstrate to you that the need for more and better research by practising lawyers will always be with us, but the computer may make much of this research easier.

The Deputy Editor of the *Economist*, Norman Macrae, has written that in the English-speaking world, the system of Government as we know it is breaking down. He says that this is occurring because of the impact of the computer revolution. He believes that the computer revolution is more significant than the industrial revolution. I know that many of you will think that what he says is an exaggeration, although even if you do think that way I would ask you to take what he has said and to consider it with great care. It nevertheless, I think, does make it very clear that we have got to begin now on extending much more seriously such studies as we have made into the role of the computer in the world of the lawyer.

I want to tell you the areas in which I think computers can work, but before I even get that far, let me say that the introduction of computer facilities can prove disastrous if there is insufficient planning and if there is failure to explain the advantages to those using computer facilities. That is the first lesson.

The second is to appreciate this. That the advent of the computer must herald certain significant changes in the traditional function of the lawyer. If the computer is effectively introduced, then the lawyer, for the first time, can be freed from much drudgery and will be able to devote almost all of his time to jurisprudence and to interpreting the law, something for which, when all is said and done, he has spent many years being trained to do. Then as we plan for the introduction of the computer, we must be very careful to see that the computer is not permitted to enter certain realms where it could strike at the fundamental fabric of our society.

The Rule of Law forms the basis of the common law system. Common law denotes the unwritten law, whether legal or equitable in its origin, which does not derive its authority from any express declaration of the will of the legislature but which has the same force and effect as statutory law. It depends for its authority on the recognition given by the Courts to certain principles, customs, and rules of conduct. These principles are enshrined in the law Reports which embody the decisions of the Judges, together with the reasons which they assign for their decisions. Thus I make this point with great force. There must be no scope for the employment of computers in applying the law, or in predicting the outcome of a Court case. Any attempt to do this must be resisted. You must understand however that whilst I take this very strong line, I still believe, as I will mention soon, that there will be an increasing dependence on the computer for steps leading up to the decision-making process.

Having made these points and have stressed that in the process of retrieval and presentation of the common law to the lawyer and even to the judiciary, the computer has a valuable role to play, I say again that there is a point beyond which the computer must not be allowed to go. Let me tell you of the four areas where I see the computer fulfilling very signifi-

cant roles in the future, and from my comments on each you will appreciate where the computer stops. The four areas which I mention are identified in an address given at a conference held by the Society for Computers and law in Edinburgh in July 1978, by David Andrews, a solicitor of London and one of the conference organising committee. The acknowledgment I think is properly made.

The first area is what I call "legal administration". Here I see areas of the law which in practice involve more administration than the solving of legal problems. This is the area of litigation support. I think a computer has the capacity to deal with the production and processing of Court documents. The computer can be used, I think, in interlocutory procedures. Debt collection, I think, is perhaps a field where the computer has a use. Conveyancing is another subject where much of the routine work of a legal practice can be computerised. I can see various registries such as the land Transfer Register computerised. I would think that in other areas such as tax planning, trust accounting and the Administration of Estates, and even the maintenance of a diary, the computer will come to be of direct service to the lawyer. Some computer experts believe that we can look forward to the day when most law offices will be "on line" to various local and national Government offices, searching registers and the like, including the Courts themselves. Here the computer is performing a mechanical-administrative function. Privacy must be protected, of course, but if this is done, there is no problem.

The second heading is one which I find of very great significance and that is the use of the computer for "information services". This is the most significant message I have for you. I think that the concept of the traditional law library will disappear. I believe that countries more advanced in their thinking in this area than we are, realise that what the lawyer needs is a sophisticated information centre. The specialist lawyer in the large firm will develop his own reference library, and I hope will develop his own systems to enable him to have ready access to source material. But the lawyer in the smaller firm, the lawyer at first instance, the bulk of practising lawyers, are faced with more difficult problems because their work covers a wider range, and because they are less specialised and so frequently involved in research. Such lawyers are likely to be attempting to seek access to a wide field of source material. Thus the collation and dissemination of information under properly controlled procedures is a speciality stretching beyond the traditional library tasks. I have no hesitation in saying that this is a function which lends itself to computer application.

It is obvious that the lawyer's effectiveness and productivity will be greatly increased by having the facility of ready information over a wide field at his finger-tips. I do no more than point to this use of computers, reminding you, as I leave it, that I am looking in this computer endeavour for means of finding information. The lawyer himself will still have to analyse this information and to advise on it. He will still have to handle that information and demonstrate therein his legal expertise.

The third heading is one wherein we have already seen a start being made and I say little about it. It is word processing and text handling. The means of communication of words and text handling are of the utmost importance. The role of the secretary will undergo a revolution. The future is likely to see, I think, a growing dimunition in the amount of typing that the secretary does and greater emphasis will be placed upon what today we would regard as retrieval of the written word in the production of documents. Because of the fact that we are already seeing this develop, I content myself with saying that we must sill look for the best expertise that is available in this field, and the New Zealand law Society is ready and willing now to advise on it.

The fourth head is accounting and management services. It is clear enough that due to the complete complexity of modern electronic equipment, and of course of the computer itself, there is a real danger of over-elaboration of both the design of systems and the information they are set out to produce. This can result in unnecessary complications and often in wrong or impractical systems being introduced. Thus it is important to be sure that the type of equipment which is purchased and installed is simple and essential for the purpose and that proper advice should be taken before what can be very costly equipment is purchased.

What I have set out to do is to draw attention to some of the problems that the computer age can cause. Those problems are problems that can readily be overcome if we set our minds to it. As I have heard it said, "They had forgotten they were able to make things happen around them rather than always wait for things to happen to them".

Let me conclude that the traditions of our great profession have established a base from which we can move into the future, but as we move into the future, whilst not departing from that which is good, let us embrace as we may the technology of the future.

THE JUDICIAL VARIATION OF THE PRIVATE TRUST: PART II

The second (and final) part by MFL FLANNERY, *LLM Hons, a Wellington practitioner. (The first part appeared in [1979] NZLJ).*

Signal decisions in Scotland and New Zealand

Under all variation of trusts legislation the Court in effect merely contributes on behalf of minors, unborn and unascertained (and in both New Zealand and Western Australia unknown) persons the binding consent to the arrangement which they (unlike the adult beneficiary) cannot give. The power of the Court to give such consent is potentially available to be assimilated to the wide powers which beneficiaries adult and sui juris can manifest; but the potentiality is never matched by reality for the Courts have almost consistently failed to apply the generality of that word *varying* in the statute beyond a strictly literal (and non-liberal) meaning. Scotland in *John Sutherland Aikman* [1968] SLT 137 and New Zealand in *Re Bodle's Trusts* [1970] NZLR 750 have both signally found exit (by slightly different paths) from the legislative labyrinth because *Aikman* allowed the proposed arrangement to be approved as a new settlement and *Bodle* approved a new trust by way of variation and so not strictly may be construed as a resettlement. Both decisions represent beacons on the uncharted sea of judicial variation of trusts.

In *Bodle* there clearly was a variation of the original trust that was effected (at least in part) by the creation of a new trust that appears identical to rather than different from the trusts of the original settlement. The application sought an order for the acceleration of the date of vesting and approval of an arrangement whereby infant and unborn children and grandchildren of the settlor would not be disadvantaged. The proposed arrangement was devised to ensure that ultimate beneficial interests under the original trust would not be upset. The settlor of that trust was still alive. Contingent beneficiaries were those of his children who survived him and attained 21 years of age or being female married under that age with a per stirpital substitutionary provision for the grandchildren. If vesting were to await the death of the settlor then estate duty would deplete the trust fund.

The Court approved the date of vesting as at 31 August 1971 and the creation of a new trust to be set up by the settlor's adult children and authorised nominees for his infant children so that "(T)he beneficiaries of the new trust will be all the persons named in the present deed and on a stirpital basis; but on the basis that the interests of these persons shall vest on a day 15 years from the date of execution of the deed of covenant or at the death of the settlor of the present trust whichever shall be the earlier."

Woodhouse J added (at p 752): "In addition, any such beneficiary under the new trust must bring into hotchpot capital sums he or she may have received under the trust with which I am dealing (as varied)."

The result is that there has been ordered a variation of the original trust that has as its settlors the adult beneficiaries and authorised nominees for the infant beneficiaries all in place of the original settlor; but the purposes of the new trust are more similar to than different from the trusts of the original settlement and that fact plus the hotchpot provision fortifies the contention that this was (as termed by Woodhouse J three times on p 752) a "new trust" that was effected partially at least by way of variation and one that has some appearance of being a resettlement because of the substitution of the settling party, and the alteration of the vesting date.

In his oral judgment Woodhouse J referred to no case and the report of his judgment does not indicate what cases were cited to him; but after a careful recital (at p 751) of the history of the variation (it had apparently come before him earlier) he acknowledged (at p 752) the duty of the Court to "consider the proposed variation in a broad sense and at the same time attempt to assess and keep in mind the probable attitude of the persons on whose behalf it must speak if they were present and able to speak for themselves."

. . . and retrograde decision in New Zealand

Where Counsel relies on s 64(1) as persuasive of the contended jurisdiction of the Court to rearrange the disposition of trust's annual income, then the Court may be precluded from so acting if the proceedings have failed to invoke also s 64A when the Court holds that that submission pertains to a "variation of the

will": see *Re Lyell* [1977] 1 NZLR 713 (at p 716).

The Courts in England seek the presence of benefit: the Supreme Court in New Zealand must additionally at times be satisfied on the absence of detriment (except when varying protective trusts: s 64A(1) (d)) as well as consider at its discretion all direct and indirect benefits including the welfare and honour of the applicant's family.

Lyell concerned an application under s 64(1) (with support from all interested parties) for leave to sell a dilapidated property which was being held upon testamentary trusts for successive life interests. There was no power of sale in the will. Counsel representing the plaintiff's children and unborn issue and those persons who would take upon an intestacy contended that to counteract the effects of inflation, one-third of the income arising from the planned investment of the sale proceeds should be held capitalised for the ultimate use of such beneficiaries.

Manifestly, application should have been made also under s 64A to allow both an order of sale and the resettlement of part of the sale proceeds upon a new trust for the remaindermen within the terms suggested by their Counsel. The failure of both Court and Counsel to suggest amendment to and to draft respectively the application resulted in neither a just decision nor a wise conclusion. Nothing in *Re Bodle's Trust* [1970] NZLR 750 was cited to or quoted by Beattie J. Section 64A ensured that the class of persons fell within the ambit of subs (1) and the proviso that there be no detriment on the Court making the order for variation. The facts in *Lyell* easily fulfilled both conditions.

The Court held that it had no jurisdiction under s 64 to vary the beneficial trusts of the will and accordingly refused the submission that the yearly income be capitalised and held on trust for the plaintiff's two teenage children.

Beattie J (at p 716) held:

> "That suggestion would amount to a variation of the will which, in my opinion, is not authorised by section 64(1). It was submitted . . . that the wide terms of the discretion in the proviso to s 64 enables the Court to rearrange the disposition of the annual income as suggested. Although from 1956 to 1960 the section did provide for the rearrangement of beneficial interests, in 1960 that provision was repealed and a new section, s 64A, was enacted. The position, therefore, is that pursuant to s 64 the Court has a supervisory function whereby it can enlarge on inadequate powers of administration and management as contrasted with s 64A where the Court is empowered to act as a statutory agent to vary beneficial interests. In my opinion there is nothing in s 64 which indicates that the Court has the power to vary beneficial interests more particularly when the section has been stripped of that specific power."

On the same page Beattie J indicated that he did not think that he had jurisdiction whereas s 64A supplied two available grounds: the class of persons who might have applied clearly satisfy the conditions in subs (1) and the proviso to that subsection clearly indicated that there would be no detriment to any person if the Court made the order approving the variation of the trusts.

Beattie J declined (at p 717) to hold that it was a suitable case ". . . to saddle the trustees with the responsibility of earmarking a fixed percentage of income for capital purposes." He did not "canvass the argument that was submitted on the desirability of taking into account the effects of inflation." Instead he was content to order a power of sale and for the net proceeds to be held by the trustees upon the same trusts as those contained in the will of the testatrix relating to that property.

Here was a Court *confronted* by a plaintiff with a relatively modest income and whose wife suffered from a very disabling illness that interfered with plaintiff's working hours and disabled his wife from the task of bringing up his children. Beattie J (at p 717) added:

> "He has almost a full housekeeping burden although he would obviously get some assistance from his daughter. Some $1500 a year will immediately be set aside for the education of Richard at Nelson College and to that extent that payment is a direct benefit to him. The applicant is also a little fearful that he can keep on enjoying the goodwill of his employers against the family background difficulties he has. In the result, therefore, I do not intend to canvass the argument that was submitted on the desirability of taking into account the effects of inflation."

And yet here too was a Court *offered* a compromise solution that would have allowed the capitalisation of part of the income for the benefit of the son and daughter and yet permit their father to apply at short notice for access to all or part of that income so capitalised.

The conclusion is that there may be an application of law that under the Family Protection Act 1955 allows the moral duty to be ele-

vated to near omnipotent, omniscient level and that under the Trustee Act 1956 (albeit the incorrect section) permits the Court to turn a blind eye to helping a parent fulfil his filial, financial and moral duties.

It may be easy to find reasons for such varying accent and result in the law's workings but difficult to seek demonstrable justification. At best *Lyell* must be considered an uneasy decision. The procedural prohibitions may have persuaded the Court that it lacked jurisdiction although it is difficult from a reading of the decisions to be definite on this point. Jurisdiction was clearly available because the facts were clearly comprehended by s 64A that then should have been invoked with s 64.

Liberality under the Family Protection Act

Liberality has always characterised the approach of the Supreme Court to Family Protection Act 1955 disputes. Twenty years ago the contention in one typical case *(Re Crewe* [1955] NZLR 210) was that the testator had made no provision either for his widow or for his two infant children. The Supreme Court awarded the widow a lump sum of $2,000 and an annuity of $832 reducible to $416 on her remarriage. The Court of Appeal reduced that lump sum to $1,000 and increased the annuity of $1,040 to continue during her widowhood and cease entirely on her remarriage: *Re Crewe* [1956] NZLR 315 (CA). Twenty years later the Supreme Court in *Re Z* [1977] 2 NZLR 444 acknowledged inflationary trends by providing for an escalatory provision in the annuity awarded to the widow that was to be increased or reduced according to movements in the National Consumers' Index (All Groups).

Enfranchisement of a son and the adoption eventually by him of a life-style that is totally alien to that of his parents do not in themselves disentitle that son from obtaining relief but may have a bearing on the quantum of his claim so that a judicial variation of the testamentary trusts will be ordered: In Re McCutcheon [1978] NZ Recent Law 58 (in which the applicant son had removed himself physically and emotionally from his family to live on a Buddhist farm in Tasmania. He told the Court that anything he received would be given to the Buddhist community or used to repay those who had helped him in the past. The Court held that the father had been in breach of his moral duty to make some provision for his son and (as well) should have greater provision for the son's family because those grandchildren had no guarantee of help from their father.)

A survey of cases under the Family Protection Act 1955 noted in 1977 shows:

Re Mercer [1977] NZ Recent Law 469: Widow left nothing in will - Court gave her two-fifths of residuary estate in place of the customary annuity during widowhood with one-fifth shares to two surviving daughters.

Re Brooker [1977] Recent Law 48: Widow left no meaningful provision - Court awarded annuity of $3,000 with discretionary resort to corpus.

Re Stafford [1977] Recent Law 48: Claim by adult daughter born out of wedlock and left nothing - Court awarded one-half of estate.

Re Poole [1977] Recent Law 51: Court supplemented widow's life interest with power to trustees to acquire ownership flat and invest in trustee investments.

Re Booth [1977] Recent Law 12: Estate had been left to adult children of testator's second marriage - Court increased legacy of adult child of first marriage from $500 to $3,000.

Re Kirk [1977] Recent Law 81: Testatrix left residuary estate to youngest child - Court reduced this to 40 percent so that the other six adult children shared.

Re Aspden [1977] Recent Law 107: Adult son had been disinherited because testator had lost contact with him - Court awarded $2,500 to be deducted from residuary legacy left to testator's friend.

All such applications clearly turn upon the peculiar circumstances of the case. Aspden might have been answered differently had the Court asked whether it was unreasonable of the deceased to have made no provision for the applicant for that question of unreasonableness would have to be answered in the light of the facts known to and the eventualities reasonably foreseeable by the deceased up to the time of his death.

The Family Protection Act 1955 in most cases results in liberality, almost largesse.

No less an Act is the Trustee Act 1956. It, too, should be governed by comparable climatic changes whether financial, filial, practical, moral or social and warrant the exercise of a similar equitable jurisdiction as that in Family Protection Act matters. That last Act says ". . . the Court may at its discretion. ." (s 4(1)), and the Trustee Act says ". . . the Court may if it thinks fit . ." (s 64A(1)) so clearly there is nothing but an inexplicable difference in the method of expressing the discretionary power reposed in the Court. The only difference is

that the criteria under the Trustee Act are broadly indicated whereas under the Family Protection Act nothing is said so that the Courts look to case-law to refine and define meanings (cf "comfortably situated financially" in Re Harrison; Thomson v Harrison [1962] NZLR 6, 10 (CA) and the same words in Re Young [1965] NZLR 294 (CA)).

There are few reported cases on the relationship between the Family Protection Act 1955 and the Matrimonial Property Act 1963. Both the failure to report and the delay in reporting have been somewhat alleviated by the descriptively factual comments of cases in Recent Law. However it is the report of the case that allows obiter dicta to be detected, examined and applied.

Nevertheless the manner that claims made under both the Matrimonial Property Act 1963 and the Family Protection Act 1955 should be dealt with was exhaustively considered by Roper J in Re Rossi [1978] NZ Recent Law 379 and in Re Hansen (Supreme Court, Christchurch. 8 June 1978: M 484/76) when (in both cases) he said:

> "No very clear picture emerges from the cases . . . except that it can be said with some confidence that where an application is brought by a widow under the Family Protection Act alone the Court will not have regard for circumstances which are relevant only to an application under the Matrimonial Property Act in deciding whether an award of a lump sum is justified. It can also be accepted that when applications are brought under both Acts they should be heard together. Whether an award is made under one or the other Act, or both, seems to depend upon the particular circumstances of the case. It may be apparent in the particular circumstances that an award under one Act will do justice, but where that is not the position the authorities seem to support the conclusion that the Court should first consider and make its award on the Matrimonial Property application and then consider the Family Protection application in the light of the award already made."

Mahon J in Re Richards [1979] NZ Recent Law 54 followed Roper J in Re Rossi and allowed a claim under the Matrimonial Property Act 1963 but disallowed relief under the Family Protection Act 1955.

The Matrimonial Property Act 1963 is essentially concerned with contributions whereas the Family Protection Act 1955 is concerned with the moral duty of the testator: In Re Snow [1976] NZ Recent Law 13 (and to Cooke J it seemed "undesirable to allow the lines between the Matrimonial Property Act and the Family Protection Act to become blurred".) The blurring of the jurisdictional lines may indeed be a necessary consequence when the Legislature has provided a multiplicity of statutes for the variation of trusts, whether the grounds of the resultant Order of the Court are for example, inadequacy of testamentary provision, failure to honour an express or implied testamentary promise, absence of detriment (and presence of benefit) in the arrangement seeking variation, the need for or variation of maintence or contribution on the division of matrimonial assets.

There may well be the need for the Supreme Court to be invested with either a substitutional or complementary jurisdiction that will allow for the equitable review of private trusts that for example can be invoked when the applicant proves that reasonable financial provision either has not been made or provision having been made now warrants variation in the equitable circumstances of his application.

Nevertheless in *Snow* Cooke J did exercise jurisdiction under the Family Protection Act 1955 to allow a modest claim for a capital sum ($1,000) and a sufficient grant to take care of outgoings on the house in which with the income on the residue of the estate the applicant had been left a widowhood interest under the will. The Court added that if the testator's wife did have rights under the Matrimonial Property Act 1963 then these should have been pursued in proceedings under that Act. They would not then concern the testator's "own resources" that was the only property caught by the Family Protection Act.

As in *Snow* the widow in *Olausen v Olausen* [1977] NZ Recent Law 109 had a widowhood interest in the house under the will (which gave the residue of the estate to the deceased's son by a previous marriage) but this time the Court exercised jurisdiction under the Matrimonial Property Act 1963 to give the widow a half share as tenant in common in the house; and after acknowledging also the need not to blur the lines between the Matrimonial Property Act 1963 and the Family Protection Act 1955, refused the application under the latter Act. The Court held that the testator had been justified in attempting to preserve the property for his son.

The Family Protection Act application was dismissed in *Petty v Petty* [1977] NZ Recent Law 86 in which the widow also applied under the Matrimonial Property Act 1963 to have fix-

ed her interest in the shares held by her deceased husband in the family business. The Supreme Court ordered that the widow receive $26,500 because she had carried the main burden of the marriage and had made money available for the business through her own efforts. The Family Protection Act application was dismissed because the widow had assets of her own ($46,000) before the matrimonial property order.

The effect of judicial variation of trusts under the Matrimonial Property Act 1963 was the tacit acknowledgment of the Court that reasonable provision must be made for the wife (or husband) in the light of the variety of contributions made, for the legislative intent is that each spouse shall share equally in the matrimonial property unless his or her contribution to the marriage partnership has been greater than that of the other spouse. So, in *Barton v Barton* [1977] NZ. Recent Law 171 the Court held that the contributions of the wife had been equal to those of her husband because she had helped on the farm, managed the household, cared for nine children and "throughout most of her married life of 40 odd years was obviously prepared to forego a higher standard of living than should have been available." That statement indicates that both contribution specifically and the failure of financial provision generally is the aim on the one hand and the avoidable result on the other.

Both the Family Protection Act 1955 and the Matrimonial Property Act 1963 constituted the statutory grounds for the application by the 75-year-old widow against the estate of her husband in *Re Lord* [1977] NZ. Recent Law 16. The couple had been married for 23 years; there were no children and there were no other persons eligible to claim under the Family Protection Act 1955. The net value of the estate was nearly $350,000 and consisted of farming properties and a town house. The deceased gave the widow an annuity of $3,000, the right to occupy the former matrimonial home, a life interest in the town house and a legacy of $600. The residue of the estate was divided between a nephew of the deceased and his children.

The failure of the deceased to make reasonable financial provision characterised both orders of the Court.

Under the Matrimonial Property Act 1963 the Court gave the widow a one-third interest in the matrimonial home. She had brought $3,000 to the marriage which she had used for personal expenditure and had not contributed to any capital expenditure on the farm property nor had there been any tangible contribution to the farm from the widow's general assistance that would have entitled her to an interest in it. However the Court acknowledged that the deceased had owned a town house and a savings account, $50,000 of the value of which could be traced to savings from the farm business. The Court awarded $17,500 from that amount on the grounds that the widow had accepted a reduction in standard of living far below what the couple could have afforded for she had made money available for the husband's business that that had resulted in such savings.

Under the Family Protection Act 1955 the Court ordered that the widow's annuity be increased from $3,000 to $4,500 and the legacy from $600 to $7,500 so that she could have an emergency and capital spending fund. Both the size of the estate and the absence of competing claims had justified both such awards; and what is equally obvious is the fact that the testator had demonstrably failed to make adequate financial provision for his widow.

Definition of final

Generally, there is a period of 12 months from the date of grant of administration during which application may be made for a judicial variation of trusts that seek new or improved provision from estates, with provisions for extension of time for application and the protection of personal representatives for distributions made without knowledge that an application for extension has been made. However none of the Acts allowing claims against estates appears to cast light on that vital phrase "the final distribution of the estate" and it is in the machinery provisions in the "controlling" Administration Act 1969 that illustration is attempted (but no definition given) by the inclusion therein of certain instances: see ss 47-50, and note s 46. The matter is of direct practical significance in both the formulation and prosecution of all claims, no matter how arising, against estates.

Anything less than such definition allows the Supreme Court to raise artificial distinctions between property held qua executor and property held as trustee. That principle is enshrined in 19th century English case-law and no matter how suited it was then to social conditions, today it creates uncertainty as to the precise point of time when the translation from executor or relegation to trustee occurs. Nor is its retention at all suited to the social necessities and the social opinion and economic climate of today. The availability of judicial variation of trusts should not be prohibited by

artificial distinctions concerning the fiduciary character of ownership of assets still being held. Equity should innovate, not hinder.

There may well be the need for the Supreme Court to be invested with either a substitutional or complementary jurisdiction that will allow for the equitable review of private trusts that for example can be invoked when the applicant proves that reasonable financial provision either has not been made or provision having been made now warrants variation in the equitable circumstances of his application.

Nevertheless in Snow Cooke J did exercise jurisdiction under the Family Protection Act 1955 to allow a modest claim for a capital sum ($1,000) and a sufficient grant to take care of outgoings on the house in which with the income on the residue of the estate the applicant had been left a widowhood interest under the will. The Court added that if the testator's wife did have rights under the Matrimonial Property Act 1963 then these should have been pursued in proceedings under that Act. They would not then concern the testator's "own resources" that was the only property caught by the Family Protection Act.

As in Snow the widow in *Olausen v Olausen* [1977] NZ Recent Law 109 had a widowhood interest in the house under the will (which gave the residue of the estate to the deceased's son by a previous marriage) but this time the Court exercised jurisdiction under the Matrimonial Property Act 1963 to give the widow a half share as tenant in common in the house; and after acknowledging also the need not to blur the lines between the Matrimonial Property Act 1963 and the Family Protection Act 1955, refused the application under the latter Act. The Court held that the testator had been justified in attempting to preserve the property for his son.

The Family Protection Act application was dismissed in *Petty v Petty* [1977] NZ Recent Law 86 in which the widow also applied under the Matrimonial Property Act 1963 to have fixed her interest in the shares held by her deceased husband in the family business. The Supreme Court ordered that the widow receive $26,500 because she had carried the main burden of the marriage and had made money available for the business through her own efforts. The Family Protection Act application was dismissed because the widow had assets of her own ($46,000) before the matrimonial property order.

The effect of judicial variation of trusts under the Matrimonial Property Act 1963 was the tacit acknowledgment of the Court that reasonable provision must be made for the wife (or husband) in the light of the variety of contributions made, for the legislative intent is that each spouse shall share equally in the matrimonial property unless his or her contribution to the marriage partnership has been greater than that of the other spouse. So, in *Barton v Barton* [1977] NZ Recent Law 171 the Court held that the contributions of the wife had been equal to those of her husband because she had helped on the farm, managed the household, cared for nine children and "throughout most of her married life of 40 odd years was obviously prepared to forego a higher standard of living than should have been available." That statement indicates that both contribution specifically and the failure of financial provision generally is the aim on the one hand and the avoidable result on the other.

Both the Family Protection Act 1955 and the Matrimonial Property Act 1963 constituted the statutory grounds for the application by the 75-year-old widow against the estate of her husband in *Re Lord* [1977] NZ Recent Law 16. The couple had been married for 23 years; there were no children and there were no other persons eligible to claim under the Family Protection Act 1955. The net value of the estate was nearly $350,000 and consisted of farming properties and a town house. The deceased gave the widow an annuity of $3,000, the right to occupy the former matrimonial home, a life interest in the town house and a legacy of $600. The residue of the estate was divided between a nephew of the deceased and his children.

The failure of the deceased to make reasonable financial provision characterised both orders of the Court.

Under the Matrimonial Property Act 1963 the Court gave the widow a one-third interest in the matrimonial home. She had brought $3,000 to the marriage which she had used for personal expenditure and had not contributed to any capital expenditure on the farm property nor had there been any tangible contribution to the farm from the widow's general assistance that would have entitled her to an interestin it. However the Court acknowledged that the deceased had owned a town house and a savings account, $50,000 of the value of which could be traced to savings from the farm business. The Court awarded $17,500 from that amount on the grounds that the widow had accepted a reduction in standard of living far below what the couple could have afforded for she had made money available for the hus-

band's business that that had resulted in such savings.

Under the Family Protection Act 1955 the Court ordered that the widow's annuity be increased from $3,000 to $4,500 and the legacy from $600 to $7,500 so that she could have an emergency and capital spending fund. Both the size of the estate and the absence of competing claims had justified both such awards; and what is equally obvious is the fact that the testator had demonstrably failed to make adequate financial provision for his widow.

Definition of final

Generally, there is a period of 12 months from the date of grant of administration during which application may be made for a judicial variation of trusts that seek new or improved provision from estates, with provisions for extension of time for application and the protection of personal representatives for distributions made without knowledge that an application for extension has been made. However none of the Acts allowing claims against estates appears to cast light on that vital phrase "the final distribution of the estate" and it is in the machinery provisions in the "controlling" Administration Act 1969 that illustration is attempted (but no definition given) by the inclusion therein of certain instances: see ss 47-50, and note s 46. The matter is of direct practical significance in both the formulation and prosecution of all claims, no matter how arising, against estates.

Anything less than such definition allows the Supreme Court to raise artificial distinctions between property held qua executor and property held as trustee. That principle is enshrined in 19th century English case-law and no matter how suited it was then to social conditions, today it creates uncertainty as to the precise point of time when the translation from executor or relegation to trustee occurs. Nor is its retention at all suited to the social necessities and the social opinion and economic climate of today. The availability of judicial variation of trusts should not be prohibited by artificial distinctions concerning the fiduciary character of ownership of assets still being held. Equity should innovate, not hinder.

The executor's assent to the trusts of the will is the method by which the personal representative indicates that he does not require certain property of the deceased person for administration purposes (including the discharge of the estate liabilities) and that consequentially it may pass to the beneficiaries pursuant to the terms of the will: see the writer's article in [1976] NZLJ 399-407. Clearly it is time both for a uniform trust code for New Zealand and for illustrative definition therein so that executors can point to demonstrable acts whenever the Supreme Court must examine whether executorial duties have been completed. Final distribution can be made to mean more than the change in the nature of the fiduciary character of the person holding the assets. It can be defined to mean *actual* distribution that endows the beneficiary with both property and possession, so that the executor's assent to the trusts of the will occurs and the final distribution of the estate is complete (and all executorial of administrative duties terminate) when such credit has been tangibly and unequivocally effected. Without such, assent (especially unwritten) will continue to pose intractable problems in executorship law. New Zealand should emulate England and the State of Victoria and go further to provide for written assent in all cases and to define exactly "final distribution" to avoid quandary in the future.

NZ ignores HCA decision

Neither Parliament nor the Court of Appeal is omniscient and yet while the latter may not be able to fill in the gaps of the legislation of the former, it does seem regrettable that the Court of Appeal [in the single judgment delivered by Somers J in *Lilley v Public Trustee* (19 July 1978, CA 106/77: see case note [1978] NZ Recent Law 396) and concurred in by Richmond P and Richardson J] held itself from being precluded from "an independent examination of the validity of those earlier interpretations" that enlarge in Australia the words "final distribution". Somers J said that the New Zealand Legislature had recognised and accepted *Public Trustee v Kidd* [1931] NZLR 1 and *In re Donohue* [1933] NZLR 477 as to the meaning of "final distribution" and it was not now open to the Court to adopt the reasoning in the recent decision of the High Court of Australia in *Easterbrook v Young* (1977) 13 ALR 351. Parliament had defined the meaning to be attributed to those words, Somers J added:

> However, words are not mere labels for things. They do not have fixed, immutable meanings; and to say that a person or legislature did or did not mean to include something within a general directive does not necessarily mean or involve saying that the person or legislature had previously thought of it. *Easterbrook* would have advanced estates law in New Zealand

whereas *Lilley* rests on the attribution of a phantom intent to the Legislature. The Court of Appeal should always examine alternative solutions so that law may grow and adapt. Blinkers allow neither direction nor progress.

Trustee Act decisions

There have been few reported cases on s 64A of the Trustee Act 1956 as amended. That failure to report may partially or wholly be due to the fact that the section appears to be rarely litigated. Certainly, descriptively factual comments of then unreported cases on variation of trusts appear infrequently in Recent Law. The justification for the non-reporting of cases (and too for the omission of case comment) may well be that such cases rarely are felt to contain any important element of principle for admittedly each case deals with its own set of facts and may be felt often to be of no assistance outside the particular facts with which it deals. That may well be; but, for example, in New South Wales (the most populous State in Australia and where a Sydney QC told the writer that about a dozen applications were heard each year) only two have been reported under the "expediency" s 81, of the Trustee Act 1925-1969 (*Freeman v AG* (1973) 1 NSW LR 729 and *Re Sykes* (1974) 1 NSW LR 597), consequent upon the innovation of the judicature system in 1972.

Both the failure to report variation of trust applications heard in the Equity Division, Supreme Court of New South Wales, and the inability of the Master in Equity for NSW to supply to the writer unreported decisions are evocative of the conditions obtaining in England before the enactment of the Variation of Trusts Act 1958 when both the law profession and its clients were precluded from learning how the discretionary jurisdiction in the Chancery Division was in fact being exercised. New South Wales has no legislation similar to the Variation of Trusts Act 1958 for it chose to rely on an "expedient" section that allows the ". . . adjustment of the respective rights of the beneficiaries . ." Clearly the failure to report in New South Wales means that the public and practitioners (and, too, later Courts) are being denied scrutiny of matters to learn what principles are being applied, what and how persuasive are the decisions of England.

Conclusion and then recommendation

When the widow claims that she has been inadequately provided for under the terms of her late husband's will then she can invoke both the Family Protection Act 1955 and the Matrimonial Property Act 1976 but where the Court is reluctant to consider both applications simultaneously it seem absurd to force the widow-applicant into the expense and inconvenience of two separate applications under separate Acts when both the facts and justice of the whole case could readily be dealt with in a single proceedings. There are other reasons beside the obvious economic wastage and unnecessary use of Courts and people.

Indeed, it seems legislatively inelegant and judicially inconvenient to have multiple and separate but near-parallel jurisdictions for both disappointed or disadvantaged wives and dependants. The Supreme Court may already have had to consider the financial relations of parties seeking a variation of an inter vivos trust and yet (whether or not the Order of the Court has insisted upon deeds of covenants or insurance indemnities to protect the interests of contingently entitled grandchildren) such financial matters may have to be considered when a disadvantaged or disappointed child seeks new or further provision from his or her parent's estate under the Family Protection Act 1955.

There needs to be statutory provision allowing for the equitable review of trusts so that there is a clearly recited enumeration that can be invoked by disappointed and disadvantaged beneficiaries and confidently applied by the Courts.

The generality of expression in all legislation specifically authorising the judicial variation of trusts should permit its adaptability to changing times both socially and economically; and so the lesson may well be that the Judiciary generally is not using fully, realistically and constructively the tools with which the respective Legislatures have provided them. There needs to be a composite uniform trust code for New Zealand that among other things solves the problems associated with executors assent, final distribution and judicial variation.

All Parliaments have been content with the establishment of a broad principle of law and have left its administration to be developed by the Courts in their Equity Divisions. That legislative effort has resulted in judicial uncertainty and conservatism that has allowed full lip service to be paid to the sanctity of the trust often at the expense of the will of the beneficiaries. What is now required is a simple, unequivocal declaration of State policy:

> The Court shall have power to vary trusts on behalf of persons not sui juris [and on

behalf of persons having any discretionary interest that may arise on failure or determination of the interest of the principal beneficiary under a protective trust] provided that such variation shall be for the benefit of such persons and provided further that such variation may include the settlement of the trust property upon trusts identical to or different from the trusts of the original settlement.

And then a comprehensive recital of criteria, mutatis mutandis, applicable to all judicial variations of private trusts. Both the New Zealand Legislature and Judiciary could do so much more.

Recent Matrimonial Property decisions

A quintet of 1979 Court of Appeal decisions (*Martin v Martin* [1979] 1 NZLR 97, *Dalton v Dalton* [1979] 1 NZLR 113, *Williams v Williams* [1979] 1 NZLR 122, *Barton v Barton* [1979] 1 NZLR 130, and *Meikle v Meikle* [1979] 1 NZLR 137) represent equality in the division of the matrimonial home and family chattels; but all leave unexamined whether the same test (of equal sharing unless repugnant to justice) applies to, and the same result is available in the judicial variation of other forms of matrimonial property.

Many hitherto unreported matrimonial property decisions are now contained in the publication (1978) Matrimonial Property Act cases.

STATUTES

TWO WAYS OF DRAFTING STATUTES

By N. J. JAMIESON *BA(NZ),LLB(VUW), Senior Lecturer in Law, University of Otago.*

There are two ways of drafting statutes. It is possible to distinguish them according to the mechanics of legislative composition. It is not possible to account for them and explain their misuse, however, unless by referring to the metaphysics, rather than the mechanics, of the drafting process.

One kind of statute begins with machinery provisions. Barely having breathed commencement, like a reluctant debutante this statute defines terms, acknowledges those who are to be responsible for administering her provisions, and diverts the would be statute-user from the main issues by delegating to boards and committees the legislative power to determine the issues. In this way some statutes may provide no more than for procedures, and in doing so constitute only adjectival law. Nevertheless it is argued that, even as the most reluctant debutante prepares her trousseau with an underlying seriousness, so this kind of statute works towards a climax whether in her later and more matronly provisions or as may only be vicariously experienced through her offspring by way of delegated legislation.

The Tenancy Act 1955 and the Hovercraft Act 1971 provide examples of this first way of drafting statutes. It will be observed of the Tenancy Act that it deals first with citation, then interpretation, administration and application before dealing with the substantive policy of rent restriction and recovery of possession. The Hovercraft Act is an even more extreme example of emphasising adjectival at the expense of substantive law. The Act does not determine the issues relating to hovercraft, but by s 4 empowers the Governor-General to do so by Order in Council.

The other kind of statute is vastly different. By contrast he is a brash, impetuous sort of fellow. Taking both his own commencement and that he may be known by a diminutive of his proper name for granted, he plunges himself into deciding issues of the highest policy. Defining terms, appointing officers and providing for administration are left to the old age of his concluding provisions, and beyond that even to his resurrection in delegated legislation*(a)*

(a) An extreme example of delegated legislative power is provided by Canadian Federal legislation. The Federal-Provincial Fiscal Arrangements Act 1972 (21 Eliz. II. c.8) goes so far as to empower the Governor-General to make regulations to define expressions used in the Act. it is submitted that by the element of arbitrariness thus introduced this proposition goes far beyond the pale of legislative propriety. If definitions are no more than stipulations as to the way in which words are to be used, and words are to be used according to those stipulations (no matter how arbitrarily the stipulated meanings appear) a power to define the terms of an Act can make the Act to anything. Thus the term Governor-General may be defined to mean "the first stock-broker to be encountered in the street by the Inspector of Police on the second Sunday morning in June of each year" - an example which is not the worst of its kind because it is only nonsensical. As

The Building Societies Act 1962 (UK) and the Patents Act 1977 (UK) are examples of the second sort of statute. Thus, the first section of the Building Societies Act expresses high policy. It relates to the establishment of building societies for the purposes of the Act. It is not until s 129 that the Act defines terms and expressions. The last section deals with citation and commencement. The Patents Act is the same, dealing first with the issue of patentability, latterly (s 130) with interpretation, penultimately (s131) with application, and ultimately (s 132) with citation and commencement.

Statute Books invariably follow one or other of these two ways of legislative composition. The examples chosen are intended to make this apparent. Thus New Zealand statutes have citation, commencement, scope, and definition clauses towards the beginning, while United Kingdom statutes have these clauses towards the end. In this way it is possible to distinguish the two kinds of statute quite readily according to their individual morphology and the tenor of their respective Statute Books. It would seem at this point, therefore, that the whole matter can be explained by the mechanics of legislative composition. It is not for nothing that metaphysics underlies mechanics, however, and none the less so for Statute Books.

The position of citation, commencement, and definition clauses within a statute, whether among the first or last provisions, is a fairly obvious matter. In this the draftsmen of any legislature can be expected to achieve and maintain consistency as a matter of mechanical control. Indeed in so far as draftsmen tend to be stamped according to the mould of whatever legislature has been their alma mater, they take for granted the position of these clauses within her Statute Book. In being viewed at the most as a matter of domestic convention therefore, the underlying metaphysics affording a free and rational choice between alternatives is forgotten. It is at this point that the two different ways of drafting statutes become confused, for the distinction between substantive and adjectival law is not always so apparent as with citation, commencement, scope, and definition clauses.

Invariably, the confusion between the two ways of drafting statutes is to the detriment of statute law. Each Statute Book must have methodicity and express consistent principles of drafting if the legal fiction of Statute Books is to serve any useful purpose at all. Yet it is just such a confusion between these different ways of drafting, metaphysical rather than mechanical in origin, which attacks the binding by which Statute Books contribute continuity to legal system.

This detriment to statute law is trivial in so far as the statute user is left in some doubt, from one statute to another, where to look for and find substantive, or as it may be, adjectival law. Thus in studying the interpretation provisions of s 129 of the previously-mentioned Building Societies Act 1962 (UK) the statute-user may be forgiven for overlooking that what is meant by the term "mortgage" in applying the Act to Scotland, is determined by s1. Likewise, in being led by s 129 of that Act, s 130 of the Patents Act 1977 (UK), and innumerable other provisions *(b)* to expect the general interpretation clause to occur towards the end of United Kingdom statutes, the statute-user will be disconcerted by the Reservoirs Act 1975, (UK) the Recess Elections Act 1975, (UK) and the Greater London Council (General Powers) Act 1975 (UK) which begin with definitions.The extent to which the United Kingdom statute-user can be disconcerted by this diversity of drafting practice will be clear from comparing the last-mentioned examples with other statutes having the same year of enactment *(c)*. That the confusion extends even beyond this is exemplified by such Acts as the Rent (Agriculture) Act 1976, (UK) throughout which general definitions are so widely distributed as to require an index of them to be included as a Schedule to the Act. *(d)*

Legislatures whose draftsmen emphasise adjectival rather than substantive law, and

to the separation of interpretation provisions, and their distribution throughout an Act, compare the Canadian view (see Driedger,*The Composition of legislation* p.47: "[w]here a statute is divided into parts, each Part may have a definition section . . ." with the view of others who less freely allow exceptions to the general rule that ". . . all definitions necessary for an Act should be assembled in one section where they may easily be found by the reader": Thornton,*Legislative Drafting* p.159.

(b) Eg., s.32(1) of the Policyholders protection Act 1975; s.107(1) of the Children Act 1975; s.168 of the Social Security Act 1975; s.72 of the Adoption Act 1976; s.47 of the Development Land Tax Act 1976 (all UK).

(c) Eg., s.9 of the Mobile Homes Act 1975; s.17 of the Safety of Sports Grounds Act 1975 (both UK).

(d) This form is not infrequent in UK legislation. It is arguable whether the provision of a glossary meets a need which results from the complexity of the legislative policy or rather from the draftsman's failure to provide a proper arrangement for definitions in the Act. "In considering the arrangement of definitions, the draftsman must be primarily concerned with ease of communication. To achieve this, the pepperpot approach must be avoided; it produces a muddled appearance and the scope of the definitions is difficult to see quickly": Thornton, op. cit. p.160.

whose statutes generally begin rather than end with citation, commencement, application, and interpretation clauses are not immune from a confusion between these two alternative ways of drafting statutes. In contrast to the previously mentioned New Zealand statutes exemplifying an emphasis on adjectival law, therefore, one must take account of infrequent instances to the contrary. This may be seen most clearly by comparing a consolidation Act such as the Plants Act 1970 whose form of drafting differs from that of the Orchard and Garden Diseases Act 1928 which it consolidates, and which differs also from the drafting form of the Plant Varieties Act 1973 in pari materia.

An account of these Acts demonstrates that the Orchard and Garden Diseases Act 1928 and the Plant Varieties Act 1973 both conform in their arrangement to the customary emphasis by New Zealand draftsmen on adjectival rather than substantive law. Thus the Orchard and Garden Diseases Act, dealing first with citation and interpretation, goes on to empower subordinate legislation and appoint officers, before dealing in s7 with the eradication of disease. In the same way the Plant Varieties Act, after citation, commencement and interpretation provisions, goes on to bind the Crown, to deal with the application of the Act, to enable the appointment of a Plant Varieties office, to provide for a seal for that Office, to enable the appointment of Registrars and other officers, the publication of a Journal, and like administrative matters, all before issues of substantive law.

On the other hand the Plants Act 1970 is somewhat different, and anomalous in the context of the New Zealand Statute Book. Although the arrangement of citation and interpretation provisions remains the same, substantive provisions, such as s8 dealing with the seizure by an inspector of illegally introduced plant material, preceded provisions empowering the appointment of those inspectors and defining their powers and functions. These administrative provisions are postponed to ss17-23 of the Act. Section 3 of the Newspapers and Printers Act 1955, s3 of the Oil in Territorial Waters Act 1926, and s3 of the property Speculation Tax Act 1973 are further examples of New Zealand Acts which, contrary to the usual drafting arrangement, headline substantive issues before matters of adjectival law.

However detrimental this lack of consistency over the arrangement of statutes may be to statute law, whether in United Kingdom or New Zealand statutes, it does not, as so far explained, cause any more than a mechanical inconvenience to the statute-user. Some may see this as trivial. It is less trivial, however, in so far as a statute-user may misinterpret an adjectival for a substantive provision, or vice versa, according to their respective positions in the statute. The triviality is further reduced in that this sort of misinterpretation leads to mistaking the legislative intent of the statute. If a statute-user has learned to take for granted that his legislature headlines of punchlines the main substantive issues first, he will likely be misled whenever that order is reversed in favour of adjectival law.

More metaphysical and not in the least trivial is the second statute law deficiency caused by this confusion of two distinct drafting arrangements. The result of this is to cut across, distort, and frustrate the separate objectives sought by textual and non- textual systems of drafting.

If it is possible to give a brief, then it will also be an inadequate, explanation of the distinction between textual and non-textual systems of drafting *(e)*. Not only is this one of the most intricate and controversial issues of legislative drafting *(f)*, but one of the deepest issues of metaphysics in legal theory. Whether to follow a textual or non-textual system de-

(e) The most adequate explanation is now that of the Renton Report: see Report of a Committee on the Preparation of Legislation, Cmnd 6053 (London, 1975) Ch. XIII.

(f) The controversy extends to, and is compounded by what is meant by referential legislation. Thus the account of Marshall H.H. and Marsh N.S., "Case Law, Codefication and Statute Law Revision", *Record of Third Commonwealth and Empire Law Conference* (Sydney, 1966) p.407 at p.425 is usually quoted (as by Thornton, op. cit pp. 296-297) to explain textual and non-textual systems of amendment. The account professedly distinguishes, but in practice only further confuses non-textual with referential amendment. See instead now the Renton Report (op. cit.) Ch. XII. Compare Ilbert, Sir Courtenay, *Legislative methods and Forms* (Oxford, 1901) p.259 with Fiennes, Sir John, who in a memorandum to the Select Committee on procedure, 1970-71 (Second Report of the Select Committee on procedure: The Process of legislation, Session 1970-71, H.L. 538 (London, 1972) p.322 wrote ". . . there is nothing so destructive of any logical and coherent arrangement as a continued process of textual amendment." The Renton Report (op. cit.) 13.20 concluded with less emotion and more compromise that ". . . the textual method should be applied as generously as possible . . .". For the separate audiences said to be served respectively by textual and non-textual amendment see Hutton, Sir Noel, "Mechanics of Law Reform" (1961) 24 M.L.R. p.18 at p.21. In Australia the preferred terminology is "incorporable" and "unincorporable" amendment, which breaks through or avoids the fixed positions of the old argument to some advantage.

pends in theory on the answer to this question - which takes precedence words or ideas? The textual system of drafting which is followed by our legislature and taken for granted by the New Zealand statute-user professes that words take precedence. The New Zealand Statute Book is therefore less of a myth and more of a reality than the Statute Books of non-textual systems. The corollary to this is that there can be no amendment to statute law (in a textual system) without an express change of words. The language of the Statute Book determines legal notions, rather than the notion of law determining the language of the Statute Book. In consequence, Parliamentary Counsel in New Zealand change statute law by being first and foremost linguists - however much they may be linguists in the service of law.

On the other hand, a non-textual system of drafting, as operates to some considerable (although not exclusive) extent in the United Kingdom, gives priority to ideas before words. Under this system a change in legal thinking as witnessed by a new legislative enactment will itself occasion whatever changes are required to the existing language of the Statute Book. Of course this system relies both on the common sense logic of consistency, necessity, sufficiency and adequacy, as well as the legal reasoning embodied in the doctrine of implied repeal. In consequence, the Parliamentary Counsel of non-textual systems are lawyers both first and last, and by their practise profess little or no allegiance to linguistics at all. They have a notional rather than a verbal view of law.

A legislature which professes a textual system of amendment, in attaching first priority to words and only a subordinate, secondary, and derivative significance to ideas, will emphasise first the linguistic context of the Statute Book into which any new words are to be introduced. The aim will not be to strike the imagination with the novelty of a new idea, but to show a concern for the existing context of the Statute Book. The textual system thus tends to be conservative rather than radical, in attaching first importance to the existing continuity and consistency of statute law, rather than to exploding it by the irreconcilability of some new idea.

This conservatism is demonstrated by the usual arrangement of New Zealand Statutes which proceeds from adjectival to substantive matters. In this way the new ideas are introduced by preparing a suitable context for their function. The linguistic foundation of the New Zealand textual system is also borne out by the concern for interpretation at the beiginning rather than at the end of a statute.

Conversely of United Kingdom legislative drafting, to the extent that it is non-textual it may be seen to demonstrate a preference for ideas before words. Thus substantive provisions appear before adjectival, for only by exhibiting the novelty of new legal ideas can the doctrine of implied repeal be relied on to amend the existing language of the Statute Book (g). Interpretative and administrative provisions, in being less important and a detracting gloss from the novelty of the notions, come at the end of statutes.

In so far as the position of substantive and adjectival provisions has an effect on textual and non-textual systems of drafting it will be clear that correctness and consistency in arranging these provisions appropriate to the system of drafting will be required. Confusion over their arrangement will have an adverse effect on both systems of drafting.

It is interesting to confirm the reality of this correlation between textual and non-textual systems of drafting and the two ways of arranging statutes considered by this article. This confirmation is to be found in different metaphysical views of definition. The classical view of definition is that the process of definition is notional, achieved after exploration and search for the essence of the subject to be defined, and thus concludes any intellectual enterprise (h). The modern view of definition is that it is an agreement as to the use of words, and in being arbitrary and entirely verbal, is quite divorced from notional reality (i). Definition in modern terms is a means to an end, never an end in itself, and thus begins rather than concludes any intellectual enterprise.

From these two radically different views of definition, classical and modern, it will be clear how interpretation clauses have come to be arranged at the end of statutes drafted notionally (ie non-textually) rather than verbally (ie tex-

(g) This is only very roughly true, for the United Kingdom follows (or purports to follow since it is unclear whether one can be said to follow) three systems (if one can have three systems) of drafting. Some Acts profess the textual method of drafting, some others profess a non-textual method, and yet others do the same thing twice over first textually then non-textually, the latter to give rise to the criticism of Brett R.M. in *Hough v Windus* (1884) 12 Q.B.D. 224.

(h) Aristotle, *Metaphysics*.

(i) Beginning with Ogden C.K. and Richards I.A. *The Meaning of Meaning* (London, 1923). See Robinson R., *Definition* (Oxford, 1954) for a comparison of modern and classical theories of definition.

tually) (j). It will also be clear how the draftsmen of verbal (ie textual) systems see fit to arrange interpretation clauses at the beginning of statutes. Theirs is the modern view of definition. Whether that be true or false they are among today's linguists.

The last statute law deficiency arising from confusion over the two ways of arranging statutes is not quite so deeply metaphysical. It does relate, however, to abstract legal theory. How is substantive law to be viewed in any legal system? it is suggested that for the draftsmen of those legislative systems whose enactments emphasise adjectival law, substantive law has not only the appearance but the reality of being ". . . secreted in the interstices of procedure" (k). In the context of this view of law which Maine applied to infant legal systems, it is interesting to note that its correlation with textual drafting applies to the newer if not infant legal systems of today. Perhaps for New Zealand it is true, as the arrangement of our statutes bear out, that substantive law is secreted in the interestices of delegating powers, appointing officers, instituting procedures and other generally administrative matters. Yet in so far as Parliamentary Counsel in New Zealand confuse their arrangement of statutes so also becomes confused the relationship between adjectival and substantive law.

Rather than conclude by summarising the main points of this article, the author proposes to indicate their significance by suggesting in what way they might promote further inquiry. Thus the emphasis on adjectival law by a textual system of drafting might be examined to see whether it gives rise to a needless, wasteful, and confusing proliferation of statutory corporations, bodies, committees, officers, inspectors and other bureaucratic persons. It may also be that in being concerned with procedures for the resolution of issues rather than directly resolving the issues, an emphasis on adjectival law provokes a wider delegation of legislative power and more subordinate legislation. Lastly, it is suggested that in the way that form is more esoteric than function, and the abstraction of anatomy harder to fathom than the practicality of physiology (which takes account of purpose), an emphasis on adjectival law may compound whatever other difficulties there are in comprehending statutes. In these ways the practicality of the issues raised by this article is left to be judged by their suggestiveness.

(j) This accounts for the *origin* of interpretation clauses towards the end of United Kingdom statutes. It by no means suggests that today's Parliamentary Counsel in the United Kingdom adhere to Aristotelian metaphysics.

(k) Maine, Sir Henry S. *Early law and Custom* p.389 (considered by Maitland, F.W., *Forms of Action*, p.295 to be one of Maine's most striking phrases).

If a [farmer] tenant dies, his neighbours phone the factor with an offer for the land before they phone the widow to commiserate – *Scotsman.*

CORRESPONDENCE

Sir,

I note that while the Economic Stabilisation (Conservation of Petroleum) Regulations 1979 Amendment No 1 restrict the sale of petrol between 7 pm on Friday and 6 am to Monday the Shop Trading Hours (Approved and Special Goods) Order 1979 allows (inter alia) the sale of motor spirits, petrol and oil between the hours of 7 am and 6 pm on Saturdays.

As the former set of regulations were passed before the latter may I presume that the effect of the latter is to impliedly repeal the former and accordingly we are now all free to purchase petrol on Saturdays?

Yours faithfully
H O Lovegrass
Patea

Twisting the tongue – I protest against subjecting the English language, and more particularly a simple English phrase, to this kind of process of philology and semasiology. English words derive colour from those which surround them. Sentences are not mere collections of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put back again into the sentence with the meaning which you have assigned to them as separate words, so as to give the sentence or phrase a meaning which as a sentence or phrase it cannot bear without distortion of the English language. That one must construe a word or phrase in a section of an Act of Parliament with all the assistance one can from decided cases and, if one will, from the dictionary, is not in doubt; but having obtained all that assistance, one must not at the end of the day distort that which has to be construed and give it a meaning which in its context one does not think it can possibly bear. Stamp LJ in *Bourne v Norwich Crematorium Ltd* [1967] 2 All ER 576, 578.