REVIEW OF LEGISLATION.

I. Western Australia.

Introductory.

The second session of the twenty-fourth Parliament again worked very hard. The session opened on the 1st August 1963 and closed at 4.54 a.m. on the morning of the 7th December. In his valedictory speech in the Legislative Council, the Hon. A. F. Griffith, Leader of the Government in that Council, observed that during the session the Council had dealt with ninety-five Bills, and added that there were "too many bills"—a remark which drew an emphatic "Hear, hear" from the Hon. F. J. S. Wise.[1] In point of fact, 103 pieces of legislation were introduced into Parliament during the session, but 8 of these did not reach the legislative council at all. Of the 103, 88 were placed on the statute-book, and 15 fell by the wayside.

A review of the titles of the pieces of legislation which passed the Assembly and the Council shows that, in addition to three separate Acts to amend the various Constitution Acts, there were during the session two amendments to the Criminal Code, two amendments to the Firearms and Guns Act, two amendments to the Reserves Act, two amendments to the Totalizator Agency Board Act, three amendments to the Mining Act, and three to the Traffic Act, and four separate amendments each to the Stamp Act and the Licensing Act. Apparently unnecessary multiplication of amending legislation has been adverted to in this review before now.[2] As it happens, however, investigation of circumstances shows that most of the multiple legislation of 1963 was, in the circumstances, unavoidable. For example, the introduction of the Bill which became the Native Welfare Act required consequential legislation to amend the Firearms and Guns Act, the Criminal Code Act, the Licensing Act and the Mining Act; these ancillary pieces of legislation could hardly have been included in the principal amending Bill for the session. Again the Licensing Act Amendment Bill (No. 3) was a private member's Bill, not a Government-sponsored amendment. There was perhaps also some justification for dividing the subject matter of the other two Bills, the first of which, dealing solely with a matter of revenue, was introduced by the Treasurer, while the second containing amendments to the general law relating to licensing, was introduced by the Minister for

1 (1963) 166 WESTERN AUSTRALIAN PARLIAMENTARY DEBATES (hereinafter referred to as PARL. DEB.) 3823.

2 (1959) 4 U. WEST. AUST. ANN. L. REV. 462.

Justice. Again, although it is ordinarily possible to introduce all legislation relating to reserves in one amending Bill, the first of the two Bills introduced in 1963 to amend the Reserves Act was introduced, as a matter of some urgency, to enable the Government to begin at once the construction of new government offices on the Observatory site. But there does not seem to be any reason why the first of the Bills amending the Stamp Act, although specifically associated with the Dairy Cattle Industry (Butter Fat) Compensation Fund could not have been combined with a later amendment. It is true, too, that the amendments contained in the Traffic Act Amendment Bill (No. 2) were closely associated with the introduction of the Budget; but one wonders whether they could not have been incorporated in the comprehensive amending Bill (No. 3) introduced only six days later.

As usual, the Labour Party, with the Hon. Mrs. R. F. Hutchinson as its spokesman, introduced in the Legislative Council a Bill seeking to extend to all adults the franchise for the Legislative Council. Although the last two attempts by the Labour Party to enlarge the franchise for the Legislative Council had been debated to a division in that Council, after being introduced there, the Hon. A. F. Griffith, on this occasion, sought to foreclose the debate by taking the point that the Bill was one which appropriated revenue and therefore, under section 46(1) of the Constitution Acts Amendment Act could not be originated in the Legislative Council.[3] The President, after taking time to consider the point raised by the Hon. Mr. Griffith, ruled that the Bill was in fact in order, as it came within the framework of existing appropriations, and he gave examples of other Bills, of a sort which involved the expenditure of funds, which were regularly introduced into the House.[4] Mr. Griffith immediately moved to dissent from the President's ruling, but, after further examining the matter, thought better of his dissent (perhaps because of the implications already suggested by the President's reference to other Bills which had been regularly introduced) and withdrew his motion. As might be expected the Bill was defeated after a short further debate, in which the Hon. A. C. Strickland commented upon the amazing paucity of speakers on the Government side. The Hon. Mr. Griffith observed in the course of a very brief speech that he did not support the Bill, nor did he support the principle of it.[5] It therefore seemed somewhat ironical to find him, a little more than three months

3 (1963) 164 PARL. DEB. 728.

4 *Id.*, at 861.

5 *Id.*, at 919.

later introducing into the Legislative Council a Bill which, in the course of reconstruction of the electoral structure of that Council, extended the franchise to all adults. But the irony was not of his making. Little over a week after the Hon. Mrs. Hutchinson's Bill was defeated, by a majority of 3, the Hon. J. G. Hislop, a Liberal member of the Council, moved that the House express its opinion that the Electoral Districts Act be amended so as to redistribute the fifty Legislative Assembly districts in a way which would provide "a more equitable distribution of Legislative Council provinces than obtains at the present time", and that if this were done future elections for the Council could be conducted upon the basis of adult franchise, with compulsory enrolment and voting, and further, that the House request the Government forthwith to introduce legislation to give effect to these suggestions.[6] The motion (with the substitution of the word "should" for the word "could" in the part referring to adult franchise for further elections) was passed after a remarkably short debate; the Hon. Mr. Griffith re-asserting his view that "the contents of the motion . . . are contrary to the principles which were held by the originators or architects of our Constitution."[7] The Government's acceptance of the Council's request led to the introduction of the Bill referred to.

An attempt was made by the Hon. H. E. Graham to alter the qualification for enrolment on the electoral rolls from three months' residence in a district to one month's residence in a district. It met with defeat on the final day of the session. Nevertheless, the Hon. C. W. M. Court undertook (although without making any commitment) that consideration would be given to Mr. Graham's proposals in legislation, then being considered for introduction in the following session, which would make extensive amendments to the Electoral Act.[8]

Two of the defeated Bills related to the health of the community. The Fluoridation of Public Water Supplies Bill provoked lengthy and inconclusive debate, along lines which have become all too familiar, in both the Legislative Assembly and the Legislative Council. Nonetheless, the Bill succeeded in passing the second and third readings in the Assembly and in passing its second reading in the Council. Attempts were made by Labour members of Council to secure the passage of an amendment requiring that before any water supply be fluoridated a referendum of the persons affected be taken; this was

[6] *Id.*, at 1174.
[7] (1963) 165 PARL. DEB. 1343.
[8] (1963) 166 PARL. DEB. 3920.

defeated. But the Bill met a curious fate. The Hon. F. J. S. Wise disclosed that the Bill was supported at the second reading in the Legislative Council, without a division being called for, because it was hoped that in Committee the Council would agree to the proposal for a referendum.[9] This having been negatived, the anti-fluoridation party in the Council proceeded by a majority of one to negative the vital clause 9, described by both the Hon. Mr. Wise and the Hon. Mr. Griffith as the operative clause of the Bill.[10] In spite of this the remainder of the Bill was proceeded with in committee; when, however, the question that the Bill be reported to the House was put, there was an equal division of votes (the Hon. N. E. Baxter, Chairman of Committees, who had voted against clause 9, refraining from voting) and as a result the Bill was defeated. The second of the defeated Bills affecting health was the Drugless Practioners Bill, introduced (together with consequential amendments to the Medical Act and the Physiotherapists Act) by the Hon. Mr. J. T. Tonkin. Mr. Tonkin's Bill was based on existing legislation operative in Ontario, which had been adapted to meet local conditions. The main purpose of the Bill, as described by its sponsor, was to provide that from the date of operation of the legislation nobody should practise as a chiropractor, osteopath, or naturopath, unless registered under the Act.[11] In an interjection in the course of Mr. Tonkin's speech, the Minister for Health, the Hon. Ross Hutchinson, described the then current policy of the Health Department towards such persons as one of "vigilant tolerance."[12] The defeat of the Bill means that such policy will continue in the meantime.

Mr. Tonkin was responsible for the introduction of three other pieces of rejected legislation. The Totalizator Agency Board Betting Act Amendment Bill (No. 2) proposed that revenue from unclaimed dividends should be equally divided between the Old People's Welfare Council and a proposed trust for the benefit of physically handicapped children. An ancillary measure, the Physically Handicapped Children's Welfare Trust Bill, was introduced by him at the same time. Both Bills were eventually discharged from the order paper. Another Bill, the Totalizator Agency Board Betting Act Amendment Bill (No. 3), which sought to provide that the auditor general was to have power to examine the books and accounts of the Board and report thereon to the Minister, was defeated on the second reading on the last day of the session.

9 (1963) 165 PARL. DEB. 2421.
10 *Id.*, at 2421 and 2423 respectively.
11 *Id.*, at 2191.
12 *Id.*, at 2189.

There was rather more debate on the Hon. H. K. Watson's Companies Act Amendment Bill, which proposed to restore to the companies legislation of Western Australia the principle, which had existed for ten years or so before the recent 1962 Companies Act, that when a subsidiary company of a holding company goes into liquidation the claims of the holding company against the subsidiary company should be deferred until the ordinary outside creditors of the holding company were paid in full. The Hon. the Minister for Justice, expressing his opposition to the proposals in the Bill, emphasised the fact that it involved unilateral action by Western Australia which would endanger the fabric of uniformity resulting from the 1962 company legislation.[13] Despite this there was general support in the Legislative Council for the principle of the Bill, which passed its second reading by a majority of nine however. Uniformity, however, gained the day in the Legislative Assembly on the last day of the session, when, after Mr. Court had expressed the Government's opposition to the Bill, the debate was adjourned.

The Hon. E. M. Heenan was another unsuccessful proponent of legislation. His first proposal was an amendment to the Motor Vehicle Third Party Insurance Act which would have added to the Act a section enabling one spouse to sue another and, if successful, to recover damages. Mr. Heenan had to support him, of course, the example of the wisdom of the *English Legislature* in abolishing the rule which had precluded actions between husband and wife,[14] but it was clear from the debates that they started off on the wrong foot by tying this piece of law reform, most desirable in the eyes of the present reviewer, to motor vehicle accidents only, and within that field to third party compulsory insurance only. The introduction of the proposed reform in this context led immediately to concern at possible increases in third party insurance premiums, and the Bill was defeated on the second reading by a majority of four. Mr. Heenan's second proposed piece of law reform was an attempt to amend the Unauthorised Documents Act making it an offence for debt collecting agencies to demand from the debtor a collection fee in addition to the debt. The Hon. Mr. Griffith, in his speech on the second reading, suggested that Mr. Heenan's measure would not only not serve any practical purpose, but might make the situation worse than it was before, in that debt collecting agencies, instead of first making a demand for payment of the debt, might immediately issue a summons involving the debtor in costs greater than the collection fee, costs,

[13] (1963) 164 PARL. DEB. 862.
[14] The Law Reform (Husband and Wife) Act, 1962 (U.K.).

moreover which would be recoverable at law, as the collection fee is not.[15] The Bill was defeated by a majority of three.

The other unsuccessful legislation comprised the Marketing Of Eggs Act Amendment Bill, which proceeded no further than the introductory speech on the second reading, a Local Government Act Amendment Bill, to authorise local authorities to pay for telephone installations and telephone rental for their members, which was opposed on grounds that the provision might be abused and was defeated on the last day of the session, and an Industrial Arbitration Act Amendment Bill, embodying proposals, first brought before the Legislative Council in 1960, to provide minimum penalties for second (and subsequent) offences under the Act. This Bill, too, met defeat.

I. CONSTITUTIONAL.

The Electoral Districts Act Amendment (No. 69 of 1963) makes provision for the re-division of the state into 15 electoral provinces instead of 10; each electoral province is to return two members to the Legislative Council instead of three. The redistribution is to be carried out by electoral commissioners, appointed in accordance with section 2 of the principal Act, in such a way that the metropolitan area is to contain five electoral provinces, three of which are to contain four contiguous electoral districts and two of which are to contain five contiguous electoral districts;[16] the agricultural, mining, and pastoral area is to consist of eight electoral provinces, each of which shall consist of three contiguous electoral districts; and the North-West area is to be divided into two electoral provinces, one of which is to comprise two contiguous electoral districts, out of the three which at present constitute the North-West area under the principal Act, and the other of which is to contain the remaining district and the Murchison district, which for this purpose is removed from the agricultural, mining and pastoral area. This reconstruction of the Legislative Council necessitated amendments to section 8 of the Constitution Acts Amendment Act, 1899, so that in future there shall be only two elections for the Legislative Council, instead of three, in each six yearly period. This in turn involved an alteration of the provisions governing the retirement of present members of the Legislative Coun-

15 (1963) 165 PARL. DEB. 1431.

16 This, at least, appears to be the intention of the Legislature; but what it has said, in the new sec. 11A(3) (a) is that "the Metropolitan Area shall consist of five electoral provinces, each of which shall consist of at least four [*i.e.*, 4, 5, 6, ... or so on] or not more than five [*i.e.*, 1, 2, 3, 4, or 5] contiguous electoral districts."

cil. The new sections 8 and 8a of the Constitution Acts Amendment Act, 1899, added by sections 5 and 6 of the Constitution Acts Amendment Act (No. 2) (No. 72 of 1963) extend for one year, the terms of office of the members who would normally have vacated their seats on the 21st May 1964, and provide that five of the members who in the ordinary course of events would have vacated their seats on the 21st May 1966 are also to vacate their seats on the 21st May 1965. The five members chosen to retire early are defined by section 8a(1) as those who in the 1960 elections obtained in a contested election the smallest "winning margin percentage." The other five (who include any who may have been elected unopposed) will not vacate their seats until May 21st 1968, when the third group of ten will vacate their seats. By a new section 8b each of these last 15 may apply to the Governor, within 14 days after the 1965 general election to the newly constituted provinces, certifying the province for which he desires to sit. If two of such members elect to sit for the same electoral province the Chief Electoral Officer is to draw lots to determine which is to be preferred. After the necessarily elaborate—perhaps in places over-elaborate—provisions necessary to effectuate these amendments, section 8 of the Act effects the most simple and far-reaching amendment of all. It repeals and re-enacts section 15 of the principal Act so as to introduce adult suffrage for the Legislative Council, and, as a necessary corollary to the abolition of the property qualification, introduces the "one man, one vote" principle into Legislative Council elections.[17]

Acts Nos. 45 and 46 of 1963, the Constitution Act Amendment Act, 1963, and the Constitution Act Amendment and Revision Act, 1963, make certain amendments necessary to enable the long overdue reprinting of the Constitution Acts to be carried out. In the light of the provisions of the preceding Acts it is a little strange to read in section 5 of the latter Act (which was assented to on the 3rd December 1963) a provision that the State should be divided into ten

[17] The exclusion of these two principles from the process of electing members of the second Chamber was the product of a political philosophy which believed that those who had an interest in the State, in the form of the holding of land, ought to have an opportunity through their representatives of checking hasty or ill-considered legislation put forward by the representatives of the great majority, who, because they held no land, were thought to have little interest in the true welfare of the State; in addition, the more extensive a man's holding of land the more weight his vote should carry. It is extraordinary, in going back over the debates of more than 30 years, to see how often this argument, in its various guises, appeared in opposition to all proposals to reform Legislative Council suffrage; for an early example see the speech of the Hon. V. Hamersley (1929) 83 PARL. DEB. 1567. Unsound ideas die hard.

electoral provinces each returning three members, when this was amended by Act No. 72 of 1963 assented to 11 days later. One would have thought that one bite of the cherry would have been enough; but perhaps the Government was not sufficiently certain that it would be able to introduce the more elaborate legislation in time. It is hardly likely to have been uncertain of its passage through both Houses.

II. ADMINISTRATION OF JUSTICE.

Reciprocal Enforcement of Foreign Judgments.

Provision for the reciprocal enforcement of judgments is at present contained in Part 8 of the Supreme Court Act 1935, but this will cease to apply when the Foreign Judgments (Reciprocal Enforcement) Act (No. 12 of 1963) is proclaimed to come into operation. The new legislation results from the decision of the standing committee of Federal and State Attorneys-General that uniform legislation to this effect be introduced in all states and in the Australian Capital Territory.[18] The principal difference between the present legislation and the new Act appears to be that, whereas under section 148(2) of the Supreme Court Act 1935 the Court was forbidden to order registration of a judgment if certain conditions prevailed, the new Act makes the existence of these or similar facts grounds for setting aside the registration of the judgment. The Court is, however, forbidden, by section 7(2), to register a judgment if at the date of the application it has been wholly satisfied, or if it is a judgment of such a nature that it may not be enforced by execution in the country of the original court. A registered judgment is of the same force and effect as an original judgment in the Supreme Court for purposes of execution; the like proceedings may be taken on it, the sum for which it is registered carries the like interest, and the Supreme Court has the same control over its execution, as in the case of an original judgment. Execution is not to issue, however, so long as it is competent for any party to make application to have such registration set aside, or, if such application has been made, until it is disposed of. In addition execution may not issue if there is an order staying execution in force in the court which originally gave the judgment. Where

18 *Per* the Hon. C. W. M. Court (1963) 164 PARL. DEB. 1070.

19 Namely (i) that the original court acted without jurisdiction (ii) that the judgment debtor did not submit to the jurisdiction (iii) that the judgment debtor was not duly served (iv) that the judgment was obtained by fraud (v) that an appeal was pending or intended (vi) that the cause of action was not one which would be entertained by a Western Australian court.

the registered judgment is expressed in a currency other than Australian currency it is to be registered for a sum in Australian currency calculated by reference to the rate of exchange prevailing at the date of judgment of the original court.

The new Act applies not only to the United Kingdom and Commonwealth countries but also to foreign countries, provided that the Governor is satisfied that similar arrangements exist in the Commonwealth country or foreign country for the enforcement of Western Australian judgments, and extends the operation of the Act to that country by Order-in-Council.[20] By section 6(3) no judgment may be registered unless it is final and conclusive as between the parties, directs the payment of a sum of money which is not payable in respect of taxes or of charges of a like nature, or in respect of a fine or other penalty, and is given after the coming into operation of the order directing that the Act shall extend to the country whose court gave the judgment.[21] Section 9 of the new Act specifies the cases in which a registered judgment may be set aside; they are (1) that the judgment is not one to which the Act applies, or that it was registered in contravention of the provisions of the Act; (2) that the court which delivered the original judgment has no jurisdiction; (3) that the judgment debtor, whether or not he was served with process, did not have sufficient notice of the proceedings to enable him to defend and did not appear; (4) that the judgment was obtained by fraud; (5) that the enforcement of the judgment would be contrary to public policy in Western Australia and (6) that the rights under the judgment are not vested in the person making application for registration. There is a curious provision to the effect that the judgment may be set aside if the court is satisfied that the matter in dispute in proceedings in the original court has, before the date of judgment in the original court, been the subject of a final and conclusive judgment by a court having jurisdiction in the latter.[22] It seems that the case which the Legislature had in mind was one in which courts of two different countries have jurisdiction in respect of a particular cause of action, and the plaintiff, having unsuccessfully brought his action in country A, tries again in country B and succeeds (the defendant

20 Sec. 6 (1) and (2).

21 Judgments emanating from superior courts in the United Kingdom, and from the courts of any Commonwealth country to which Part 8 of the Supreme Court Act 1935, had already been applied by Order-in-Council, are registrable under the new Act irrespective of the date on which they were given; this appears to be the result of a rather awkwardly worded (and probably superfluous) subsec. (4) of sec. 6.

22 Sec. 9 (1) (b).

either not raising, or raising unsuccessfully, the existence of the preceding judgment) and then seeks to register his judgment in Western Australia.

Section 9(2) and (3) provide the detailed rules for determining when a foreign court shall or shall not be deemed to have had the jurisdiction. In an action *in personam* the foreign court will be deemed to have had jurisdiction (a) if the judgment debtor submitted to the jurisdiction by voluntary appearance (otherwise than for the purpose of protecting property or obtaining the release of property seized or threatened with seizure, or of contesting the jurisdiction); (b) if the judgment debtor were plaintiff in the original proceedings or had counter-claimed; (c) if the judgment debtor had before proceedings began agreed to submit to them; (d) if the judgment debtor was, at the time of the original proceedings, resident in the country of the court which delivered judgment (or if the judgment debtor were a body corporate, had its principal place of business in that country); (e) if the judgment debtor had an office or place of business in the country in question and the transaction was effected through or at that office or place of business. In an action relating to immovable property, or an action *in rem* relating to movable property, the court will be held to have had jurisdiction if the property were situated in the country where the court was at the time of the original proceedings. In respect of any other proceedings (for example proceedings determinative of status) the original court (*i.e.*, the court which delivered the judgment in question) is deemed to have had jurisdiction if its jurisdiction is recognized by the law of Western Australia.[23] Sub-section 3 expressly provides that the original court[24] shall not be deemed to have had jurisdiction[25] (1) if the subject matter of the proceedings was immovable property outside the country of the original court[26] (2) in some, but not in all, cases, if the bringing of

23 Does this paragraph do any more than state the obvious? Incidentally, proof-reading slipped in the first line of this paragraph and "judgment" appears as "judment."

24 The subsection says "the courts of the country of the original court"; this is tautologous.

25 "Shall be deemed not to have jurisdiction"? Why can draftsmen not put the negative in the correct place when "deeming"?

26 This is puzzling, in the light of the preceding subsec. 2(b); if the court is deemed to have jurisdiction in an action concerning immovable property, or an action *in rem* concerning property of either class, if the property was situate in the country of that court, surely by force of the maxim *expressio unius est exclusio alterius* it has not jurisdiction in such actions if the property was situate outside that country? Perhaps the intention of the Legislature is to invoke that maxim so as to provide by indirection that a court may be deemed to have had jurisdiction in an action *in rem* in

proceedings of the original court was contrary to an agreement under which the disputed question was to be settled otherwise than by such proceedings and (3) if the judgment debtor, being entitled under the rules of public international law to immunity from the jurisdiction of the original court did not submit to that jurisdiction.

Section 12 provides that any judgment of a court of a country to which the Act has been applied, whether registered or not, (indeed whether registrable or not) is to have effect in the courts of Western Australia as *res judicata* between the parties, unless the judgment has in fact been registered, and the registration was set aside on grounds other than that a sum of money was not payable under it, that it had been wholly or partly satisfied, or that it could not be enforced by execution in the country of the original court. Such a judgment will also not be *res judicata,* though it has not been registered, if registration would have been set aside on any ground other than the three set out immediately above, and this can be shown to the court.

Section 13 is interesting for its oblique reference to the doctrine of reciprocity, as a foundation for the common law recognition of foreign judgments, enunciated by the Supreme Court of the United States in the leading case of *Hilton v. Guyot*[27] a doctrine which has never found favour with English courts. It empowers the Governor to order that except insofar as he may otherwise direct by that order, no proceedings shall be entertained in any court in Western Australia for the recovery of any sum alleged to be payable under a judgment given by the court of a country which appears to the Governor to accord to judgments of the Supreme Court of Western Australia treatment, in respect of recognition and enforcement, substantially less favourable than that accorded by the Supreme Court (under the principles of the Common Law) to judgments of its courts.

Section 14 empowers and requires the Supreme Court to issue to a judgment creditor a signed copy of any judgment which he desires to enforce in the courts of any country to which the Act applies. Such a certificate is not to issue while execution of the judgment is stayed for any period, either pending an appeal or for any other reason.[28]

respect of movable property even though that property is outside the country of the court. But if so, why not say so directly: and if not, why not express the statutory intention elegantly by using the word "only" before "if" in para. b. of subsec. 2?

27 (1894) 159 U.S. 113.

28 This is, no doubt, the intended effect of sec. 14(2); but what the section says is that while execution of a judgment is stayed "an application shall not be made under this section with respect to the judgment." Although

Criminal Law.

The strictures passed by Wolff C.J., on section 84 of the Police Act, 1892, in the course of his judgment in *Higgon v. O'Dea*,[29] have at last borne fruit, almost two years after the judgment was handed down.[30] Section 4 of the Police Act Amendment Act (No. 42 of 1963) deletes from section 84 the words making it an offence to allow persons under the age of 16 to be in any house, shop, or place to which the public have resort, and adds a new subsection (2), creating the more narrowly-defined offence, in the "occupier, keeper, or person having the charge of a shop or other place of public resort," of knowingly permitting or suffering a child apparently under the age of 16 to enter

it may be assumed that in most instances these words may be construed as speaking to members of the legal profession, telling them what they should not do, it seems curiously inapt to preclude what it was no doubt desired to preclude, mainly, the issue of the certificate by the court. The subsection as it is presently drafted does not make it clear whether the making of an application is an illegal act, intended to attract a penalty under sec. 177 of the Criminal Code, nor whether the application made in contravention of this subsection is to be treated as invalid; this latter point is important because the court is under an obligation to issue the certified copy of the judgment when it receives an application. It is always unfortunate when draftsmen do not say clearly what they mean, and doubly so when the Act in question is a piece of uniform legislation.

29 [1962] West. Aust. R. 140, at 142; referring to the section, Wolff C.J. said: "What becomes abundantly clear is that it is an offence for anyone—

"to have or keep a place of public resort

. . . . . .

(b) where juveniles under 16 are permitted to enter, ...

I believe that it may well be desirable, in the interest of peace and good order, to legislate to prevent juveniles from entering into or congregating at certain types of place of public resort where they may be exposed to influences by which they may be corrupted.

But enough has been said to indicate that the provisions of sec. 84 in so far as they relate to the activities of children, if interpreted literally and enforced without discrimination, could operate so absurdly, unjustly and unreasonably that they cannot be regarded as an appropriate means of curing such a mischief.

I therefore trust that the legislature may take early steps to correct the objectionable features of the section, substituting if need be legislation which is more specifically directed to remedying evils which it may be desirable to eradicate."

30 The judgment was handed down on 22nd November 1961; the Act in question was assented to on 25th November 1963. Two years' delay after the passing of judicial strictures on the unreasonableness of the Act is bad enough; but the fact that the section has made involuntary criminals of (among others) generations of storekeepers, and the administrators of the W.A.N.F.L. and the W.A.C.A., has been known for years; and it is scandalous that successive Ministers and Commissioners of Police should have sat complacently by and allowed this thoroughly unsatisfactory piece of legislation to remain on the statute-book for so long.

and remain there under circumstances which indicate that the mental, physical or moral welfare of the child is likely to be in jeopardy.

The amending legislation also contains provisions intended to suppress the growing practice, among city-dwellers, of wandering all over country farms in search of mushrooms, a practice which has become increasingly irksome to farmers and has in the past few years brought an increasing crop of angry letters to the paper each autumn. A new section 82A in the principal Act makes it an offence to enter the enclosed land of another and cause damage or injury to certain classes of property thereon.[31] The offender is liable to a fine not exceeding five pounds, and must pay to the party aggrieved the value of the property damaged. Even if a trespasser has done no damage, he is bound, on demand by the owner, occupier, or person in charge of the land, to give his name and address; refusal to do so (or the giving of a false name and address) is an offence.[32] For some unfathomable reason, the final subsection of the new section 82A provides that "The provisions of this section shall be read and construed as in aid of, and not in derogation from, the provisions of section eighty-two of this Act, and not in derogation from the rights of a person[33] at law." It is difficult to see what effect the draftsman thought section 82A might have on section 82; perhaps he envisaged an implied repeal *pro tanto*. It is even more difficult to see what the last phrase means; subsection (1) expressly excludes from its ambit a person who acts with lawful excuse, so that to that extent the phrase appears otiose, and one simply cannot see what other situations the draftsman envisaged.

The provisions of section 82A apply only to "enclosed land" as defined: this means land enclosed or surrounded by a fence, wall or other erection,[34] or surrounded partly by a fence or wall and partly by "some natural feature, such as a river or cliff, by which the

31 The property in question is described as that referred to in sec. 82. But sec. 82 has three subsections; subsec. (1) refers to fences and gates; subsec. (2) to such things as growing trees shrubs and plants, and fruit and vegetables, to which sec. 2 of the amending Act adds mushrooms and other fungi. Subsec. (3), however, speaks of goods, wares, and materials committed to the care of an artificer, workman, journeyman, apprentice, or other person; was it intended that these, too, should fall within the ambit of the new sec. 82A?

32 To give a false name and address *is* to refuse to give one's name and address; but the tautology is probably inevitable.

33 What person? The only "person" mentioned specifically in the section is the "person" who trespasses, and the "person" in charge of the land. Did the draftsman mean "any person"?

34 Would these words include a hedge?

boundaries thereof may be known or recognized." Presumably a road is not such a "natural feature," so that the section cannot be prayed in aid by city-or town-dwellers whose properties have no fences and gates on the road frontages.

Legal Practitioners.

The Legal Practitioners Act Amendment Act (No. 15 of 1963) is intended to put beyond any doubt the power of the Barristers Board to make enquiries as to the suitability for readmission to the legal profession of a person who has at some time been struck off the Roll, or suspended from practice, and wishes to be placed on the Roll again, or to have his suspension lifted. It is now expressly provided by an amendment to section 33 of the principal Act that the applicant for readmission must satisfy the Board that he is a fit and proper person to be readmitted.[35] The Board is empowered, by a new subsection 2, to make its own enquiries concerning the fitness of the applicant for readmission to be readmitted, and for the purpose of such enquiry to summon and examine witnesses.

The above legislation, creating, as it does, two new minor offences, is perhaps not of very great importance. Far more important and far-reaching are the provisions of the Offenders' Probation and Parole Act (No. 23 of 1963). Hitherto, Western Australia has lagged behind many other countries, from the point of view of penology, in that it had no probation service. The new Act remedies this. In addition, it sets up a Parole Board, to succeed the Indeterminate Sentences Board constituted under section 6A of the Prisons Act 1903. The new legislation is closely modelled on the corresponding Victorian legislation Part IV of the Crimes Act, 1958, (which re-enacted the Penal Reform Act 1956). A number of sections of the local act appeared to have been lifted *verbatim* from the Victorian Act, and a few of its infelicities have also been copied.[36]

Probation and Parole.

The probation service is to be administered by Probation Officers (including a Chief Probation Officer and a Deputy Chief Probation Officer) appointed under the Public Service Act 1904. Parole is to be

35 The amendment reads "[that] the applicant . . . has satisfied the Board that he is, in the opinion of the Board, a fit and proper person to be readmitted. . . ." Shades of Liversidge v. Anderson! One wonders how members of the Legislature thought the applicant could satisfy the burden cast upon him.

36 *E.g.*, the unnecessary and tautologous provisions in secs. 6 (6), 31 (1), and 35 (6); *cf.* secs. 507 (5), 526, and 533 (5) of the Crimes Act 1958 of Victoria.

administered, under the superintendence of the Parole Board, by Parole Officers, including a Chief Parole Officer, also appointed under the Public Service Act. Section 6(2) and section 35(2) provide that a person may be appointed to hold more offices than one under the Act; the intention is presumably that Probation Officers shall also act as Parole Officers.[37]

In addition to the salaried service, sections 6(3) and (4) and 35(3) and (4), provide for the appointment of anyone, other than a police officer, who is a clerk of petty sessions or an officer under the Child Welfare Act 1947, as an Honorary Probation Officer or Honorary Parole Officer. The appointment is to be made only in respect of a locality or district, specified in the appointment, more than 50 miles from the Perth Town Hall;[38] but unless otherwise directed in the appointment any such honorary officer may exercise and discharge his duties anywhere in the state.

It is contemplated that any court which convicts a person may, before sentencing him, ask the Chief Probation Officer for a report on him and his background, and section 8, therefore, authorizes the Chief Probation Officer to prepare and submit such a report to the court. Notwithstanding the provisions of section 126 of the Child Welfare Act 1947, the report may disclose the fact that he has previously been committed to the care of the state, or to an institution, or has been convicted under that Act. It is not mandatory upon the court to obtain such a report. Whether or not it has obtained a report, it may, after convicting a person of any offence punishable by a term of imprisonment (otherwise than in default of a fine) make a probation order in respect of that person in lieu of sentencing him. The order will require him to be under the supervision of a Probation Officer for a specified period of not less than one year and not more than five years, and will specify a convenient court of petty sessions to act as the supervising court. Only a magistrate may exercise the jurisdic-

[37] It is not clear why it is thought necessary to repeat, in sec. 35(2), what has already been said in identical terms in sec. 6(2). Moreover, the provisions themselves are awkwardly worded: "a person may be appointed under this Act to hold one or more offices under this Act." To say twice that a person may be appointed ("under the Act" is surely superfluous) to hold *one* office under the Act looks silly. It would have been better to have said "to hold more offices than one under this Act." But it still needs to be said only once.

[38] One can foresee some little difficulty in determining exactly (if exact determination becomes necessary) what is meant by a "locality or district . . . located more than 50 miles from the Town Hall in Perth." How are the boundaries of a "locality" or "district" to be determined; and must every part of it be more than 50 miles from the Town Hall?

tion of a court of petty sessions under this provision. In general the most convenient court of petty sessions will be that nearest to the place where the probationer intends to reside, but the court making the order may consider some other court to be, in point of fact, more convenient. A probation order may also require the probationer to comply with such requirements as the court making the order considers necessary, and in particular (i) may require that the probationer submit himself to medical, psychiatric or psychological treatment, (ii) may require that the probationer pay damages for injury or compensation for loss caused by his wrongful act, on such terms and conditions as the court thinks fit, and (iii) may require that he reside in some specified place or in an institution. A court making a probation order must, before it makes the order, explain to the offender, or have some other person explain to him, in language which he will readily understand, the effect of the order and of any additional requirements which the court proposes to impose, and the fact that if he fails to comply with the requirements of that order, or commits another offence during the period of probation, he will be liable to be sentenced for the offence in respect of which a term of probation has been imposed upon him as well as for the subsequent offence. The offender must express his willingness to comply with the proposed requirements of any probation order before the court may make it.[39]

Once an order is made the court is to give a copy of it to the probationer, and is to send a copy to the Chief Probation Officer, and, if the probationer is required to live in any institution, the person in charge of that institution. A copy of the order is also to be sent to the supervising court, if it is a court of petty sessions other than the court imposing the term of probation. The Chief Probation Officer is then to assign a Probation Officer to supervise the probationer during the period of the order; he may from time to time replace that Probation Officer with another. While the Probation Officer is supervising the probationer under the order he is subject to direction by the court which made that order.[40]

It has not always been the case that persons convicted of offences, either summary or indictable, have necessarily been sentenced to the appropriate period of imprisonment or to pay the appropriate fine. Sections 19 and 656 of the Criminal Code allow a person to be discharged upon entering into recognizances to keep the peace or to appear and receive judgment if called upon, and section 669 of the

39 See sec. 9 (1) to (8) of the Act for the details of the scheme outlined in this paragraph.

40 See sec. 9 (9) and (10).

Code allows for conditional discharge of a first offender upon a similar recognizance. By section 10 these powers are not to be used if the person concerned could properly and conveniently be released on probation.

A probation order is automatically discharged at the expiration of its term, provided that its requirements have been complied with and the probationer has not committed any other offence during its currency. An order may also be discharged by the court by which it was made (as defined in section 11) upon application either by a Probation Officer or by the probationer. If as a result of a breach of probation order, either by failure to comply with its terms or by conviction of some other offence, the probationer is sentenced in respect of the offence for which the order was originally issued, the order is similarly to be discharged. If a probationer changes his place of residence, there is power in the supervising court to appoint another convenient court of petty sessions as supervising court.

Section 14 allows for the amendment of a probation order by the supervising court, at any time, upon the application either of the supervising Probation Officer or the probationer himself. The amendment may either cancel any of the requirements imposed upon the probationer by the order, or add or substitute other requirements, or extend the probation period for a term not exceeding five years; the term of a Probation Order may not be reduced. The consent of the probationer is required to any amendment imposing the requirement that the probationer reside in an institution, and, if additional requirements are imposed on the application of a Probation Officer, the probationer must express his willingness to comply with the requirements of the proposal to be included in the amended order before it is made. It would appear that if the probationer refuses to comply with such a proposed requirement there is nothing that can be done about his refusal, and the original probation order must continue unamended, although no doubt its terms may be extended.

Sections 16 and 17 lay down the procedure to be followed when a breach of a probation order is committed. There are two classes of breach; failure to comply with any of the requirements of the probation order made in respect of the offender, which is dealt with under section 16,[41] and conviction of the probationer of another offence committed during the probation period, which is dealt with in section 17. Under section 16 the offending probationer may be

41 Sec. 16 (1) says "has failed to comply with all or any of the requirements." Surely "all or" is redundant.

fined not more than £10 for breach of a probation order, which then continues unimpaired, or may be dealt with for the original offence, either by the supervising court (if the probation order was made by a court of petty sessions) or by the Supreme Court or a Court of Session, if the order was made by one of such courts. A probationer who is convicted, in Western Australia or elsewhere, of an offence committed during the probation period, and is sentenced or otherwise dealt with for that offence, is to be brought before the court by which the probation order was made (or the supervising court if the former court was a court of petty sessions) and that court may then deal with him for the offence in respect of which he was originally put on probation.

Section 20 of the Act makes it clear that if a person is convicted for an offence and a probation order is thereafter made, the conviction is not deemed to be a conviction for the purpose of any enactment either imposing, or authorizing or requiring the imposition of any disqualification or disability upon him as a convicted person. Thus, if a person were put on probation for the offence of driving a vehicle under the influence of drink or drugs (under section 32 of the Traffic Act 1919) his licence could not be suspended nor could he be disqualified from obtaining another licence.[42] Section 20(4) provides a right of appeal for a person who is aggrieved by a summary conviction, in a court of petty sessions, for an offence in respect of which a probation order is made.

Part 3 of the Act makes provision for the parole of offenders. The Parole Board, which, by section 32, is made the successor of the Indeterminate Sentences Board constituted under Part VI A of the Prisons Act 1903, but which has much wider powers, is composed of a judge nominated, with his consent, by the Chief Justice of the Supreme Court,[43] the Controller General of Prisons, and 3 other men. When the Board is dealing with a general matter, or with the case of a male prisoner, these three men are to sit; when, however, the Board is dealing with a female prisoner, two of them are to be replaced by two women appointed by the Governor. The judge, who is chairman of the Board, holds office until death, retirement, or resignation;

42 But it would, no doubt, be a requirement of the probation order that he should not attempt to obtain a renewed licence, nor drive a vehicle, for a period specified in the order.

43 The curious requirement that the judge must consent to his nomination is lifted from the Victorian legislation; see sec. 521 (2) of the Crimes Act 1958. It does not seem an appropriate matter for legislation; *cf.* the new sec. 108A (2) of the Industrial Arbitration Act 1912, inserted by sec. 108 of Act No. 76 of 1963.

provision is made for the appointment of another judge as a temporary substitute if the first judge is incapacitated or is unwilling to act in a particular case.[44]

Section 28 provides that at a meeting of the Board the Chairman and two other members constitute a quorum. This again is copied from the Victorian Legislation (although the rather silly statement, in section 523 (2) of the Victorian Act, that a quorum shall consist of the Chairman and *at least* two other members of the Board has been appropriately corrected). It does not appear to have occurred to the Legislature that it might have been desirable to require that at least one of these members should be a woman if the case of a woman is to be dealt with. The Board is to act by a majority, except when any question of law arises for determination; this is reserved to the Chairman alone. The Chairman has a casting vote in the event of any equality of votes.

The operation of the parole system is made to depend upon the fixing, by the court which convicts a person of any offence and sentences him to be imprisoned, of a minimum term of imprisonment, during which he is not to be eligible to be released upon parole. It is

[44] Sec. 23 (1) and (2). Subsec. (2) also authorizes the appointment of a judge to be an acting member "if there is a vacancy in that office"; the intention is, presumably, to authorize a temporary appointment until a suitable permanent appointment can be made under subsec. (1).

Subsecs. (1) and (2) are adopted, with some modifications, from the Victorian model (the Crimes Act 1958, sec. 522 (1) and (2)). Subsec. 3 is a local invention which strongly suggests that whoever was responsible for it was not quite sure what he was doing. It reads:—

"If the member referred to—

a. in paragraph (a) of subsection 2 of section twenty-one of this Act, ceases to hold office of judge

b. in paragraph (b) of that subsection, ceases to hold the office of Comptroller-General that member shall be deemed to have vacated his office as member."

Apart from the curious variations of syntax (*cf.* "office of judge" with "the office of Comptroller-General"), and the ridiculous verbosity ("the judge who has been nominated a member" (subsec. 1) has become "the member referred to, &c."—sixteen words to say what has been said in eight, and "his office as member becomes vacant" in subsec. 1 has become "that member shall be deemed to have vacated his office as member"—twelve words, including an incorrect use of "deem" instead of six) the subsection is, except that it provides for one remote possibility, quite unnecessary. Subsec. 1 has already provided for the death, retirement, or resignation of a judge; the only remaining contingency is removal from office, and if this were in contemplation (which is doubtful) it could be taken care of by three additional words in subsec. 1. The Comptroller-General as such is a member (sec. 21 (2) (b)), and if any person holding that office ceases to be Comptroller-General he automatically ceases to be a member.

mandatory to fix a minimum term (unless the term of imprisonment imposed is less than 12 months, when it is discretionary) but section 37(2) provides that the court need not fix a minimum term if it considers that the nature of the offence and the antecedents of the offender make this inappropriate. Further, a court is precluded from fixing a minimum term in respect of a person who at the expiration of any term of imprisonment imposed upon him is to be detained during the Governor's pleasure (whether as an habitual criminal or not) or a person who is to be imprisoned for life. A person in respect of whose imprisonment no minimum term has been fixed is, of course, not liable for parole. All persons already in prison, other than (i) those in prison for life (including those whose imprisonment for life is the result of a commutation of a death sentence), (ii) those who have less than 12 months of their term of imprisonment to serve, and (iii) those who are to be detained during the Governor's pleasure at the expiration of their term of imprisonment, whether as habitual criminals or otherwise, are (by section 47) to have their cases reviewed by the Board, which is to fix a minimum term in respect of their imprisonment. In fixing a minimum term for such persons the Board is to have regard to the possible effect of the remission regulations under the Prisons Act 1903, so that the minimum term does not extend beyond the date at which the prisoner would have been eligible for release under those regulations. The Board is required, by section 50, to determine these minimum terms within a reasonable time. The section goes on to provide that a person is not entitled to be released, or to have any cause of action, by reason only that the minimum term is not determined "at any earlier time." If this means, as apparently it means, an earlier time than the "reasonable" time this suggests that a prisoner may have a cause of action[45] if the Board does not determine his minimum term within a reasonable time; but presumably this was not intended by the Legislature.

Section 41 empowers the Board to release on parole any prisoner undergoing a sentence of imprisonment in respect of which a minimum term has been fixed at any time after the expiration of the minimum term, it may also release on parole any person, whether a habitual criminal or not, who is being detained pursuant to the Governor's pleasure, and any person who is serving an indeterminate sentence under section 662(b) of the Criminal Code. A prisoner released on

45 For false imprisonment? or breach of statutory duty? The whole idea seems so absurd that one wonders why the reference to a cause of action was inserted. Query, whether in those circumstances an offender could claim to be entitled to his release.

parole is to be under the supervision of a Parole Officer[46] until the date on which his term of imprisonment would normally expire. If he is a prisoner detained at the Governor's pleasure, or under an indeterminate sentence, the period of parole is two years. A parolee is to comply with any requirements inserted in the parole order. Whatever other requirements the Board may see fit to impose, it must insert in every order a requirement that the parolee shall not frequently consort with reputed criminals or persons of ill-repute. A prisoner serving a life sentence, other than a life sentence for murder or a life sentence resulting from commutation of a death sentence, may by section 42 be released on parole at any time by the Governor on the recommendation of the Board. The parole period is not to exceed five years. The Board is empowered by section 44 to cancel or vary a parole order at any time before the parole period expires; if a parolee is sentenced to another term of imprisonment in respect of any offence committed during the parole period, whether within or without Western Australia, his parole is automatically cancelled. Upon the cancellation of his parole he is returned to prison to serve the balance of his original sentence from the time of operation of the parole order; that is to say, the period during which he has been on parole is not regarded as being part of his term of imprisonment. If, however, he completes the parole period without its being cancelled, and without committing any offence for which he is sentenced to imprisonment, he is to be regarded as having served his term of imprisonment and is free.

Persons who at the date of coming into operation of the Act are on leave of absence under section 64 (h) or (k) of the Prisons Act 1903, or who have been released from a Reformatory Prison on probation under section 666 of the Criminal Code, continue to be subject to the provisions governing them, but the Parole Board is substituted for the Indeterminate Sentences Board as the body to deal with their cases.

By section 39 the imposition of a minimum sentence automatically excludes the operation of the remission regulations under the Prisons Act 1903 in respect to the term of imprisonment in question.

One important duty of the Board, under section 34(2), is to make reports on persons who are found not guilty on the ground of insanity but are kept in custody during Her Majesty's pleasure, upon persons whose sentences have been commuted to life imprisonment, and upon persons sentenced to life imprisonment under the Code.

[46] The assignment of parole officers to parolees is to be made by the Chief Parole Officer, not by the Board: sec. 41 (4).

The Act, in effect, provides the machinery and the general outlines of a probation and parole system. The details are left to be filled in, partly by the making of rules by the judges, under section 53. One matter upon which specific regulation making power is given is the reduction of minimum terms fixed in accordance with the Act as an incentive to or reward for good conduct or industry; these regulations, it is expected, will follow the lines already laid down by the remission regulations under the Prisons Act 1903.

Consequential amendments are made to the Prisons Act 1903, by Act No. 22 of 1963 and to the Criminal Code, by Act No. 21 of 1963.

E.K.B.

(To be continued.)