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THE FUTURE OF LEGAL AID

The present system of criminal legal aid as it operates in our Courts is, in my opinion, unfair to defendants, humiliating for lawyers and embarrassing for Judges or Magistrates. I have three basic objections to the present system and present a single proposal for its reform.

My first objection is that nowhere in the Offenders Legal Aid Regulations 1972, in terms of which the present system operates, or in the Offenders Legal Aid Act 1954, under which the Regulations were made, is there established any clearly defined criterion for the grant of criminal legal aid. Section 2 of the Act directs the Court to have regard to the interests of justice, the means of the person charged, the gravity of the offence, and any other circumstances that in the opinion of the Court are relevant. Applicants for criminal legal aid are required to specify basic details of their financial circumstances, but it is not possible as a general rule to advise a defendant whether or not he qualifies for legal aid unless he is being held in custody or is out of a job, in which cases refusal of legal aid is rare. Where, however, a defendant is in work the grant of legal aid becomes much more discretionary. It seems to me that some basic guidelines ought to be laid down, on the basis of which one could assess a defendant's potential eligibility for legal aid. In the case of civil legal aid the criteria regarding disposable income and disposable capital are sufficiently clear so that an application may be made with reasonable confidence in the majority of cases. This is not the case with criminal legal aid.

My second objection to the present system relates to what I submit is an imbalance in the prescribed fees in favour of defended cases as opposed to pleas of guilty. Allowances for preparation, together with the fees payable per half day for the actual conduct of a defended case, result in a not unreasonable reward for the criminal advocate whose client elects to plead not guilty. But the vast majority of legal aid assignments result in pleas of guilty, with the counsel assigned appearing to plead in mitigation. Any lawyer who has spent any time in the criminal Courts would confirm that a plea of guilty often involves as much work and worry as a defended case. In addition to one's interview or interviews with the defendant himself one may have to speak to his doctor, console his anxious relatives, arrange for and peruse a psychiatric report, appear in Court to obtain remands and prepare one's own submissions on sentence. The usual fee for all this is $13.10. If the lawyer involved is a partner in a firm that fee will not even pay half his share of the firm's overheads which have accrued during the time he has spent on the case, let alone remunerate the lawyer and his partners. The inevitable consequence of this is that the great bulk of legal aid pleas of guilty are handled by inexperienced lawyers who are not yet too valuable to their firms to be whipped off the legal aid list. A partner in a firm who continues to remain on the legal aid list performs a voluntary act of public charity at his own and his partners' expense. This is surely wrong. The criminal legal aid system should not have to depend upon the inexperience of junior practitioners and the charity of senior ones.

My third objection to the present system relates to the dreaded three-tiered scale. The regulations provide for three scales of fees. To take an example, the Scale I fee for a plea of guilty is $8.75, the Scale II fee is $13.10 and the Scale III fee is $17.50. After a lawyer has completed his assignment he is obliged to ask the Court which scale it is prepared to award. In deciding which Scale it should award the Court is obliged to have regard to the seriousness of the offence, the complexities of law and fact involved, and the skill, labour and respon-

sibilities of the practitioner in the conduct of the case. There are other considerations but these are the main ones. The necessity of having to invite his Worship to fix a scale, after one has ended one's golden eloquence on behalf of one's client, is extremely humiliating. One feels like a nervous actor at an audition, asking the producer whether one's performance was good enough to get one the part. Fortunately Magistrates seldom reply—don't call us, we'll call you, but the procedure is still highly embarrassing and I have it on the authority both of a Judge and a Magistrate that they find the procedure as distasteful as do counsel. Furthermore, it serves no real purpose as almost everyone gets Scale II, unless they are either appallingly bad or impressively senior.

A fourth objection relates not to the details of the scheme itself but to its promotion and publicity. The voluntary duty solicitor scheme operated in Christchurch and other centres ensures that those most in need of criminal legal aid are at least aware that the scheme exists. Much more, however, should be done to make all citizens aware that a criminal legal aid scheme exists and that legal advice is not a privilege reserved for middle class accused. The New Zealand Law Society, the District Law Societies and their members are doing a tremendous amount in this regard—what they need is massive and continuing assistance from the Justice Department to educate the public into an awareness of the assistance which the State provides for those who come into conflict with its laws.

I turn now to my one suggestion for reform of the criminal legal aid system. It is not original or peculiar to me, which is one of its merits, and it is perfectly simple, which is the other. It is this. The existing system of civil legal aid should be extended to cover criminal matters as well. There seems to be no justifiable basis for the present discrimination between civil and criminal work. One suspects that the discrimination is based on the unspoken feeling that criminal defendants, most of whom are convicted and are therefore by definition criminals, do not deserve as comprehensive a system of legal aid as is available to civil litigants. There is surely no justification for this distinction. A person facing a charge on which he will be imprisoned if convicted is surely entitled to the same quality of legal advice as a woman asking a Magistrate to determine the amount of her maintenance. Therefore I suggest that the Offenders Legal Aid Act should be abolished and the Legal Aid Act 1969 extended to cover criminal proceedings. The following benefits would, in my submission, flow from this:

(1) Criminal counsel would be properly remunerated for legal aid work with the result that more experienced counsel would be attracted back to criminal work.

(2) Criminal defendants would be able to instruct the counsel of their choice, instead of being obliged to accept whatever counsel is assigned to them by the Court.

(3) An invidious distinction between criminal and civil legal aid would disappear.

(4) Criminal legal aid would become available to a wider range of defendants.

(5) The abolition of the Offenders Legal Aid Regulations would, like the abolition of slavery and hanging, mark a significant step upwards in mankind's ascent towards a higher state of human consciousness.

A K GRANT

CASE AND COMMENT

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

Contract—Was clause void as against public policy—Did it offend the underlying principles of winding up under the Companies Act 1955?

Underwood & Son Ltd (In Liquidation) v The Attorney-General (the judgment of Mahon J was delivered on 29 June 1973) is an interesting decision on the ambit and operation of the doctrine of public policy in the law of contract. The Liquidator of the plaintiff company sought to recover the balance of the contract price accruing under a contract entered into with the Ministry of Works to build a number of State housing units at Mangere. The defence was that by virtue of a term in the contract payment was conditional on the plaintiff having satisfied the defendant's engineer inter alia that: "Progress payments or other sums due to subcontractors had been paid".

The plaintiff sought a declaration that the said term when read in conjunction with another clause which gave the defendants a discretion to pay progress payments or other sums due from the plaintiff to subcontractors, was

void as being: (1) against public policy in that it contravened s 293 of the Companies Act 1955; (2) in breach of general bankruptcy rules, as its effect was to prefer one unsecured creditor to another; (3) an agreement having the effect of perverting the course of justice, in that it was a contract with a tendency to affect the due administration of justice; (4) an agreement having a general tendency to offend against the principles of pari-passu distribution.

Mahon J rejected the plaintiff's first submission by holding that s 293 of the Companies Act was inapplicable. Section 293 states:

> "Subject to the provisions of this Act as to preferential payments, the property of a company shall on its winding up be applied in satisfaction of its liabilities pari passu and subject to such application, shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company."

His Honour held that since the payment was only conditional on obtaining the Engineer's certificate, it never became the property of the plaintiff company. His Honour said:

> "But if the contractual term effectively precludes the contract moneys becoming part of the assets of the company without the concurrence of the Ministry's Engineer then the question of purported interference with the liquidator's rights of disposal cannot ex hypothesi arise."

Alternatively his Honour thought, following F B Adams J in *Re Walker Construction Co Ltd (In Liquidation)* [1960] NZLR 523, that the section did not reflect any considerations of public policy; the statutory requirement of pari passu payments declared by s 293 was a matter of private right which might be renounced as the creditor thought fit.

His Honour then proceeded to reject the plaintiff's second submission that the clause was in breach of general bankruptcy rules. He refused to accept the plaintiff's proposition (citing *8 Halsbury's Laws of England,* 3rd ed 129, para 223) that this clause was in fraud of the general body of creditors. The contract had been entered into with the plaintiff company as a going concern, and this situation had nothing whatever to do with fraudulent agreements devised on the eve of liquidation for the purpose of defrauding the general body of creditors.

The plaintiff's third proposition (viz, that this was an agreement having the effect of perverting the course of justice in that it affected the due administration of justice) was also rejected. His Honour gave two reasons for so doing: (1) the agreement was far removed from the category of those on which the plaintiff had relied. (The plaintiff had cited *8 Halsbury,* 136, para 237). (2) There could be no question of interfering with the future administration of the company's assets if the payment was only conditional—and that condition had not been complied with.

His Honour then dealt with the plaintiff's fourth submission—that the condition was void as having a general tendency to offend against the principles of pari-passu distribution. Whilst it would be too narrow a statement to say that the categories of public policy were closed, his Honour thought the doctrine ought only to be invoked in clear cases. Though his Honour did not dispute the proposition that a promise might be struck down as being against public policy where it merely creates a tendency towards the commission of a harmful act, one dominant consideration of public policy was pacta sunt servanda. "A mere possibility that a subsequent promissory act may be against the public interest if performed in a particular manner cannot affect the right of each contracting party to stipulate for the perofrmance of an obligation ex facie valid. The time to examine the validity of a contractual condition is when the contract is made."

The test, his Honour thought, was whether the clause in question would lead in the generality of cases to acts against the public interest. In this case the answer in his Honour's judgment was no.

> "The contract was made with a solvent company and . . . the contemplated performance of the conditions relating to the subcontractors merely involved the payment of those creditors directly or indirectly by the Ministry of Works, whose overriding and entirely proper purpose it was to protect subcontractors from the consequences of possible insolvency on the part of a Contractor and to place them in the same position as subcontractors entitled to the protection of the Wages Protection and Contractors liens Act 1939."

His Honour therefore rejected the plaintiff's fourth submission and held that the clause in the contract was valid and enforceable. He consequently refused to grant the plaintiff his declaration or award him the balance of the contract price.

By way of comment it is evident that his Honour thought that the clause in question was

inserted specifically to "protect subcontractors from the consequences of possible insolvency on the part of a contractor". One might think that in those circumstances there could be only *one* aim in drafting the clause and that was to prefer some unsecured creditor to the remainder. Why then wasn't the clause held void? There is much to be said for the position taken by his Honour that in deciding whether any given clause is against public policy, it is proper to balance on the one hand the purpose of inserting the clause—to make the Ministry of Works stand in the same shoes as any other contracting party who would be bound by the Wages Protection and Contractors Liens Act 1939—with the resultant effect of upholding the clause—that it undoubtedly does aim to prefer one unsecured creditor to another. One might then conclude that, on balance, policy dictated upholding this clause.

The second comment that might be made on that part of his Honour's judgment rejecting the plaintiff's first submission (that the condition was void as against s 293) is that it has the appearance of begging the question. The plaintiff's action was for a declaration that the condition was void; if it was, then he is owed the contract sum. It appears illogical to decide the question whether the condition was valid by assuming that the condition is valid and, holding that because it is, the contract price never became payable and therefore never became the company's property. If the clause was void, then the money was the company's property. Whether or not the clause was void depends on balancing the policy behind s 293 and the merits of upholding the particular condition in question.

F D

Tort—Trespass to Land—Exemplary Damages

Claims for trespass to land, especially ones arising out of such an unusual fact situation as was present in *Superior Homes Ltd v Upjohn* (the unreported judgment of Cooke J was delivered on 26 July 1973) are not common in New Zealand. The action also involved a consideration of the question of exemplary damages (and appears to be the first New Zealand decision since the House of Lords decided *Cassell & Co Ltd v Broome* [1972] 1 All ER 801). In the area of exemplary damages may questions are still unanswered but nevertheless this case is not without interest.

The plaintiff was in the business (on a comparatively large scale) of building homes. Its method was to sell a section to a potential house-owner with whom it then entered into an agreement to build a house for the home owner on the section so purchased. Under the terms of the agreement exclusive possession of the land was given to the plaintiff for the necessary period during which the house was to be erected. (In the situation involved in the action this included the period during which the dispute arose). By an agreement between the plaintiff and the defendant (who was a "franchise" builder) the defendant had agreed to erect part of the dwellinghouse (mainly basic carpentering and and building work) and to supply some of the necessary materials, but this agreement in no way purported to surrender any part of the plaintiff's possessory rights over the land.

After building had commenced disputes arose between the plaintiff and the defendant. When the house was nearing completion, the defendant boarded up the back door in an endeavour, as he admitted, to prevent the plaintiff and his subcontractor from entering, but also with the intention of delaying the completion of the house (by that means the defendant hoped that he would extract money from the plaintiff which he claimed was due to him). The plaintiff retaliated by breaking in and changing the locks. For several days a struggle went on and the locks were changed more than once by each side.

During the course of these events the plaintiff wrote to the defendant stating that his right to be on the property was terminated and that if he did enter (without specific consent) proceedings for trespass would be issued.

The defendant admittedly treated this letter with contempt, and a few days later an interlocutory injunction (which was effective) was issued restraining him from going on the land.

The action was brought to claim damages for the period prior to the granting of the injunction, and for exemplary damages under the second head in *Rookes v Barnard* [1964] AC 1129 on the ground that the defendant had, among other things, taken the law into his own hands and acted high-handedly.

It was necessary for the learned Judge to consider the question of possession, and the nature of the defendant's right to be on the land. His right to be there was virtually a contractual licence, and in spite of some conflicting authority to the contrary the learned Judge concluded that the licence could be revoked effectively, even although the revocation might amount to a breach of contract (see *Cowell v Rosehill Racecourse Co Ltd* (1937) 56 CLR 605 and *Mayfield Holdings Ltd v Moana Reef*

Ltd [1973] 1 NZLR 309. The learned Judge then held that the defendant was in fact a trespasser ab initio, as in his opinion (for which he had ample support) the *Six Carpenters' Case* (1610) 8 Co Rep 146a was still good law, and was authority for the proposition that where a person enters with a licence, but abuses his rights under the licence, he becomes a trespasser ab initio. This, it appeared, was how one could describe the actions of the defendant.

This decision is of some considerable importance as cases where a trespass to land is alleged are not common today, and some textbook writers (including Street, *The Law of Torts* (5th ed) p 35) have said that the doctrine of trespass ab initio is of little practical relevance today; but a case such as this one does illustrate that the doctrine can be of relevance today, since clearly the point of time from which trespass is deemed to have taken place may have an effect on the award of damages.

Because damages was an essential part of the claim in this case, the learned Judge found that he had to give consideration to the law relating to damages. A claim for exemplary damages had been made but Cooke J pointed out that these are not awarded as of right, and in the present case he concluded that a liberal award of special damages was all that was warranted to cover the loss suffered. For that reason he did not have to consider whether *Cassell & Co Ltd v Broome* (supra) had affected the law relating to exemplary damages in New Zealand (it had been alleged that the claim fell within the second category allowed in *Rookes v Barnard* [1964] AC 1129 but whether or not these cases are the law in New Zealand is still a moot question—see *Fogg v McKnight* [1968] NZLR 330, 333 per McGregor J).

The judgment does add something to our understanding of two somewhat uncertain areas. MAV

Tort—Negligence—Duty of care—Attempt to create a new category of liability based on a wrong to someone else

That the tort of negligence has not withered away and that there may still be room for new areas of liability is illustrated by the recent Court of Appeal decision in *Marx v Attorney-General* (the unreported judgment of the Court, McCarthy P, Richmond and Beattie JJ was delivered on 3 October 1973). In that case the attempt was not successful, but inherent in the judgment of the Court there is the strong implication that on another fact situation such an attempt might be more successful, since in the instant case the real stumbling block was the fact that the claim was really based on a wrong done to another. (It was made quite clear by the House of Lords in *Bourhill v Young* [1943] AC 92 that this is always likely to be an impassable barrier.)

The Court of Appeal had been asked to consider whether a wife could succeed against her husband's employer for physical manhandling and the associated injuries which she suffered as a result of his mental disturbance caused by his injuries due to negligence (for which his employer was liable to him).

Briefly, the husband of the appellant had been injured at work when a counter-weight fell from a ladder causing another object to fall onto the husband, causing him severe head injuries. In so far as the husband was concerned, his employer, the Railways Department, accepted that the accident was caused by the negligence of its servants. The appellant herself personally claimed that as a result of the brain damage her husband had suffered he began to sexually and in other physical ways assault her causing injuries which necessitated her having to have several operations. Accordingly she alleged that for these the Attorney-General ought to be liable, and she claimed $6,000 general damages together with special damages. Unfortunately, from the appellant's point of view, the Court of Appeal could not accept the legal basis for her submissions, and her claim did not succeed.

From the way the matter had been argued in the Supreme Court Mr Justice Henry concluded that the claim was essentially one for loss of consortium, for which, it was held by the House of Lords in *Best v Samuel Fox and Co Ltd* [1952] AC 716, a wife has no claim. (In any event since then the Accident Compensation Amendment Bill (No. 2) 1973 will abolish the action for loss of consortium.)

Mr Justice Henry had also considered whether, if the claim was one for damages for personal injury it was based on a breach of a duty of care, but he concluded that no duty of care was owed to a wife in circumstances such as had arisen, and he therefore rejected the claim. It was from this latter ruling that the appeal was brought.

On appeal counsel for the appellant argued that the claim was solely a negligence claim and that the wife was a person who it was reasonably foreseeable might be ill-treated by her husband as a result of his head injuries.

In any unusual situation in which negligence is alleged, argument invariably begins with the

famous statement of Lord Macmillan that "the categories of negligence are never closed (see *Donoghue v Stevenson* [1932] AC 562 at 619). The instant case was no exception, but as the learned President pointed out, a defendant is not liable for all consequences to which his act contributes. The Court then made a detailed study of the question of the circumstances in which a duty will be held to exist (it gave consideration to Prosser, 4th edition as well as to a number of authorities including its own earlier decision in *McCarthy v Wellington City* (infra).

Once again McCarthy P stressed that in deciding whether a duty of care is owed is invariably a question of judicial policy. At page 5 of the unreported judgment he said: "It is possible to argue, though I do not want to be thought (sic) that I necessarily agree with the proposition, that the department should have foreseen the injuries to which Mrs Marx was subjected by her husband. However, though foreseeability is a necessary precedent condition in negligence, it is not the determinant of duty. Whether in a particular case a duty is owed is a question of law, and will in many cases be decided in accordance with contemporary judicial policy. This I tried to say in *McCarthy v Wellington City* [1966] NZLR 481. I still hold that this is so."

Clearly the Court of Appeal thought that the appellant's claim was derived from her husband's injuries. Counsel for the respondent had argued from the principle well-established by the leading authorities of *Bourhill v Young* [1943] AC 92 and *Palsgraf v Long Island Railroad Co* (1928) 248 NY 339, that no one can build a claim upon a wrong suffered by another, and the Court accepted this.

On the other hand counsel for the appellant had argued that this principle should be departed from, and in circumstances such as the ones which arise in this case a new category of duty should exist towards those in the "family or geographical circle at the time of the accident". Although there is a degree of support for this proposition to be found in cases such as *Malcolm v Broadhurst* [1970] 3 All ER 508 (but in that case the wife had herself been injured in the accident), the Court was reluctant to open up the categories of negligence in such a way, for as McCarthy P stressed:

> "The proximity which is relied upon as a justification would prove difficult to confirm, for the same logic as is adopted for its creation could justify its extension to all those with whom an injured man is constantly in contact. . . . The possibilities opened up by such a category are indeed most extensive."

Although the appeal was disallowed this case is a very interesting one because of the attempt made to persuade the Court of Appeal to extend the range of the categories of negligence, and for the insight the judgments of McCarthy P and Beattie J give as to the nature of the judicial process. In this case it was probably true that it was not a situation to which a duty should have been held to exist, but as the learned President said:

> "Of course, the Common Law must live and develop. New categories of negligence *will* be created. But the justification for allowing claims such as the present seem to me to be insufficient, and I would hold that this action cannot succeed in law."

The great advantage of the tort of negligence is its flexibility, and the judgments of the Court of Appeal in this case illustrate that negligence is still alive, and that in the future (in spite of the impact of the Accident Compensation Act) it will be developed and extended. MAV

Relief against refusal to renew a lease

In *Vince Bevan v Findgard Nominees Ltd* [1973] 2 NZLR 290, the Court of Appeal considered certain aspects of the relief jurisdiction given by the Property Law Act 1952, s 120. Basically, the facts were that the appellant had purported to exercise the right of renewal contained in its lease after the expiry of that lease, but while it still held over as a monthly tenant. The respondent refused to grant the renewal and the appellant applied for relief under s 120.

The Court first held that under s 120 (3) (b) one of the conditions precedent to the Court's jurisdiction is that the lessor's refusal be on the ground of the lessee's failure to perform or fulfil the covenants, conditions, and agreements required to be kept by the lessee before the right of renewal can be exercised. This is the only ground of refusal against which the Court is empowered to grant relief. The Court made it clear that the failure need not be actual; it is enough if it is "purported" (p 298) or "alleged" (p 302). But it is essential that this is the ground for the refusal and that the ground has been communicated to the lessee, though this may be done either expressly or by implication (pp 296, 297, 299, 303). In the present case, the Court found, by a majority (Turner P dissenting), that the lessor had given no reason for his refusal so that the condition precedent to the Court's jurisdiction was not fulfilled.

In addition to these findings, which formed

the ratio of the case, their Honours made a number of important obiter statements regarding ss 120 and 121. First, it was pointed out that although the lessee cannot claim relief under s 120 where the lessor has not given reason for his refusal, the lessee is not without remedy. He should then resort to the contractual remedy of specific performance open to him in any event, and if the statement of defence shows that he comes within s 120 he may amend his statement of claim to include a prayer for relief accordingly (pp 300 and 301).

The second point relates to the relationship between ss 120 and 121. The three month period under s 121 does not begin to run until a refusal has been given which gives the Court Jurisdiction under s 120 (3) (b). Time cannot begin to run until the lessee is able, within the terms of the statute, to make an application for relief (pp 300 and 301). Section 121 then has the effect of a limitation provision so that no application can be entertained if made more than three months from the date of the refusal (p 298).

Thirdly, the Court emphasised that the provisions of s 120 are to be read and applied with a large and liberal interpretation. Aspects of sums (2), (3), (6) and (7) were pointed to as indications that the Legislature intended the Court to be placed in a position to do justice so far as possible between the parties (pp 297 and 299). DWMcM

Caveatable interests

In *Catchpole v Burke* (Supreme Court, Auckland, 20 July 1973) Mahon J considered whether a sub-purchaser (ie, a person having a contract to buy land from a person who in turn was a purchaser under an agreement for sale and purchase from the registered proprietor) has a caveatable interest under s 137 of the Land Transfer Act 1952. His Honour began by considering the nature of the interest of the purchaser in direct contractual relations with the registered proprietor and used as a starting point s 41 of the Land Transfer Act. This provides that no "instrument shall be effectual to pass any estate or interest in any land under . . . this Act" until registration. His Honour found that this must include equitable estates or interests, so that it is not correct to say that an agreement for sale and purchase executed by a registered proprietor passes the equitable estate to the purchaser. It merely gives the purchaser a contractual right, enforceable in equity, for the transfer to him of the statutory title to the land. The authority cited for this is *Orr v Smith* [1919] NZLR 818. It is respectfully submitted that though this may be the correct interpretation of s 41, there are other authorities the other way which might have been considerd. In part the answer turns on the meaning of "instrument" which may, under the definition given in s 2 and other judicial interpretations (eg, *Cuthbertson v Swan* (1877) 11 SALR 102, 117) be seen to relate only to instruments in statutory form and not to affect the consequences in equity of entering into a binding agreement for sale and purchase. Even Hosking J, who decided *Orr v Smith,* was not so certain in the later case of *Taylor v Commissioner of Stamps* [1924] NZLR 499.

However, even in the form of a contractual right enforceable in equity, the purchaser can sustain his right against the registered proprietor regardless of the indefeasibility of his title. The right comes within the in personam exception to indefeasibility protecting persons in direct contractual or trust relationships with the registered proprietor, an exception which has long been recognised and was confirmed by the Privy Council in *Frazer v Walker* [1967] NZLR 1069, 1078. Mahon J found that it is because a purchaser under an agreement for sale and purchase comes within this exception that he has a caveatable interest.

From this point, his Honour went on to consider the situation of a sub-purchaser and found that the in personam exception is limited to persons in direct contractual or trust relations with the registered proprietor and so would not include a sub-purchaser who could not have a caveatable interest. This was held to be so even though the sub-purchaser may be able to compel his vendor to obtain specific performance from the registered proprietor. It is respectfully submitted that it is probably right to limit the in personam exception to situations where there are direct relations with the registered proprietor, but, again, there are decisions which suggest a wider ambit for the exception, eg, *Shepheard v Graham* [1947] NZLR 654, and it would have been helpful if these could have been considered.

It is strange that a judgment on whether a person has a caveatable interest does not consider the wording of s 137 of the Land Transfer Act which defines these classes of persons entitled to lodge a caveat. The words relevant to the present case are "Any person claiming to be entitled to or to be beneficially interested in any land, estate, or interest under this Act by virtue of any unregistered agreement . . . may . . . lodge . . . a caveat . . . ." The judgment does not fully explore the exact nature of the interest.

if any, of a sub-purchaser and, indeed, there are surprisingly few cases which throw any light on the subject. However, there are at least some indications that a sub-purchaser may in certain circumstances claim the rights of an assignee, and claim specific performance directly against the head-vendor if he undertakes all the obligations of the head-purchaser (*Naismith v Smith* [1954] VLR 567; *Stonham on Vendor and Purchaser,* para 1318). A sub-purchaser might then have some beneficial interest in the land sufficient to support a caveat. Mahon J had expressly pointed out that the position would be different if the purchaser had assigned his interest in the contract with the registered proprietor because the assignee would then have acquired the purchaser's right by subrogation.

However, in the present judgment, the sub-purchaser joins the persons, like the registered proprietor himself (*Re Haupiri Courts Ltd No 2*) [1969] NZLR 353), who require the right to lodge a caveat against dealings, but are denied it on the interpretation of the Act.

DWMcM

Motor vehicle accident insurance—A question of safety

It is common in motor vehicle accident insurance to have an exception in the policy exempting the insurer from indemnifying against any accident occurring to the vehicle "whilst" it is "being driven in an unsafe condition". This clause has been interpreted to give considerable protection to the insurer. Thus, no causal connection need be shown between the particular accident and the unsafe condition: *Parsons v Farmers Mutual Insurance Assn* [1972] NZLR 966. Nor need the insured have knowledge of the unsafe condition for the exemption to apply: *Trickett v Queensland Insurance Co Ltd* [1936] AC 159. That such interpretations might well be considered unreasonable by the insured or even the officious bystander does not seem to have weighed heavily with the courts. As was said in *Wright Stephenson & Co Ltd v Holmes* [1932] NZLR 815, 822: "It may not be the construction that would be placed upon this unusual clause by the average layman on a cursory perusal of his policy. But that does not appear to be the test of its correctness or otherwise." Paradoxically, a more liberal rule appears now to apply to a negotiated contract made by parties of equal bargaining power: *Dimond Manufacturing Co Ltd v Hamilton* [1969] NZLR 609, 623.

The need for such broad exceptions is to immunise the insurer against what it considers to be unmeritorious claims. Included in this category are claims where suspicion is rife but proof is lacking. The facts are frequently in the possession of the insured but the rose-tinted hue which he bestows upon the incident is often not matched by the insurer's state of satisfaction about its true causes. Of course, the insurer's suspicions may on occasions be unjustified and an insistence on the exception may work unfairly. In other situations, the insurer may make an ex gratia payment where strictly speaking the insurer falls within the terms of the exception but in the insurer's opinion there are mitigating circumstances. However, nothing short of legislative interference seems likely to change the apparent philosophy behind these exception clauses. Why insurers bother to seek judicial interpretation of the amorphous phrases contained in such clauses instead of redrafting more broadly is a matter of speculation.

The Court of Appeal in *The State Insurance General Manager v Harray* (CA 72/72; McCarthy P, Richmond and Beattie JJ; judgment delivered 19 October 1973) had to deal once more with the elusive concept of "unsafe condition". The appeal was with leave from a judgment of Roper J reported at [1973] 1 NZLR 276 affirming a judgment for the insured. The vehicle in question had two bald tyres, the third being described as "border-line", and the fourth satisfactory. The accident occurred in dry conditions in the course of a 130-mile day trip. The insured intended making the return trip the following day. Three facts appeared to be common ground. The bald tyres were not proved to have caused or contributed to the accident. Nor was the vehicle in an unsafe condition at the time of the accident, having regard to the dry conditions and the nature of the road. Had the road been wet, then the vehicle would have been in an unsafe condition because of its unsatisfactory tyres. The insurer did not put his case on the basis of this last hypothetical fact situation. He would have met with little success had he done so, for as Myers C J indicated in *Trickett v Queensland Insurance Co Ltd* [1932] NZLR 1727, 1731, in a passage quoted by McCarthy P in the present case, whilst defective brakes would render a car unsafe in all conditions, defective lights would not render it so during daytime. Instead, the insurer argued that lack of safety had to be judged either by reference to the ordinary contingencies of day-to-day driving or in the light of the use being made of the vehicle and the journey undertaken. It was not unreasonable to expect in a journey of this length different road surfaces and pos-

sibly inclement weather which would render the car unsafe. The time when unsafeness was to be judged was presumably immediately before setting out on this journey. Affirming Roper J, the Court of Appeal in separate judgments unanimously rejected these arguments and accepted the insured's argument that the clause was temporal in nature and that accordingly unsafe condition must be judged solely in the light of the circumstances existing at the time and place of the accident. In a review of the authorities, the Court concluded that the actual decision in *Yaxley v NZ Insurance Co Ltd* [1973] 2 NZLR 231 was not to be doubted, although some of Quilliam J's dicta in that case appeared less restrictive than the test the court laid down in the instant case.

One hopes that this spate of cases upon the meaning of this one phrase will shortly end. The hope is likely to be futile. For, as Richmond J pointed out at the end of his judgment, even on the restricted test laid down by the Court, "it is possible that questions of some difficulty could arise as to the various matters to which regard may properly be had." Perhaps it is time the clause was redrafted adding the proviso that whether a vehicle is being driven in an unsafe condition is to be decided by the insurer having regard to all circumstances it thinks fit. Or for maximum flexibility, since few insured bother to read their policy or understand it if they do bother, perhaps all the specific exceptions should be scrapped and a more general clause inserted: "the insurer shall not be liable to indemnify the insured whenever in its opinion it deems it unreasonable to do so." DV

Real estate agent—Agent for whom?

At first sight it is hard to imagine a stronger case for a real estate agent recovering his commission on a completed sale than what occurred in *Markham v Dalgety Ltd* (CA 71/72; McCarthy P, Richmond and Beattie JJ; judgment delivered 9 October 1973). The first instance judge, Henry J, had awarded it commission. Henry J had found that the seller of the land understood that he would have to pay the agent commission. McCarthy P in the Court of Appeal further said that he had "some sympathy" for the agent's claim that it was "largely instrumental in bringing the vendor and purchaser together, and one would like to see them [sic] rewarded for their services". Further, the agent had drawn up the option to purchase which was the foundation for the final sale, and had inserted in the document a clause that "it is acknowledged that this sale is made through the agency of Dalgety-Loan Ltd MREINZ and commission is to be paid on $80,000 at completion of the agreement". This document was signed both by optionor and optionee. Admittedly the solicitors for the parties changed the terms of the eventual sale apparently without the agent's active help, but it is well settled that an agent has no duty to continue in the negotiations once he has brought the parties together and their solicitors have taken over the matter: *McGrail v Lewis* [1922] NZLR 1160, 1168. Why then did the Court of Appeal unanimously reverse the judgment of the Supreme Court and hold the agent not entitled to his commission?

The problem, as the Court saw it, was simply this: undoubtedly the agent was acting as agent for someone, but for whom—vendor or purchaser? Initially, the agent heard that the prospective purchaser was looking for land and took him round a number of sites. The agent found out that the vendor was interested in selling his property and what his asking price was. It then obtained the parties' signature to the option agreement. However, no formal letter of appointment was signed by the vendor and the surrounding circumstances were too equivocal to amount to an instruction by the vendor to act as his agent. Richmond J said that it is common for a property owner to receive inquiries from land agents whether he is interested in selling his property to the agent's "client". The owner's intimation that he is willing to sell at a fixed price does not amount to appointing the agent as the owner's agent. However, liability may arise as a result of a special contract to pay commission entered into between the agent and the owner. Thus, if the agent says that in the event that he effects a sale, he expects the owner to pay him his usual commission, this will be sufficient to establish a special contract if the owner assents to the agent's proposal, although it will not amount to an appointment as the owner's agent. (The contract will naturally have to be evidenced in writing: Real Estate Agents Act 1963, s 79). There are, as Richmond J pointed out, two ways for the agent to get commission: one by proving an agency from which a contract to pay the usual commission would be implied, the other by proving a special contract to pay commission, without needing to prove agency. In this case, no special contract was alleged, and the agent relied solely on the claim that it was the vendor's agent to sell his property. The onus was firmly on it to prove the agency. The acknowledgment in the option was of no help. If there was any

dispute as to who brought about the sale, the acknowledgment would probably have amounted to an admission by both signing parties that it was the respondent. But on the crucial point of whose agent the respondent was, the acknowledgment was silent. McCarthy P summed up the matter succinctly thus:

> "If Dalgetys intended to look to appellant for their [sic] commission, their right to do so should have been put beyond all doubt, either by obtaining the signature of appellant to a form of authority to sell, or by incorporation in the documents of sale of a sufficiently explicit statement. In the present case they have not done this, and I find it impossible to say that they have discharged the onus of proving agency. For this they cannot blame anyone but themselves."

For the same reason, the acknowledgment was in any event not sufficient to amount to a writing for the purposes of s 79 of the Real Estate Agents Act 1963. For this reason, too, the agent could not succeed in his claim.

The moral of the case is clear for estate agents: unless they wish their services to be regarded as gratuitous, McCarthy P's words will have to be taken firmly to heart.

DV

Consent to a minor's marrying

It will be recalled that Stout CJ said in *In re a Petition of AB* (1915) 34 NZLR 384 that the law did not permit religious coercion or persecution in the context of withholding parental permission to marry. In the light of this statement, it is interesting to read the case of *Re B* (1972) 20 FLR 178 decided by the Queensland Supreme Court. The applicant minor desired to marry a Miss R, who was also a minor. There was a very strong attachment between them and it was not a recent one, having developed over a number of years. Miss R was pregnant to the applicant. The applicant impressed the Court as being of considerable maturity for his age. Though likely to have financial problems in their immediate future, these were no greater than those of many others in their situation. It was the applicant's father who refused consent. He had always been at least nominally a Mohammedan, but had recently become more attached to that religion and actively practised it. The applicant, though nominally of the same faith, had in fact never been instructed in, or practised, that religion. Moreover, his mother adhered to the Church of England and the applicant himself had undergone secondary education at a Roman Catholic school, with the net result that his religious contacts had been mainly with Christian religions and that, while he apparently did not specifically adhere to any religion, he believed in the Bible. Miss R was a Roman Catholic and unprepared to give up that faith.

The applicant's father, however, stipulated that the marriage must take place, if at all, under Mohammedan rites, that Miss R changed her religion and also assumed a Mohammedan first name and that any children should be brought up as Muslims. He had no objection to her as a daughter-in-law. Kneipp J stated:

> "I think that it is plainly unreasonable on the part of the applicant's father to wish to impose on the applicant, as a condition of his consent to the marriage, a religion which the applicant has never practised, although nominally he may have belonged to it, and to wish to impose on Miss R the same religion, whereas in fact she has always actively been an adherent of the Catholic religion. It is very important, I think, that the applicant's father has made no objection whatever to Miss R as a daughter-in-law. It appears that he merely wishes to use the situation in order to impose his own religion on her and on his son. Of course what I say is in no way in denigration of that religion, which no doubt the applicant's father sincerely believes in, and which has many millions of adherents. What I think is unreasonable is the endeavour . . . to impose it on persons who do not wish to have it imposed on them and who . . . would never be likely to embrace it voluntarily" (at p 179).

The only real difficulty which the learned Judge experienced was that there was "at least a risk" that, by marrying Miss R, the applicant might stand to forfeit possibly substantial benefits which he might otherwise derive from his father. It also appeared most probable that the applicant would, if not now permitted to marry Miss R, wait until both were of age and would then marry, with similar consequences to any which might now follow. His Honour concluded that the considerations in favour of allowing the marriage outweighed those which might be against it and accordingly gave the consent of the Court to the marriage.

The decision is to be applauded—any other decision on these facts would be, to use the phrase of Grant SM in *In re B (An Infant) (No 2)* (1965) 11 MCD 291 (the famous "Rationalist" adoption case), "religious toleration in reverse".

PRHW

OF OIL, LAW AND ORDER

Dr Richard Lawson writes from Britain

New Zealand, you may be surprised to learn, features little in the English press. Apart from an oblique reference in the sport pages of *The Times,* hinting that the Commonwealth Games *would* be affected, I cannot determine how the cut-back in oil supplies are affecting you. Some friends, I might perhaps add, have passed on to me unsubstantiated rumours as to a 50 mph speed limit.

But I'll wager anything that our problems are blazed fairly prominently across the *Herald* and the *Dominion.* You will know that the miners have banned overtime, and have thus cut coal production by one-third. You must also know that industrial action has vastly impeded the rail services, and so preventing what coal is being mined from being delivered. And I dare say you know that workers in the electricity industries have banned out-of-hours working.

A gloomy picture, you might think; especially when set against the grisly wave of letter bombs and car bombs menacing the householder and the shopper. Certainly, the darkness of the shops, the three day week, the chill of our universities as the heating goes off, present a formidable picture of Yuletide misery that is singularly difficult, it might be thought, to dispel. The weather, of course, is rotten.

Comparisons with 1940 are freely evoked. But they are false. In 1940, you could turn off your radio, throw away your newspapers, and still know there was a war on. But cast away the media (by the way, TV now shuts down at 10.30 pm to conserve electricity), and few would realise that something was amiss. Generally, people seem well-clothed, well-fed, and generally, reasonably well-off, though I do not forget that there is a regrettably large number of people who fall into none of these categories. In short, all seems pretty much what passes for normal.

Certainly, Mr Barber's emergency budget did little to disarm the cynics who believe that the crisis springs from the fertile minds of the media and the Government. Is there, then, no crisis? Well, there certainly will be one, if the oil, coal and trains stop altogether. There is also much anguish now that the three day week has become reality.

In fact, there is a crisis upon us, but which has not always been seen for what it is. It goes under the heading, familiar to us all, of "law and order". For immediately behind the industrial crisis lies the statutory incomes policy which the miners, electricians and railwaymen are striving to breach. It is a generous policy, allowing for an increase in wages of up to 16 percent. Yet it is unpopular, for it deprives unions of their traditional role, the free bargaining for wages. Looming even darker than the Counter Inflation Act is the Industrial Relations Act, the most despised piece of legislation, in the unions' eyes, since the Combination Act of 1799. It is this Act, above all, which the unions are bending their muscle to destroy.

By coming directly into the industrial arena, the law has become a political football and Sir John Donaldson, President of the National Industrial Relations Court, has been the subject of repeated onslaughts both inside and outside Parliament. The Lord Chancellor then defended his man, asking voters to note the affiliations of those seeking to remove Sir John. So much for the separation of powers!

The real issue has thus become one of whether Parliament runs and governs the country or the unions. It is a real fight, too, where the unions have invoked Nazi Germany to show that occasionally, there is a duty to ignore immoral legislation. Hence, it is said, the right to ignore such blatant class-legislation as the statutory incomes policy and the Industrial Relations Act. Whatever the rights and wrongs of the matter, I suspect that the Government (any Government) is on a winner. For not only will voters flock to the side of Parliamentary democracy, but this Government has just realised what power it has as the country's largest employer.

MR JUSTICE HENRY RETIRES

A special sitting was held at the Supreme Court at Auckland on 30 October last to enable a widely representative gathering to pay its respects to the Hon Mr Justice Henry who was retiring from the Supreme Court after a sojourn on the Bench dating from 1955.

Among those present were Sir Alfred North, Stipendiary Magistrates, and an array of practitioners which included seven Queen's Counsel.

The first to address His Honour was the Solicitor-General, Mr R C Savage QC, who said:

"The Attorney-General very much regrets that owing to a long standing commitment he is unable to be present today, and accordingly it is my privilege speaking for the Attorney-General to acknowledge with deep appreciation the service that you have given to the whole community. That service, Sir, has extended over nearly 18 years and during much of that time Your Honour was the resident Judge in Dunedin, though, of course, sitting in other places. Your Honour won the affection and respect of the practitioners in Dunedin, and I think that I might add without fear of contradiction that for a variety of reasons Dunedin deeply regretted and, indeed, has not ceased to lament Your Honour's return to this City.

"Your Honour's appointment as a Judge of the Supreme Court in 1955 was met with great satisfaction but no surprise by the whole profession. Your career, Sir, has been one of great distinction, and I note that at the time Your Honour was sworn in the late Mr Justice Finlay told the assembled practitioners that it was no secret that your success had been gained by merit alone. You had come to the profession with no influence and no powerful force behind you and what you had won you had won by your own unaided efforts. You had from the time you commenced practice on your own account and subsequently in partnership concentrated on the Court side of legal practice and had achieved great eminence. By the time Your Honour was appointed a Judge, and, indeed, for a long time before that, your name was well-known throughout New Zealand as one of the most able and successful practitioners in the Dominion, both in the civil and criminal field and, indeed, both before a jury and Judge alone, and there have been few men who have combined all such fields so successfully. There could, Sir, have been very few important or celebrated cases in the Auckland Province in the decade before your appointment with which you were not in some way involved. I started work in a law office in the middle forties and I remember that we law clerks knew that if you were in a case it was a case to go and watch and listen. And we did. And many of us here owe much to your example.

"As a Judge, Sir, Your Honour's courtesy and consideration for counsel gained you the affection of the profession. If I may without presumption say, Sir, your understanding grasp of fact, your ability to sum up clearly and effectively to a jury in every kind of case and your clear way of expressing yourself in your written judgments won their deep respect. All of us too, Sir, were filled with a deep admiration for your capacity to do an enormous volume of work.

"We are assembled in this Court to say goodbye to you as a Judge. We do this with great regret but also with gratitude for the service that you have given to the cause of justice. It is particularly appropriate that it should be in this Court room that this ceremony is held for it was here that much of your professional life was spent and much of your great success achieved. You take with you, Sir, the warmest good wishes of the Government to Lady Henry and yourself for good health and a long and happy retirement.

The President of the New Zealand Law Society then addresed his Honour in the following terms:

"On behalf of all the members of the profession throughout New Zealand whom I have the honour to represent, I welcome the opportunity of appearing before you this morning on this the last day you will be sitting on the Bench which you have graced with distinction for so many years.

"We come here today to pay tribute to the success and eminence which you have attained and to offer our thanks to you for your great contribution to the administration of justice and to the profession. It is fitting that such a tribute should be paid in this Courtroom, Sir, which is so well known to Your Honour. My

friend, Mr Hillyer, will doubtless deal in detail with Your Honour's career. Suffice it for me to say that you commenced practice in times which were much more difficult, at least, from an economic point of view, than they are today, and through your sheer ability, courage and tremendous capacity for work, you succeeded in carving out for yourself a very high place in what was acknowledged was a very very strong Bar. Your elevation to the Bench inevitably followed. On your becoming the senior puisne Judge, Her Majesty graciously bestowed on you the honour of a knighthood, and this was acclaimed by the whole profession.

"Some of us in this Court today, Sir, remember the great satisfaction with which the profession received your elevation to the Bench and now, as we come to say farewell, we share with your family their pride in your achievements and particularly in your devoted service over a long period of years in the pursuit of justice and truth, achievements, as the learned Solicitor-General said, were won with no advantage other than your own ability, integrity and hard work.

"We thank you, Sir, for the ineffable kindness, courtesy and patience you have shown to all of us during the whole of your judicial career. These have won you the esteem of the whole profession. We also thank you for your great contribution to the law. Everyone who has appeared before you remains your debtor.

"Your Honour has the inestimable advantage of having at your side a great companion, Lady Henry, because those of us who know you well know how much she has meant to you and how much you have meant to her.

"It is with regret, Sir, that we take farewell of Your Honour today, but I want to tell you that you go into retirement in the sure knowledge that you have the respect, the gratitude and the warm affection of every one of us. We can truly say of you that you hand on to your successor the torch of judicial excellence with its flame undimmed.

"On behalf of the whole profession I extend to Lady Henry and yourself the good wishes of us all and express the hope that you have many happy, rewarding and restful years in a well earned retirement."

Mr P Hillyer QC, then addressed his Honour as President of the Auckland District Law Society:

"When I first enquired whether Your Honour would have a final sitting at which tributes could be paid to the services you have rendered to us and expressions of the gratitude that we all feel could be made, Your Honour said "No". Your Honour does not like a fuss being made. But Your Honour has since been persuaded to hold this sitting and it is right that you should hold it. You may not need reminding of the years of patient and dedicated work which have led up to this day. They are part of the weft and warp of your character. Your Honour may not even need to be told how much we appreciate them. One always hopes that appreciation is manifested in what we do rather than in what we say. But it is good for us when we say thank you and mention those things you have done for us. We should pause in our daily blur of activity to remember our debts. So I say we are glad of this opportunity to farewell you in the traditions of the profession and in public.

"I have been particularly asked by the Presidents of Gisborne and Hamilton, where you so often sat on circuit, and of Otago, where they still think with affection of their Judge Pettigrew, to associate them with the tributes I pay. Mr Southwick and Mr Barker, Queen's Counsel, have also asked me to apologise for their absence and to associate them with these tributes.

"This booming city of Auckland poses problems for those who have to deal with its expansion, however exciting it might be, and when Your Honour came here in June 1970 as senior puisne Judge, our growing pains were acute. Your ability to get to the heart of the problem, as well as your immense capacity for work, straightened out the difficulties and we remember this in particular with gratitude. As the Solicitor-General has said, years on the Bench as well as Your Honour's breadth of knowledge and ability have enabled Your Honour to deal well with all types of cases from criminal to contract and matrimonial to misrepresentation. But I wonder how long it will be in this increasingly complex society that Judges and Magistrates and, indeed, counsel will be expected to be able to deal with all the law. It is not as if it is standing still. One no sooner thinks one knows something about a particular branch of the law than some enthusiastic law reformer changes all the rules and one has to start to learn all over again. What a relief it would be if we could read only those cases in the law reports which deal with the areas in which we specialise. How much more efficient we would be, and how much less strain there would be. Something must be done to relieve the strain on Bench and Bar alike and the "jack of all trades" syndrome could well be abolished. I venture to suggest that the time will come when we will have divisions of the Courts presided

over by men of expertise in that field alone and this will be a much welcome reform.

"When Your Honour's leave finishes on 28 February next, Your Honour will have been 19 years and 4 days on the Bench. It was on 24 February 1955 that you assumed this high office that you have held with such distinction, and that was, as has been said, after a career at the Bar which made you a leader even amongst the formidable advocates who were then practising. As Your Honour retires from the Supreme Court Bench, it is pleasant to know that the people will not be completely deprived of your ability. You are to sit on the Court of Appeal of Fiji, and I have no doubt will be asked to assist this country in other ways. It may even be that your great experience will be called on to institute some solution of the problems I have mentioned. Whatever you do, you will carry with you our affection and good wishes."

Mr Justice Henry then replied:

"Mr Solicitor, Mr Tong, Mr Hillyer, I feel incapable of reply to the very, very kind things you have said about me. I have tried in my own small way to live up to the reputation of this Bench and I am comforted by your words to know that at least that trying has had some success.

"My first memory of this building, and one, of course, at a time like this goes back to the early days, there were only two Courts in session, one, this Court presided over usually by Mr Justice Stringer and No 2 Court upstairs by Mr Justice Herdman. The first farewell to a Judge which I heard was that of Mr Justice Stringer, I think it was 1928, if not immediately thereafter. He was the first Judge of the Supreme Court of New Zealand to retire compulsorily at 72 years of age. All appointments previous to that time had been life appointments. As I have stated, we then had two Courts in session. Of course, because there was a Court of Appeal and the Judges here were Judges of appeal, there were long periods when a Judge was in Wellington and we then made do with one Court. The Arbitration Court was a separate Court but it was in this building. It has now been reconstructed, but I well recollect that when we thought we were getting busy we had a third Judge sitting and he sat in the Arbitration Court. That we thought then was a very significant and important addition to the Courts and to Court work here in Auckland. As you have stated there has been vast expansion since then. The number of Judges has been increased, new problems have arisen and not the least is that of accommodation. Both Judges and counsel have been seriously inconvenienced by that. We have been sitting in quite a number of places under considerable inconvenience both to the Judges, who are the least important in that, to counsel and to litigants and witnesses. However, I am happy to say that now we seem to have in train all those things that will be necessary to ensure that the Courts and those who have business in the Courts will be properly accommodated. Unfortunately, of course, these things take time but the fact that they are now past the drawing board stage in some respects but very definitely on the move will mean that Auckland will have a Supreme Court and accommodation which is worthy of the work which must be done here. In the meantime, of course, some inconvenience will arise but that will end as soon as possible. I myself, of course, retiring now will never participate in that.

"Since I commenced practice of the law world power has shifted, shifted from what we were then pleased to call, and those of my generation or a bit later nostalgically refer to as, the British Empire. But the system of law which had by then spread over a very large part of the globe became the embodiment of the Rule of Law and it stands, I think I may say without contradiction, foremost in upholding that Rule. The burden of carrying on and upholding that falls squarely on the present generation of Judges and lawyers, on them to maintain the pre-eminence of our system. The future is in safe hands, but continual rethinking and reconsideration of the situation are both essential. To sustain our system as an effective instrument in our community, it must be adapted to give and to ensure a speedy and effective hearing of commercial cases, or, as they are called generally, commercial causes. That I think is an important topic that must be looked to and kept ever in mind. It must be made capable of expeditious dealing with all problems arising from modern development in all fields. It must keep abreast of developments and problems arising even at an international level. Such problems will arise from the very shrinking of distance by reason of fast modern transport facilities. And further the impingement of the activities of all countries in the development of our own immediate area. We must think internationally and the lawyer's place in that is ever important. Our future development must be consonant, as far as possible, with legal progress in other systems in the world. These problems which have already arisen and will more acutely arise

place a particularly heavy burden on your profession. When I say 'on your profession', of course it passes from the profession to the judiciary and I speak of the profession as a whole. Such problems tend to fall upon the busy practitioner, for who, better than he, can appreciate and deal with them. I wish therefore to pay an especial tribute to those who give generously of their time and services in advancing the status and the effectiveness of our law in its application to changing times and changing points of view. These practitioners serving on committees and in other various ways get little or no publicity. Yet their work is crucial to the orderly development of our law which is so essential to us, and I again state, and I think I state it on behalf of the whole country, the appreciation which we ought to express to these persons whose work so often is not known to the general public. One reads their reports and wonders at the time that they must have spent, the ability that must have been expended in covering the subjects and so placing those matters before the appropriate authorities that the law can develop and can meet those problems which are arising from day to day and which are so important in ensuring, as I have said, that our law is a proper instrument of justice and does in fact serve the community in all its facets. Today case law is more easily ascertainable. Comprehensive and easily available digests and references have taken the drudgery out of devilling the law. But the age old and difficult part of the practice of the law is still the application of the special facts of the case to the appropriate principles of law. There is no short cut in this process. It depends solely upon the expertise of the individual lawyer coupled, of course, with clear and analytical thinking. Legislation—parliamentary and subordinate—produces a mass of material which touches the citizen in his every walk of life. The modern lawyer must keep abreast of this and it is truly a monumental task. No tribute that I can pay is too high when referring to all members of the profession for their part in ensuring that our system of law in all its modern complexity will truly serve our modern society in a fast changing environment.

"Members of the profession, I thank you for your attendance here. I feel quite incapable, as I have already said, of answering those very kind things that you have said about me. A great poet spoke of Judges lagging superfluous on the judicial stage. Those are words of wisdom and words of warning. I hope I have not done that. And I therefore take my leave of you all. I trust that I have in some small manner maintained the stature and responsibility of my office and left it at least not lessened by my having passed this way. I thank you all."

LEGAL AID—THE PATTERN

One of a series of papers delivered at a recent seminar organised by the Canterbury District Law Society. It was prepared by Prof R A Caldwell, Professor of Law, University of Canterbury. Another paper appears at p 49.

A paper of his kind, it seems to me, should refer in outline to some of the matters which will be examined in detail by the various panels and workshops in the course of this Seminar and also endeavour to canvass, and focus attention on, some ideas which may be relevant to future developments. Make no mistake; this is an area of the law and legal administration where changes and developments can be expected in the not too distant future.

It is unfortunately true to say that until recently New Zealand has not been overzealous in providing financial assistance to persons of modest means in the conduct of their legal business. This may not necessarily have been a bad thing for it is almost certainly true that the very lack of formalised legal aid schemes fostered a tradition of service within the legal profession itself, so that it could fairly be claimed that nobody with a good case was prevented from litigating it because of lack of money. Thus for some years the traditions of the profession and the rudimentary provisions for indictable offences of the Justices of the Peace Amendment Act 1912, amplified by the Poor Prisoners Defence Act 1933 were regarded as adequate. An attempt to introduce legal aid in civil litigation in 1939 proved abortive. The Legal Aid Act 1939,

which enabled the Governor-General, by regulation, to authorise the New Zealand Law Society to establish district committees and panels for the purpose of advising poor persons and conducting litigation on their behalf was overtaken by the Second World War and never went into effective operation.

During this early period the situation in the United Kingdom was no different. Indeed, as at 1939 it might fairly be said that this country was some way ahead of the United Kingdom in that it had given at least some thought to the need for legal aid in civil litigation. However, the position in the United Kingdom changed quite dramatically after the Second World War. In 1946, the Rushcliffe Committee made a series of revolutionary recommendations which resulted in the Legal Aid and Advice Act 1949. The scheme thus devised proved enormously popular, so much so, that by 1964—only 15 years after its inception—it was true to say that legal aid was provided for more than 50 percent of the more serious cases in the courts throughout the country. In the meantime the New Zealand Law Society had been giving thought to the provision of a comprehensive scheme of legal aid in this country. The product of its endeavours was the Legal Aid Act 1969 which came into operation on the 1st April 1970. It should be emphasised that this legislation was very largely the result of the New Zealand Law Society's endeavours because it is too often and too easily hinted that the Law Society and its members are oblivious of the plight of the less well-endowed members of our community.

The present situation is governed by two statutes. For legal aid in criminal matters there is the Offenders Legal Aid Act 1954: The statute and scheme are stark in their simplicity. In any criminal proceedings any court having jurisdiction may grant legal aid to any person charged with or convicted of any offence. The Court is enjoined to have regard to: the means of the person charged or convicted; the gravity of the offence; in the case of an appeal, the grounds of the appeal; and any other circumstances the Court considers relevant. In the case of charges of murder the Court need have regard only to the means of the person charged or convicted.

The Governor-General is empowered to make regulations for the implementation of the purposes of the Act, and in particular governing the assignment of counsel and the payment of fees. The regulations currently in force are the Offenders Legal Aid Regulations 1972. They provide for: the keeping of lists by Registrars of the Supreme Court of practitioners who are fit and willing to accept assignment; the hearing of applications which may be in private; and the assessment and payment of fees.

Legal Aid in civil matters is provided for by the Legal Aid Act 1969. This Statute will of course be subjected to detailed analysis and discussion during the course of this Seminar but it may be of benefit at this stage to set out the underlying objectives and broad outline of the scheme. It is intended "to make legal aid more readily available for persons of small or moderate means." The cost of the scheme is borne primarily by the Crown, although the legal profession also bears its share; insofar as practitioners engaging in legal aid work recover only 85 percent of profit costs, the remaining 15 percent may properly be regarded as the legal profession's contribution to the cost of the scheme. In essence, the nature of the legal aid envisaged is representation in the course of litigation, including, where necessary, representation by both a solicitor and a barrister. The day-to-day administration is in the hands of a number of District Legal Aid Committees to whom applications for legal aid are made and whose decisions may be appealed against to the Legal Aid Appeal Authority. Responsibility for overall control of the scheme is vested in the Legal Aid Board which is given the following functions: administering the scheme as a whole; supervising and co-ordinating the work of District Legal Aid Committees; ensuring that the scheme operates as inexpensively, expeditiously and efficiently as is consistent with the spirit of the Act; and making recommendations to the Minister of Justice about the working of the scheme and the amendment of the Act and any regulations made thereunder.

Those who seek legal aid are, as a rule, expected to make a minimum contribution of $30 and they must satisfy certain financial criteria. These are specified in considerable detail in Sections 17-19 of the Legal Aid Act, in terms of "disposable income" and "disposable capital". Neither should exceed $2,000. Broadly, "disposable income" is what remains after deducting from an applicant's total income payments in respect of income tax, rent, rates, household insurance premiums and making allowances for the maintenance of himself and the family. "Disposable capital" is calculated on the basis of the total value of the applicant's assets less deductions to allow

for ownership of a modest home, household chattels, a motorcar, mortgages and other debts. The relevant amounts were specified in 1969 and have already been far outstripped by inflation. The Legal Aid Board has recently described the amounts fixed for disposable income and capital as unreal and recommended that eligibility for legal aid should be equated with eligibility for an income-tested social security benefit. The Board has also recommended that the provisions for assessment of "disposable capital" should be redefined so as to take account of the increased value of house property and the escalation of costs since 1969.

For what kinds of proceedings is legal aid available. The answer, in simple language, is: all civil and domestic proceedings in the Magistrates' Courts; all proceedings in the Children's Courts; all original civil proceedings in the Supreme Court; proceedings in the Compensation Court and before the Accident Compensation Appeal Authority; applications for ancillary relief under the Matrimonial Proceedings Act 1963; appeals to the Supreme Court and the Court of Appeal; and appeals to the Privy Council. The granting of legal aid for appeals to the Privy Council is subject to certain conditions; either the applicant must be the respondent to the appeal in which case the grant of aid must be approved by the Minister of Justice; or, alternatively, the Attorney-General must certify that the appeal involves a question of law of exceptional public importance and that the grant of legal aid is desirable in the public interest. Additionally, legal aid may be granted in proceedings in the Maori Land Court or the Maori Appellate Court or in any administrative tribunal or judicial authority, provided the District Legal Aid Committee to which application is made considers that the case requires legal representation and that the applicant would suffer substantial hardship if legal aid were not forthcoming. In all of these cases, be it noted, a District Legal Aid Committee may refuse legal aid if it thinks that the applicant's prospects of success are slight; where there is doubt about the merits of an applicant's case the Committee may take counsel's opinion. Section 15 (2) specifies certain proceedings in respect of which legal aid may not be granted. They are: relator actions; election petitions; petitions for inquiry under the Local Elections and Polls Act 1966; actions for breach of promise, seduction or enticement; and petitions for the dissolution of marriage, nullity or separation in the Supreme Court.

Such is the bare outline of the two schemes for legal aid currently in force in New Zealand. What thoughts do they provoke?

Two very obvious comments may be made about the Offenders Legal Aid Act 1954. First, there must be a question worthy of debate about the extent to which an applicant should be entitled at least to ask for counsel of his choice. Under the Regulations at present in force, the Registrar, on the grant of legal aid in a criminal case, assigns a practitioner from the list kept by him. Only an applicant charged with murder or treason may nominate the particular counsel whom he desires to defend him; if such counsel is willing to appear, he may be assigned, whether or not his name is on the list. There seems to be a case for suggesting that similar provision should be made for the more serious crimes triable on indictment in the Supreme Court. The second obvious comment has already been made forcibly by the Legal Association. It relates to the three scales of fees laid down for the remuneration of an assigned practitioner. The arguments have already been canvassed. Sufficient to say that it seems capricious that a judge or magistrate should be expected to bear in mind during the course of a trial such factors as the complexities of the issues involved and the skill and responsibilities of counsel in order to determine the appropriate scale of remuneration. Conversely, it seems invidious that counsel should have to steer a course between Scylla and Charybdis—Scale I or Scale III?—whilst endeavouring to protect the rights of his client.

Yet there are deeper issues associated with the grant of legal aid in criminal cases. Some of them arise from the criteria laid down in the Offenders Legal Aid Act itself! some of them arise from the nature and idiosyncracies of the consumers. As I have already mentioned, Section 2 (2) requires the court to take into account the means of the applicant, the gravity of the offence and "any other circumstances that . . . are relevant." To what kind of factors does this last test refer, I assume that it must, in the majority of cases, bear reference to the circumstances of the offence itself. The victim of an alleged sexual assault may, for example be a child of the defendant in which case it would almost certainly be undesirable to have a personal confrontation in cross-examination between the child and her father. Again, the nature of the defence may be such that some question of law is likely to arise during the course of the trial. How is a Magistrate to ascertain this without, in effect, inviting the defendant to disclose at least part of his defence before the trial begins and how is a conscien-

tious Magistrate to avoid making at least some assessment of the merits of the proposed defence? The dilemma may perhaps be illustrated by paraphrasing the facts of *McIntosh v Police* [1963] NZLR 83 in which a Magistrate refused legal aid because he was not satisfied, wrongly as it ultimately transpired, that the applicants had insufficient means to provide for their defence. The McIntosh brothers were convicted but the Supreme Court directed that there should be a rehearing. The charge was one of burglary and a perusal of the Magistrate's notes of evidence revealed that such questions of law as the effect of recent possession and whether the appropriate conviction should have been for burglary or receiving had been raised during the course of the trial. Had the Magistrate been satisfied about the applicants' lack of means he should, presumably, have probed the nature of the defence in order to determine whether legal aid should have been granted. This is not to say that a defence will be pre-judged. From the point of view of the applicant, however, he is obliged to reveal his defence to the presiding Magistrate before the trial and it may appear to him that it is being pre-judged. I suggest that such a state of affairs is undesirable.

This poses the question whether Magistrates should deal with legal aid at all. It also highlights the fact that the context of the Offenders Legal Aid Act is confined to applicants. The Widgery Committee, reporting in the United Kingdom in 1966, observed that the objective of a legal aid scheme in criminal cases "should be to secure that injustice does not arise through an accused person being prevented by lack of means from bringing effectively before the court matters which may constitute a defence to the charge or mitigate the gravity of the offence." It thought that the presence of any one or more of the following factors points towards the need for legal aid and representation in Magistrates' Courts: that the charge is grave in the sense that the defendant is in real jeopardy of losing his liberty or suffering serious damage to his reputation; that the charge raises a substantial question of law; that the defendant is unable to follow the proceedings and state his own case because of inadequate education, mental illness or other disability; that the nature of the defence involves the tracing and interviewing of witnesses or expert cross-examination of prosecution witnesses; or that legal representation is desirable in the interest of someone other than the defendant.

There is already a substantial body of evidence in England which shows that Magistrates do not always or uniformly identify these criteria. It is clear, for example, that the majority of those defendants who receive custodial sentences do not have the benefit of legal representation. It may well be that similar evidence is available in this country. Moreover, it must be acknowledged that the unrepresented defendant is often at a serious disadvantage in Court: he may be frightened; he may be inarticulate; he may simply be unfamilar with the procedures; he may be overawed by the, to him, formality of the occasion and proceedings. A survey completed in London in 1971 revealed a young woman with a professional background who thought that bail and probation were one and the same thing—until the police roughly disillusioned her. The same survey revealed that many women, when asked in court, "What have you to say?", thought that this question called simply for the reply "I'm sorry" and found it impossible in the Courtroom atmosphere to talk about the background to their offences or describe circumstances which might mitigate the penalty. There is even evidence that many defendants plead guilty to offences which they did not commit. Similar pointers emerge, although in a somewhat emotive way, from the recent report of the Nelson Race Relations Action Group "Justice and Race—a Monocultural System in a Multicultural Society."

The burden of this argument is that a great deal more thought should be given to the provision of facilities for aid, advice and representation to persons charged with criminal offences at a time and stage before the Offenders Legal Aid takes effect. Moreover, it is difficult to see why this preliminary assistance should not be provided free of charge. Hence the idea of the Duty Solicitor which has been operating successfully in Scotland and Ontario for some years and which is at present the subject of a pilot scheme under the auspices of the Canterbury District Law Society. An alternative might be the Public Defender system which exists in New South Wales and some of the American States. The Public Defender is, however, in the nature of an institution and a system in which the legal profession is actively involved seems preferable. The proper scope of the Duty Solicitor system is debatable but it may be suggested that ideally the services of the Duty Solicitor should be available to any defendant who has been taken into custody or who faces any charge that carries a penalty of imprisonment. The Duty Solicitor can perform a number of functions. He can advise defendants, before their first appearance in Court, on their pleas and, in the

case of pleas of guilty, plead on their behalf in mitigation of sentence. He can apply for bail and adjournments. He can prepare and appear in applications for legal aid. It might be advantageous if applications for legal aid were always dealt with ex parte in Chambers. Moreover, justice would clearly be seen to be done if there were a firm rule to the effect that the Magistrate who hears the application for legal aid should take no further part in the trial. The Scottish experience, at least, suggests that the cost of a Duty Solicitor scheme need not be exorbitant or prohibitive. The total cost for the financial year 1969-70 was £71,697, representing an average cost of under £2.50 per case.

The Legal Aid Scheme in civil cases has now been operating for some three years. The most recent report of the Legal Aid Board suggests that, by and large, it is working quite well. The cost has been surprisingly cheap. A total of 6,214 applications was granted during the last financial year is in the region of $600,000.

In its most recent report the Board has made two specific proposals to extend the scope of the Act. First, it points out that, whilst legal aid is available for appeals to the Town and Country Planning Appeal Board, the use of such aid is largely stultified because there is no provision for aid in town planning objections to local authorities. As the Board points out, it is at the stage of initial objections that legal aid is most needed and genuine hardship may result from its absence. Moreover, those who fail to exercise their rights of objection before local authorities forfeit their rights of appeal to the Town and Country Planning Appeal Board. The Legal Aid Board, therefore, recommends an extension of the scope of the Legal Aid Act so as to include aid in town planning objections before local authorities.

The Board's second proposal is much more far-reaching in effect. One of the significant omissions from the present scheme is legal aid for divorce proceedings. This omission was deliberate and experience in other jurisdictions has shown that the provision of legal aid for divorce greatly enhances the cost of a legal aid scheme. Nevertheless, the Board has now concluded that the scope of the scheme should be extended to include provision for divorce petitions. It points out that legal aid is already available for ancillary relief in matrimonial proceedings and that it is often difficult to separate the cost of the divorce itself from the cost of the ancillary proceedings. Moreover, the Board argues, this is one of those few situations where the law compels the parties to resort to the Courts if they wish to achieve a particular result and it seems illogical to deny legal aid when the law itself insists on the parties incurring the expense of court proceedings. These arguments appear to be unanswerable. It should, however, be appreciated, as the Board itself recognises, that an extension of the scope of the scheme so as to include divorce proceedings will greatly augment its cost. The Board's estimate is between $400,000 and $500,000 per year.

One other matter is perhaps worthy of mention and attention. As long ago as 1953, the Evershed Committee on Supreme Court Practice and Procedure acknowledged that there may sometimes be an argument in favour of supporting litigation at public expense—outside the legal aid scheme and irrespective of the means of the litigants. The suggestion is that some machinery should be evolved to enable cases involving points of law of exceptional public interest and importance to be determined at public expense. Obviously the implementation of such a scheme should be restricted to real cases between actual litigants; in other words, if public funds are to be used in this way, they should be used only to enable the parties themselves to litigate in accordance with ordinary procedures and the parties should be bound by the result in the ordinary way. Obviously too, the Attorney-General would have a very important role to play in any such scheme and the question arises: to what kinds of cases might it apply? In reply, it may be mooted that it is unjust for the parties to have to share or the loser to have to bear the cost of proceedings where the determination of the issue is governed by a new or doubtful point of law or the construction of a Statute or Regulation; and where the doctrine of precedent has either led an inferior court to take a mistaken view of the law or precluded it from reaching a just decision.

A significant feature of the Legal Aid Act is that it envisages the provision of aid only for the purposes of representation and litigation. In this respect it differs from its English forbear which contemplates legal aid for advice in non-contentious matters as well; indeed, the English scheme has recently been extended in this respect. The Legal Aid Board is currently investigating the need for such provision in this country and Legal Advice Centres and Legal Referral Services have been established on a voluntary basis in Auckland, Wellington and Christchurch. More will be heard about the working of these centres and services during the course of this Seminar. There must be an issue as to whether they should be formalised and, if

so, in what way. This also suggests that we should be giving some detailed thought to devising new procedures for resolving small claims. These matters are already receiving some consideration and I should like to conclude, if I may, by saying that the present endeavours to provide these services for the poor, the needy and the shy represent, in the finest possible way, the concept of service to the community which is the hallmark of our profession.

CORRESPONDENCE

The Gilfedder Affair

Sir,

In the much quoted article on the Gilfedder affair ([1973] NZLR 457) Mr R A Moodie is somewhat critical of remarks attributed to me in the Parliamentary debate on the incident. He says I was reported as having said that Sergeant Gilfedder was faced with "intolerable provocation" and with this he disagrees. I do not suppose it is a matter of very great importance but I would like to set the record straight. This debate was thrust on us the very morning the first press report appeared and as first speaker for the Government this constituted my whole knowledge of the affair. As the attached extract from Hansard shows, what I said was "there *seems* to be little doubt that Sergeant Gilfedder was exposed to very great and possibly intolerable provocation to which he reacted" and the context confirms that this view was based solely on newspaper reports which I said might or might not be full and correct. I should add that later in the debate the Prime Minister spoke and quoted from a Police report which put quite a different complexion on the matter.

Yours faithfully,

DR A M FINLAY QC,
Minister of Justice.

[The extract confirms Dr Finlay's comment. The Minister also noted that "a report appearing in a newspaper is often far from being a full transcript . . .", an observation in which Mr Moodie would doubtless concur. Ed.]

Words, words, words

Sir,

In brief, Mr Jamieson, in his article "Peril upon an Ambiguity", appears to say that legislative draftsmanship suffers for two reasons:

(a) Insufficient time is allowed for competent drafting.

(b) The pay is inadequate—necessarily inferring incompetence because of this.

I think there may be a third, if perhaps less tangible reason. We live in a phoney society devoted to the worship of the great god Kudos, a society in which mediocrity masquerades as intellectuality in the endeavour to impress. Our educationists and administrators have invented a polysyllabic, pseudo-scientific jargon which is largely unintelligible even to themselves, but which they must use if they hope for promotion—"Words, comfortable planks set together to make a specious floor above the chasm of doubt".

The disease spreads like an epidemic into politics, commerce, the professions, until we are suffocated with prolixity, with words which do not mean what they say, or, indeed, mean nothing at all.

It should occasion no surprise if some of this *mumbo-jumbo finds its way into our legislation* and one need go no further than The Soil Conservation and Rivers Control Act 1941 and its numerous amendments, The Underground Water Act 1953, The Water and Soil Conservation Act 1967, The Mining Act 1971 and The Wellington Regional Water Board Act 1972, *to find examples of ill-considered, imprecise,* devious and confusing draftsmanship. Our law draftsmen could perhaps, not without some profit, peruse the early statutes of New Zealand from 1842 to say, 1884.

Yours etc,

F G OPIE,
Palmerston North.

Tax Exemption on Depreciation of Professional Brains

Sir,

The taxi driver receives income tax exemption on the car used in business. The tradesman is helped tax-wise on the maintenance of his tools of trade. It would thus appear that almost everyone receives some taxation acknowledgement of lessening values of the factor that earns income—but not the barrister or solicitor whose tool of trade is his brain. It is therefore in the interest of the Government that the lawyer's brain be kept in first class working order. This applies also to all professional men in private practice whose brain must be kept well oiled and in first class condition to earn maximum income and thus to pay larger taxes accordingly. To maintain the professional brain in good working order I suggest that at least three weeks' annual vacation is required. I recommend that the professional self-employed earner be granted therefore a tax deduction of 3/52 of annual earnings as a depreciation allowance. While anticipating Government reaction to this suggestion, I was tempted to sign this letter 'Excreta Tauri', But unafraid, I now sign—

GEORGE JOSEPH,
Wellington.

LAWASIA, LAW AND DRUGS

The third and final of MR M F CHILWELL QC.'s *reports on the Third Lawasia Conference.*

The Commission on Law and Drugs received and considered nine papers. It met in four sessions and considered the following topics:

(1) The Legal Control of Drugs.
(2) The Drug Addict: Punishment or treatment.
(3) Drugs and Crime.
(4) The International Control of the Traffic of Drugs.

Legal Control

The Legal Control has two aspects, the international and the domestic. Mr Rasmin Saleh's paper gave the Commission a Historical account of all the Conventions which have been adopted by the international community to control drugs. He also discussed the various international bodies which have been created to enforce the international law. The Commission agreed to call upon states which have subscribed to the Single Convention to adopt appropriate national laws to carry out their obligations under the Convention. The Commission emphasised the need for international co-operation in the observance of the said Convention.

In discussing the question of legal control at the domestic level, the Commission started by reminding itself of the correct meaning of the term *drug*. Scientifically, a drug is any substance which, by its chemical action, alters the function of the human being. So defined, it should be obvious that not all drugs should be subject to legal control. Some drugs, such as coffee, tea, should be and are allowed free use in our societies without any legal restrictions. There is a second category of drugs which should be allowed to be used only under legal regulation. These are, for example, drugs which have a medical use but which could be dangerous if used for non-medical purposes. There is a third category of drugs which are inherently dangerous and which have no medical or other therapeutical use. Such drugs should be totally prohibited by law. The Commission was unable to agree as to which category cannabis belongs. The majority of the Commission were of the view that cannabis should be prohibited. This view accords with the position under the Single Convention and with existing laws in the member countries. Some members of the Commission felt however that cannabis should be a registered drug and still other members of the Commission felt that it should be permitted free use.

Drug Addict: Punishment or Treatment?

In dealing with drug addicts, the Commission was of the view that the primary emphasis should be on treatment and rehabilitation. The choice of the specific sentence to be imposed on a drug addict, should however take into consideration the social background of the drug addict, the nature of his addiction, and other pertinent facts. The Commission considered that in some cases the treatment of the drug addicts may have to take place within a coercive framework, for example by removing the drug addict from society for his own good as well as to prevent him from corrupting others. In cases where the drug addict would not cooperate in his own treatment a punitive treatment may be unavoidable. Where a drug addict has also committed a non-drug offence the Courts should punish him for such offence as well as treat him for his drug addiction.

In some of the countries of Lawasia the power exists for requiring drug addicts to undergo compulsory treatment, including hospitalisation, without the prior conviction of the drug addict. The Commission approved of this preventive approach but was of the view that such power should be reposed in the Courts rather than in a law enforcement agency and that the law should stipulate a maximum period for such compulsory hospitalisation.

Drugs and Crime

The Commission was handicapped in its consideration of this topic by the absence of adequate data showing the precise connection between drug addiction and crime. Some judicial members of the Commission related their personal experience with drug addicts who had been driven by their desperate need for drugs to commit other offences. While such evidence is both relevant and useful, the Commission would want to see more research done on the connection between drug addiction and crime so that hard data would be available for discussion.

International Control of Traffic In Drugs

The Commission was greatly assisted in its consideration of this topic by the paper pre-

sented by Mr Lukman Naam. The Commission endorsed the following conclusion: first, that effective international efforts to control drug traffic would not be possible in the absence of effective national efforts controlling the drug problem. Second, that there must be effective international control over the licit traffic of drugs, for otherwise drugs in licit traffic will be diverted to illegal markets. Third, effective international control requires each country to establish a central narcotic bureau responsible for all activities in combating the drug problem. Fourth, that there is an urgent need for countries of the world, particularly of our region, to synchronise their national efforts in combating the international traffic of drugs.

The Commission considered the view that the developed countries of the west were concerned to suppress the cultivation, manufacture and illegal trafficking of natural drugs but were insufficiently concerned about the export overseas particularly to developing countries, of such synthetic drugs as LSD, amphetamines, barbiturates, and methaqualon. It was suggested that the Commission should call upon all countries, which have important pharmaceutical industries, to take effective steps to control the export of such products.

The Commission's attention was directed to the new problem of the international drug offender, i.e. a person who commits a drug offence in other than his own country. Three questions were phrased in this connection. First, should the international drug offender be sentenced in the country in which he has committed his offence, or should he be returned to his own country for sentencing? Second, if the offender is to be fined, to which country should he pay his fine? Third, would the process of treatment and rehabilitation be more effective if the offender were returned to his own country for treatment?

Recommendations by the Commission on Law and Drugs

(1) The Commission on Law and Drugs concluded that the guidelines and provisions set by the Single Commission and its amendments of 1961, and also the Convention on psychotropic substances, should be carried out without disregarding the domestic condition of each Lawasian country.

(2) Furthermore, the Commission pointed out that measures taken towards the addict, should be in accordance with each individual case.

(3) The Commission agreed upon the fact that a further study of the relationship between drug and crime is urgently needed. And that this topic should further be discussed in the forthcoming Lawasia conference.

(4) A suggestion made by the Commission is that a regional co-ordinative and co-operative body be set up, besides those already in existence. Specifically in handling the traffic of both natural and synthetic drugs.

(5) The Commission also agreed upon the fact that the mass media should assist in the campaign against drug abuse and not stimulate it.

(6) Finally it is also recommended by the Commission that research be carried out in the Lawasian countries on the nature and extent of drug abuse, the profile of drug offenders, the causation of drug addiction, and the laws concerning drug abuse. It is also recommended that the editorial committee of the Lawasian Journal consider the feasibility of publishing a special issue of the Drug Abuse and the Law in the Lawasian region.

Commercial Arbitration

Report of Panel on International Commercial Arbitration.

After considering papers presented by distinguished contributors and hearing their discussion, and that of the commentators, the panel on International Commercial Arbitration recommends to the General Assembly the following resolution for adoption:

A. It would be of considerable advantage to those engaged in commercial activity in the countries represented in this Assembly where dealings frequently involve individuals, corporations and state agencies of different countries, that there should be drawn up a set of model rules which might be used or adopted when thought fit in the conduct of Arbitration; and in particular:

(1) A model set of Arbitration rules

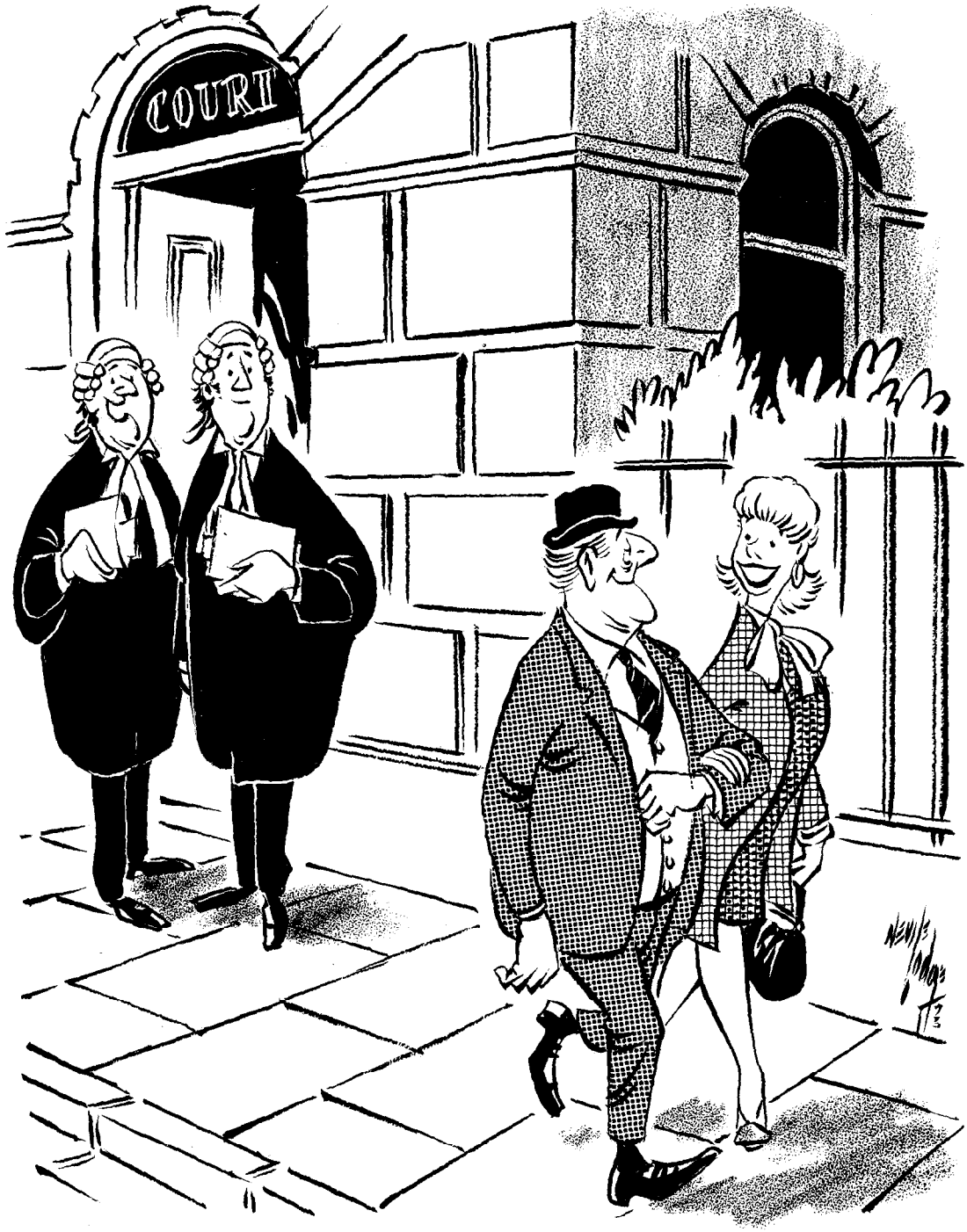
(2) A model set of Arbitration provisions for inclusion in commercial agreements.

B. Mindful that UNCITRAL is presently concerned with this subject, the Panel commends the work of UNCITRAL, expresses its willingness to co-operate with that body and requests the Secretary General to convey this willingness to the Secretary of the United Nations Commission on International Trade Law.

C. That an ad hoc committee be created to consider the issues arising out of this resolution.

"A FUNNY THING HAPPENED ON THE WAY TO COURT THIS MORNING . . .": 2

Drafted by Scilicet *Engrossed by Neville Lodge*



"No, that's not Judge Ponder's wife—that's the Judge and his 'Obiter Dicta'."

OBITUARY

Sydney Jackson Castle

Sydney Jackson Castle died recently at the age of 80. He had practised law in Wellington for 50 years, founding the firm of Castle & Castle in 1945.

He was educated at Wellington College and Victoria University. During World War I he served for four years in Gallipoli and France.

He was Chairman of the New Zealand Board of Directors of the Norwich Union Life Insurance Society for 37 years, a position from which he retired in 1968. He served on the Council of the Wellington District Law Society for eight years and was President in 1940. He was also a member of the Council of the New Zealand Law Society, of its Standing Committee and of the Costs and Conveyancing Committee.

He was also for many years the Manawatu Lawn Tennis Association's delegate to the National Association and was a member of its management committee for two years. He gave long service both as Chairman and Member of the Otaki and Porirua Maori Educational Trusts Board and the Papawai Board.

LEGAL LITERATURE

1901-1972 Commonwealth Statutes and Regulations Annotated (Butterworths), 416 pp.

An up-to-date statute and case annotation for Australian federal legislation supersedes and incorporates Segal's *Commonwealth Statutes Case Annotations* (3rd edition) and Butterworths *Commonwealth Statutes Annotations 1965-70.* Subordinate legislation is included in conjunction with each Act.

Looking back—Motorists whose over-indulgence during the Christmas festivities brought them into unlooked for conversation with traffic officers might take some comfort from a sense of history.

The following article appeared in "The Press" (Christchurch) 70 years ago:

"The motorist is ubiquitous; so are his enemies. In England the motorist is the victim of the country policeman; in Morocco the populace stone him, declaring that conveyances good enough for the Sultan's father and grandfather should be good enough for the Sultan and all visitors to Morocco."

"In Philadelphia, according to 'Motoring Illustrated', they have a new form of police terror. A special brand of automobile policeman has been told off to trap motorists.

"Their costume consists of blue knickerbockers and blouse, grey woollen stockings, and light flannel shirts. The men are mounted on bicycles and armed with stop watches. M. Lepine, the Prefect of the Paris police, has told off a sergeant for automobile duty.

"The sergeant will be provided with an automobile, and it is his duty to give chase to anyone who is driving a car at an excessive rate of speed. The automobile for this duty is a very large one and is capable of attaining a speed of 50 m.p.h."

REGULATIONS

Beer Duty Districts Order 1973 (SR 1973/325)
Broadcasting Act Commencement Order 1974 (SR 1974/1)
Customs Districts Notice 1973 (SR 1973/326)
Economic Stabilisation (Conservation of Petroleum) Regulations 1974 (SR 1974/2)
Motor Spirits Prices Regulations 1970, Amendment No 7 (SR 1974/9)
Public Service Regulations 1964, Amendment No. 7 (SR 1974/3)
Revocation of Price Freeze Regulations (No 4) 1973 (SR 1974/10)
Rotorua Trout Fishing Regulations 1971, Amendment No 4 (SR 1974/4)
Sales Tax Districts Order 1973 (SR 1973/327)
Southern Lakes Fishing Regulations 1971, Amendment No 2 (SR 1974/5)
Taupo Trout Fishing Regulations 1971, Amendment No 2 (SR 1974/6)
Therapeutic Drugs (Permitted Sales) Regulations 1972, Amendment No 4 (SR 1974/7)
Wheat Board Regulations 1965, Amendment No 5 (SR 1974/8)