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THE HON H G R MASON QC, CMG, LLD

The family was very kindly invited to be present at the sitting in the Supreme Court, Wellington, at which tributes were paid to my father, the Hon H G R Mason.

My father assumed office as Minister of Justice and Attorney-General close on 40 years ago, before the great majority of those now practising law had joined the profession and some of the things he did early in his period of office might not readily come to mind. It will therefore in no way reflect upon what was said then if more is set down for the record at this time. Perhaps a layman may be permitted to do this.

On coming to office my father made great efforts to relieve the physical discomforts of his legal colleagues when in Court. Among things done I recall the installation of ventilation systems in some of the Courts. One Courthouse, Blenheim I think, actually got air-conditioning, something little known in New Zealand in those days. Advantage was taken of the expanded public works programme of the time to erect some new Courthouses. The architecture of these was supervised in detail by my father. Not only did they have to be functional and convenient, but of attractive appearance. There were various tussles with the architects to this end.

While I do not know whether it was his own idea, my father put through the Regulations Act 1936. This made regulations available to the public in the same way as had been the case with statutes. The preface to the 1936 volume clearly states the intention—to proclaim the law and make it readily available to all. The superiority of the arrangements made for the publication of regulations by this Act will be readily appreciated by anyone who has had to dig back in the *Gazette* to find the law, and then find that the particular regulation wanted is not in print. Further, the regulations were previously not in a format easy to read.

It was my father's great regret that circumstances did not permit him to bring out a reprint of the statutes. It became possible to do this only well after the war years, when Sir John Marshall launched that project. Nevertheless my father had the matter very much in mind in the 1940s. He was constantly talking about the relative merits of consolidation and re-enactment, as was done in 1908 with the danger of inadvertently changing the law in the course of the necessary tidying up, and those of a simple reprint.

However one thing he said he did do, and that was to lay down the way statutes and regulations are amended. At one time it was the practice to make amendments to an Act by amendments which were substantive in themselves. These would modify or embellish the provisions of the Act proper. Then the provisions in the amending Act might be amended. This was a very great nuisance to anyone trying to fossick out the position on a particular point. When published, the legislation might be spread over several enactments.

The situation now is that when an Act is to be amended by the addition of new provisions, then they are inserted in the Act in their proper sequence. If the provisions are to be amended except in a simple way, then the old provisions are removed from the Act and the amended provisions are substituted. Under this system the Parliamentary Counsel can very quickly get a statute ready for reprinting, the job being reduced pretty much

to one of using scissors and paste. The blue volumes of the statutes will soon be crowding the shelves in legal offices. But the profession can be assured that when the time comes once more to reduce the statutes to a few volumes, it will be possible to produce the reprint for them with relative ease.

Perhaps these are only some of the ways in which my father endeavoured to minimise practical problems which beset the legal profession, and it may be added, every one who is concerned in the administration of the law.

B R MASON

TRIBUTES TO THE LATE REX MASON

Members of the judiciary and members of the profession gathered recently at Wellington at a special sitting of the Supreme Court to pay tribute to the life and work of the late the Hon H G R Mason QC, CMG, LLD. On the Bench with the Chief Justice, Sir Richard Wild, were Mr Justice Richmond, Mr Justice Woodhouse, Mr Justice White, Mr Justice Cooke, Sir Douglas Hutchison, Sir David Ward and the Hon A L Tompkins.

Addressing their Honours, the Attorney-General, Dr A M Finlay QC, said that the face, and in particular, the characteristic voice and figure of Henry Greathead Rex Mason QC was more familiar to what has been called "The High Court of Parliament" than it was to the Courts of law and his loping stride was indeed more suited to the corridors of power than to the confines of the inner Bar to which he was called as long ago as 1946.

"His influence, however, bears strongly on both," he continued. "As a lawyer of distinction and a law reformer of eminence, he argued with dogged persistence for measures that were sometimes hotly opposed and sometimes encountered the even more impenetrable wall of total indifference. His measure of success is familiar to us all.

"By temperament, something of a conservative and by no means always in the forefront of radical thinking in his own political party, he proved himself in all matters legal and in many of a social character, to be startlingly innovative.

"He was dedicated to the rule of law and was an outspoken advocate and defender of it in Parliament and elsewhere, but he never doubted that the law was made for man, not man for the law. As a result, all principles and propositions remained open to question and proof—and if unsustainable, to modification and even reversal. Antiquity, to him, conferred no authority, and no special sanctity attached to any precedent or Act of Parliament, however venerable. Even that article of faith known as the Torrens system of land transfer did not escape his critical contemplation. To say he was pragmatic implies some concession to expediency, but if a precept or proposal "did not work", and work properly, then there was something wrong with it and something to be remedied.

"This disposition, coupled with an eager, inquiring and ever hungry mind, made him, despite advancing age, a life-long student. He early earned the title of "Father of Systematic Law Reform" in this country and he lived to become Father of the House of Representatives.

"As Attorney-General and Minister of Justice in the first two Labour Governments, he won the respect and affection of the profession and his integrity and dedication were universally conceded and admired. Long after his retirement, he remained a familiar and friendly figure in the precincts of Parliament, always ready with a word of advice, but always busy with some activity of his own, right up to the time he entered hospital not long ago. He was, and will continue to be, an inspiration to his successors both in law and in politics.

"I had the honour of serving as his junior for a period in his Ministry, and the privilege later, of inheriting part of the area he had earlier represented, and became his political neighbour in Parliament, this time in opposition. Both experiences were illuminating and rewarding and I am enriched by the knowledge that as a campaigner and a colleague, as a Parliamentarian and a lawyer he was, and always will be to me, simply Rex Mason," Dr Finlay concluded.

On behalf of the New Zealand Law Society, its President, Mr Lester Castle, said that at the opening of the 16th Triennial Law Conference, passing reference only was made to the sudden death of the Hon H G R Mason QC.

"This morning, the New Zealand Law Society is proud to be associated with the tributes to

Mr Mason, at one of his last public appearances, making the first presentation of the Rex Mason Prize to Mr R A Moodie (see [1974] NZLJ 571).

the life and work of the late Mr Mason, and we note that in the last six months, we have had occasion to recall the services of the late Sir Kenneth Gresson and the late Sir Wilfrid Sim, both of whom were the Law Society's representatives on the Law Revision Committee from its inception, whilst the man whose memory we honour today founded the Law Revision Committee following the passing of the Law Reform Act in 1936," he continued.

"From time to time there have been surges of endeavour to keep the law fashioned so as to be an effective instrument for the attainment of justice. His was the acknowledged guiding hand in the initiation of law revision and law reform nigh on 40 years ago.

"Prior to 1935, a strong case had been made by the profession for a reconstruction of the office of Attorney-General by the appointment of a practising barrister to that office; previous holders had to some extent held the position as an appendage to other onerous ministerial portfolios. It was not surprising then that the profession marked with pride his appointment as Attorney-General and Minister of Justice in December 1935.

"His experience in general practice during the years 1924-1942 assured his ready sympathy with the ideals of the profession as a whole and an understanding of the difficulties of its members in the ranks. He was constantly alert to the necessity to stimulate awareness, particularly in young lawyers, of the nature and function of law in practice and the need for development of law in times of social change," Mr Castle continued.

"His scholastic achievements were of the highest order; they provided the broad base for his great pride and satisfaction in the task of developing and shaping the lines of a new social and economic order. His extensive service throughout 17 years as Attorney-General, as

leader of our profession and as Minister of Justice was most marked in so many ways.

"All members of the New Zealand Law Society acknowledge with gratitude his outstanding services to the nation and to the profession and we, in turn, extend our sympathy to the members of his family," he concluded.

Sir Richard Wild observed that it has long been our tradition, when a specially distinguished lawyer dies, for the Bench and the Bar to join in this Court to pay their tribute to his life and service. If he had held office as a Judge, the practice is for the Judges to summon the gathering: if he was of the practising profession, the request comes from the Law Society.

"It is in itself, I think, eloquent testimony to the universal respect in which Mr Mason was held by our whole legal community that on this occasion both the Judges and the Society have moved independently to arrange this morning's assembly," he continued.

"Mr Mason was born in Wellington and educated at the Clyde Quay school, at Wellington College, and Victoria University College. His high academic ability was shown by his winning a Queen's Scholarship and a Junior University scholarship, by his being head boy at Wellington College, and by his graduation in the degrees of Master of Arts with honours and Bachelor of Laws. He began practice at Pukekohe in 1911, and then moved to Auckland in 1923.

"Mr Mason gave long and distinguished service to local and central government. He was Mayor of Pukekohe for four years, a member of the Auckland Transport Board, and ultimately its Chairman. Outstanding in our legislative history was his service to Parliament of which he was a member for an unbroken period of no less than 40 years. During his membership he pressed, often single-handedly and against unthinking opposition, for a variety of reforms which have long since been accepted—notably, of course, decimal currency, but of no less importance from the lawyer's viewpoint, advances in the law of divorce and domestic proceedings, in the jurisdiction of the Magistrate's Court, in much overdue modernisation of the law of property, and in setting up machinery for continuing law reform.

"When Mr Mason died on 2 April at nearly 90 years of age he had long outlived most of his contemporaries, and there are comparatively few now who had the privilege of working closely with him. I am very glad that the Attorney-General, who collaborated with him as adviser and Parliamentary colleague, is here to pay his fine tribute. I am glad, too, that men like Messrs Dallard and Robson, who were his senior departmental officials, are present.

"For my own part I am proud that it fell to my lot to be Solicitor-General during the three years when a change of Government brought him back at an age past normal retirement, even for Judges, to the office of Attorney-General. That office he held in all for a total of 17 years—a period unsurpassed in all our history in length and, I believe, in quality of service. When he first assumed it in 1935 he said, in regard to improvement in the law, that 'no arm-chair philosophy can take the place of what is impressed upon one's brain through the course of daily employment'. In that observation, I think, lay the key to Mr Mason's great achievements, always practical and wise, in law reform. He did not leave it to the theorists and academics. He was a sound lawyer, liberal and clear of thought, incisive of speech, and logical and courageous in action. It was not his way to seek easy or general popularity. He was a self-contained man, austere—yet generous and kindly in personal relationships. No problem was insoluble against the penetration of his intellect and the light of his smile.

"In paying our tribute to his long and dedicated life in the law it is good to reflect that his service was recognised by the Queen in the honour of CMG and by his own University in the award of LLD honoris causa. We are glad to know that his name will be perpetuated through the munificence of his sister, Miss Henrietta Mason. To her and to Miss Ruth Mason, Mr Brian Mason and Mrs Hutchings, the Judges and their retired colleagues express our profound sympathy," the Chief Justice concluded.

A progressive step—Divorces are now being granted by the Land Transfer Office on the presentation of a simple, single document. How else can one account for an entry discovered in the Land Transfer Office at Wellington recently: a memorial noting registration of a Notice of Marriage had been cancelled by the application of a rubber stamp emblazoned, "Discharged".

CASE AND COMMENT

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

Time of the essence and specific performance

From time to time seemingly fundamental matters arise for judicial consideration. In *Forsyth v Tannahill,* a reserved judgment of White J delivered in the Supreme Court at Wellington on 24 March 1975, the main issue of practical concern was the necessity of giving notice making time of the essence before issuing proceedings for specific performance. On the facts, after the vendor had delayed settlement of the agreement for sale and purchase for just over 2 months, the purchaser wrote to the vendor in, inter alia, the following terms: "We accordingly advise you formally herewith that unless settlement is effected within 14 days of the date of this letter we shall assume that your client is unwilling to settle the sale and shall commence proceedings in the Supreme Court immediately for a writ of specific performance". In due course proceedings were commenced.

Counsel for both parties directed argument to the validity of this notice. It was submitted first for the purchaser that he was not required to make time of the essence, and that, provided he was ready, willing and able to complete at all relevant times and had not himself caused any delay, he was entitled to specific performance. This submission is not discussed in the judgment, which proceeds on the assumption that it is necessary that time be of the essence before specific performance proceedings are issued. His Honour then makes findings that time was not made of the essence either by the contract itself or the surrounding circumstances, but that the vendor's delay was such that the purchaser was entitled to make time of the essence and had validly done so by the letter of notice. His Honour then went on to consider arguments relating to laches and hardship, and finally decided to grant specific performance.

With respect, it is necessary to take issue with the basic assumption that it is a prerequisite of specific performance proceedings that time must first have been of the essence. It is submitted that counsel's argument that the purchaser was not required to make time of the essence, was correct. It seems clear that no notice is necessary when specific performance is sought. The purpose of notice making time of the essence is to remove the equitable bar, by the remedy of injunction, to the exercise of the common law right of rescission. In other words, equity will not permit the contract to be determined merely because a particular time limit has not been kept, and will grant some relief against common law rescission to the person in default. But the matter is quite otherwise when one is seeking an equitable remedy to compel the person in default to carry out his bargain. Equity does not need to protect the defaulting party from its own remedy, nor so much from a compulsion to carry out his bargain as from a determination of the contract. (See Stonham, *Vendor and Purchaser,* paras 460, 1473 and 1478; Farrand, *Contract and Conveyance* (2nd ed) p 239.)

Further than the lack of necessity to give notice, it may well be inadvisable to do so for the reason that, once a valid notice is given, it makes time of the essence for both parties and so binds the giver as well as the recipient (*Finkielkraut v Monohan* [1949] 2 All ER 234). There seems no reason to take the risks inherent in this if one can commence proceedings for specific performance without.

However, the notice must be a valid notice and, contrary to the decision of White J, there is some authority which must be considered to the effect that a notice giving warning of proceedings for specific performance unless the contract is completed by a specified date will not operate to make time of the essence of the contract (*Lennebere v McGirr* (1919) 19 SR (NSW) 83). Although there appears to be only the one decision examining this particular form of notice, there is ample authority on the other side—that to be effective the notice must make it plain to the recipient that if settlement is not completed by the date set, it is the intention of the notifier to treat the contract at an end or as entitled to end it. In *Baker v McLaughlin* [1967] NZLR 405 at p 412-3 there is a discussion of this requirement and a finding that the alleged notice in that case was not operative to make time of the essence. (See also Stonham, *Vendor and Purchaser,* para 1474; and *Pry on Specific Performance* (6th ed) p 513.) On the authorities discussed in these sources it is res-

pectfully submitted that it is doubtful if the notice in the present case was operative to make time of the essence.

In conclusion, it must be stated that although these matters are of importance to practitioners in knowing how to proceed in a particular case, they would have made no difference to the final result in the instant case.

DWMcM

Family Law—Quantum of maintenance under Domestic Proceedings Act 1968

Borrington v Borrington (a judgment of Chilwell J's delivered in the Supreme Court, Auckland on 20 March 1975) was an appeal from the amount of certain maintenance orders. The mathematics of the case need not concern us, but certain important matters do emerge from his Honour's judgment: (a) Counsel for the appellant husband submitted that the Court below and the Supreme Court on appeal should be guided by certain principles in fixing the quantum of maintenance. The first, to use the learned Judge's own words, was that: "Maintenance ought to be fair and reasonable having regard to the total situation, ie the position of both wife and husband". His Honour accepted this as conforming to the basic principle laid down in s 26 (1) of the 1968 Act, which enjoins the Court to order a husband to pay "such periodical sum towards the future support of his wife as the Court thinks reasonable". It was pointed out that reasonableness is to be considered in the context of the matters referred to in ss 27, 28, 29 and 30 of the Act.

Counsel's second proposition was that: "The normal guideline is that a wife should receive one-third of husband's net income". Reliance was placed on *Wachtel v Wachtel* [1973] Fam 72, especially at p 94 and *Trippas v Trippas* [1973] Fam 134, especially at p 140 and also upon *Chamberlain v Chamberlain* [1974] 1 All ER 33 (CA). Chilwell J remarked that the *Wachtel* case must for the time being be accepted as providing the appropriate judicial gloss on the modern English legislation and emphasised that "in England the so-called rule—(a) applies to the joint income of the parties. (b) Is *not* a rule. (c) Is a flexible starting point". He observed that the so-called rule had previously been discarded by the English Court of Appeal as having any application to the magisterial jurisdiction to award maintenance in *Ward v Ward* [1948] p 62, where justices "were advised in clear language to adhere to the words of the statute and make an award which was reasonable in the circumstances. This advice was reinforced . . . in *Kershaw v Kershaw* [1964] 3 All ER 635. The rule had been earlier discarded in divorce proceedings in *Gilbey v Gilbey* [1927] P 197, where Lord Merrivale considered that the application of such a formula "disregards the nature of the duty imposed on the Court by the statute" (p 200). Chilwell J referred to the rule as having received scant popularity in New Zealand, citing *Clark v Clark* [1937] GLR 176 and *Wright v Wright* [1942] GLR 357. He notes also the rejection of the rule in Australia, citing *Davis v Davis* [1964] ALR 992, at pp 994 and 995, per Barry J. Chilwell J had this to say:

"In my judgment it would be unwise to reintroduce into New Zealand as a principle for the guidance of Magistrates, or for Judges on Appeal, any rough rule of proportion whether it be regarded as rough guide or a flexible starting point when it has been so decisively rejected here in the past. The criteria are clearly laid down by the provisions contained in Part IV of the Domestic Proceedings Act, 1968. In the end the Magistrate must fix an amount which he thinks reasonable having regard to the criteria (in the case of wives' maintenance) set forth in ss 27, 28, 29 and 30 of the Act. Having paid regard to those criteria his decision is, in the end, a matter of judicial discretion. . . . It could well be that a Magistrate may in a particular case or in a particular category of cases go through the mental process of examining the application of a rule of proportion such as the so-called one-third rule. He could not be criticised for so doing; nor could he be criticised if he ignored it. His judgment would, in my judgment, be properly the subject of criticism if the so-called rule were shown to have played a decisive part. As I have observed, a Magistrate's decision on making a maintenance order is, in the end, a matter of discretion. So long as he has exercised it judicially it is not open to review on appeal unless his discretion is shown to be exercised on some wrong principle, or that he has relied on some fact irrelevant for the purpose, or omitted consideration of a relevant fact, or, finally, that he has been shown to be wholly wrong. See *Bateman Television Ltd (In Liquidation) v Coleridge Finance Co Ltd* [1971] NZLR 929, 932. In the present case, assuming that the learned Magistrate completely ignored the one-third rule, his discretion ought not to be reviewed on this ground."

Counsel's kind submission was that "maintenance should be such as to allow the husband the means of living as close as possible in the standard to which the parties were accustomed save for the necessary adjustment in the circumstances inherent in the fact of separation. On the facts of the case, this submission was accepted by the learned Judge, who referred to *Attwood v Attwood* [1968] 3 All ER 385, especially at p 388.

Counsel's fourth submission was that "Budgets can be used for the assistance they give in the assessment of fair overall maintenance but it is incorrect to proceed on mathematical calculations based on budgets without looking at the overall situation having regard to other relevant factors and without attempting a broad assessment of what it is fair and just on the merits to award". He also submitted that budgets were of doubtful assistance and at best should be used by magistrates only as a guide and that the Magistrate here had commentated unduly on the budgets. It was suggested that the Magistrate's attention had been deflected by them from the overall situation.

Chilwell J proceeded to the matter of budgets, stating that: "Having regard to the matters to which s 27 of the Act directs attention is to be paid, I cannot accept the general proposition that budgets are of doubtful assistance. The weight to be given to any particular budget will depend upon the care and accuracy taken with its preparation". He continued:

"I understand that as a matter of general practice the learned Magistrates require the production of budgets. In my judgment reliable budgets are of great assistance to the Court in considering the requirements of s 27 of the Act. They are certainly much more reliable than any so-called one-third rule. It is to be remembered that the learned Magistrates hear a great number of these cases each year. They acquire a vast knowledge of the living standards and costs of a full cross section of the community. This is a continuing process by virtue of which they are kept in daily touch with these matters. This is the type of experience to which Barry J referred in *Davis v Davis* (supra). The learned Magistrates can quite quickly perceive the critical points in any budget.

"... I cannot accept the principle contended for by Mr Ennor in the way he framed it. In my judgment it is proper for a learned Magistrate to proceed on mathematical calculations based on budgets so long as he does not overlook his ultimate duty to make an order which he 'thinks reasonable'."

On the facts and figures, his Honour made an order for $50 per week in favour of the wife and confirmed the award of $1,500 in respect of past maintenance which the learned Magistrate made. In regard to the latter matter, his Honour saw no analogy whatever between s 41 of the Matrimonial Proceedings Act 1963 and s 26 (1) (b) of the Domestic Proceedings Act 1968.

PRHW

No interim maintenance orders in the Magistrates' Courts

The decision of McMullin J in *Beck v Beck* (judgment was given on 12 March last) is of considerable importance to practitioners. The case was an appeal against the making of an interim order in a Magistrate's Court. The ground of the appeal was that no jurisdiction existed to make it.

The history of the proceedings was as follows. On 13 February 1974 the respondent wife applied for separation, maintenance and related orders. Included in her application was a request for dispensation of the conciliation procedure. On 18 February reference to a conciliator was dispensed with. On 6 March the appellant husband gave notice of intent to defend. He then filed in the Supreme Court a petition for restitution of conjugal rights. The wife then filed a petition for a separation decree. Because of the issue of these Supreme Court proceedings, no steps were taken by the wife to obtain hearing of her application for the orders for which she had applied in the Magistrate's Court. On 6 June she applied for an order for interim maintenance and her case was heard on 24 September. The wife gave evidence of means but the appellant did not. The Magistrate made an order for $45 a week. It was plain that he regarded himself as dealing with the wife's application for an order for interim maintenance and not with her substantive application and that he regarded himself as having power to make such an order. He adjourned the "proceedings before the Court" for a period exceeding one week and made the interim order. The submission upon which the present appeal was based was that the Magistrate had no jurisdiction to make the interim order because at the time he made it he was not hearing a substantive application for a maintenance order and the proceedings which he adjourned in order to give himself

jurisdiction consisted only of the application for the interim order and not the application for the substantive order for which no fixture had been sought or obtained. It was submitted that the Magistrate could not confer jurisdiction on himself by adjourning the application for the interim order for more than a week when it was only that application which was before him.

His Honour carefully scrutinised the terms of s 77 and the definition of "maintenance order" contained in s 2. His Honour proceeded to say:

"Clearly then 'Maintenance order' where used in s 77 includes an interim maintenance order as well as a substantive order unless the context otherwise requires. I am of the opinion that the context in which the term is used in s 77 requires otherwise. I reach that conclusion for two main reasons. The first reason is that, if s 77 were to be read as including an application for an interim maintenance order, the subsection would not be capable of a sensible interpretation. It would then have to be read as providing that, where the hearing of an application for an interim maintenance order is adjourned for any period exceeding one week, the Magistrate may make an order for maintenance until the final determination of the case or such shorter period fixed by the Magistrate, ie, an interim maintenance order. Such a construction raises the question as to how an interim order can be made when the application for that very interim order is adjorned for more than a week. While the Domestic Proceedings Act recognises the existence of an interim order and what I have called a substantive order, such a construction would require the recognition of a third type of order, namely, an interim interim maintenance order. That hybrid is not known to the law. The second reason is to be ascertained by a reference to the provisions of s 15 (2) of the Act. Section 15 (2) permits of the reference to a conciliator of an application for a maintenance order where the maintenance order sought is "other than an order for interim maintenance". Section 77 permits the making of an interim order not only where the hearing is adjourned for a period exceeding one week, but also where the application for a maintenance order is referred to a conciliator in terms of s 15. But the application to be referred to a conciliator under s 15 (2) is an application for a maintenance order "other than an order for interim maintenance". Consequently, the words 'any such application' where used in s 77 (1) can only refer to an application for a substantive order, the 'such' application referred to in the second limb of that subsection being a reference back to the 'application' for a maintenance order referred to in the first limb. It is a necessary inference that the application referred to in the first limb is an application for a substantive order.

"The construction which I have placed upon s 77 is one which gives effect to what I believe to be its general purpose, that is, to enable the Court to make a 'stop gap' maintenance provision for a party seeking a substantive order where the substantive proceedings are adjourned for something more than a minimum period of time. It also gives the Court power to make that 'stop gap' provision where the application for a substantive order has been referred to a conciliator; a procedure which may itself preclude the Court from hearing the substantive application for maintenance for an indefinite period of time (s 15 (1))."

His Honour continued to say that jurisdiction to make an interim order arose only where an application for a maintenance order is referred to a conciliator or the hearing is adjourned for more than a week. He then proceeded to add:

"But in the situation before the Court it is clear from s 77 (1) that jurisdiction to make an interim order arises only where the hearing of an application for a maintenance order (which I have held to be a reference to an application for a substantive order) has been adjourned for a period exceeding one week. There has never been any hearing in the present case of the application for a substantive order. No fixture has ever been sought. The Magistrate made it clear from his judgment that the hearing which he was adjourning was the hearing of the only application which was before him, namely, an application for an interim order.

"There being no jurisdiction to make the interim order, the appeal must succeed."

What must be particularly well noted by the practising family lawyer are the closing words of McMullin J.

"It will be a result of this judgment that, cases where references have been made to conciliators apart, interim orders should not be made where there has been no adjournment of the hearing of the substantive application. This, I am informed, will run counter to the practice adopted in the many Courts where, pending the making of substantive maintenance orders, interim orders are made even though no hearing date has been fixed, much less adjourned. While the efforts of those who administer the

Domestic Proceedings Act to make the Act a workable proposition are laudable, the interpretation of the law must not bend to the dictates of expedience and, if no jurisdiction exists under s 77 to make an interim maintenance order in the circumstances before the Court, jurisdiction is not to be assumed for reasons of convenience. The matter is one that requires legislative intervention, not judicial interference. It requires only an amendment to the provisions of s 77 to give the Court power to make interim maintenance orders in circumstances such as the present."

The appeal was allowed and the interim maintenance order was quashed.

P R H W

Administrative law — Delegation of administrative power

The Waitemata County Council in 1972, acting under reg 10 (6) of the Heavy Motor Vehicle Regulations 1969 (SR 1969/231), adopted a resolution prohibiting vehicles exceeding 40 feet in length from using part of the Waitakere Scenic Drive. The resolution declared that the portion of the Drive subject to the limitation was not of a standard suitable for such vehicles. Regulation 10 (6) provides:

"Any controlling authority may prohibit the use on any specified road of any heavy motor vehicle which exceeds 30ft in length, or of any combination of motor vehicles that includes a heavy motor vehicle and exceeds 30ft in length, where it is satisfied that the road is not of a standard suitable for such heavy motor vehicles or of any such combination of motor vehicles."

In *Montana Wines Ltd v Waitemata County* (judgment 23 October 1974, Mahon J) the plaintiff sought an injunction claiming that reg 10 (6) was ultra vires the Transport Act 1962. It was asserted that there was nothing in the enabling section, s 199, which authorised the Governor-General in Council to delegate to a controlling authority (which term included the defendant Council) the legislative power conferred on the Governor-General. Nor could s 77 be invoked because the prohibitions there authorised were limited to a specified period, whereas the resolution of the defendant made under reg 10 (6) operated indefinitely. It was also argued that reg 10 (6) was repugnant to s 72 (conferring powers to make bylaws) and was therefore ultra vires. For the plaintiff to succeed one of two submissions needed to be upheld. The first was that a prohibition could be imposed only by a bylaw made in terms of s 72 and that reg 10 (6) was ultra vires. The second submission was that reg 10 (6) purported to allow legislative power to be subdelegated without statutory authority.

The first submission was not upheld. Regulation 10 (6) was seen as an alternative mode of imposing limited restrictions and was not therefore in conflict with s 72. It was held that there was no authority for the subdelegation of legislative power and if the prohibition imposed by the Council amounted to an exercise of legislative power, reg 10 (6) was invalid. *Geraghty v Porter* [1971] NZLR 554 and *F E Jackson & Co Ltd v Collector of Customs* [1939] NZLR 682 were cited in support. But it was contended for the defendant Council that the power given by reg 10 (6) was solely administrative and not legislative. The learned Judge observed: "The distinction between legislative and administrative action is sometimes very fine and there can be no doubt that the power vested in the local authority by reg 10 (6) comes very close to being legislative in its nature. I have particularly in mind the purported power to impose prohibition indefinitely".

He later stated, in relation to the remarks of the Turner J in *Hookings v Director of Civil Aviation* [1957] NZLR 929, that if the

> "transferred function is unconfined in its application, especially in relation to the subject-matter of its exercise, an unauthorized sub-delegation of legislative power may readily be inferred. An unauthorised sub-delegation of discretionary authority will be saved by s 2 (2) of the Statutes Amendment Act 1945, but that enactment does not protect the unauthorized sub-delegation of legislative powers: cf *Hawke's Bay Raw Milk Producers Co-Operative Co Ltd v New Zealand Milk Board* [1961] NZLR 281 (CA). But in the present case, it appears to me that the power vested in a controlling authority by reg 10 (6) to prohibit a special class of vehicle from using a specified road with defined characteristics is confined by legislative conditions of sufficient particularity to warrant that power being described as an administrative function."

The plaintiff's action was dismissed and the interim injunction was discharged. Had the discretion conferred by reg 10 (6) not been limited by the legislation, which had provided guidelines as to its exercise, it is probable that the Regulation would have been invalidated.

Wide discretionary authority without adequate standards or guidelines is liable to offend the maxim delegatus non potest delegare.

J F N

Cancellation of maintenance order

Mitchell v Mitchell (decision of White J delivered in the Supreme Court, Auckland, on 14 March 1975) was an appeal against a magisterial decision that an application to cancel or vary a maintenance order in favour of the respondent wife must be refused. The principal ground of appeal was that the Magistrate had failed to acknowledge that the intimate relationship of the wife with another man was a ground for varying or cancelling the maintenance order. In fact the intimate relationship (including acts of adultery) was assumed to exist for the purposes of the decision of the Magistrate, who had said: "Suffice to say whatever the extent of any association between the wife ... and this male friend, she is not on the evidence before me in receipt of any maintenance or support from this friend. . . . There is in my finding no question of anyone else supporting her or being under any legal or moral obligation or duty to do so, other than this applicant, the defendant in the earlier proceedings". His Honour considered several cases, viz: *Blunt v Blunt* [1943] AC 517; *Mason v Mason* [1921] NZLR 955, 961; *Kerr v Kerr* [1959] NZLR 266, 270; *Johnson v Johnson* [1933] GLR 439; *Stead v Stead* [1968] P 538, 542; *Miller v Miller* [1961] P 1 and *Taylor v Taylor* [1974] 1 NZLR 52, and continued as follows: "As has been said frequently, it is a question of fact in each case. I do not consider that in the present case the appellant has been able to show that the exercise of the discretion by the Magistrate was wrong on the facts as he found them at this stage. It is proper to add, however, that, in my opinion, conduct may well be an important consideration where, for example, a wife has become involved in a semi-permanent association falling short of a stable de facto relationship or where a husband's maintenance is being used in part to enable a wife to associate intimately and continually with other men". It seemed to his Honour that associations of that nature were not intended by the legislature to be subsidised by a husband or former husband and that they were contrary to the public interest. In his view, the cases support the view that conduct is a factor to be considered and that the variation of an order does not depend in all cases on the question whether the evidence has established a financial contribution by "the other man". His Honour concluded by adopting the words used by Sir Micheal Myers CJ in *Managh v Managh* [1937] NZLR 498, at p 507: "I do not doubt the possibility of cases arising in which the circumstances may be such as to call for suspension or variation, but each case must be dealt with on its own facts and circumstances." In dismissing the appeal, White J leaves us with a subtle question, viz;: "When does a semi-permanent association falling short of a stable de facto relationship become an actually stable de facto relationship".

P R H W

Watching a witness—"Although every witness did his best to help the Court in this strenuous inquiry, even at the cost of considerable personal strain while testifying at length on topics of complexity, my final decision will be greatly influenced by the advantage of having seen and heard the contemporaneous exposition of each expert. Cogency, persuasiveness, and the other imponderable qualities that augment or detract from a sense of conviction in the mind of a Court are all due for assessment in this case. I refrain as far as I can from making personal comments about prominent professional men, who went to such trouble to assist me in this task. Although the transcript was corrected at my insistence by counsel in open Court, there were occasions when the typewriter could not depict in toto the revealing efforts of a witness who was forced in cross-examination to defend a less tenable aspect of a thesis which he had already advanced. The literal text of the transcript (which I have reread several times) cannot supplant here the advantage gained from hearing the oral evidence at first hand" per Haslam J in *Todd v IRC* (1972) 2 ATR 427, 429.

Judgment affirmed—"Until I heard Mr Macassey's able and ingenious argument, it never occurred to me to doubt that the law is that either bailee or bailor may sue a wrongdoer for the entire damage done to the chattel bailed. And after careful consideration of the argument and examination of the authorities, I adhere to my previous opinion." Gillies J in *Mangan v Leary* 3 NZ Jur (NS) 10, 16.

CAPACITY OF THE AGED

An address given to the Auckland Medico-Legal Society by Mr C P Hutchinson QC.

It seemed requisite to commence by researching the pronouncements of judgments down through the centuries on the capacity of the aged, bearing in mind that according to the Annuity Tables in the Estate and Gift Duties Act 1968 the longevity of women is greater than that of men.

Starting in modern times and working backwards, in the case of *Re Alsopp* [1967] 2 All ER 1056 Lord Justice Russell described a man of 79 as being "in the terminal years of his life". In 1913 in *Brougham v Grooby* 16 GLR 476 Sir Robert Stout in discussing the capacity of a testatrix of only 78 years of age remarked that "most aged people approaching the portals of death had not the mental ability they had as when vigorous in body". Any superannuitant engaged in such research at this stage would be filled with gloom, but the climax was yet to come. In 1835 in the case of *Jones v Goodrich* 5 Moo PCC 16 the testatrix aged 86 was described by the Judge as being "on the verge of the conclusion of a life unusually protracted."

At this stage it is not surprising that one is driven to ask the question as to the origin of the mainspring of any decision of that abstract concept, justice. Down through the centuries justice has been depicted as a goddess holding a pair of scales—which to the mere male seems most inappropriate as it should, of course, have been a god. In primitive times the tribal ruler attached to this concept a supernatural agency, but in modern times that supernatural agency has been replaced by the catchcry of every plaintiff who brings an action against a Government Department or a local body—that the decision was contrary to natural justice. On reflection it becomes perfectly clear that "natural justice", which has recently been described as "fair play in action", has arisen because the human species walks upright. By reason of this it becomes plain why the law, when left to its own devices, measures mental capacity by the physical ability of an individual. The reason why a person came of age at 21 years was because by that time, so far as the knowledge of the medical profession then went, a man's bones had become set and he was capable of bearing armour. It is also probable that there was an economic reason for this—because it would be expensive to put a gusset in a suit of armour.

Turning to statutory declarations regarding the age of retirement of persons, a study of the ages shows a distinct mental snobbery and class distinction. In New Zealand any Judge appointed after 4 September 1903 has to retire at the age of 72. No reason is ascribed for this, but it may be some sort of bonus on the biblical-allotted span of three score years and ten. Turning to England, a director of a public company has to retire at the first annual meeting after his 70th birthday, although he may be reappointed by the Company in general meeting after special notice has been given of a proposal to reappoint him and stating his age. There is no counterpart to this in New Zealand. Until 1920 in New Zealand there was no compulsory age of retirement of a Magistrate, although a Magistrate held office at the pleasure of a Governor-General. In 1920 the retiring age was fixed at 65, but in 1924 it was extended to 68. The ordinary man and woman in the street becomes a superannuitant at 65.

Under the Aged and Infirm Persons Act 1911 an application may be made to the Court under s 4 for appointment of a manager of a person by reason of that person's age, disease, illness or mental or physical infirmity if he or she is (1) unable wholly or partially to manage his or her own affairs, or (2) is liable to be subject to undue influence. This Act turns to the medical profession for assistance and there are no longer arbitrary ages laid down in the statute. There are only three cases reported on this section. In *Re Morgan* [1940] GLR 55, in which an old lady of 84 who was mentally but not physically capable of managing her affairs, and who had appointed two attorneys under a revocable power, the Court appointed the Public Trustee as Manager of her affairs since the old lady strongly desired that this should be done, and the Court said that as her inability was only of a physical nature her desire must have very great weight with the Court. In *Re M* [1965] NZLR 286 the Court laid down the principle that an application for a manager of a person under that Act must be served on the proposed protected person unless independent medical evidence was given that such person was incapable of rational appreciation of the proceed-

ings even with the assistance of competent advice; the latter obviously being given by a lawyer. The third case was *Re G* [1966] NZLR 1028 in which a mentally defective person aged 29 who had a domicile of origin in New Zealand, at the age of 13 had been taken by her mother to Scotland where she had been placed in an institution and still remained there. She was entitled to substantial assets in New Zealand and to a considerable income. The Court held that as she had not acquired a domicile of dependence in Scotland it had jurisdiction to make, and did in fact make, an order for protection in New Zealand.

Transactions by Infirm Persons

In *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127 an illiterate Malay woman of great age had set up her nephew, who was an Arab, in business. He had come to Singapore some twenty years before, penniless. The nephew instructed his own lawyer to draw up a deed of gift by the old woman giving him all her property. The Court in setting aside the gift said that "in particular a gift should be set aside—(a) where the Court is satisfied that the gift was the result of influence expressly used by the donee for the purpose, or (b) where the relationship between donor and donee had at or shortly before the gift been such as to raise a presumption that the donee had influence over the donor. In order for a gift of such a nature to be effective the evidence must show that it was the spontaneous act of the donor acting under circumstances which enabled her to exercise an independent will.

Wills

The foundation of the Courts upholding the will of a person is to be found in an American case of 1820. *Van Alst v Hunter* 5 Johnson NY Chan Rep 159. Chancellor Kent in that case said:

> "It is one of the painful consequences of extreme age that it ceases to excite interest and is apt to be left solitary and neglected. The control which the law gives to a man over the disposal of his property is one of the most efficient means which he has in a protracted life to command the intention due to his infirmities."

This seems to be a powerful reason for enacting the Testamentary Promises Act, but it also raises the question of protection from undue influence.

In *Bankes v Goodenough* (1870) 5 QBD 549, 564 Sir Alexander Cockburn after citing from *Van Alst's* case went on to say:

> "For these reasons the power of disposing of property in anticipation of death has been regarded as one of the most valuable of the rights incidental to the right of property, while there can be no doubt that it operates as a useful incentive to industry, the acquisition of wealth, to frugality, and to the enjoyment of it."

In order for a will to be held to be valid a testator at the time he makes his will must have a "sound disposing mind and memory and understanding". On the question of degree of memory the principle was again laid down in the United States of America in *Stevens v Vancleve*, 4 Washington 267, where the learned Judge said:

> "The testator must, in the language of the law, be possessed of sound and disposing mind and memory. He must have memory; a man in whom the faculty is totally extinguished cannot be said to possess understanding to any degree whatever or for any purpose. But his memory may be very imperfect; it may be greatly impaired by age or disease; he may not be able at all times to recollect the names, the persons, or the families of those with whom he had been intimately acquainted; may at times ask idle questions and repeat those which had before been asked and answered, and yet his understanding may be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength of memory and vigour of intellect to make and to digest all the parts of a contract, and yet be competent to direct the distribution of his property by will. This is a subject which he may possibly have often thought of, and there is probably no person who has not arranged such a disposition in his mind before he committed it to writing. The question is not so much what was the degree of memory possessed by the testator as this: Had he a disposing memory?—was he capable of recollecting the property he was about to bequeath; the manner of distributing it; and the objects of his bounty? To sum up the whole in the most simple and intelligible form, were his mind and memory sufficiently sound to enable him to know and to understand the business in which he was engaged at the time he executed his will?"

This passage was applied in New Zealand by Herdman J in *Gray v Gray* [1919] GLR 261, 264.

Eccentricity

Eccentricity is insufficient. In *Brougham v Grooby* (1914) 16 GLR 476 Sir Robert Stout CJ said:

> "It is not sufficient to prove that the testator was capricious or was moved by bad motives and did disinherit some of his relatives who ought not to have been disinherited nor to prove that he was eccentric. There must be proof of want of saneness."

In the later case of *In re O'Brien* [1932] NZLR 43 examples were given as to eccentricity which did not affect a will; such as peculiarities in dress or in the habits of life, or indeed even if the testator had withdrawn himself from contact with others.

Delusions

A definition of "delusion" was given by Sir John Nicholl in *Dew v Clark* (1826) 3 Add 79 as follows: "It is only the belief of facts which no rational person would have believed: that is an insane delusion."

In 1793 in *Cartwright v Cartwright* 1 Philm 90 a spinster was of very disturbed mind; so much so that her hands were generally bound together. She kept on asking for pen and paper but her doctor refused to permit this because he feared it would be damaging to her head. However, he relented one day and the maid, named Charity Thom, took into her a pen and sheets of paper. The maid was told to leave the room and the lady was left alone for two hours. They could hear her pacing up and down, crumpling paper and muttering. At the end of the period when she opened the door she had written out a sane testamentary paper which was subsequently admitted to probate. In an earlier case in 1791, *Clarke v Lear & Scarwell* 1 Philm 120, a gentleman who was a mental case went to Littlehampton to bathe in the sea. Whilst there he saw a young woman for the first time and desired to marry her. He was taken to London in a strait-jacket and when loosened he wrote out a codicil in favour of the young woman. This the Court refused to admit to probate. In *Smith v Tebbit* (1867) 1 LR P & D 398 a Mrs Thwaites, believing herself to be one member of the Trinity, left the bulk of her property to a gentleman whom she believed was another member of the Trinity. It is not surprising that the Court would not grant probate of this document. There is one case in New Zealand—*Jones v Jones* [1930] GLR 662. The testator was aged 83, a tanner by trade, who fell off a plank into a tan pit, which at the time he treated as a joke. A few months later he had a stroke and subsequently made a will cutting out his eldest son because at that time he was convinced in his own mind that his son had put the plank there as a trap, which in fact was quite untrue.

Physical disability

In *Re Holtham* (1913) 108 LT 732 an old lady had had a stroke and could not speak. Her solicitor, in order to get instructions for her will arranged that he should ask her questions and if her answer was "Yes" she would squeeze his hand, and nod, and if the answer was "No" she was to shake her head. The solicitor drew her will giving effect to the questions which she had answered in the affirmative. Before the will was read over to her she was asked to push the solicitor's hand away if she agreed. Upon completion of the reading of the will she pushed away his hand vigorously to the full extent of her arm. This document was admitted to probate. But for sheer ingenuity of a solicitor in the case of physical infirmity there can be no better example than the case of *Moore v Moore* reported only in the *Times* newspaper on 13 February 1900, but referred to in *Holtham's* case in arguendo. The aged client had had a stroke which rendered her speechless, but she was capable of using her right hand. The solicitor obtained two packs of cards. On one pack he wrote her assets on the cards and placed them face upwards on the table before her. On the other pack he wrote the names of her relatives and other beneficiaries. He then shuffled the pack and dealt her a card. She placed the card with the name of the relative on the card on which a particular asset was written. The solicitor then collected the two cards as a trick, and subsequently drew a will in accordance with the tricks he had gathered in. The will was admitted to probate and the case is commonly known as the "Pack of Cards Case", but those who remember the old-fashioned parlour game may think it more felicitous to call it "Happy Families".

Undue influence

The test of undue influence in respect of wills is the other side of Chancellor Kent's statement in some ways; namely that a person looking after an aged and solitary person may threaten to withdraw his or her assistance unless the aged employer makes a will in his or her favour. The best statement as to what is and what is not "undue influence" is to be found in *Hall v Hall* (1868) 1 P & D 481 at 482:

"To make a good will, a man must be a free agent. But all influences are not unlawful. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like—these are all legitimate, and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity of threats, such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these, if carried to a degree in which the free play of the testator's judgment, discretion, or wishes is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led but not driven; and his will must be the offspring of his own volition, and not the record of some one else's."

It is as well to remember that wills made in favour of a member of any of the three great professions—the Church, the Law, and Medicine—are looked upon with the gravest suspicion by the Courts. In the case of a lawyer the Courts seem to be even more vigilant and jealous than of either of the other two professions. In *Wintle v Nye* [1959] 1 All ER 552 the testatrix was aged 66 and, unversed in business, her affairs were managed by her brother until he predeceased her. Her solicitor drafted a will for her appointing a Bank and himself to be her executors and leaving the residue of her estate to charity. The solicitor had many discussions with her and eventually another will was drawn and executed in his office whereby he was appointed sole executor and the residuary estate was given to him, a clause being included requesting him to apply the same in accordance with a letter not then written. There were other bequests of annuities which on the death of the annuitants were given to charities. Subsequently the solicitor drew a codicil which revoked the gifts to charities so that they fell into residue. The House of Lords, in reversing a grant of probate, said that it was not sufficient to direct the jury that the will and codicil should be looked upon with suspicion; it should have been put to the jury that they might have considered the solicitor to have been an "evil man".

In the case of *Jones v Goodrich* (supra) the testatrix, who was aged 86 and who had no relatives or friends, had lived in her doctor's house for three years and during that time a will and two codicils were prepared for her by the doctor's solicitor. The Court refused to grant probate of the second codicil under which the doctor would have received considerable benefits.

In *McManus v O'Connor* [1923] GLR 29 the plaintiff, a priest, received a message by telephone to go to the hospital where he found the testator in great pain and about to have an operation. The testator, who had inherited considerable assets from his wife, said that it was his own and his deceased wife's wish that the estate should be used for charitable purposes in the way the plaintiff thought best for their spiritual advantage. The plaintiff drew a will in his own favour and the testator died the same day. Probate of the will was refused.

The case *In re the Estate of Park* [1953] 2 All ER 1911 shows that the Courts have distinguished in the end between physical and mental ability. The testator in this case, aged 77, had been widowed in January 1948 and in May of that year he had a stroke. In May 1949 the testator was very much attracted by a voluptuous blonde who was the receptionist at his club. She consented to marry him and on the same day as he was married, after the ceremony, he executed a new will giving her a life estate. He had no near relatives, but his distant relations, who no doubt had been beneficiaries in earlier wills, had applied to the Court and had the will set aside on the grounds that the testator was not of sound mind. On the happening of that event the testator was, of course, intestate. So the widow claimed a grant of Letters of Administration upon an intestacy. The relatives opposed the grant on the ground that the marriage was void as the testator was incapable, mentally, of understanding marriage. The Lords Justices held that the marriage was valid in that a contract of marriage in its simplicity was readily understandable, whereas the same person's understanding might be such as to be unable to understand a will. The result of it all was that the voluptuous blonde got the whole estate upon intestacy since he had no issue or parents or brothers or sisters. It is interesting that in a case to be reported in New Zealand in 1974 the question of the mental capacity of a weak-minded person to understand the contract of marriage has been before the New Zealand Courts. There was also an earlier case in New Zealand—*R v R* [1947] NZLR 179. This was a case in which it was sought to set aside a marriage considered invalid upon the ground that one of the parties was of such unsound mind

that he could not appreciate the nature of a contract of marriage. The Court held that although weak-minded he understood the contract.

Whatever view the law may officially take of age and mental capacity being linked together, there are examples of lawyers of great age carrying on the profession. The record, so far as I have been able to find, was one Edwin Wyatt, who served as a clerk for a period of 80 years to Messieurs Burgess, Ware and Scannell of Bristol. The authority for this statement is to be found in Hine's "Confessions of an Uncommon Attorney".

* * * *

During the discussion after the address Doctor Hogg raised the question, which was left unanswered, as to whether a power of attorney is invalidated by the person giving it becoming insane. Subsequently I found that there are three cases, none of which really make the position crystal clear.

Drew v Nunn (1879) 4 QBD 661: In this case a husband declared his wife as being his agent and after a time he was committed to an asylum as a lunatic and she continued to obtain goods as his agent. The husband subsequently recovered and refused to pay the bills incurred by his wife as his agent. One of the tradesmen brought an action against the husband and the members of the Court were unanimous in holding that the plaintiff, being unaware of the insanity, could recover against the husband, but they also said that when he became insane the wife's authority was determined, and it would seem that a power of attorney would be determined once the agent was aware that his/her principal had become insane, but mere feebleness of mind, provided the principal was capable of understanding the transaction, would not determine the agency.

The next case was *Yonge v Toynbee* [1910] 1 KB 215. In that case a solicitor had commenced the defence of an action on behalf of his client and had filed an appearance. Subsequently the solicitor became aware that his client was insane. Nevertheless he proceeded to file a defence in the action and some other documents. The Court held that although the solicitor had acted in good faith, whenever he acted as an agent he was in fact warranting that he had authority to act, and any costs incurred by reason of him continuing to act after he was aware of the insanity had to be paid by the solicitor personally.

The third case is the *Daily Telegraph Newspaper Ltd v McLaughlin* [1904] AC 776. In that case shares were transferred by the donee of a power of attorney but it was found that at the time when the power of attorney was executed the principal was insane and accordingly the power was void.

It would seem, therefore, that a power of attorney given by a person competent to give it at the time it was executed would only be void if the principal was committed to a mental hospital under the Mental Health Act; and yet the question remains as regards the principal gradually becoming less and less competent to manage his or her own affairs as to when the power of attorney will be invalidated. The test as to it being valid appears to be whether or not the transaction to be carried out by the agent was such that the principal would have understood what the nature and effect of the transaction was. This, of course, only deals with the power of attorney that is revocable. An irrevocable power of attorney is covered by the Law of Property Act 1925 in England, ss 126 and 127, and by the Property Law Act 1952 in New Zealand ss 136 and 137, one of which deals with an irrevocable power of attorney for valuable consideration, and the other with a power of attorney expressed to be irrevocable after a fixed time not exceeding one year from the date of the instrument. Both these sections provide that the power of attorney shall not be revoked by the mental deficiency of the principal.

"Tax Charting in Business": It comes too late to be of any practical value, but practitioners should be made aware of the seminar by this title arranged in Britain for March 1974. As befits a course of such an appellation, the Cunard liner *Adventurer* had been chartered and those registering were to learn of the finer points of corporation tax as they cruised through the Bahamas. One topic was "Tax Holidays". This, of course, was no holiday. It was tax deductible.

Lord and Master—In one case, the celebrated Irish counsel, John Curren, found himself facing the Lord Chancellor of Ireland, Lord Clare, who had brought his Newfoundland dog along for company. Curren paused in mid-argument as the Judge was busily petting his dog. After an embarrassing pause His Lordship looked up and invited Curren to proceed with his argument, at which point Curren snapped back at him, "I beg pardon. I thought your Lordships were in consultation."

PONSONBY LEGAL REFERRAL SERVICE

By J C CLAD, *formerly of Auckland but now with the Ministry of Foreign Affairs, Wellington.*

The Ponsonby Citizen's Advice Bureau has been operating a legal referral service for well over three years. The service has become an established part of the inner city scene and the initial strangeness of solicitors giving advice in one part of a building while (say) Polynesian dance groups practise in another, has long since disappeared.

The referral service operates on a limited basis, generally on Wednesday or Thursday evenings and Saturday mornings. Solicitors on a volunteer basis occupy the small office in the Bureau's building off Ponsonby Road in a former church hall. Frequently they are joined by third year students from the Auckland Law School. Not only is this valuable training for later client interviews but the students, if they attend the Bureau a minimum of three times, are partially able to discharge their obligations for the Law School's "Legal Practice III" course.

From early 1971 the Bureau has kept records for over 1000 referrals, though many more legal enquiries have been dealt with on an informal basis throughout this period. For most of this time the records of the people requiring advice have been kept on index cards. From an analysis of some 884 cards some interesting results emerge.

Initial ignorance or reluctance of community members to use the referral service is reflected in the scarcity of early records. As time went by more people began to use the service and a surprising number of these have come from suburbs outside the inner city area.

One constant feature is the large proportion of matrimonial or domestic problems; nearly 33 percent of all referrals were concerned with this area. The next most prominent area was tenancy problems, followed (surprisingly) by house sale and general land law problems, such as easements. Table A sets out the classification of referral inquiries adopted for this paper, together with the number of inquiries dealt with in that category.

TABLE A

Classification of Referral Inquiries

Category	*No of Referrals*
1. Traffic	25
2. Drugs/Alcohol	2
3. Other Criminal	39
4. Landlord/Tenant	101
5. Client Creditor	22
6. Client Debtor	29
7. Personal Injury (other than automobile claims)	15
8. Auto Accident Claim	33
9. General Welfare/Family Benefit	16
10. Family Maintenance	47
11. Other Matrimonial and Other Family — including Adoption, Paternity	244
12. Land Law—Easements, House Sales	67
13. Immigration	12
14. Repairs/Mechanics Disputes	17
15. Workers' Compensation	10
16. Probate and Will—F. P. A.	39
17. H. P. Disagreements; Door to Door Sales	32
18. Complaints with Solicitors	28
19. Tax	3
20. Trespassers	2
21. Insurance — Property Disagreement	17
22. Town Planning	8
23. Personal Services Contract/ Employment	3
24. Defamation	9
25. Company Winding Up and Management	8
26. Consumer Goods Dispute	24
27. Affidavit Notary	5
28. Neighbour Disputes	25
29. Sob Story, Lonely, Etc; all other	8

The figures show a wide variety of problems for which legal advice was sought. This result is particularly interesting in light of suspicions that the proposed Neighbourhood Law Centres may become nothing more than an auxilliary social welfare service. In spite of the large number of family law referrals, the female percentage of the total number of inquiries was only slightly over 50 percent. Thirty-three of the referrals were complaints brought to the Bureau jointly by couples.

Has the Bureau catered only for the Ponsonby-Grey Lynn area? The rather surprising answer is that the referral service's "business" comes from as far afield as Browns Bay to the north to Papakura in the south. An examination of complainants' addresses yields the following:

TABLE B

Suburbs Served by Referral Service

Suburb	*No of Referrals*
Ponsonby	168
Grey Lynn	95
Secondary Suburbs beyond Ponsonby-Grey Lynn: (includes Mt Eden, Mt Albert, Sandringham, Western Springs, Balmoral, Epsom, and Green Lane)	197
All Others	424

Another unexpected result is that the Bureau Referral Service has not been used very repetitively by its "clients" although a significant percentage of the total number of persons have returned for further advice on different matters. Many problems arriving at the office door have been handled without referral (and thus have not required recording), yet most have required legal assistance for solution. Perhaps this testifies both to a high perception of when problems become legal problems, and perhaps also to a disinclination to use the referral service frivolously or vexatiously.

The critical drawback of any referral service is that it can deal with legal difficulties only by advice; it cannot handle a problem directly which requires further legal attention. This is reflected in the disposal of complaints:

TABLE C

Disposal of Complaints Received by Referral Service

	Number
Referral to Solicitor	818
No further action or advised not to proceed	4
Solved by referral to other agencies or by intervention by Bureau	62

In order to breathe some life into these figures, observe the following cases for one recent Saturday afternoon.

Case One

An ex-prisoner is faced with execution of various debts and maintenance proceedings from estranged wife. Present de facto accompanies him with two adorable children. He is unhappy with his present solicitor's handling of his affairs and is being pressed by him for fees. Advised to put debts in priority, to resist application for maintenance, and to change lawyer if not satisfied.

Case Two

A seventeen year old girl has had a child by a man who refuses to pay her maintenance. Parents refuse to help. Advised to initiate paternity proceedings and to apply for legal aid.

Case Three

As case two departs, Bureau manager sticks head through door, saying, "look out for these terrors, lads." Five old ladies march in. Gradually realise after ten minutes that they are the executive of a Senior Citizens' Club and they are keen to acquire some property for the Club. Advised to incorporate under Incorporated Societies Act. Regret unable to do this for them. Referred to solicitor.

Case Four

A Samoan comes in with a small boy child. Transpires that he wishes to adopt him; "I love kiddies." Mother gone back to Islands without making arrangements for boy. Advised to see a solicitor.

Case Five

A timid elderly couple. Being sued for contract price on veranda ironwork. Debt collector harassment. They think job is very poor; iron is already rusted and concrete crumbling. They don't want to pay but they "don't want to go to gaol". Advised to resist claim, obtain legal aid, and see a solicitor.

Conclusion

The figures above cover most of the period between the inception of the legal referral service up to the beginning of 1974. Indications are that the referrals since then reflect the same diversity of inquiries and inquirers. Other citizens advise bureaux offering legal advice are now operating in the South Auckland area with fewer visits from "outsiders" now than in the past. The work of such organisations as Tenants Protection undoubtedly siphoned off problems that would otherwise have come to the Ponsonby Bureau, but the contraction of that organisation may reverse the tendency. In view of the service's limited operation, it has obviously met and to some extent reduced the need for legal services in some areas of the community.

It is hoped that these figures on our longest operating referral centre will help allay the fears that neighbourhood law centres (offering direct legal services instead of mere referral) are likely to be only one-dimensional in work load. To be sure, handling domestic work without reprieve is a cheerless task but the Ponsonby experience shows that the picture is likely to be

much more varied for the neighbourhood centres once they are established.

The proposals to go before the Minister of Justice urging the establishment of State-assisted Neighbourhood Legal Aid Firm could well take note of this result.

Even with the Bureau's restricted function and hours, it has received a lively number of varying legal problems, and, it is submitted, shown the way for New Zealand's overdue expansion of legal services.

THE HOUSE OF LORDS — A NEW DEPARTURE IN STATUTORY INTERPRETATION?

Lord Simon has invited the Courts to consider whether legislative history may assist in statutory interpretation. DR J B ELKIND, *of the University of Auckland, considers the ramifications.*

Some recent decisions, mostly in the field of race relations indicate that at least some members of the House of Lords are considering a change in their approach to statutory interpretation which could have a far reaching impact on the legal profession in the United Kingdom. Needless to say, if the New Zealand Courts follow the lead of the House of Lords the impact on the legal profession here will be as significant as in the United Kingdom.

It is generally agreed that it is the duty of a Court to interpret an Act of Parliament so as to give effect to Parliament's intent. Since it is a fiction that a body such as Parliament can have a will of its own, Courts really ask themselves what the draftsman must have intended. The draftsman is expected to know what the intention of the legislative initiator is and what canons of construction the Courts will apply. It is a bit of wishful thinking to expect him to know the latter with any precision*(a)*.

Nonetheless the draftsman will then hopefully use this presumed knowledge to draft the Act so that the Courts, using the canons of construction will give effect to the intent of the legislation. Parliament, in enacting the legislation, assumes responsibility for the language of the draftsman.

The primary canon of construction is that the words of a non-technical statute will be construed on their face, according to their plain, ordinary meaning*(b)*.

But in the words of Lord Simon of Glaisdale:

> "In the interpretation of an Act of Parliament, the first thing to do is ascertain its purpose. Words are at best less than perfect tools of communication: and in English they often bear a number of different meanings. However skilfully the draftsman may have chosen his language, however subtly he may have varied, juxtaposed and contrasted his terminology so as to isolate the precise shade of meaning he intends each word to bear, an autistic, a narrowly linguistic, approach to interpretation is liable to misconstrue. This is no more than the forensic aspect of a general human fallibility in communication."*(c)*

Thus the words of a statute are not always clear on their face. And where they are not clear, it is much more difficult to discern the intent of Parliament*(d)*. To remedy this, there are a number of subsidiary canons. One of these is that where a statute establishing a criminal offence is capable of a variety of constructions, the more restrictive interpretation will be adopted. Likewise, statutes which remove or subtract from rights allowed to the citizen under Common Law will be construed restrictively. Finally statutes must be construed so as to identify and avoid the mischief which the legislation was intended to overcome.

Generally there are five traditional ways of ascertaining legislative intention. These have been described by Lord Simon in the case of *Ealing London Borough Council v Race Relations Board* [1972] AC 342; [1972] 1 All ER 105. They are:

"(1) examination of the social background, as specifically proved if not within

(a) Ward, "A Criticism Of The Interpretation of Statutes In The New Zealand Courts" [1963] NZLJ 293. The article was written by a legislative draftsman of 21 years' experience.

(b) Herron v The Rathmines and Rathgar Improvement Commissioners [1892] AC 498, 502.

(c) Crouch v McMillan [1972] 1 WLR 1102, 1109.

(d) For a more detailed discussion of statutory interpretation in New Zealand see Ward, supra note *(a)*.

common knowledge, in order to identify the social or juristic harm which is the likely subject for remedy;"

However, the example he gives seems to be more of a historical than a social analysis. It is definitely not sociological.

"(2) a conspectus of the entire relevant body of law for the same purpose."

In other words Courts enquire into the sweep and breadth of the law in question. Does it permit of exceptions? If so, what sort of exceptions? What relation do these exceptions bear to the mischief which the law intends to deal with? In that case, he attached significance to the fact that the English Race Relations Act 1968 was not an absolute prohibition against all forms of Racial Discrimination but in fact contained numerous restrictions and exemptions.

"(3) Particular regard to the long title of the statute to be interpreted (and, where available, the preamble), in which the general legislative objective will be stated;

"(4) Scrutiny of the actual words to be interpreted in the light of established canons of interpretation;

"(5) examination of the other provisions of the statute in question (or of other statutes in pari materia) for the light which they throw on the particular words which are the subject of interpretation."

The traditional approaches to statutory interpretation have been called chaotic. The result of this chaos is that it is impossible for even experienced parliamentary draftsman to predict what approach a Court will make to any case*(e)*.

What the English and New Zealand Courts do not permit themselves to do in ascertaining the intent of Parliament is to look at the legislative history of a statute*(f)*. They do not consider what reports or documents the Parliamentarians had before them when they were passing the Act in question. Nor do they examine what the Members themselves had to say about the statute they were passing.

This rule of interpretation is by no means universal in common law jurisdictions. American Courts avail themselves of the full range of legislative history, particularly legislative debates.

Thus Justice Brennan, of the United States Supreme Court, in deciding that Public Amusement parks were covered by Title II of the Civil Rights Act of 1964 took note of the fact that:

"President Kennedy, in submitting to Congress the Public Accommodation provisions of the proposed Civil Rights Act, emphasized that 'no action is more contrary to the spirit of our democracy and Constitution—or more rightfully resented by a Negro citizen who seeks only equal treatment—than the barring of that citizen from restaurants, hotels, theatres, *recreational areas* and other public accommodations and facilities'."*(g)* (Emphasis supplied by Justice Brennan.)

He also took note of the Senate debate on the Bill:

"When Title II was being considered by the Senate a civil rights demonstration occurred at a Maryland amusement park. The then assistant Majority leader of the Senate, Hubert Humphrey, took note of the demonstration and opined that such an amusement park would be covered by the provisions which were eventually enacted as Title II."*(h)*

The idea of using legislative history to ascertain the intent of Parliament is not a new one to New Zealand writers*(i)*. The most commonly expressed objection is that "it is what Parliament enacted that is to be interpreted, not what someone intended to enact"*(j)*. In answer to this objection elsewhere expressed the eminent English jurist, H C Gutteridge, said:

"This may be so in certain cases, but it seems difficult to avoid the conclusion that this deliberate hoodwinking of the judiciary must often result in the distortion of the object of a statute where its meaning is ambiguous."*(k)*

The New Zealand writer G Cain also considered the matter of reference to Parlia-

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(e) Ward, supra note *(a)* at 296.

(f) *Herron's case,* supra note *(b)*.

(g) *Daniel v Paul,* 395 US 298, 306 (1969), citing Special Message to the Congress on Civil Rights and Job Opportunities, 19 June 1963 in Public Papers of the Presidents, John F Kennedy, 1963, at 485.

(h) Ibid at 307 citing 109 Cong Rec 12276 (1963).

(i) Ward, supra note *(a)* at 297: Cain, "Interpretation of Statutes: References To Parliamentary Debates [1962] NZLJ 207; O'Keefe, "Trees and Views" [1969] NZLJ 54. 55.

(j) Ward, ibid.

(k) Gutteridge, *Comparative Law* (Cambridge Studies in International and Comparative Law 1946) p 105.

mentary history*(l)*. He did not dismiss the technique out of hand. But he did raise a number of questions which could be construed as objections.

His first objection is based on the difference between political and legal terminology. Concerning statements by Ministers he said:

> "In the first place a Minister is a fallible human being like all of us. His background often has not prepared him for particular precision in the use of language, and his experience on the political scene tends to influence him rather to make generalised statements with sufficient doors left open lest he subsequently finds it necessary to withdraw.
>
> Politicians after all rarely fail to have an unashamed eye cocked on the electorate. Many politicians have mastered the art of using many words to say very little and while they may thus earn the applause of the electorate the accomplishment tends to limit the usefulness of their remarks as reliable indicators of the purpose of a statute when that has to be considered by trained legal minds."*(m)*

About this two general comments can be made. In the first place the rule excluding legislative history is an attempt to ignore a vitally important characteristic of legislation which is that it is the end product of political processes. The fact that a Parliamentary draftsman puts a statute into legal language should not obscure the fact that it is Parliamentary policy that he is interpreting. And Parliamentary policy is political policy. To put it more bluntly, the intent of Parliament in enacting a statute is political. The distortions that Gutteridge complained of stultified interpretation borne of persistent attempts to ignore this central fact.

Secondly, words of debate, like the words of a statute, are subject to conflicting interpretations. It is true that US Congressmen do not choose their words with the care that legislative draftsmen do. Nor do they choose words of debate with the consideration that they may be cited, some day, in Court. But most American lawyers and Courts are aware of that fact. If legal minds can be trained to assess the probative value of such imprecise matters as testimony, they can be trained to assess the probative value of Parliamentary debate. The criticism we are discussing should not be undervalued. It is a useful caution to lawyers that Parliamentary history is not a complete panacea to vague statutory language and that a whole new set of skills may be required of those who intend to use it. But once this caveat is taken to heart, legislative history may be seen to be what it is, another useful tool in the lawyer's kit bag.

Another observation by Cain illustrates this point. He is concerned that the Court in interpreting a statute may have the invidious task of allotting weight to the utterances of different Minister of the Crown.

This is one of the situations in which new skills are required. When conflicting utterances occur there are a variety of techniques for dealing with them. Priority can first be given to the Minister whose Department is most directly concerned with the subject-matter of the legislation. Next we might consider the Minister who is given responsibility for execution or enforcement of the law in question. Next priority can be given to the words of the Prime Minister on the strength of the theory of Ministerial responsibility. After that the words of other Ministers might be considered. Finally points made by back benchers might be considered if they can shed some light on the question at issue. Where an Amendment is introduced and eventually adopted, the words of the initiator might have significance in interpreting the Amendment. Likewise, when a Private Member's Bill becomes law, the statement of the Initiating Member as to what he intended would be highly probative. Finally reports of Royal Commissioners identify the need for legislation. They are highly probative of the defect which such legislation is intended to remedy. Cain accepts the value of such reports without hesitation stating that this type of material is in compact form and usually available and is, for its probative value, to be preferred to reports of debates. It is submitted that such reports are of probative value only in so far as we know how much value Parliament attached to them. And this we can glean only from Parliamentary debate.

Cain's third observation is that it is difficult to extract a recognisable and reliable principle to be applied in the interpretation of a statute from the cut and thrust of Parliamentary debate. This is true. But the answer is that the ability to extract relevant principles must depend on the skill of the advocate. Many law students have difficulty extracting recognisable and reliable principles from the cut and thrust

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(l) Supra note *(i)*.
(m) Ibid at 209.

of judicial debate. In some cases this is the students' fault. In other cases the fault lies entirely with the Judges.

The fourth observation deals with statements made after a Bill becomes law as well as statements made in other debates as to the Government's intention to introduce the Bill in question. Cain would reject both such statements. The former ought to be rejected on the ground that a law can only be amended in accordance with the proper manner and form required for the passage of legislation. The latter type of statement should be accepted provided that it is relevant.

The fifth and sixth observations relate to the volume of work involved in this type of legal research and the cost of purchasing, housing and maintainance of such material.

The answer to this is that questions of interpretations of statutes are more likely to arise at the appellate level. Consequently only those firms which are consistently involved in appellate work need have constant recourse to such material. Secondly a rule allowing resort to legislative history need not replace or supplant the canon that non-technical statutes are interpreted first according to their plain and ordinary meaning. Legislative history is only intended to replace those chaotic canons of construction now used when the meaning of an Act is ambiguous.

Lord Simon admits that the use of preparatory material "may be open to abuse and waste". But he suggests that English Courts might at least reconsider their blanket refusal to have recourse to any legislative history.

He is not urging the total adoption of the American approach. Nor does he suggest that Courts and lawyers make free reference to *Hansard* for the purpose of statutory interpretation. He first proposed some recourse to legislative history in the case of *Crouch v McMillan*. About it he said at p 1119:

> "There are weighty considerations in favour of such a practice. But the issue is generally posed as if the choice lay between the adduction of all relevant extra statutory material (including reports of debates in Parliament) in every case, on the one hand and the adduction of no such material in any case, on the other. The choice, however, need not be so stark. There might be some material only, and then in only certain specific circumstances, in respect of which present rigidities might be relaxed; and the sanction of costs might be available where Courts are burdened with material that was less than decisive. Perhaps the matter could be reconsidered on some such lines."

He repeated his proposal in three race relations cases*(n)*. In *Dockers' Labour Club v Race Relations Board,* he developed his thinking a bit further (at p 601):

> "It would be one thing to cite debates in Parliament to help to ascertain the general objective of the Act and the general limitation on such objective—this would be using the debate to identify the 'mischief' which the Act seeks to remedy ...: courts nowadays frequently have recourse for such a purpose to parliamentary papers such as reports of royal commissioners, departmental or inter-departmental committees or the law commissioners. It would be quite another thing to have recourse to reports of debates to see whether any understanding was expressed as to the meaning of the statutory language as related to particular situations not statutorily identified. It might be yet a third thing if any such understanding so expressed contradicted the meaning of statutory language.
>
> All such matters are now under official consideration. But there is one way of avoiding forensic misinterpretation of the parliamentary intention to which I venture to refer in the hope that it may have consideration. Where the promoter of a Bill, or a Minister supporting it, is asked whether the statute has a specified operation in particular circumstances, and expresses an opinion, it might well be made a constitutional convention that such a contingency should ordinarily be the subject-matter of specific statutory enactment—unless indeed it were too obvious to need expression. Such a convention would seem to have constitutional advantage not only as an aid to forensic interpretation and general understanding but also by way of parliamentary control of the executive."

Lord Simon is not entirely sure that his suggestion will ultimately be adopted. Nor can we be sure that it will. He notes the fact that debates in Congress are freely cited to the Courts in the United States as evidence that there is no fundamental rule of common law precluding the practice. Nonetheless he is not entirely free of qualms:

> "On the other hand, it may well be a

(n) Ealing London Borough Council v Relations Board (supra); *Race Relations Board v Charter* [1973] AC 868, 900; *Dockers' Labour Club v Race Relations Board* [1974] 3 All ER 592, 600.

rule to the contrary so firmly established in English Law that it should not be disturbed by judicial lawmaking even in your Lordships House" (at p 600).

Still there is evidence that he is gaining support in the House of Lords. In the first expression of support by another Lord, Lord Kilbrandon said in the *Dockers' Labour* case:

"My Lords, I wish in conclusion to say that I entirely agree with the observations made by my noble and learned friend, Lord Simon of Glaisdale, on the interpretation of statutes" (at p 602).

It would appear that the only reason that the Lords have not considered whether legislative history might be used as an aid to statutory construction is that they have not been asked to do so. But Lord Simon has issued a fairly explicit invitation to the English bar to pose the question. It is entirely likely that some enterprising barrister will do so in the not too distant future.

CORRESPONDENCE

Sir,

Abortion in Perspective—II

The common modern paranoid obsessions are about communists and flying saucers. It is surprising to read in the NZLJ of 18 March a resurrection of the nineteenth century paranoia about Catholics which I fondly imagined had died in this ecumenical age. The marathon article by Littlewood mentions the Catholics about 40 times. As he mentions me by name at least 13 times I presume I may be permitted to reply to some of his points.

If a person wants to know precisely what the Catholic teaching is he should not quote dissident priests but should go to the top, that is, the Popes and the Councils. There are as many silly theologians as there are silly lawyers and doctors, and only an unsophisticated person would be shocked by their statements.

From the earliest times the Church has consistently regarded abortion as wrong. The Second Vatican Council condemned it in half a sentence: "... while abortion and infanticide are unspeakable crimes (against humanity)". *(The Church in the Modern World,* para 51.)

His description of the British Abortion Act 1967 omits two important clauses, one of which almost incredibly permits abortion if this new child will be a disadvantage to its own brothers and sisters. The conscience clause for objectors to abortion is in effect non-operative. I cannot see why he is so agitated about Catholics when the vista ahead is so rosy for abortionists. In Britain, and possibly in New Zealand, there will be in the future simply no Catholic gynaecologists because of the operation of these "liberal" and "reformed" laws.

It may heighten his chagrin to know that my pamphlet "What's Wrong with Abortion?", from which he quotes so extensively and inaccurately, has been a best seller, running to 150,000 copies. When I refer to a late abortion being done by a "hysterotomy, which is like a miniature Caesarean section", he quotes me as "a hystereotomy done by Caesarean section"! As every schoolgirl knows the two operations are completely different.

When I say that "premarital intercourse has become the norm" he quotes me as saying it is "normal"! I described my personal series of 1250 unmarried mothers safely delivered, and he says querulously "It is not clear what inference is intended to be drawn from his statistics". Let me spell it out in simple terms: these were 1250 precious infant lives. If the patients had gone to an abortion clinic instead to my clinic these lives would nearly all have been sacrificed. (Over 80 percent of the clientele at the Remuera abortion clinic are unmarried.) Surely this massive salvage of human life is the obvious message for those with eyes to see and ears to hear?

There are two fundamental points to make about abortion—exactly what does the operation entail; and is the foetus a human being?

No modern doctor would deny that from the time of conception it is a new, separate, unique human being. Referring to it as "the mother's body", which she claims to be free to dispose of as she wishes, is the extreme of anti-intellectualism.

The operation—there are only three ways of causing the death of the foetus, which is the primary aim of abortion: by dismemberment (suction curettage); by poisoning (salt injection); or by prematurity and exposure (hysterotomy). Supporters of abortion give at least their implied assent to these barbaric procedures. Is there no pity left?

Abortion is the ultimate violence. It must be perceived as one facet of the modern phenomenon of abnormality sexuality. Sigmund Freud pointed out the association of sexual deviations with sadism and masochism. Dare one quote in a professional journal St Thomas Aquinas without further upsetting your distinguished author? In the thirteenth century he gave us a dictum which explains many modern marital and social problems: "Impurity leads inevitably to violence".

Yours sincerely,

H P DUNN, FRCS, FRCOG, FRACS,
Auckland

Sir,

I trust you will be able to find space for a few comments on Barrie Littlewood's article "Abortion in Perspective—II", which appeared in your issue of March 18.

In devoting so much of his space to contraception, sterilisation and philosophical arguments about the date of animation, Mr Littlewood does not so much put abortion in perspective as confuse the issue, and the confusion is compounded by his suggestion that opposition to the legalization of abortion on demand is inspired by nothing more cogent than religous beliefs or private value-judgements.

The issue is juridical—has every human being a right to life, and is it the duty of the civil authority

to prevent that right from being violated? If the answer to these questions is yes, then in our democratic society there *is* good cause for derogation from the freedom of an individual to procure an abortion.

It is incontrovertible that the fertilised ovum, or zygote, is alive, is a "whole" independent of the mother, and is genotypically human. If such an organism is not human life, what is it? Potential life? No, because it is actually alive, it is not just potentially so. It has actual life, with further potential (as, hopefully, do we all). Is it perhaps life, but not human life? No, because what is genotypically human, is not nonhuman. Is it perhaps a form of human life, but not a person? No, because a "living human being" is what we mean by a "human person". Otherwise, some human beings would not be persons, which is contrary to usage. Hence the direct destruction of the zygote, eg by the IUD, is wilful homicide. ie murder in ordinary parlance, if not as lawyers use the term.

There are a number of points in the article with which, if space allowed, one could take issue. Thus, the precise date of animation is *not* of crucial importance to Catholics; Fr Wassmer's view is *not* a return to the position of St Thomas; although the population of Puerte Rico, a US territory, is predominantly Catholic, Puerto Rico is *not* a Catholic country; the principle that human life is sacred is *not* a matter of private morality, but is one of the bases of our civilization; nor, by the way, is the sale of liquor a criminal activity. To deal with these and similar items at length would take up too much space, and more important, it would distract the attention of your readers from the central juridical issue, which is, that abortion is the violation of a basic human right, which the civil authority must do all in its power to protect.

G H DUGGAN,
Greenmeadows

Sir,

re: **Abortion Report**

At [1975] NZLR 61 you published a report by (sic) the Pregnancy Advisory Service, which suggests that its findings give considerable support to those in favour of the British Abortion Act.

This may mislead people in New Zealand, who should know that the British Pregnancy Advisory Service (BPAS) whose headquarters are in Birmingham, and the Pregnancy Advisory Service (PAS) whose headquarters are in London, are among the largest abortion referral agencies in Britain.

According to the book *Babies for Burning(a)* by Michael Litchfield and Susan Kentish, the BPAS also runs a clinic in the south of England which has become an international centre for abortion.

These matters are relevant in assessing what weight should be given to any such report.

J M ARMSTRONG,
Auckland

(a) The credentials of the authors and the veracity of their book's contents are understood to be suspect, to say the least.—JDP.

Sir,

Court Structure

At the recent New Zealand Law Conference at Wellington one of the papers which I thought would be of particular help was that by Mr Holland on Court structure. In particular I hoped that we would get as a result of Mr Holland's work, helpful contributions from members of the Society with their reactions to his suggestions and also to the view previously put forward by the Committee on Court Business as to methods of dealing with the ever increasing volume of Court business.

Unfortunately, as so often happens at Conferences, the time available for discussion was limited. Consequently we did not have the advantage of hearing from practitioners with experience in this field. In particular I was disappointed that there was not time to hear from the younger practitioners whose comments, I am sure, would have been most informative.

I write, therefore, to ask if you could publish this letter with an invitation to anyone who feels he wishes to make any comments and forward them in writing to the Secretary of the Committee on Court Business, viz: Mr M F McGehan, Senior Deputy Registrar, Supreme Court, Napier. Information thus collected will be considered by my Committee.

Yours faithfully,
G D SPEIGHT
Judge's Chambers, Auckland

COMPUTERISING LAND DEALINGS

On 10 April 1975 *Hon G F Gair* (North Shore) asked the Minister of Justice, "What plans, if any, has the Government for speeding up the work of the Land Transfer Office, and has his department considered the use of computers in land transfer record work, as have been employed successfully in New South Wales?"

Hon Dr A M Finlay (Minister of Justice) replied, "Plans for speeding up the work of the Land Transfer Office were put into action some time ago and the objective is well on the way to being achieved. Office reorganisation has either been completed or put in hand in all the major centres and has resulted in the speedier and smoother processing of documents. Regional relief and training teams have been set up to prevent arrears accumulating, and new processes for the reproduction of plans have speeded up the output of new titles. The present situation is that arrears of work exist at only two offices, and it is expected that these will be cleared up within the next few weeks. The normal time for the registration of

documents in Auckland, for example, is only a few days, and the Auckland office is supplying relief to Hamilton, and the Wellington office relief to Nelson, to bring those offices up to date. A new system of microfilm title and document recording is being tried in Napier, and substantial use of microfilm techniques in this and other offices should bring about further improvement in the service, together with sufficient flexibility to meet expected future demands. The present computer system in New South Wales, which is used for the purpose of providing work flow information, indices, and statistics, has been examined. We have an effective alternative system in New Zealand which is adequate for documenting work flow now and in the immediate future, although investigations are being made into mechanical means of collating and printing work flow information. While the sort of computer system used in New South Wales is beyond the requirements of land transfer offices in New Zealand, studies have already been made here on the possible use of computers for recording various amounts of information about land. A preliminary study was undertaken some 2 years ago to ascertain whether a central computer service could be provided to cater for everyone wanting information about land use and interests in land, but it appears that with present technology the cost would be prohibitive. Continuing research is being carried out on establishing a common and readily available land identification system as a practicable preliminary, and this is reaching the stage of a pilot study. An Australian team has been looking into the possibility of operating a complete land registration system by computer. My department is maintaining a liaison with the New South Wales registry, and any significant advances will be closely examined for possible adoption in New Zealand.

Tributes to Lord Reid

Lord Reid, who retired at the beginning of the year, died recently. Appointed in 1948, he surpassed Lord Macnaghten for the longest tenure of his office during which he heard at least 500 appeals, delivering his own opinion in most of them.

Lord Wilberforce described him to the House of Lords as being generally recognised as one of the greatest Judges who has ever sat in this House.

"If one is to sum up the qualities which made him so outstanding as a Judge they would lie, I believe, in accuracy of thought and precision of reasoning, broad common sense, generous humanity, simple and elegant use of language. He was never one to fear criticism or for himself to seek publicity; but he was deeply concerned for the reputation of the law as an institution—a reputation strengthened by the weight of legal science expounded in a way that people could understand," he continued.

"He was resistant to fashionable trends, but he always saw the law as a moving stream and he kept it moving at a pace unhurried and controlled. He will certainly be seen by posterity as in the best sense a progressive Judge.

"Our last tribute should, I think, come from us in two capacities. We must all here have appeared before him at some time as advocates and I do not think that anyone will forget the combination of courtesy and devastating acuteness with which he would probe an argument for its weaker points, or at times seek out some strength which we had failed to perceive for ourselves. We would emerge from the ordeal wiser, but, because of his charm and kindness, not sadder men. I believe that one of his achievements will be seen to be the raising by many degrees of the standard of legal debate—a standard which now that he has gone it is our duty to try to maintain," Lord Wilberforce concluded.

In the Privy Council, Lord Diplock paid tribute at a sitting of the Board which included Sir Thaddeus McCarthy, and spoke of the pleasure and delight of appearing before Lord Reid as counsel.

"In the course of this century there are perhaps two or three Judges who are pre-eminent in the influence they have had upon the development of the law. I have no doubt that the verdict of history upon Lord Reid will be that he was one of the two or three who have had the most formative influence on the development of the law during this century. At this sad moment that is not the only thing we recall about him. As a colleague and as a friend we regard him with affection as well as admiration. As a guide in our deliberations he was unexcelled. It is indeed a loss for the whole of the legal world that we have suffered with his recent death," he said.