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INTER ALIA

Lawyers in the House

A self-described "unsubtle" election sheet has been distributed to lawyers in Christchurch, urging them to support one of their number in his quest to gain election to Parliament. "From time to time your clients will discuss with you the political candidate," it says. "Any support short of undue influence would be most appreciated." ("Undue influence" is, of course, a corrupt practice under s 143 of the Electoral Act 1956 carrying a maximum penalty of 12 months' imprisonment).

The election sheet has a valid point—lawyers are lamentably few in the House—but the authors see this as prejudicing the profession by there being few Members who are able "to counter in Parliament misunderstandings or unjustified criticism" directed at it.

It is unfortunate that the election sheet portrays a lawyer-candidate as standing to represent lawyers, and implies that lawyers can, do and should take it upon themselves not only to influence their clients' political beliefs but to influence them to the lawyers' own advantage. This is precisely the sort of exercise that handicaps the Law Society in its quest to establish the profession's role in its true light. The election sheet merely reinforces a host of existing prejudices against lawyers. Nor is it that the National Party is necessarily the lawyers' friend as the broadsheet claims, for there are elements within that party, just as there are within Labour ranks, which view our profession with a blend of envy and distrust.

The tragedy is that the election sheet left unsaid those things which really need saying—there is a need in Parliament for lawyers of all persuasion as they have a breadth of experience of life, a continuing experience of decision-making, and an expertise well-honed for reducing problems to their fundamentals. It is these qualities which are all too often lacking.

If the profession were represented here in the same proportions as it is in Britain, there would be 17 lawyer Members—instead of a mere six. In the United States, about two-thirds of politicians have legal qualifications. One political commentator has described the incidence of lawyers in the New Zealand Parliament as being "perhaps the lowest in the world".

It is this that needs redressing. Not because lawyers need a cosy coterie at the top to promote and protect self-interest. Rather it is because lawyers have a lot to offer, and a lot to give.

Human rights

On p 294 the Leader of the Opposition, the Hon R D Muldoon, takes issue with a recent editorial which questioned his party's proposed expansion of the Ombudsman's office into a Human Rights Commission.

The editorial criticised the lack of defined limits and commonly accepted standards for the expanded Ombudsman to apply. These are not met by the reply. "Any decision," it says, "would be based on equity and the application of the rules of the organisation or association complained of." Equity, of course, is capable of an infinite variety of interpretations, and a host of Ombudsmen with differing shoe sizes will quickly stamp out the thesis that equity varies only with the length of the Lord Chancellor's foot.

Also criticised was the area of proposed operations. This has apparently now been revised—it will cover (all?) organisations "which exert power over individuals". If the previous proposal was selective, the present is impossibly

broad. Apparently whenever two or three are gathered together, the Ombudsmen will hear complaints made about them.

If we believe in the Rule of Law, there is only a narrow field in which an Ombudsman can operate. If we believe in Rule by Ombudsmen we express our distrust of the Rule of Law.

If the rules that comprise our law are inadequate, they must be revised by Parliament. Not simply overridden by an Ombudsman's discretion.

One thinks of Dr Gerard Wall's defence of his proposed amendment to the homosexual law reform measure. When told that his offence as defined would apply to parents speaking to their children he dismissed the objection, saying that he had more faith in the Courts than that. It seems that Courts, too, are to override the Rule of Law if they consider Parliament is trusting them so to do.

And one thinks, yet again, of the need to have more lawyers in Parliament. It has been said that he is a wise man who deals in generalities—it's the details that cause all the problems.

Crime doesn't pay

A recent criminal trial in the Supreme Court at Wellington lasted three days. One of the accused, separately represented as his situation was entirely different from his co-accused, was acquitted on a charge of rape. The others were convicted.

Counsel for the acquitted accused, who was on legal aid, received a total payment of $280, ie about $8 per hour.

Garagehands, plumbers and jobbing carpenters earn substantially more than this rate. Were it not for the public spiritedness of the profession, it would surely have refused to do it at all.

That same counsel has overheads of $15,000 per annum to meet—ie about $7.50 per hour. At the rate paid he will just succeed in covering his overheads, without feeding family or meeting mortgage commitments.

This is the reality of the situation. Suggestions that counsel are taking legal aid for a ride, or waxing fat on the public purse, should be viewed in the light of these facts.

For some considerable time lawyers have criticised criminal legal aid rates as paltry, and a system of classification by the trial Judge at the conclusion of the hearing as demeaning.

Surely it is not asking too much for criminal legal aid rates to cover outgoings and leave a modicum of reward for those who undertake this thankless task.

For until the rates do, criminal trials will continue to be treated by some as a training ground for the young and newly qualified. After all, they can cut their teeth on people. It's property that really counts—and that's where the legal aid rates are reasonable.

JEREMY POPE

CASE AND COMMENT

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

Town Planning—Building permits and Crown immunity

The issues in *City of Wellington v Victoria University of Wellington and Her Majesty's Attorney-General*, Supreme Court, Wellington, 28 April 1975 (A 54/75, Cooke J) arose out of the City Council's attempt to exercise some control over the form of a building (to be known as the von Zedlitz building) which the University proposed to erect on the west side of Kelburn Parade. The City Council had purported to issue a building permit for the building subject to a number of conditions, including one that the height of the building be reduced by two floors, or twenty feet, whichever was the lesser. The City Council contended that it had power to impose such a condition under its Town Planning Ordinances.

The dispute turned on the application of the doctrine of Crown immunity to the facts of the case. There were two issues. First, was a building permit necessary for this building? Secondly, did the Council's Code of Ordinances apply to this building?

The facts were that the land in question had been acquired by the Crown under the Public Works Act 1928 and was vested in the Crown "for a university". The University is a body corporate constituted by the Victoria University of Wellington Act 1961. It was the University which had entered into the contract with the building company, though the project had been approved by the University Grants Committee and by the Government, and was to be paid for by the Government. It was also clear that the Government and Government departments, had been closely involved in the planning of the project. The general understanding seems

to have been that at some later time the property in the land would be transferred to the University, but this would be after the project was completed.

On the first issue, concerning the need for a building permit, two statutory provisions were potentially relevant. The first was s 412 of the Municipal Corporations Act 1954, the relevant subsections of which state:

> "(1) Except as otherwise specifically provided herein, nothing in this Act or in any regulations or bylaws under this Act shall be construed to apply to or shall in any way affect the interest of Her Majesty in any property of any kind belonging to or vested in Her Majesty.
>
> "(2) Except as provided in subsection (1) of this section, this Act and the regulations and bylaws thereunder shall apply to the interest of any lessee, licensee, or other person claiming an interest in any property of the Crown in the same manner as they apply to private property."

The other statutory provision was s 5 (k) of the Acts Interpretation Act 1924:

> "No provision or enactment in any Act shall in any manner affect the rights of His Majesty, his heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby; . . ."

The learned Judge considered in detail *Lower Hutt City Council v Attorney General* [1965] NZLR 65 in which the Court of Appeal held that the Drainage and Plumbing Regulations 1959 could not be enforced against drainlayers and plumbers engaged by the Ministry of Works to carry out work on Crown land, even though they might be neither agents nor employees of the Crown. As the learned Judge noted, the finding in that case was limited to work done by Crown contractors on Crown land, while here, although the work was on land vested in the Crown, the contract was with the University. But he held that as the Crown was paying for the work, the requirement to obtain a building permit, and to submit to a measure of control by the Council's building inspectors, affected the "rights and property of the Crown". He also held that even if the University could be regarded as a licensee or other person claiming an interest in the property of the Crown, within the meaning of s 412 (2), the opening words of that subsection showed that the Crown's exemption must predominate when any others' interest cannot be severed or disentangled. Another possibility was also ruled out. Counsel for the City had contended that the position was essentially similar to that in *Victory Park Board v Christchurch City* [1965] NZLR 741 where Wilson J held that the Crown was a bare trustee of Lancaster Park and that therefore the City could rate the Victory Park Board who had responsibility for the administration of the park, and could make bylaws regulating the use of the park. In the present case Cooke J held that no such trust was involved as the control and development of the property remained the responsibility of the Crown.

It is a little difficult to assess the full implications of these findings as the Judge does not make clear whether his decision that the doctrine of Crown immunity applied was based on s 412 (1) of the Municipal Corporations Act 1954 or upon s 5 (k) of the Acts Interpretation Act 1924. The phrase he uses, the "rights and property of the Crown" does not appear in either act, but seems to be an amalgum of the relevant portions of both. The learned Judge seems to view his decision as based on both provisions, but it is hard to see how s 412 of the Municipal Corporations Act could apply to the circumstances of this case. Assuming that the word "interest" in that subsection means "legal interest" the interest of Her Majesty in this property was as owner. ". . . The requirements of the council do not seem either to "apply to" or "in any way affect" this interest. The words "apply to" appear to relate naturally to the situation where rating requirements are made to apply to the interests of various persons in property. Because of s 412 (1) such provisions do not apply to any interest of Her Majesty. There may also be other cases to which these words are appropriate, but they do not seem appropriate here. So far as the words "in any way affect" are concerned it might be contended that the council's controls purported to restrict Her Majesty's freedom to use the property as she chose, and therefore would necessarily have affected her interest in the property. One answer to this argument would be that the controls would not have restricted the freedom of Her Majesty to use the property as she chose, but merely that of the University. But even if the controls could be interpreted as restricting Her Majesty's freedom of use of the property this does not seem to affect her "interest" in the property. The freedom of use of a property is one of the incidents of an interest in property—as owner, lessee, etc.—it is not the interest itself. The interest of Her Majesty—as owner—would have remained unaffected by the restriction. Of course, there might be a

case where a limitation on use of property was so drastic as to amount in effect to a destruction of an interest in the property, but that was not the case here.

Perhaps it will be thought that this interpretation of the word "interest" is unduly narrow and that in this subsection the term should be construed broadly as meaning "rights" in a general sense. But in that case it is hard to understand the draftsman's apparently careful selection of the word "interest", a word with a long-standing legal history. It is important to note that this word did not appear in the early predecessors of this subsection. In *Lower Hutt City Council v Attorney General* (supra) the learned Judges in the Court of Appeal were considerably influenced by the decision in *Doyle v Edwards* (1898) 16 NZLR 572 which had then stood for 67 years. In that case Prendergast CJ held that a builder employed by a tenant of Crown land did not need to obtain a building permit. He based his decision on the forerunner of the present s 412, s 3 of the Municipal Corporations Act 1886, which read:

> "Nothing in this Act contained, nor in any by-laws made thereunder shall be construed to apply to, or shall in any way affect any property of any kind belonging to or vested in Her Majesty the Queen."

Here the words "interest in" do not appear. (They appear to have ben introduced in s 384 of the Municipal Corporations Act 1920.) Prendergast CJ held that to require the builder to obtain a permit would affect the land, and he therefore held that the builder did not need to obtain a permit. As far as one can ascertain from the judgment, this was simply a literal interpretation based on the view that to require a builder to obtain a permit for building on the land, even though he was building for a tenant, would still affect the land. Prendergast CJ stated: "There are no words excluding tenants from the benefit of the exemptions and such words cannot be presumed." Such an interpretation is not beyond criticism (cf. Turner J in the *Lower Hutt* case at 77), but at least it was open on the wording as it then stood. It does not seem to me that this interpretation is still open on the present wording of s 412 (1) because the requirement to obtain a permit in such circumstances could hardly be said to affect the Crown's *interest* in the land.

This difference in wording was not directly relevant in the *Lower Hutt* case as the Court was not concerned with a by-law under the Municipal Corporations Act but with a regulation made under the Health Act 1956. The issue which directly concerned the Judges was whether there was any material difference between s 3 of the Municipal Corporations Act 1886 (the provision Prendergast CJ relied on) and s 5 (k) of the Acts Interpretation Act 1924. Both North P (p 75) and Hutchison J (p 81) compared these two provisions and held there was no material difference. Hutchison J noted that the form of the provision in the Municipal Corporations Act 1886 had been later modified to the form now found in s 412 of the present Act, and remarked that as the section now stands the builder for a tenant would not have the same exemption, but he seems here to have been thinking of the effect of subs (2) of the present s 412 rather than the change of wording in subs (1). Oddly, Turner J (p 78) compared s 5 (k) of the Acts Interpretation Act 1924 with s 412 (1) of the *present* Act, remarking that he could not derive any assistance from such difference in wording as appears from the two provisions. None of the Judges noted the difference in wording between s 3 of the 1886 Act and s 412 (1) of the present Municipal Corporations Act. Part of the reason for this may be that apparently the Judges received a memorandum from counsel that it had been generally understood by municipal authorities since *Doyle v Edwards* that a building bylaw requiring building permits to be taken out before construction begins will not apply to buildings erected on State property held unleased by the Crown, whether the buildings are erected by departmental employees or by independent contractors (see p 78). It seems to me that this conclusion might be justified by s 5 (k) of the Acts Interpretation Act 1924, but if local authorities have assumed that such conclusion follows from s 412 (1) of the Municipal Corporations Act 1954, or any of its predecessors since the change of wording in 1920, they have been wrong. In any event the only relevant finding which can be considered a ratio of the *Lower Hutt* case is that because of s 5 (k) an independent contractor contracting with the Crown to do work on Crown land does not need to obtain a local authority permit for such work (or, presumably, submit to local authority control).

The difference in wording between s 3 of the 1886 Municipal Corporations Act and s 412 (1) of the present Act was directly relevant in *Victory Park Board v Christchurch City* (supra) where Wilson J held that the interest of the Crown in the land of Lancaster Park

was as "bare trustee" and that such interest was not affected by a rate levied against the Victory Park Board, or by by-laws controlling the use of the land. His Honour pointed out that under s 412 (1) the immunity of the Crown extends only to the Crown's interest in property vested in it and not to the property itself, as was the case under the Act of 1886 (p 746). The interpretation of "interest" adopted in this judgment clearly coincides with the interpretation for which I have argued here.

If the view is accepted that s 412 (1) of the Municipal Corporations Act 1954 was not applicable to the facts of this case, then the decision that a building permit was not necessary must be seen as resting on s 5 (k) of the Acts Interpretation Act 1924. In that event the finding on this point was on precisely the same basis as the learned Judges' finding on the second point that because of s 5 (k) the control the Council purported to exercise under its town planning powers did not bind the University. In both cases the decision amounts to a finding that the controls the Council sought to impose would affect the "rights of Her Majesty" within the meaning of that term in s 5 (k). Looked at from this point of view the case can be seen to go further in the application of the doctrine of Crown immunity than the decision in the *Lower Hutt* case. In that case the Court determined that to hold that the Drainage and Plumbing Regulations 1957 applied to the contractor would interfere with Her Majesty's liberty to use her property as she chose, since it would interfere with her liberty to carry out, or have carried out, work on the property which was not in conformity with the regulations. In the present case the relevant restrictions would not have affected any similar liberty of Her Majesty. The restrictions applied only to the University. His Honour held that the University was a principal in the contract with the builder, so it seems we should view the University as a licensee of the land, allowed by the owner (the Crown) to erect a building on it. The restrictions did not purport to prevent the Crown itself carrying out the erection of the building without respecting the controls or purport to stop it having such work carried out by an independent contractor, and on the authority of the *Lower Hutt* case they could not have been successful had they attempted to do so. There was, however, no reason why such freedom should have been held to extend to a licensee of the Crown. Such a decision has the effect of conferring on the Crown a power to transfer to a licensee the protection of its own immunity, at least in the case to which the learned Judge limited his finding where the licensee is carrying out work on Crown property which is being paid for by the Crown.

It might be contended in answer to this argument that if the word "rights" in s 5 (k) is to be construed broadly to include liberties, as it was in the *Hutt Valley* case (cf North P at 74), it should also be construed to cover powers. At the least, it might be said, the restrictions here would have affected the Crown's power to confer on another the liberty to do all those acts on the property which it itself could have done. This argument misses the point. It is true that a landowner normally has power to give another liberty to perform acts on his property which would otherwise be a breach of duty to the landowner. The exercise of this power makes these acts no longer a breach of duty *so far as the landowner is* concerned. But a landowner does not normally have power to give another liberty to perform on his land acts of a type which are for some reason prohibited by law independently of any duty owed to the landowner. If the other does not have, even with the consent of the landowner, a liberty to do these acts, then the landowner cannot confer it. Thus, the present decision does not save to the Crown a power which is a normal incident of ownership, it confers on the Crown a novel power to transfer to another the benefit of its own immunity from the effect of statutes, or of regulations or bylaws made under them. There does not seem to be any good reason why s 5 (k) should have been construed as conferring such power. It might be thought that even if s 5 (k) does not confer this power the common law does. I do not think this is so, but it is an interesting point. Readers who wish to follow up this point might like to look at the discussion in Hogg, *Liability of the Crown* (1971) 174, 207, and the cases cited there.

Let me conclude by attempting to sum up the present law as I see it. Because of the finding in the *Lower Hutt* case it seems that an independent contractor from the Crown, carrying out works on Crown land, is free from control by statutes, bylaws or regulations, if otherwise the rights of the Crown would be affected. This result was held to follow from s 5 (k) of the Acts Interpretation Act 1924. Because of the express terms of s 412 (2) of the Municipal Corporations Act 1954, no similar protection applies to any lessee, licensee or other person claiming an interest in any property of the

Crown, or any contractor dealing with such person, so far as the provisions of that Act or any regulations or bylaws made under it are concerned, unless the application of such provision would affect the interest of Her Majesty in the property in question. In cases falling outside the Municipal Corporation Act there is no reason in principle why the protection which applies to a contractor from the Crown should apply to a licensee or lessee from the Crown, or a contractor employed by such person, although the present case stands as a contrary authority on this point.

P J E

English Cases Contributed by the Faculty of Law, University of Canterbury

The mental element in criminal attempts

The judgment of the English Court of Appeal in *R v Mohan* [1975] 2 All ER 193 includes a consideration of the mens rea which must be proved when an attempt to commit an offence is charged, and the meaning of "intention" in the criminal law.

The facts were that a police constable had stepped onto the road to stop a driver whom he thought was exceeding the speed limit, but instead of stopping the driver accelerated and drove straight at the constable, forcing him to leap out of the way. The jury acquitted the driver of an attempt to cause grievous bodily harm but convicted him of dangerous driving; and they also convicted him on a charge of an attempt to commit an offence against s 35 of the Offences Against the Person Act 1861, which makes it an offence to cause bodily harm by wanton or furious driving of a carriage or vehicle (cf ss 55 and 56 of the Transport Act 1962).

The trial Judge directed the jury that this latter charge did not require proof of "an intention actually to cause bodily harm", and that it was enough if the driver realised it was likely that his conduct, unless interrupted, would cause bodily harm, or that he was "reckless" as to whether such bodily harm would be caused by his driving (there is no explanation of what the difference between these two states of mind might be; there is probably no difference). On appeal it was argued that this direction was wrong. The appellant argued that on a charge of attempt the prosecution must prove that the defendant intended any consequence of his conduct which was an element of the crime allegedly attempted, and mere foresight of that consequence, or recklessness, was not enough. This was disputed by counsel for the Crown who submitted that the Judge's directions had been correct because on a charge of attempt it is unnecessary to prove any state of mind other than that required for the full offence.

The Court accepted that it might be thought strange that a more culpable state of mind must be proved on a charge of attempt than is required for a completed offence, but it concluded that the authorities showed that the appellant's contention was correct; an intention to cause bodily harm had to be established, even though mere recklessness would suffice for the completed offence (citing *Whybrow* (1951) 35 Cr App R 141, 146, and *Davey v Lee* [1967] 2 All ER 423, 425 per Lord Parker CJ).

This decision accords with that of the New Zealand Court of Appeal in *Murphy* [1969] NZLR 959, where it was held that on a charge of attempted murder the Crown has to prove an actual intent to kill, notwithstanding that on a charge of murder it would suffice that the defendant had intended bodily injury he knew was likely to cause death, and was reckless as to whether death ensued or not. (s 167 (b) of the Crimes Act 1961). In coming to this conclusion the Court applied *Whybrow* and another English case to like effect: *Grimwood* [1962] 3 All ER 285. Rather surprisingly the Court made no reference to s 72 (1) of the Crimes Act 1961, for its wording strongly suggests the same result: it seems to contemplate that a person is guilty of an attempt to commit an offence only if that offence was "intended" by him, and indeed, only if it is his "object". If the words of s 72 (1) are given their ordinary meaning they appear to provide statutory confirmation of the decisions in *Mohan* and *Murphy*: a person is guilty of an attempt only if he actually intended the offence allegedly attempted, and this state of mind will exist only if he intended any consequence of conduct which forms part of the actus reus of the offence (eg a man cannot be said to intend murder unless he intends to cause the death of a human being). Furthermore, for such an intention it would seem that there would have to be at least recklessness as to all essential surrounding circumstances (for doubts as to the law on this, see Smith and Hogan, *Criminal Law* (3rd ed) 192-194); but the same rule should apply to attempts as applies to conspiracy: see *Churchill v Walton* [1967] 2 AC 224).

The above view of the law has been rejected in Canada. In *Lejoie v The Queen* (1973) 10 CCC (2d) 313, the Canadian Supreme Court held that a person could be convicted of an attempt if he acted with the same mens rea as that required for the full offence, so an intent to injure with recklessness as to causing death was enough for attempted murder (and see *Comeau* (1974) 14 CCC (2d) 472). The contrary view in the English cases was considered by the Court, but was rejected as being "illogical". The Court was faced with the task of construing statutory provisions which were in all material respects identical to those in New Zealand, but it concluded that the "intent to commit an offence" required by the equivalent of s 72 (1) means "an intent to commit that offence in any of the ways provided for in the Criminal Code . . . " (and the same view has been taken of the requirement in s 66 (2) that the "offence" must be "known to be a probable consequence". *Trinneer* [1970] 3 CCC 287). No reference was made to the contrary decision in *Murphy,* but it seems likely that the Canadian Court would not have been swayed by the brief oral judgment of the New Zealand Court, which fails to analyse the statutory provisions.

Authority apart, the Canadian approach is open to attack for at least two reasons. Firstly, it may be argued that it is not "illogical" to require a more culpable state of mind for an attempt than for the full offence, for the policy of the law may reasonably be to impose sanctions on a narrower group of persons when no relevant harm has in fact eventuated. Secondly, the Canadian judgments distort the meaning of the words of the statute: a person does not intend an offence unless he intends the actus reus of that offence. It might also be said that the various paragraphs in s 167 do not provide different "ways" in which murder can be committed, but simply define the different states of mind that will make it murder if the defendant actually kills.

At present the law in New Zealand appears to be the same as that propounded by the English Court in *Mohan*: an attempt requires actual intent to commit the offence in question. There is, however, one area of doubt. If a statute in defining an offence expressly proscribes an attempt to commit it, so that reliance need not be placed on the general provision in s 311 (1) of the Crimes Act 1961, then it may be that it suffices if a person acts with the same mens rea as is required for the full offence. Thus, recklessness may well be enough for an "attempt" under s 3 (1) (c) of the Official Secrets Act 1951: see *Bingham* [1973] 2 All ER 89, noted [1973] NZLJ 365. In *McCone v Police* [1970] NZLR 105 the Court of Appeal went so far as to impose strict liability with respect to essential circumstances when s 64 (1) of the Government Railways Act 1949 expressly proscribed attempting to drive across a level crossing when there is a risk of collision. But the Court did not discuss the fact that the charge was one of attempt: the possible significance of this appears to have passed unnoticed. It is rather difficult to see why the definition of attempts in s 72 should not apply in these cases, but if it does an intent to commit the offence would be required. With respect, it seems arguable that *McCone* was decided per in curiam.

Having decided that intention was required the Court in *Mohan* proceeded to consider what is meant by "intention" in this context. The meaning of "intention" in the criminal law was canvassed in the House of Lords in *Hyam v DPP* [1974] 2 All ER 41. Lord Diplock and Viscount Dilhorne had there suggested that, as a general rule at common law, the concept of "intention" might include what modern writers usually call recklessness: foresight that a proscribed harm was "likely", or at least "highly probable", in circumstances providing no justification for running the risk of causing the harm. On the other hand, Lord Hailsham had preferred a narrower notion of intent, and the other law lords had expressed no clear view. The Court of Appeal preferred Lord Hailsham's view, although it noted that the fact that a person foresaw consequences as probable is some evidence that he intended them. Thus, the Court concluded that foresight that a consequence was "likely" or even "highly probable" was not the same as intention in the context of attempts. Attempt, it concluded, requires a "specific intent", and this it defined as "a decision to bring about, insofar as it lies within the accused's power, the commission of the offence which it is alleged the accused attempted to commit, no matter whether the accused desired that consequence of his act or not". Why it was thought necessary to introduce the word "specific" before "intent" is something of a mystery, but apart from that it is to be hoped that this definition will not be put before juries without some further explanation: they might be forgiven for having some difficulty in understanding that a man may decide to do everything he can to cause something, and yet not "desire" it. The explanation

is to be found in Lord Hailsham's speech in *Hyam* where his Lordship explains that while foresight of a high probability is not enough, yet a man may "intend" something although he does not "desire" it in that it may not be the thing which prompts or motivates him to act: he will still "intend" it if he realises that it is an "inseparable consequence" of achieving his object—if it is "a moral certainty if he carries out his intention" (so a man who blows up an aircraft to obtain insurance moneys can be held to have intentionally killed the passengers).

The result of all this was that the Judge's directions in *Mohan* were bad in law and the conviction on the attempt charge was quashed.

GFO

RACE RELATIONS CONCILIATOR APPOINTED

Mr Harry Delamere Barter Dansey, MBE, has been appointed as Race Relations Conciliator. Mr Dansey is 54 years of age, married with four children. After Army service in the Middle East and Italy with the Maori Battalion he commenced a career in journalism with the Hawera Star and other papers; ultimately in 1961 becoming senior reporter and feature writer with the *Auckland Star*. Mr Dansey has the distinction of being awarded the Cowan Memorial Prize for outstanding journalism in particular for a series on Pacific Islanders in New Zealand. He has written a number of well received books including *How The Maoris Came To New Zealand* and *Maori Custom Today*. Mr Dansey ran a weekly "Hot Line" talk back session on 1ZB radio from January to September 1971. He has lectured on Maoris and their way of life at Auckland University and other places. Mr Dansey is a member of the Auckland East Rotary Club and he was also re-elected to the Auckland City Council in 1974 after having served one previous term. He is at present a member of the Council's Social Welfare Committee and is Chairman of the Ethnic Relations Sub-Committee. Mr Dansey was awarded the MBE in 1974. He is a member of the Ngati Rauhoto sub-tribe of Ngati-Tuwharetoa of Taupo and Tuhourangi sub-tribe of Te Arawa of Rotorua. Mr Dansey will be based in Auckland.

"There is actually a vacancy in the Office of Conciliator", said Dr Finlay, when announcing the appointment, "and the community is fortunate in having a man of such distinction and calibre to fill it. When it was first created with the passage of the Race Relations Act 1971 Sir Guy Powles agreed to hold it in conjunction with his post as Ombudsman and his office in Wellington became the office of the Race Relations Conciliator. The area where the need for it was greatest felt, however, was Auckland and in September 1972 an office was opened there under the control of Mr Peter Sharples who was appointed Executive Officer, a position he continues to hold. Sir Guy Powles concluded that it was not practicable to combine two positions of such importance, especially when he and his staff were located in different centres, and resigned as Conciliator with effect from 31 March 1973. No replacement was immediately made as the Government was satisfied the Auckland Office could continue under the surveillance of Mr K H Mason SM, the Deputy Conciliator, who exercises jurisdiction in the Magistrate's Court at Otahuhu. He had no desire to desert the Magistracy but agreed to remain as Deputy and I myself concluded that it would be desirable for a time to let the Auckland Office feel its way and find its own feet. This it has done unobtrusively but effectively and I am now satisfied the time has arrived for it to assume a more prominent role. Mr Sharples and his staff have unearthed areas that call for further examination and are anxious to take up work that will prevent racial discord arising rather than dealing with instances of it which come to their notice after they occur. Mr Dansey will, of course, direct all these operations and will continue to have the assistance of Mr Mason SM as his deputy."

Theory in practice—In Court proceedings concerning the Bordeaux wine scandal and asked whether he could tell a red Bordeaux from a cheaper wine, Mr Guus Verbundt, Cruse's Dutch distributor, said that he *could* "theoretically", but that in practice "confusion is possible". (Noted by Bernard Holloway in Hand-in-Hand).

A LOOK AT "SUTHERLAND'S LAW"

ROBERT SORLEY, *an Edinburgh graduate, former Procurator Fiscal and Secretary of the Procurator Fiscal Society, and now practising in Wellington, lifts the veil on prosecution procedures north of the Tweed.*

"Sutherland's Law", the drama series presented on TV1, is loosely based on the work of a mythical Procurator Fiscal in an equally mythical Scottish coastal town. The programmes have aroused a considerable degree of interest in the Scottish system of criminal procedure in general, and in the office of Procurator Fiscal in particular, but, regretfully, it will not be possible in this article to sustain the romantic notions of both so assiduously cultivated by ingenious scriptwriters.

The Procurator Fiscal is central to the criminal administration of Scotland. He is a lawyer and civil servant appointed by the Lord Advocate (Scotland's Attorney-General, an outer-Cabinet government post). In Scotland, it is the Procurator Fiscal who has the duty of investigating crime (but excepting minor offences with a maximum penalty of 60 days' imprisonment which are tried in the Justice of the Peace Courts). In practice much of the investigation is done by the police who have the technical facilities and organisation which the Procurator Fiscal lacks, but it is the duty of the police to lay the results of their investigations before the "fiscal" (as he is commonly known). The Procurator Fiscal directs the investigation from that point on, acting in personal contact with the CIB officers concerned, and instructing them as to what further enquiries are to be made and what information sought.

In a case of suspected homicide the Procurator Fiscal is notified by the police at once, and he personally inspects the scene of the crime. Attendance at the scene is invaluable as it enables the fiscal, who is ultimately responsible for preparing the case for the High Court, to see the body in situ and to discuss the case on the spot with senior police officers. Because he also exercises the powers of coroner, the fiscal will determine whether the body is to be removed at once or whether it is to remain untouched until the pathologists he instructs have inspected it. It is the task of the Procurator Fiscal to instruct pathologists to carry out a post-mortem dissection of the body, and he frequently attends the autopsy in order to consult with the pathologists at first hand.

The Procurator Fiscal is also responsible for the prosecution of all crimes and offences, other than those tried in the High Court, whether the proceedings are taken by way of summary complaint or an indictment before a jury. The decisions that he makes are almost unchallengeable. The prosecution is under his management, and no Court or Magistrate can formally direct or recommend to the prosecutor what he should do. In the conduct of the prosecution the functions of the Procurator Fiscal are essentially judicial, but he is responsible to the Lord Advocate, rather than to the Court. He is, of course, subject to the sanction of malicious prosecution.

It is in the exercise of his discretion that the Procurator Fiscal makes what is perhaps the most important decision in the criminal prosecution. He has to consider whether or not there is sufficient evidence, whether the act is of sufficient importance to justify putting a person to trial, whether there is sufficient excuse for the conduct of the accused, and whether the case is more suitable for civil proceedings.

In addition he has to decide whether, where there is an option, the case should be tried summarily on on indictment. In Scotland, no accused has a right to make this election. Perhaps the implied reasoning is that only an impartial and skilled prosecutor, in the exercise of his judicial function, can be relied upon to make the appropriate decision in the light of the evidence known to him, and of his experience in the field of prosecution.

We have by no means exhausted the duties of the Procurator Fiscal. In Scotland there is no coronor's inquest, and the investigation of sudden, suspicious and accidental deaths is carried out by the Procurator Fiscal in private. The police, of course, do the preliminary work of enquiry into deaths and report to the Fiscal for instructions. The latter then interviews witnesses and relatives of the deceased in his office. In the case of accidental death in the course of industrial employment the fiscal will arrange for a Fatal Accidents Inquiry to be held. He will himself call the witnesses and conduct the inquiry before a Court comprising

a Judge of lesser standing than a High Court Judge and a jury of seven.

Where it is alleged that a police officer has committed a minor offence during the course of his duties (eg petty theft), the investigation of the complaint is carried out by the Procurator Fiscal notwithstanding the minor nature of the complaint, and not by a senior police officer. In this way public anxiety as to the partiality of the investigation is allayed.

If the system of public prosecution in Scotland works well and has the approval of the Scottish public, it is probably due, among other things, to the impartiality and fairness of the body of Procurators Fiscal. Public opinion in Scotland is very well informed on matters affecting the administration of justice, and while the handling of particular cases has been criticised from time to time, there has been no criticism of the prosecution system or of the body of men who make up the Procurator Fiscal service.

MORE ON MATRIMONIAL PROPERTY

A flurry of recent decisions has cast both light and shade on the vexed question of matrimonial property.

In *Haldane v Haldane* [1975] 1 NZLR 672, McCarthy P helpfully summarised the position created by *E v E* [1971] NZLR 859. He notes that

(1) each item of property must be considered separately;

(2) except where some enforceable right exists independently of the Matrimonial Property Act 1963, a spouse's claim *must* be based on contributions, and an award made *only* to the extent that contribution is established. The matrimonial home (and perhaps other "family" assets) is in a different category in that there "it is proper to take a more benevolent attitude in favour of a wife" and the Court "will not be over-ready to hold the burden of proof unsatisfied in a matrimonial home claim by a wife who has performed her matrimonial responsibilities with credit.

(3) North P's comment in *E v E* that a spouse is not entitled to share in the other's business interest unless they carried on the business "more or less jointly" does not exclude a claim by a wife who, for example, has deliberately accepted a reduction in her standard of living—and gone without—to make more money available for her husband's business activities with consequent growth in his assets, or where in some special or unusual way the wife has freed her husband to add to his assets.

(4) (a) When dealing with assets other than the matrimonial home the Court (subject to s 6 (2) relating to common intention) has a discretion whether to take contributions of the other spouse into account, but the Court is obliged to have regard to these when dealing with the home.

(4) (b) Where the home is on a farm, the Court must act in a common-sense way and include so much of the total land holding as can fairly be said to be used for domestic purposes associated with the home in contrast with that used mainly for farm activities.

(5) The Court is given the widest discretion in the form of order it makes and can order payment of a sum of money (North P in *E v E* at 879 explained).

(6) Wrongful conduct is relevant where it relates to the acquisition of the property in dispute, or its extent or value.

(7) Except where the claimant spouse has contributed to the retention or increase in value of property received by the other by way of gift or inheritance, he or she will have no claim.

The principles were clearly set out, but in *Robinson v Israel and Others* (Auckland, 28 May 1975, M 681/74), Mr Justice Wilson held that the effect of the second of McCarthy P's observations is to *limit* an award under s 5 in respect of a matrimonial home to the extent of contributions made by the claimant. The Court, he observed, is in respect of other property "free to consider all relevant considerations". With respect, *Robinson* misinterprets the learned President's observations in *Haldane,* the more so as McCarthy P's judgment concludes "I have also entertained doubts whether the wife established a claim [to the home] but . . . I should apply the benevolent approach." The accounting operation suggested by Wilson J surely leaves no room for benevolence.

Rather it seems that the requirement that the Court "shall" take account of contributions (which include intangibles) is intended to assist a claimant wife when dealing with the home, by ensuring that her prudent household management etc go into the scales.

In both *Haldane* and *Robinson* there are other points of interest.

In *Haldane* both McCarthy P and Richmond J drew attention to the much-neglected Matrimonial Proceedings Act, and to capital sum awards of maintenance where a wife has a special need for a capital sum payment in addition to periodic maintenance.

In *Robinson,* Wilson J explains the reference to "common intention" in s 6 (2). "Common intention", he notes "confers no jurisdiction on the Court to make an order . . . but simply precludes the Court from making an order which [it] might otherise have made." Common intention, then, is a shield, not a sword.

Another vexed question, whether to value the matrimonial home at separation or at the date of the hearing, was argued in *Mason v Mason* (7 November 1974, Supreme Court, Christchurch, D 479/70). There Casey J anticipated Mr I L McKay's challenge at the recent Law Conference. The parties had separated in 1968. "A good part of the increase [in value] over the years must have been due to inflation," the learned Judge observed in selecting the later date. "And I can see no reason why the wife should not receive the benefit of some of that increase."

If wives won that round, they lost another. In *Stacey v Stacey* (28 May 1975, Supreme Court, Auckland, M 68/75) Speight J is recorded as cautioning that those advocating parity in the division of the matrimonial home too often overlook the fact that the husband has a continuing obligation to maintain his wife—and this obligation in part rewards the wife for her wifely services during the marriage.

To return to *Haldane,* we confront a situation summarised by Woodhouse J as follows:

> "This appeal concerned property held by a husband at the end of a marriage that had lasted for about 29 years. The marriage finally ended when he went to live with another woman. By then, on his own estimate, he was worth $118,500. His wife had nothing—neither home nor capital nor savings; and she was obliged to live with one or other of their five children. So she applied under the Matrimonial Property Act 1963. As a result the Chief Justice made an order that in essence gave her about $19,000 and left the husband with the balance of almost $100,000. Yet he is dissatisfied. Hence the present appeal."

In his dissenting judgment the learned Judge continues the debate that has raged unabated since *E v E.* He describes the situation as "a classical example of the very social problem that the legislation has been designed to prevent." Yet in the result the legislation failed so to do. The appeal succeeded and the wife received only $5,000.

There is an urgent need for the fundamental problem to be reassessed by Parliament, and this despite the clearing of the air which has followed the abandonment of the appeal to the Privy Council in *E v E.* Now that *Haldane* has plainly circumscribed the parameters of the Matrimonial Property Act, the issues have been sharpened and our policy-makers should declare whether or not the Courts' declarations echo their legislative intentions.

J D POPE

NEW MAGISTRATE APPOINTED

The appointment of Mr H Rutherford H Paul of Auckland as a Stipendiary Magistrate to sit in Auckland has been announced by the Minister of Justice, the Hon Dr A M Finlay.

Mr Paul has for some time been practising on his own account as a barrister in Auckland. He previously practised as a barrister in chambers with Mr Hillyer QC and had earlier experience in a solicitor's office in London and with the Auckland law firm of Messrs Wallace, McLean, Moller and Bawden.

His practising career was interrupted in 1960 consequent upon his selection as one of the four Royal New Zealand Naval Volunteer Reserve ratings to join the complement of HMNZS Otago for its delivery voyage to New Zealand. He remained in the volunteer services for some years attaining a commission and the retired rank of Lieutenant. He also left practice in 1965 for almost a year to take up a scholarship at Temple University in Philadelphia where he studied criminal law, contract law and the law of torts and criminal and civil trial techniques.

Mr Paul, 37, is married with two children.

Of willow and wine—I know the good years for French wines because long experience has taught me that they are linked climatically with the arithmetic strength of the first-class County Cricket Championship batting averages; and I know what I like.—BERNARD HOLLOWAY.

UGANDA AND ADVOCACY

MR B E D'SILVA, *now a legal officer with the NZ Railways, was in private practice in Uganda for 17 years and spent 8 years on the Magisterial Bench. Before coming to New Zealand he was Uganda's delegate at the Executive Council Meeting of the Commonwealth Magistrates' Association in London. He decided not to return to Uganda after the kidnapping of the late Chief Justice, who was never seen alive again. Mr D'Silva prefaced his reminiscences with the comment "The articles in the New Zealand Law Journal issues have always intrigued me. As one of its readers I thought I should make my mite of contribution for a better perception of the legal horizon and for the better appreciation of an act of omission or commission when it occurs in Commonwealth countries outside New Zealand."*

For all the trauma of my departure from Uganda I have a lot to be grateful for my presence here in blissful tranquillity. In the Railways Department where my destiny is inevitably tied up we have a journal intituled *Advocate* and published by the New Zealand Railway Officers Institute. This organisation is a proud repository of the confidences of the Railway employees who seek its sanctuary; it ventilates appellants' grievances to the appropriate forum, in the main the Railways Appeal Board. The advocates who appear are, incidentally, not necessarily lawyers, but are at least as good and efficient, if not better. Their quality is of an undisputedly high calibre and can be equated with those who have painstakingly battled for the aggrieved invariably with considerable triumph which included financial benefit. The motto of the magazine—"Nec Temere Nec Timide"—when I first saw it, somewhat confused me—not that it should have, since an advocate means one who pleads for another, but because in a country (India) where I first obtained my law qualification and in another where I later practised and where I was actively connected with law for a quarter of a century (Uganda) that nomenclature meant a professional pleader in courts of justice.

The May issue had a brilliantly-written article entitled "The Technique of Nisi Prius Advocacy" with an introduction, "The paper, although dealing with procedures before a Judge and jury, makes very relevant comment which should be of assistance to advocates presenting cases before our Appeal Board". This fascinating paper revived my youthful days of advocacy. Reading such a discerning analysis from a student who earned a first in competition and no less than an encomium from the then Chief Justice left me enthralled and jogging my memory. The author specifically discusses examination-in-chief of witnesses as of cardinal significance requiring expert handling. What will appear here will amply illustrate his point.

In Uganda there was no jury system (for reasons obvious to the outgoing British regime) but for all purposes the principles of a jury trial in criminal civil cases applied, with the final decision resting with the presiding magistrate or a High Court Puisne Judge sitting with assessors in criminal cases who advised him on indigenous customs. He was an arbiter of fact and law. Theft and receiving or retaining stolen property was justiciable by a senior resident Magistrate with a right of review by the High Court if the sentence upon a conviction was more than 2 years, or a right of appeal to the High Court from a conviction, and a further appeal to the Court of Appeal for Eastern Africa under certain circumstances. Wigs, gowns and the rest of the panoply of British system symbolised the dignity of appearance in High Court and Appeal Court. I shall keep the parties anonymous. This was before the Instruments of Independence were conferred upon the deposed Dr Milton Obote now in Dar-es-Salaam, Tanzania.

The charge was receiving or retaining a stolen radio. The accused was a notorious Indian whose antecedents were well known to both prosecution and defence. The trial was in an open hall characteristic of East African Lukiko Halls where the District Commissioner would summons his councillors for administrative matters and reach his decisions. There was no doubt that if this man was convicted he would languish in prison for at least 2 years. So the best counsel was engaged. Of course he was expensive, but the rascal could afford to pay him handsomely. The stipulation was that he and not any of his legal assistants could appear in Court. He motored from the metropolis

in his Rolls Royce (Silver Shadow) for an overnight stay. We examined all the pros and cons, and the more we scanned the possible case for the Crown the further away the hope of an acquittal receded. The prosecution was bound to produce several witnesses. The redoubtable lawyer's philosophy in all trials—"the more the merrier". There were no depositions and all the time the defence had to grope. We knew we could anticipate some details of the prosecution from a conference with our client and his witnesses. All that the defence would be provided with before the trial as part of his arsenal was a copy of the charge sheet and a copy of any statement or statements made by the accused whether under caution or not. At the trial the defence counsel would be allowed to see in Court the prosecution witnesses' statements recorded by the police for cross examining on them.

The next day we assembled in Court. Tense atmosphere prevailing, the formal bow over we occupied our seats. Before the prosecution could open the trial Magistrate said in open Court that he had both a moral and legal duty to perform. He indicated that he had a pile of recriminatory letters on his desk, some signed and some unsigned calling upon him to convict our client because he was a crook and therefore a stigma on the community, and to deport him after his conviction. There was a hush in Court after what was said by the Magistate was translated into the Indian language. The faces of the defendant's foes beamed with the joy of revenge, and those of his friends fell. The Magistrate remarked, however, after his melodramatic announcement that those letters had achieved nothing in prejudicing him against our man in the dock, but that he would grant an application before him for transfer of the trial before another Magistrate if such an application was made. Senior defence counsel, after conferring with the accused, stated that he had no objection to the trial proceeding before him, as a professional Magistate must be credited with the ability to decide a case on the evidence before him.

The prosecution was conducted by a policeman. As expected there was a parade of witnesses who I thought were whited sepulchres, determined to plumb to any depth of mendacity in order to make sure that our client was duly convicted and incarcerated—though the police officers and the witnesses from the radio manufacturing company were not in this category. When evidence was adduced to prove ownership, make and model of the stolen radio there was very little cross examination. When the policemen testified to the circumstances of the discovery of the radio there was hardly any cross examination; when the owner of the radio gave his testimony there was no cross examination at all. The prosecutor appeared stultified. I did not know what the trump card was. There was the sworn account of the professed enemies of our client to whom the sanctity of affirmation meant nothing. Picking holes in the prosecution was not sufficient at this juncture.

Some sets of numbers running into 5, 6 and 7 figures shown on the invoices and documents appertaining to the sale of the stolen radio were actually shown to be on it. While each adversary tried his verbal antics to close the net inexorably round him I was writing everything that was said, important or unimportant. If defence counsel wrote everything down the Magistrate would be constrained to do the same. By the way the Magistrate had to write the evidence in long hand throughout the trial; the eyes of the leader seemed glued to the radio exhibited in Court and when I intercepted his thoughts he repeated that I should continue to note every word on oath by the witnesses, to compare notes later. As I was engrossed in various implications and how I myself would have reacted to a seemingly formidable case, the prosecution came to a close.

As the statutory legal rights were being communicated to the accused through the Court Interpreter, up stood my senior and submitted "no case to answer". I could not fathom where and how the Crown had failed to make out a prima facie case. The Court and the prosecutor were taken aback. No grandiose submission. He briefly argued that there was no proof that any of the various number of numbers on the stolen radio was or were identifying serial number or numbers and furthermore that these would not be found on another radio of the same make or model. I thought this was a stroke of luck reflecting a touch of genius emanated as it did from an advocate who some years later was to take silk and shine in East African legal firmament. After a short adjournment the learned Magistrate read his short ruling—that a vital link and not a mere technicality in the prosecution was left gaping wide, that he fully concurred with the defence contention that the radio had not been identified as averred in the charge, and that he had no choice but to discharge the accused. In retrospect I think this is a course any reasonable tribunal would have adopted. The set of sanc-

timonious humbugs did not succeed in envenoming the Court.

This time there was a different silence, with the jubilation for the defence. Here was a lesson to be learnt. Because counsel knew when to cross examine, when not to, and when to stop, he had uncannily pursued the weakness of the Crown to redound to our client's advantage; one false step by way of cross-examination from a lawyer of lesser perspicacity may have filled the yawning gap, and sealed the alleged receiver's fate by demolishing the only available reasoning at that stage.

Inevitably this looked like a contest where the most talented practitioner had been pitted against an untrained policeman who certainly had done his damnedest. If the examination-in-chief had been conducted by an experienced counsel the result would have been disastrous from defence standpoint, at any rate at the close of the prosecution. Everyone will agree that nowadays one does not require the oratorical pyrotechnics of the illustrious legal luminaries of the past—only the will to work hard, and to have all the facts at one's finger tips so as to lay only relevant facts in examination-in-chief. What was illustrated at the trial was not so much a failure of the prosecution in its responsibility to the public, as the folly of entrusting it to inexperience. It certainly would not happen in a jury trial here.

If I may digress, I wonder if the prescription urged in a Shakespearean play "The first thing we must do is to kill all the lawyers" in its prescience had come to pass in today's Uganda. There the language of guns is better understood by the powers that be than the rule of law, bearing in mind that the late Chief Justice Benedicto Kiwanuka and the First Chief Minister in autonomous Uganda was sacrified at the alter of Justice. He was abducted from his chambers where he had once dusted law books from the previous Chief Justices' book shelves as an office messenger during the British Protectorate days and where he had returned proudly as the First Black African Chief Justice though born to a heritage of poverty. This transpired only a day after he had allowed the writ of habeas corpus filed by the British High Commission in Kampala, setting free Donald Steward, a Briton arrested and detained in custody for 10 days without a criminal charge. Judith Listowel in her book *Amin* reports the late Chief Justice as recording in his decision, "That you got out is a matter for satisfaction —others have not been so lucky".

I shudder to think what would happen to us in the face of liquidation of a large part of African intelligentsia at the hands of black mercenaries clad in army uniform through their unbridled brigandage for which the present Government has not accepted liability. Menacing Uganda may be for its African nationals, but one journalist calls it a safe place for foreigners, who have nothing to fear from gun-toting trigger-happy self-appointed executioners.

CORRESPONDENCE

Vigilance or Vigilantes?

Sir,

I read with interest your editorial in the New Zealand Law Journal of 20 May 1975, which criticised the National Party's proposals for a Human Rights Commission. I should like to emphasise that the concept of the Human Rights Commission was floated and favourably received at the Ombudsman's Conference in November 1974*(a)*.

Indeed the proposal springs broadly from the success of the Ombudsman. The National Party admires what the Ombudsman has done and wholly endorses his role. Our aim is to expand that role and develop a group of ombudsmen operating within the Human Rights Commission.

Since floating the concept at the Ombudsman's Conference, and developing our thinking, we have naturally checked out our policy with people experienced in the field. There is, we feel, nothing strange in the proposal to expand the role of the Ombudsman. He already has jurisdiction over government departments and some governmental organisations. The Bill at present before the House should provide jurisdiction over local body organisations before the end of this Parliamentary session.

The National Party policy is to expand the role of this office further so that the Ombudsmen will have jurisdiction to investigate complaints of inefficiency and mal-administration where an industrial association has acted outside its rules or undemocratically; and to investigate complaints of inequity or discrimination where the complainant alleges racial, sexual or religious prejudice when seeking accommodation or employment in other defined areas. These will be defined by Act of Parliament.

The Ombudsman operates within defined limits, accepted standards and on a specific complaint. We would envisage the same approach under a Human Rights Commission. Any decision would be based on equity and the application of the rules of the organisation or association complained about.

The Commission will not be a general investigating one. Above all it is not a "union-bashing" Commission, or a means of by-passing the provisions of rules as you suggest. Its aim is rather to ensure that organisations such as unions which exert power over

individuals are, like Government Departments, open to complaint and scrutiny; and as such, more likely to operate within their rules and to act fairly in their implementation. Surely this is what we want in a fair and just New Zealand.

Certainly the National Party's aim is to work for a fair and just society. So, contrary to your claim, a Human Rights Commission will have to operate within limits and standards, above all those of equity in trying to ensure the fairer use of power and a fairer society in New Zealand.

Yours faithfully,

R D MULDOON

[*(a)* The proposal was simply mentioned in Mr Muldoon's address to the formal opening. There was no discussion on it at the Conference.—JDP]

Second Thoughts on Homosexual Law Reform

Sir,

The homosexual law debate often seems to assume that there are only two alternatives to choose between: (1) retention of an inhumane, sexist law, and (2) total abolition of legal restraints on homosexual acts between consenting adult males in private. Clause 3 of the Crimes Amendment Bill opts decidedly for the second alternative.

It appears as though legislators have to make a clear cut choice between (1) compassion for society —preserving whatever is essential to the continued existence of our society—and (2) compassion for the homosexual.

Is this the choice that the legislators have to make? Is it possible to frame a law which is sensitive to the needs of society as well as to needs of the homosexual himself?

The answer will depend upon what the general needs of the various types of homosexuals are. When the change in the law in South Australia was under consideration, the Festival of Light Committee, under the chairmanship of Dr J Court (a psychologist with Flinders University), pleaded for a law that acknowledged the homosexual's need for motivation if he were to change his sexual orientation. A law reform based largely on the pessimistic view that the homosexual's condition could not be altered was not going to help.

They presented a well-documented challenge to certain assumptions feeding the pessimistic outlook:

"CAMP [an Australian homosexual organisation] states as a fact that homosexuals have their sexual orientation determined for them by genetic and environmental pressures over which they have no control. But the genetic basis for homosexuality no longer has serious scientific support. Recent evidence is summarised by Prof. B James: 'There is now little support for the notion that homosexuality has a predominantly inherited basis'. (Symptoms of Psychopathology—ed C G Costello, Wiley 1970). The same conclusion is reached after a careful survey by C Allen in his 'Textbook of Psychosexual Disorders' (1969). That environmental pressures are very important is undoubted but "over which they have no control" must be challenged. The research since 1967 into the relationship between 'voluntary' and 'involuntary' reactions now makes it appear that this distinction can no longer be defended, at least in the area of visceral responses. This being so, evidence for hormonal abnormalities reported by J Loraine (New Scientist 3.2.72) cannot be taken as evidence of a predisposing condition, but part of a complex chain of events involving *learning*. The first 'fact' of CAMP is therefore seen to be no longer scientifically credible.

"CAMP states that 'It appears the homosexual cannot be converted to heterosexuality by any methods known to modern psychology' . . . . . This view is totally incorrect now. I Bieber has shown that psychoanalysis can be effective. Ellis demonstrated the possibilities of rational-emotive therapy in 1956 with both males and females. But since 1965 there have been numerous reports of success with behaviour therapy, notably a series of papers by Feldman & McCulloch from 1965, culminating in a book (Homosexual Behaviour: Therapy & Assessment. Oxford: Pergamon Press 1971). Their work involves a study of 43 homosexuals treated with a reported success rate of 58% (British Medical Journal 1967, 2,594). Bancroft, too, reports his own work and makes a general comment of 'increased therapeutic optimism & reports of success' (Brit Journal of Hospital Medicine Feb 1970)."

Dr Court, elsewhere, says that "when the outlook is bleak, many who might benefit tend not to seek such help but cope as best they can." This is tragic, as the facts of the case are that "it is now possible to refute categorically the view that the homosexual cannot be effectively treated." ('Homosexuality', *Interchange*, 1973. 13, pp 24-40).

If changes in the law, made in the name of compassion, ignore the didactic role of law, and encourage the homosexual to accept his condition rather than acknowledge his need for help, they are hardly compassionate. Now, if the homosexual needs a law that will promote optimism about the possibility of change, the *potential* homosexual (and this covers a vast number of young people—anyone, in fact, whose sexual orientation is not reasonably established) needs a law that will protect him against homosexual deceit. Practising homosexuals deceive, either by promising (implicitly or explicitly) sexual fulfillment, or at the very least, by offering "kicks without cost". If duration of relationships is any indication, the statistics cited by G. Westwood show that the promised fulfillment is very elusive ("A Minority", Longmans 1960—the report prepared for the British Social Biology Council—pp 119-127). The submission of Dr Court's committee states that the middle-aged homsexual who finally comes for treatment after a long series of relationships is a pitiable figure.

The medical superintendent of one of our mental hospitals recently stated, with regard to young people taking marihuana, "They don't know they're being damaged, and by the time they find out, it's too late." He could have been speaking about those who engage in homosexual acts. They do not know that they are damaging their chances of finding sexual fulfillment, and by the time they find out, it is too late. The further entrenched they become in the homosexual orientation, the more difficult it is for them to transfer to the heterosexual orientation. And by the time they discover, or can admit, the futility of their search for fulfillment, it is too late. Although they are not necessarily beyond cure, as we have seen, transfer of sexual orientation is comparable to "cold turkey" for the drug addict.

Drug laws serve both to protect the individual from himself, and to protect others from him. The man with homosexual tendencies needs protection

from *himself* and encouragement to change: it should be as difficult as possible for him to practise and thereby further enmesh himself in his condition. However, others need protection from *him*. The practising homosexual, by definition, is an evangelist. And, considering the typical brevity of relationships (see G Westwood), he is a busy evangelist, as each time he must find a partner. If he is not preaching to the unconverted, he is building up the converted, and, directly or indirectly, encouraging others who preach to the unconverted. A homosexual need not personally or initially seduce a minor in order to spread his deceptive gospel. The drug pusher is still acting criminally, even though every one of his clients may have been seduced into drug abuse by someone other than himself. Though the work of seduction is already done, he is reinforcing it, and making the hope of restoration all the more dim.

Hence the law needs to protect the potential homosexual from indirect seduction. If the proposed change is accepted, then in practice neither the law setting the age of consent for private homosexual acts at 20, nor the law regarding seduction of minors, will do much to protect the potential homosexual.

The age of consent law will probably have little deterrent effect. With the inevitable pressure for a just uniformity with the heterosexual age of consent (and the example of other countries), it is hardly likely to be enforced with rigor. At present even the law on under age (under 16!) heterosexual intercourse is generally enforced liberally, and probably has minimal deterrent effects.

Similarly, particularly in view of the severe increase in penalty, any Judge and jury with a sense of fair play are not going to rigorously enforce the law on seduction of minors, against a 20 year-old who seduces a 19 year-old. Hence, since most seduction of minors is the work of fellow minors, the proposed change would leave the potential homosexual without effective protection against indirect adult seduction.

But if the potential homosexual needs protection from those evangelists who hold before his nose the poisonous carrot of a satisfactory alternative to monogamous heterosexual marriage, society, too, for its own safety, needs to have its basic institutions (marriage and the family) fortified. And this requires the protection of the morality, on which, according to the conscience of the common man, they depend.

The homosexual threat to our basic institutions is real even though it may not often be explicit. Some of the vocal homosexuals, however, quite explicitly own the fact that they are demanding a sexual revolution. They seek the abolition of distinctions in sexual orientations which will usher in a radically reorganised society (See Millet, *Sexual Politics*, London 1969, and Altman, *Homosexual—Oppression and Liberation*, Sydney, 1972).

A carefully framed law against homosexual behaviour could therefore serve the needs of both society and the homosexual. The Anglican Diocese of Sydney's *Report on Homosexuality* made certain recommendations for changes in the law, but changes coming short of total abolition of the law. With certain modifications—in particular, the addition of (1) —they are as follows.

(1) Because of the injustice of existing laws. All legal restraints on homosexual behaviour should be equally binding on males and females.
(2) Because of the possibility of inflicting permanent emotional and psychological damage upon the person accused of a homosexual offence: First offenders should appear in private before a properly constituted tribunal.
(3) Because of the wide differences in homosexual offences, and because present conditions of confinement may exacerbate the problem of homosexuality: Careful research should be undertaken with a view to providing punishments for homosexual offenders, which, while they remain punishments, are nevertheless as humane and enlightened as possible.
(4) Because of the serious possibility of involving police in unjust and morally degrading behaviour: The processes of apprehension should be carefully reviewed, so as to eliminate the provocation of homosexuals to commit offences (ie 'agents provocateurs').
(5) Because of the need to help the practising homosexual adopt a different way of life: In addition to any other court sentence convicted homosexual offenders should be directed to receive qualified psychological help, provided that such help has the co-operation of the person concerned.
(6) Because of the need: Government should provide facilities for psychological help and rehabilitation for those who wish to avail themselves of these facilities. The high code of professional ethics should be well advertised to ensure that fear of exposure does not deter any from seeking counsel.
(7) Because homosexual behaviour is inimical to the interests of society: Government should restrict by legislation the promotion (by advertising or other means) of homosexual practises as legitimate.

(Rev) J R ROWSE,
Levin.

NEW LICENSING CONTROL COMMISSION CHAIRMAN

The Minister of Justice, Dr A M Finlay, has anounced the appointment of Mr J R P Horn, Stipendiary Magistrate as the Chairman of the Licensing Control Commission. He replaces Mr (now Judge) R D Jamieson, who recently retired from the position.

Mr Horn was appointed a Stipendiary Magistrate in April 1967 and has been stationed in Palmerston North since his appointment. He will be based in Wellington.

In announcing Mr Horn's appointment, Dr Finlay also paid tribute to Judge Jamieson's work during his long term as Chairman. The years since his appointment in 1971 have been eventful ones in the licensed trade in New Zealand. Judge Jamieson was appointed to the Chairmanship following a distinguished career as a Stipendiary Magistrate and Barrister and Solicitor.

Hybrid?—". . . did drive a Vauxwagon motor car Registered No . . ." *Extract from statement of claim.*